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PROPERTY AGAINST LEGALITY: TAKINGS AFTER *CEDAR POINT*

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In the American constitutional tradition, a zealous judicial defense of property is closely aligned with the idea of "the rule of law." Conventional wisdom holds that the Takings Clause of the Fifth Amendment vindicates both property rights and the rule of law by foreclosing arbitrary, lawless state action. But the standard story linking property rights, legality, and a constraint on arbitrary governance is more commonly stipulated than analyzed. This Article uses an apparent sharp break in takings jurisprudence, the United States Supreme Court's June 2021 decision in Cedar Point Nursery v. Hassid*, to closely scrutinize the relationship between legality and property rights. To that end, it offers first a careful analysis of the sharp rupture that* Cedar Point *makes in takings jurisprudence. Not only is the Court's result difficult to explain in terms of precedent or traditional legal methods, it also destabilizes a previously settled and reasonably predictable litigation landscape. As a result, it seeds profound uncertainty on the legal ground because it signals a dissolution of the constraining effect formerly realized by standard tools of legal reasoning. There is, further, no obvious way for the Court to restore stability and predictability to the doctrine without drawing new, arbitrary lines. In consequence, takings law will likely abide in*

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confusion, not certainty, for the foreseeable future. Cedar Point*'s vindication of property rights hence comes at the paradoxical cost of dramatically increasing the space for decisions unguided by law by one group of officials in the judiciary.*

A close reading of Cedar Point *invites a more general and abstract analysis of the complex, nuanced relationship between the rule of law and property rights. Drawing on the general jurisprudential theories of H.L.A. Hart and other legal positivists, I use the decision as a launching point for a larger exploration of ways in which the rule of law can be incompletely realized to paradoxical and even socially harmful effect. Placing property at the center of the rule of law, I suggest, can be consistent with, or even an incitement to, serious derogation of the rule of law. Doing so can undermine rule-of-law goals, such as constraining arbitrary rule. This suggests a need to decenter property rights in accounts of the rule of law, and to explore, in more nuanced and grounded fashion, how the practice of judicial review mediates systemic values of legality and predictability. In short, if we value the rule of law, it may in general be appropriate to take a more skeptical, and so more contingent, view of both property as a legal institution, and also the courts as a source of legality and stability.*

INTRODUCTION

Property and its zealous defense are closely associated with the rule of law in the American constitutional tradition. A "total, arbitrary, and capricious power" is conceived as the enemy of both.[1] In Federalist 70, Alexander Hamilton thus termed the constitutional "protection of property against those irregular and high handed combinations, which sometimes interrupt the ordinary course of justice."[2] Writing just after the Constitution's ratification, James Madison warned that "just government" and "secure" property are imperiled by "arbitrary restrictions, exemptions, and monopolies [that] deny to part of its citizens that free use of their faculties . . . which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called."[3] John Adams agreed. He opined that "[p]roperty must be secured, or liberty cannot exist."[4] In a leading constitutional treatise of the early Republic, St. George Tucker also identified the Takings Clause of the Fifth Amendment as a means "to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses."[5] The

[1] Kenneth R. Minogue, The Concept of Property and Its Contemporary Significance, *in* Nomos XXII: Property 3, 5 (J. Roland Pennock & John W. Chapman eds., 1980).

[2] The Federalist No. 70, at 471 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[3] James Madison, Property, Nat'l Gazette, Mar. 27, 1792, *reprinted in* 14 The Papers of James Madison 266, 267 (Robert A. Rutland et al. eds., 1983).

[4] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021) (quoting John Adams, Discourses on Davila, *in* 6 The Works of John Adams 223, 280 (Charles Francis Adams ed., 1851)).

[5] St. George Tucker, 1 Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia, app. at 305–06 (Augustus M. Kelley 1969) (1803); see also Armstrong v. United States, 364 U.S. 40, 49 (1960) (describing the Clause's aim as preventing

U.S. Supreme Court concurs. Citing Madison, Adams, and others, the Justices have posited that enforcement of the Takings Clause "empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them."[6] Judicial protection of property rights serves the rule of law, on this account, by making state action predictable, by restraining arbitrary uses of state power, and by empowering citizens and others to chart their own "destinies" free of government control.

In this way, the idea of the rule of law, albeit not mentioned explicitly in the Constitution, has become "central to our political and rhetorical traditions, possibly even to our sense of national identity."[7] Scholars keenly debate what the rule of law—which is also sometimes called the principle of legality[8]—requires.[9] But a kernel of common ground is apparent: the rule of law is commonly defined as the law's clarity, stability, and predictability.[10] These qualities foster "confidence about the legal consequences of their actions."[11] In contrast, state actions animated by "caprice, passion, bias, [or] prejudice" are all "antithetical to the rule of law."[12] As such, they cannot be ranked as properly legalistic state

the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

[6] Murr v. Wisconsin, 137 S. Ct. 1933, 1943 (2017); *Cedar Point*, 141 S. Ct. at 2071 (quoting *Murr*, 137 S. Ct. at 1943); see also Sveen v. Melin, 138 S. Ct. 1815, 1827 (2018) (Gorsuch, J., dissenting) ("Federalists like Madison countered that the rule of law permitted 'property rights and liberty interests [to] be dissolved only by prospective laws of general applicability.'" (citation omitted)). The same theme is found in academic literature. See Richard A. Epstein, Design for Liberty: Private Property, Public Administration, and the Rule of Law 12 (2011) (describing a "close connection" between property's protection and the rule of law); James W. Ely, Jr., Property Rights and Judicial Activism, 1 Geo. J.L. & Pub. Pol'y 125, 126 (2002) ("The Framers realized that robust protection of the rights of property owners undergirds liberty by diffusing power and protecting individual autonomy from governmental control.").

[7] Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 Colum. L. Rev. 1, 3 (1997).

[8] See, e.g., Lon L. Fuller, The Morality of Law 44 (rev. ed. 1969) (using the phrase "the demands of legality" to capture the rule of law).

[9] Jeremy Waldron, Is the Rule of Law an Essentially Contested Concept (in Florida)?, 21 Law & Phil. 137, 140–44 (2002) (surveying disputes over its meaning).

[10] Fuller, supra note 8, at 39 (listing traits of the rule of law, including clarity and the capacity to be followed).

[11] Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994); see also Lawrence B. Solum, Equity and the Rule of Law, *in* Nomos XXXVI: The Rule of Law 120, 121 (Ian Shapiro ed., 1994) (including "generality, publicity, and regularity" among the rule of law's features).

[12] TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 475 (1993) (O'Connor, J., dissenting). The association of the rule of law with the constraint of official action goes back

action. Such improper—but not, note well, *ipso facto* illegal—species of official action are impossible if those with official power "exercise their power within a constraining framework of public norms, rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong."[13] Clear, predictable, and stable law binds officials at the same time that it guides citizens. Indeed, the two guidance functions are entwined. An official's "arbitrary" exercise of power is not just the rule of law's antipode.[14] It is also the antithesis of individual liberty.[15] And so, in this standard narrative, there is a profound complementarity between the rule of law, property rights, and liberty.[16]

This Article interrogates this standard account of how property rights and the rule of law relate to each other in American constitutional law. Its point of departure is a 2021 Supreme Court opinion about the constitutional status of property rights. That judgment is important in its own right. It changes, potentially quite dramatically, the scope of constitutional protection for real property under the Takings Clause of the Fifth Amendment.[17] Whatever its exact effects on the ground (literally!) may be, it certainly marks a sea change in Fifth Amendment jurisprudence.

Cedar Point Nursery v. Hassid[18] held that a 1976 California "take access" regulation permitting union organizers to approach and talk to agricultural workers was a taking requiring compensation under the Fifth

to a Victorian legal theorist who was one of the early adopters of the term "rule of law." A.V. Dicey, Introduction to the Study of the Law of the Constitution 181–205 (10th ed. 1959).

[13] Jeremy Waldron, The Concept and the Rule of Law, 43 Ga. L. Rev. 1, 6 (2008) [hereinafter Waldron, The Concept and the Rule].

[14] Joseph Raz, The Rule of Law and its Virtue, *in* The Authority of Law: Essays on Law and Morality 210, 224 (1979) [hereinafter Raz, Rule of Law and its Virtue] ("The law inevitably creates a great danger of arbitrary power—the rule of law is designed to minimize the danger created by the law itself.").

[15] The kind of liberty protected by the rule of law is, again, contested and plural. See Brian Z. Tamanaha, On the Rule of Law: History, Politics, Theory 34–35 (2004) (distinguishing four kinds of freedom protected by the rule of law). The most relevant here are the freedom from unlicensed (and so unpredictable) legal constraint, and the preservation of a zone of personal autonomy. Id.

[16] Some accounts go further and suggest that it is the propertied who will have the leisure and the resources to defend rule of laws. Minogue, supra note 1, at 8.

[17] See U.S. Const. amend. V (stating that "private property [shall not] be taken for public use, without just compensation").

[18] 141 S. Ct. 2063 (2021).

Amendment.[19] Part of a larger constitutional transformation sweeping over the separation of powers, the Religion Clauses, and abortion jurisprudence during the Roberts Court, *Cedar Point* has received less attention than other recent doctrinal convulsions. This neglect is unjustified.

A first contribution of this Article is to explore the possibility that the decision prefigures a dramatic and destabilizing shift in the nature of constitutional property. The legal uncertainty unleashed by that opinion is not likely to abate given the absence of any stable limit on the Court's apparent reworking of the concept of constitutional property. Of larger theoretical significance, *Cedar Point* illustrates one way in which property rights and the rule of law can diverge, notwithstanding the standard story, to enlarge the scope for arbitrary state action. Hence, it invites the Article's second, more theoretical contribution—a nuanced and careful theorization of property's complex, many-stranded relation to the rule of law.

My analysis begins with the particulars of *Cedar Point*. The decision's immediate effect, of course, was to change the terms for the increasingly beleaguered organized labor movement in one of the nation's most important and fertile agricultural breadbaskets. Its longer-term, more abstract consequence was its implicit invitation for the future reworking of takings doctrine. In particular, the 2021 decision unraveled a central organizing conceit of takings jurisprudence. The latter has stabilized and channeled potential litigants' expectations for decades. By diminishing the predictive value of precedent respecting property's boundaries, the Court created uncertainty where property owners and officials previously had benefited from stable expectations.

Prior to *Cedar Point*, owners and officials got a reasonably clear sense of litigation outcomes by asking whether a state action was an "appropriation" or "regulation" as those words are used in everyday conversation. Under longstanding doctrine, legal challenges to appropriations generally prevailed under a "per se" rule. In contrast, the balancing test applicable to regulations typically, albeit far from inevitably, tilted in favor of the government. Distinguishing appropriations from regulations, moreover, was relatively straightforward when it came to real and chattel property. If the government indefinitely

[19] Cal. Code Regs. tit. 8, § 20900(e)(3) (2021); see also *Cedar Point*, 141 S. Ct. at 2069, 2072 (describing regulatory framework for agricultural labor under California law).

deprived you of the whole or part of the physical thing, you could typically expect to win a takings case.

To be sure, the doctrine elsewhere had other wrinkles. But in the vast majority of cases, these mattered only on 1L property exams and (very occasionally) in appellate litigation. The ensuing doctrine was relatively transparent, even to lay people unburdened by the intellectual pretensions of a legal education.

The Court in *Cedar Point* did not openly abandon the distinction between appropriations and regulations. More perplexingly, it invoked that distinction while refusing to deploy the ordinary meaning of an "appropriation." While the verbal formulation of the law remained the same, a key doctrinal term with a clear and predictable lay meaning was replaced with an amorphous category of uncertain and unpredictable application. Legal and ordinary language hence parted company. By diminishing the clarifying force of doctrine, the Court created uncertainty where property owners and officials previously had reasonably stable expectations. This is one way in which *Cedar Point* revealed a tension between property rights and the clarity, stability, and predictability ambitions of the rule of law. Protecting the first can diminish the latter.

Another tension underlying the majority's reasoning can be discerned by attending to its methodological choices: the *Cedar Point* Court ostentatiously relied on dictionaries, ordinary public meaning, and the binding force of precedent. But read closely, each of these argumentative threads unravel. Dictionary definitions were selectively picked; actual lay usage was ignored; and precedent was invoked only via selective quotation—distorting earlier constitutional holdings. In execution, therefore, *Cedar Point*'s vindication of property rights stood at odds with the application of familiar legal methods central to the rule of law.[20] Nor does the decision promise future clarity or stability.

Worse, *Cedar Point* did not ask or answer a crucial question: What distinguishes an impermissible "appropriation" from a "regulation" under the Takings Clause? The majority opinion offers hints. But none of these hold promise as a principled basis on which to draw a line between regulation and appropriation. Indeed, the ultimate, long-term effect of *Cedar Point* may well be to collapse the longstanding distinction between appropriations and regulations—a legal regime where most government action would be evaluated as an appropriation, even if it did not entail a

[20] See Andrei Marmor, The Rule of Law and Its Limits, 23 Law & Phil. 1, 3 (2004).

physical invasion by the government. This doctrine's end-state would dramatically expand judicial discretion, work avulsive change to the authority of state and local governments, and (ironically) foster fresh uncertainty about the resolution of inevitable and pervasive boundary disputes that arise in property law.

There is a bigger principle at stake here too. This close reading of *Cedar Point* further invites reappraisal of the way in which property and the rule of law have been theorized as working together in American constitutional law: Do they really intertwine as tightly as the standard story holds? A starting point for this analytic enterprise is a distinction drawn by the legal theorists H.L.A. Hart and Meir Dan-Cohen. Hart carved law up into "primary" rules applicable to the citizenry at large, and "secondary" rules that bind officials.[21] Dan-Cohen, reasoning in a similar vein, distinguished "conduct rules" covering everyone, and "decision rules" directed at officials.[22] The law, both Hart and Dan-Cohen thereby insisted, speaks in subtly differently accented voices to the public and to its official custodians.

Cedar Point illustrates the possibility that the rule of law can come apart along this seam. The ordinary subjects of property law remain subject to a body of (somewhat more ambiguous) rules after *Cedar Point*, even as the Court shrugs off the disciplining constraints imposed by legal method. The rule of law can thus be roughly maintained for primary rules of property, even as it dissipates as a constraint upon officials. As such, we can observe what I call "first-order legality" for rules applicable to private persons, without the "second-order legality" usually experienced by officials. This dichotomy, and the resulting internal fracturing, complicates canonical accounts of the rule of law by showing how it is possible for the qualities of certainty, predictability, and stability to be maintained with respect to one domain of the law, but not another. Consequently, legality can be partial. At worst, it can potentially come to be at war with itself.

With this bifurcated account of the rule of law in hand, it is possible to interrogate in a more considered way the supposedly monotonic relationships between legality, arbitrary rule, and the ambition of legality.

[21] H.L.A. Hart, The Concept of Law 99 (Penelope A. Bulloch & Joseph Raz postscript eds., 2d ed. 1994) [hereinafter Hart, Concept of Law] ("The union of primary and secondary rules is at the centre of a legal system . . . .").

[22] Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 Harv. L. Rev. 625, 627 (1984).

The rule of law, at least in one of its traditions, is often distilled into an image of rigid, impenetrable property rights.[23] These, in turn, are hitched to the aspiration for freedom from arbitrary rule and economic growth. But even as *Cedar Point* offered an account of property as a cornerstone of the rule of law in precisely these terms, each element of this argument was unraveling. No longer is it clear that centering legality around property minimizes the scope for arbitrary decision making by officials. To the contrary, an account of the rule of law centered around property rights may either increase or decrease the risk of such arbitrary rule without a clear effect on economic growth or social welfare. Legality, when conceptualized in terms of property rights, thus can undermine widely shared normative goals it purports to advance. Their relation is contingent, not necessary.

This Article focuses on the relationship of takings jurisprudence to the rule of law. Existing commentary criticizes *Cedar Point*'s "hostility to worker power" and "antidemocracy" effects,[24] or alternatively defends its "classical liberal" pedigree.[25] In contrast, I explore the Court's new takings doctrine in relation to the ideal of the rule of law.[26] The property/rule of law connection has been previously explored in a set of lectures by Professor Jeremy Waldron. He, however, trains on the relation of Lockean accounts of property to the rule of law though a political

[23] See sources cited supra notes 2–5.

[24] Nikolas Bowie, Comment, Antidemocracy, 135 Harv. L. Rev. 160, 163 (2021). For a similar, if more equivocal, suggestion, see Cristina M. Rodríguez, Foreword: Regime Change, 135 Harv. L. Rev. 2, 32 (2021) ("[T]he Supreme Court's burgeoning jurisprudence . . . has turned to the Bill of Rights, primarily the First Amendment, to limit social welfare and good-government regulation . . . ."); see also Linda Greenhouse, Justice on the Brink: The Death of Ruth Bader Ginsburg, the Rise of Amy Coney Barrett, and Twelve Months That Transformed the Supreme Court 224 (2021) (describing the case as a "potentially transformational development in the law of property rights . . . likely to hobble government land use regulation"). For a contrary view, see Julia D. Mahoney, *Cedar Point Nursery* and the End of the New Deal Settlement, 11 Brigham-Kanner Prop. Rts. J. 43, 64 (2022) (arguing that "*Cedar Point* represents an evolution, not a revolution, in the Court's property rights jurisprudence" while celebrating the Court's result and analysis). As it will become clear, I respectfully disagree with Professor Mahoney's conclusions for reasons spelled out at length in this Article.

[25] Sam Spiegelman & Gregory C. Sisk, *Cedar Point*: Lockean Property and the Search for a Lost Liberalism, 2020–21 Cato Sup. Ct. Rev. 165, 178–81 (2021) (talking of "the takings muddle").

[26] Cf. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021) ("As John Adams tersely put it, '[p]roperty must be secured, or liberty cannot exist.'" (citation omitted)).

philosophy lens.[27] My analysis and conclusions unfold along a different, American-constitutional-law track. Nevertheless, like Waldron, I hope to contribute to larger theoretical debates about the rule of law and its constituent parts.

Part I explores the basic architecture of takings doctrine prior to *Cedar Point*. Part II then offers a close reading of that decision. I carefully analyze its methodological underpinnings and doctrinal aftermath. Both in its origin and in its reasoning, I demonstrate, the opinion is in sharp tension with legality norms. Part III then broadens the analytic lens to evaluate the role that property plays in understandings of the rule of law. Using *Cedar Point* as an opening wedge for inquiry, it demonstrates how legality can unravel in ways that foster arbitrary rule and undermine economic growth. Of course, these are precisely the outcomes the rule of law is intended to stave off.

I. TAKINGS JURISPRUDENCE AS IT ONCE WAS

Takings jurisprudence has long been condemned as a "muddle" and a "confusion."[28] Scholars complain that its doctrinal guideposts offer too "little help in deciding any given case."[29] Yet this impression is an illusion. The most important working piece of the doctrine has, in fact, been tolerably clear for many years. While there are specific pockets of doctrinal ambiguity, most controversies are in practice relatively straightforward to predict. From prospective litigants' perspective, the Takings Clause historically has provided clear answers.

This Part shows how takings doctrine has been securely anchored, and so capable of providing citizens and officials with a stabilizing dose of certainty. To that end, it draws out a (well-known) central dichotomy that

[27] Jeremy Waldron, The Rule of Law and the Measure of Property 27 (2012) [hereinafter Waldron, Measure of Property] (doubting that "Locke's account" of property yields a specific definition of the rule of law).

[28] Carol M. Rose, *Mahon* Reconstructed: Why the Takings Issue Is Still a Muddle, 57 S. Cal. L. Rev. 561, 561–62 (1984) [hereinafter Rose, *Mahon* Reconstructed]. For other examples, see Mark Fenster, The Stubborn Incoherence of Regulatory Takings Law, 28 Stan. Env't L. Rev. 525, 528 (2009) (criticizing the "ad hoc" nature of the doctrine); Lynda L. Butler, *Murr v. Wisconsin* and the Inherent Limits of Regulatory Takings, 47 Fla. St. U. L. Rev. 99, 101 (2020) (alluding to "the confusion surrounding constitutional protection of property"); Danaya C. Wright, A Requiem for Regulatory Takings: Reclaiming Eminent Domain for Constitutional Property Claims, 49 Env't L. 307, 311 (2019) (characterizing regulatory takings doctrine in particular as "an incoherent, dysfunctional mess"); Spiegelman & Sisk, supra note 25, at 178 (criticizing "the takings muddle").

[29] Joseph L. Sax, Takings and the Police Power, 74 Yale L.J. 36, 37 (1964).

organizes the jurisprudence and generates tolerably clear predictions for many cases. Exceptions to this dichotomy seem initially to undermine this clarity. In fact, the two main exceptions help align the dichotomy with lay expectations about how an appropriation of property might occur. From a lay person's perspective, in other words, they make the law more predictable and intuitive. While zones of uncertainty persist in the doctrines as a result of unsettled "baseline" problems, litigation requiring a solution to the latter is infrequent and does not disrupt the law's overall stability and predictability.

I underscore here the stability and predictability of takings law because these qualities are central to the rule of law. One of Lon Fuller's "eight distinct routes" away from the rule of law was a "failure to make the rules understandable" in application.[30] On Fuller's view, there is "no rational ground for asserting that a man can have a moral obligation to obey a legal rule" if it is impossible to predict what the law will be.[31] In a similar vein, Joseph Raz described principles "common to virtually all accounts of the doctrine," including that the law be "reasonably clear" and "reasonably stable."[32] And Friedrich Hayek pronounced the rule of law satisfied if "[t]he law tells [a person] what facts he may count on and thereby extends the range within which he can predict the consequences of his actions."[33] A doctrine that is supposedly clotted with obscurity, I suggest in what follows, lived up rather well to the aspirations flagged by Fuller, Raz, and Hayek.

A. Is Takings Law a Muddle?

We glimpse the stability of takings jurisprudence by looking at what happened when the Supreme Court in June 2019 reversed a thirty-four-year-old precedent that required inverse condemnation actions to be filed first in state court,[34] but then excluded many of those cases from federal

[30] Fuller, supra note 8, at 39.

[31] Id.; see also Timothy A.O. Endicott, The Impossibility of the Rule of Law, 19 Oxford J. Legal Stud. 1, 3 (1999) ("Government is arbitrary if it is unpredictable—if it does not tell its citizens where they stand, what their rights and duties are.").

[32] Joseph Raz, The Law's Own Virtue, 39 Oxford J. Legal Stud. 1, 3 (2019); accord Waldron, Measure of Property, supra note 27, at 52.

[33] F.A. Hayek, The Constitution of Liberty 156–57 (1960).

[34] Knick v. Twp. of Scott, 139 S. Ct. 2162, 2165–66 (2019) (overruling *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 196–97, 200 (1985)).

court by operation of res judicata.[35] In *Knick v. Township of Scott*, a majority of the Court rejected these jurisdiction-channeling rules, opening up federal district courts to a new genre of takings claims.[36] Writing in the wake of *Knick*, Professor Richard Epstein prophesized that the new jurisdictional channel would result in some large judgments against local governments and "doubtless will introduce a welcome note of caution in local governments by exposing them to more powerful legal relief."[37] This (for Epstein, surprisingly conventional) view assumed that federal courts would be more favorable to takings claims than state courts, and that also there would be a substantial number of claims filed in those tribunals.

But is the assumption warranted? Costly litigation arises only when parties do not settle. The failure of settlement is commonly motivated by divergent expectations about legal outcomes.[38] Divergent expectations are more likely when there is legal uncertainty. Hence, if takings jurisprudence were really a "muddle," then the *Knick* decision would likely have induced a spike of filings in federal court.[39]

But it didn't. There was no flood of new suits in the lower federal courts after *Knick*. In the two years before *Knick*, some 451 district court cases

[35] San Remo Hotel, L.P. v. City & County of San Francisco, 545 U.S. 323, 347–48 (2005) (interpreting 28 U.S.C. § 1738 to preclude litigation in federal court of issues of law and fact determined in state takings cases under *Williamson*).

[36] *Knick*, 139 S. Ct. at 2178–79 (overruling *Williamson*).

[37] Richard Epstein, A Quiet Revolution in Property Rights, Ricochet (July 2, 2019), https://ricochet.com/636016/a-quiet-revolution-in-property-rights/ [https://perma.cc/2GPV-HVRA]; see also Ilya Somin, *Knick v. Township of Scott*: Ending a Catch-22 that Barred Takings Cases from Federal Court, 2018–19 Cato Sup. Ct. Rev. 153, 182 (2019) (criticizing the pre-*Knick* regime for its potential to skew the adjudication of takings cases in favor of state and local governments).

[38] The idea that divergent expectations motivate litigation rather than settlement is developed in George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1, 17 (1984). For empirical evidence that convergent expectations lower the probability of trial, see Joel Waldfogel, Reconciling Asymmetric Information and Divergent Expectations Theories of Litigation, 41 J.L. & Econ. 451, 474 (1998). Even critics of the Priest-Klein model acknowledge that "levels of uncertainty" shape the frequency of litigation over settlement. Daniel Klerman & Yoon-Ho Alex Lee, Inferences from Litigated Cases, 43 J. Legal Stud. 209, 214 (2014). The predicted relation between uncertainty and litigation breaks down if "each side might believe self-servingly that its own case is even stronger than before" when provided information about likely outcomes. Bert I. Huang, Trial by Preview, 113 Colum. L. Rev. 1323, 1329 (2013).

[39] "Likely" but not certain: perhaps litigants would have remained in state court because of their expectations of federal judges' behavior. This does not seem likely: federal courts in 2019 had a sufficiently large number of Republican appointments that it was reasonable to expect them to be relatively friendly to property rights claims.

discussed the Takings Clause; in the two years after *Knick*, 582 did.[40] An increase of sixty-five published cases per annum hardly suggests a litigation dam breaking. Indeed, between June 2019 and December 2021, 395 published opinions in all federal courts cited *Knick*.[41] To put this in context, 449 academic articles cited that decision in that same period. The absence of any "flood" of federal court litigation suggests that litigants are not uncertain about how takings cases will be resolved. If takings jurisprudence were in fact unpredictable in operation, it seems likely that litigants' expectations about outcomes would diverge more frequently, and the rate of federal court litigation would have been much higher than observed after *Knick*.[42] The absence of a litigation spike suggests that uncertainties in takings doctrine matter more in theory than in practice.

What then to make of the frequent scholarly complaints of confusion? Many of these critiques are really grousing about the substance of the doctrine and not its clarity.[43] Often, "confusion" seems to be a coded way of expressing disagreement about the perceived weakness of the Fifth Amendment's compensation regime, or the influence of judicial ideology on case outcomes.[44] Further, some scholars argue that takings jurisprudence is problematic because it simplifies too much. For example, Professor Maureen Brady has critiqued the doctrinal test for defining units of property, arguing that constitutional law should be *more* sensitive to variance in state law.[45] Brady identifies a way in which uniformity may not be desirable,[46] and hence invites a richer dialogue about the nature

[40] Based on a search of cases citing "taking" and "Fifth Amendment" in Westlaw's district court database for the two years before and after *Knick*.

[41] Based on Westlaw's list of citations of *Knick* in published opinions.

[42] It could also be that Epstein underestimated the comparative advantage of federal over state courts. Even then, he was surely right to expect *some* meaningful increase in federal court filings.

[43] See, e.g., Spiegelman & Sisk, supra note 25, at 177–78 (complaints about confusion that collapse into disagreements with the scope of takings jurisprudence); Wright, supra note 28, at 311 (criticizing the takings doctrine as "incoherent" because it is "trapped in the time warp of Lochnerism").

[44] For instance, Professor Lee Fennell has recently expounded takings jurisprudence as a Rube-Goldberg-ish "selective scrutiny machine," capable of sifting regulations favored by the Court on ideological grounds from ones that it disfavors. Lee Anne Fennell, Escape Room: Implicit Takings after *Cedar Point Nursery*, 17 Duke J. Const. L. & Pub. Pol'y 1, 3–4 (2022).

[45] Maureen E. Brady, *Penn Central* Squared: What the Many Factors of *Murr v. Wisconsin* Mean for Property Federalism, 166 U. Pa. L. Rev. Online 53, 56 (2017) [hereinafter Brady, *Penn Central* Squared].

[46] Id. at 69. In the short term, the *Murr* decision itself may not yield a uniform rule because it points toward a "maelstrom of multiple factors." Murr v. Wisconsin, 137 S. Ct. 1933, 1956

and extent of "confusion" in takings law. Her work is a useful counterpoint to the standard worries about the doctrine in this domain.

B. The Classical Dichotomy in Takings Jurisprudence

From the vantage point of 1Ls cramming for a property final, the notion that the law of takings is simple is likely to raise eyebrows or invite derisive snorts. Yet a body of law may be tolerably clear in practical operation even if it contains zones of uncertainty, provided that few actual cases in fact turn on how this uncertainty is resolved. Takings jurisprudence, I argue, has this character. The Court has maintained for more than a century a central organizing distinction that cuts between cases plaintiffs are likely to win, and those where defendants will probably prevail. That central distinction is rule-like in character, and so easy for litigants to apply ex ante. It hence dissolves uncertainty and contributes to legal predictability.

To show this, I first sketch the central, rule-like dichotomy of takings law. I then summarize some of the hidden shoals of complexity that remain. I further explain why they are less significant in practice than might first appear.

1. The Appropriation/Regulation Distinction

A central reason for takings jurisprudence's relative predictability is that there is a prominent organizing rule that cleanly sorts cases into two categories. These buckets are filled respectively with cases plaintiffs are likely to win, and cases they will probably lose. So long as litigants know which bucket they likely fall into, they will likely settle rather than waste the time and expense of a lawsuit.[47] The law might be substantively "wrong" on some view. But it is neither a "muddle" nor a "confusion."

A threshold distinction of takings law cuts between: (1) cases in which the government physically *appropriates* real or personal property, and (2) *regulations* that "interfer[e]" with property as part of a "public program adjusting the benefits and burdens of economic life to promote the

(2017) (Roberts, C.J., dissenting). But it is possible to imagine the *Murr* rule developing in ways that increase rather than decrease uniformity as courts' understandings converge over time.

[47] See supra note 38 for discussion and caveats.

common good."[48] With two exceptions to be delineated below, a government action on the "appropriation" side of the line will almost always trigger a constitutional duty of just compensation. But a government action on the "regulation" side of the line will typically not.[49] This appropriation/regulation line was quite easy to apply in practice, because it tracked some intuitive distinctions that lay people could draw based on readily observable characteristics of government action. This made the law stable and predictable.

Let me be clear: this is a trite, even boring, observation. Justices of varying ideological hues have repeatedly offered this distinction as a threshold central organizing rule for takings doctrine.[50] In 2015, Chief Justice Roberts—who would go on to author *Cedar Point*—would speak of "the settled difference in our takings jurisprudence between appropriation and regulation."[51] In 2010, Justice Scalia distinguished between regulation and "the classic taking[:] . . . a transfer of property to the State or to another private party by eminent domain."[52] Eighteen years before that, in *Lucas v. South Carolina Coastal Council*, he drew a sharp line between "a 'direct appropriation' of property," or the "functional equivalent" of a "practical ouster of . . . possession," on the one hand, and a "regulation [that is] seen as going 'too far' for purposes of the Fifth Amendment."[53] Some fourteen years before that decision, the same

[48] E. Enters. v. Apfel, 524 U.S. 498, 522 (1998) (O'Connor, J., plurality opinion) (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

[49] Another threshold limitation is the "public use" limitation on takings. But this has been given a "broad understanding" that includes "economic development." Kelo v. City of New London, 545 U.S. 469, 485 (2005). Hence, it will rarely be limited under federal constitutional law. The "public use" limitation differs from run-of-the-mill takings cases because the remedy could be an injunction, rather than merely damages. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 543 (2005) ("[I]f a government action is found to be impermissible—for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.").

[50] See, e.g., Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 31 (2012); *Lingle*, 544 U.S. at 537; Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992).

[51] Horne v. Dep't of Agric., 576 U.S. 350, 362 (2015).

[52] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 713 (2010) (Scalia, J., plurality opinion).

[53] *Lucas*, 505 U.S. at 1014–15 (quoting Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1870); Transp. Co. v. City of Chicago, 99 U.S. 635, 642 (1878)).

distinction would feature prominently in the landmark *Penn Central* decision by Justice Brennan.[54]

It is no exaggeration then to say that the appropriation/regulation distinction has been an uncontroversial keystone of the doctrine for almost fifty years. It is one that has been embraced by Justices of all ideological stripes. Consider how the distinction unfolds into practice. In the "classical taking," the government directly appropriates private property for its own use.[55] An example of a contested government appropriation is a federal regulation, promulgated by the Department of Agriculture, requiring raisin growers to "physically set aside" a portion of their crop for the government "free of charge."[56] This appropriation of private property triggered "a categorical duty to pay just compensation."[57] This oft-repeated "categorical" obligation[58] admits of no objections. Hence, when a plaintiff can successfully characterize her case as an appropriation, there is little chance that the government will be able to avoid payment.[59]

Application of the Takings Clause, in contrast, to state and federal regulation is of relatively recent vintage. In 1870, the Court observed that it "has always been understood as referring only to a direct appropriation, and . . . [i]t has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals."[60] The first instance in which the Supreme Court characterized a governmental action as a regulation, and then applied the Takings Clause to invalidate it, was in 1922. In *Pennsylvania Coal Co. v. Mahon*, Justice Holmes declared that when government regulation of property use goes "too far," a taking may occur notwithstanding the absence of formal appropriation or

[54] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 135 (1978) (distinguishing between "an appropriation of property" and a "regulation," albeit not in an articulation of the doctrine).

[55] United States v. Sec. Indus. Bank, 459 U.S. 70, 77–78 (1982).

[56] *Horne*, 576 U.S. at 354.

[57] Id. at 358.

[58] See, e.g., Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 31 (2012) (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 322 (2002)) (designating duty to compensate as "categorical"); United States v. Pewee Coal Co., 341 U.S. 114, 117 (1951).

[59] A plaintiff might successfully argue, though, that the government action was not for a "public use," in which case the just compensation requirement would not apply. Although cases are scant on the ground, a court would presumably have to opt between an injunction or a damages remedy.

[60] Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1870); accord Mugler v. Kansas, 123 U.S. 623, 667–68 (1887).

physical invasion by government.[61] This marked a break from 150 years of constitutional jurisprudence.[62] Recognizing candidly that rupture, the Court has repeatedly characterized *Mahon* as *extending* the Takings Clause to regulation.[63] Indeed, it is commonly recognized that there is no strong originalist justification for the *Mahon* rule. The best available scholarship making an originalist case in favor of regulatory takings doctrine concludes that the idea is at best "consistent" with the Constitution's text and some (but not all) state constitutional law.[64]

An example of a contested regulation is a New York City landmark ordinance limiting the uses of real property, which was challenged in *Penn Central Transportation Co. v. City of New York*.[65] The Court did not apply a "categorical" rule. Instead, it considered three "essentially ad hoc" factors: (1) the diminution in value of property attributable to the challenged regulation; (2) the extent to which the regulation interfered with the owner's "investment-backed expectations;" and (3) the character of the government action.[66] Many complaints about doctrinal ambiguity latch upon the seeming pluralism of these *Penn Central* factors.[67] Yet that

[61] 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

[62] The best and most judicious account of the original understanding of the Takings Clause is William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 Colum. L. Rev. 782, 798 (1995) ("The predecessor clauses to the Fifth Amendment's Takings Clause, the original understanding of the Takings Clause itself, and the weight of early judicial interpretations of the federal and state takings clauses all indicate that compensation was mandated only when the government physically took property.").

[63] See, e.g., Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071–72 (2021); Murr v. Wisconsin, 137 S. Ct. 1933, 1942 (2017); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992).

[64] Andrew S. Gold, Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far," 49 Am. U. L. Rev. 181, 228 (1999) (explaining that "there is almost no early Supreme Court case law applying the Fifth Amendment Takings Clause," and that "[t]he early state court decisions, on the other hand, show two lines of jurisprudence: one that provided compensation for regulatory takings and one that precluded compensation" (citation omitted)).

[65] 438 U.S. 104, 107 (1978).

[66] Id. at 124; see also Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 32 (2012) ("[M]ost takings claims turn on situation-specific factual inquiries.").

[67] Thomas W. Merrill, The Economics of Public Use, 72 Cornell L. Rev. 61, 93 (1986) (discussing *Penn Central*'s "intellectual bankruptcy"). Merrill's critique focuses on the strength of the rule against regulatory takings. Others protest its unclarity. See, e.g., D. Benjamin Barros, The Police Power and the Takings Clause, 58 U. Mia. L. Rev. 471, 471 (2004) (arguing that the *Penn Central* test has produced "widespread confusion"); Andrea L. Peterson, The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine, 77 Calif. L. Rev. 1299, 1316 (1989) (same).

test can be boiled down into a comparison between "(1) the extent of the harm suffered by the property owner *in view of* the owner's investment-backed expectations and (2) the character of the governmental action *in view of* the paradigmatic takings status of permanent physical invasion."[68] This is not all that different from cost-benefit tests or the Hand formula—operations that tend to occasion little hand-wringing about incoherence. Application of *Penn Central* is by no means certain in outcome. Governmental defendants do lose regulatory takings claims.[69] In the lower courts, however, plaintiffs seem generally far less likely to prevail in regulatory takings litigation than in challenges to appropriations. A 2013 study of *Penn Central* claims in the U.S. Courts of Appeals for the First, Ninth, and Federal Circuits, for example, found the rate of success for takings claims in the district courts to be about eighteen percent, with many rulings for plaintiffs reversed on appeal.[70] In short, it is much more likely that the government will prevail once a challenged government action has been characterized as a regulation rather than an appropriation, and an action has been filed in federal court.

The appropriation/regulation distinction, to be sure, has its critics. Professor Andrea Peterson, for instance, insists that "the key issue in takings cases is fairness," and that the latter is not well captured by the appropriation/regulation distinction.[71] Whatever the merits of Peterson's proposed alternative, it involves swapping out a vague fairness standard in exchange for the present appropriation/regulations rule. This move

[68] Gary Lawson, Katharine Ferguson & Guillermo A. Montero, "Oh Lord, Please Don't Let Me Be Misunderstood!": Rediscovering the *Mathews v. Eldridge* and *Penn Central* Frameworks, 81 Notre Dame L. Rev. 1, 47 (2005).

[69] For cases involving land, see, e.g., Palazzolo v. Rhode Island, 533 U.S. 606, 632 (2001) (land-based claim prevailing in the Supreme Court); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 693–94 (1999) (same); Suitum v. Tahoe Reg'l Plan. Agency, 520 U.S. 725, 730–33 (1997). For cases involving intellectual property and money, see Ruckleshaus v. Monsanto Co., 467 U.S. 986, 1020 (1984) (owner of trade secrets); Phillips v. Wash. Legal Found., 524 U.S. 156, 172 (1998) (plaintiff asserting taking of interest in bank accounts); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164–65 (1980) (same).

[70] Adam R. Pomeroy, *Penn Central* After 35 Years: A Three Part Balancing Test or a One Strike Rule?, 22 Fed. Cir. Bar J. 677, 697 (2013); see also James E. Krier & Stewart E. Sterk, An Empirical Study of Implicit Takings, 58 Wm. & Mary L. Rev. 35, 67 (2016) (finding that government almost always wins under *Penn Central*, unless the diminution in value is on the order of 85–90% or greater).

[71] Andrea L. Peterson, The False Dichotomy Between Physical and Regulatory Takings Analysis: A Critique of *Tahoe-Sierra*'s Distinction Between Physical and Regulatory Takings, 34 Ecology L.Q. 381, 384, 417 (2007).

would dramatically increase the law's variability.[72] It would thus defeat the aim of having a threshold sorting mechanism in the first place—ex ante certainty in most instances—in ways that run against the grain of the Takings Clause's purpose.

In sum, the appropriation/regulation distinction sorts cases into two categories. One is governed by a hard-edged rule that always yields a win for plaintiffs. In another, a multi-factor standard assures defendants of victory in most cases. The appropriation/regulation distinction itself is also hard-edged, intuitive, and so allows parties to make "a precise advance determination" of how governmental actions would be ranked for Fifth Amendment purposes—and hence how litigation would likely end up.[73] From the pragmatic perspective of counsel determining whether litigation is worthwhile for her client, therefore, the appropriation/regulation dichotomy generates a considerable benefit in terms of predictability. As a result, "the cost of learning the law is reduced"[74] and planning is made simpler.

2. Two Exceptions That Prove the Rule

The sharp and crisp distinction between appropriation and regulation is modified by two seeming doctrinal exceptions. Both extend the domain of categorical takings and trigger a duty of compensation. Although the Court has described them as "regulations," in both cases a per se rule requiring compensation is explained because the relevant governmental action is on its face similar to an appropriation. These exceptions "prove the rule" in the sense that they align the per se category of takings under the term "appropriation" with lay expectations of that word.

In the first carve-out, the Court has said that "an otherwise valid regulation so frustrates property rights that compensation must be paid" when it is a "permanent physical occupation authorized by government," and this "without regard to the public interests that it may serve."[75] In the leading case of *Loretto v. Teleprompter Manhattan CATV Corp.*, the

[72] Id. at 396, 420. Peterson does not address the trade-off between accuracy and ex ante certainty discussed here.

[73] Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557, 559, 562 (1992) (defining the difference between rules and standards in terms of "the distinction between whether the law is given content *ex ante* or *ex post*").

[74] Id. at 564 (explaining that rules make it easier for individuals to acquire legal knowledge before acting, thus increasing the likelihood of people conforming to the law's commands).

[75] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 425–26 (1982).

Court concluded that a municipal ordinance requiring landlords to facilitate cable installation in rental property was a taking.[76] No state actor set foot on Loretto's property—so it was not an appropriation into government hands.[77] Rather, a third party stepped onto Loretto's property, and then reaped the resulting benefits.[78] The *Loretto* rule has been characterized as a "very narrow" subset of appropriations.[79] It was initially justified by the Court in terms of the "qualitatively more intrusive" character of a permanent intrusion.[80] When the government mandates that you allow a third party to permanently physically occupy a space, the logic goes, it has exercised a power hard to distinguish in practical effect from eminent domain. For this reason, sophisticated commentators lump together eminent domain and permanent physical occupations into a single category of "per se" takings.[81]

A second exception is in play when a regulation impels a property owner to sacrifice all economically-beneficial uses of their land.[82] So where the regulation "render[s a] property economically worthless," there is a "categorical" taking.[83] In the leading case of *Lucas v. South Carolina Coastal Management Council*, a South Carolina environmental law imposed restrictions on a landowner's use of beachfront land that allegedly eliminated "any reasonable economic use of the lots, . . . eliminated the unrestricted right of use, and render[ed] them valueless."[84] The *Lucas* Court carved out yet a further exception from this categorical rule, however, for restrictions that "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[85] Subsequently, the main *Lucas* "wipeout" rule has been characterized by the Court as limited

[76] Id. at 421, 426.
[77] Id. at 423–24.
[78] Id.
[79] Id. at 441.
[80] Id.
[81] Michael W. McConnell, The Raisin Case, 2014–15 Cato Sup. Ct. Rev. 313, 314 (2015) (arguing that "per se takings occur when the government seizes an ownership interest in what was previously private property or when it effects a permanent or recurring physical invasion of the property").
[82] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).
[83] Id. at 1027–28.
[84] Id. at 1009 (quoting Petition for Writ of Certiorari at 37, *Lucas*, 505 U.S. 1003 (1992) (No. 91-453)); cf. id. at 1036 (Blackmun, J., dissenting) (noting that the state court's finding that all the land was "valueless" was almost certainly incorrect).
[85] Id. at 1028–29.

to the "extraordinary case."[86] Indeed, the consensus scholarly view has been that the *Lucas* wipeout rule has not been widely applied.[87] This is in large part because the "background principles" exception seems to shield many regulations.[88]

These two wrinkles—the permanent physical occupation and the "wipeout" rule—are best understood as existing alongside a per se rule for government appropriations. They amplify rather than diminish that dichotomy's predictive force because they account for circumstances in which the practical effect of a regulation is indistinguishable in a lay person's eye from outright appropriation. These exceptions therefore align the law with lay intuitions in a way that likely increases the legibility, and potentially also the social legitimacy, of the law.[89]

3. Residual Complications

None of this is to say that takings law does not have analytic quagmires. But it is important to observe that these uncertainties arise (or used to arise) in regard to relatively infrequent fact patterns. They hinge largely on how to define the "baseline" against which property is measured.[90] This "baseline" problem has proven intractable. Yet at the same time, it coexists with a high degree of certainty for litigants. As a result, it is irrelevant in all but a small fraction of cases.

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[86] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 332 (2002).

[87] Robert L. Glicksman, Swallowing the Rule: The *Lucas* Background Principles Exception to Takings Liability, 71 Fla. L. Rev. F. 121, 124 (2020) ("*Lucas* has not lived up to the hype that surrounded its birth."); see also Richard J. Lazarus, Putting the Correct "Spin" on *Lucas*, 45 Stan. L. Rev. 1411, 1413 (1993) (same). For empirical evidence, see Carol Necole Brown & Dwight H. Merriam, On the Twenty-Fifth Anniversary of *Lucas*: Making or Breaking the Takings Claim, 102 Iowa L. Rev. 1847, 1849–50 (2017) (noting that in more than 1,700 cases over a twenty-five-year period, there were only twenty-seven successful takings claims under *Lucas*—a success rate of just 1.6%).

[88] Michael C. Blumm & Rachel G. Wolfard, Revisiting Background Principles in Takings Litigation, 71 Fla. L. Rev. 1165, 1174 (2019) ("The background principles exception proved to be much more important than the per se takings rule [that *Lucas*] established.").

[89] The intuition here is that property law, including Fifth Amendment jurisprudence, gains its social legitimacy from conformity to widely held normative understandings. In a similar vein, Paul Robinson has argued that "the criminal law, even a highly instrumentalist one, cares about laypersons' intuitions of justice because criminal law's power to influence conduct may reside in large part in its normative rather than its coercive crime control mechanisms." Paul H. Robinson, Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control, 86 Va. L. Rev. 1839, 1841 (2000).

[90] On the pervasiveness of baselines necessary "to measure the constitutionally critical lines that distinguished action from inaction and neutrality from impermissible partisanship," see Cass R. Sunstein, *Lochner*'s Legacy, 87 Colum. L. Rev. 873, 874 (1987).

To see how this happens, consider three ways the baseline problem arises. Across all these lines of cases, the Court has tried (but largely failed) to come up with a stable answer. But the result has been doctrinal quiescence. A first class of cases presents the problem of "conceptual severance," which involves "delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken."[91] The Court has acknowledged the difficulty of defining "the 'property interest' against which the loss of value is to be measured."[92] In a 2017 decision, the Court addressed the conceptual severance question, but declared inconclusively in the end that "no single consideration can supply the exclusive test for determining the denominator."[93] This fluid approach has been critiqued for failing to provide guidance.[94] It is also condemned for diminishing the role that state-level law plays in defining property interests.[95]

Second, there is a temporal analog to the conceptual severance problem. All agree that state law typically creates property interests.[96] But state law also changes over time either through new state legislation (regulation) or via judicial interpretation. If state law is used to define a baseline property entitlement, and if the state can (and does) periodically change the bounds of property, how are licit refinements in state law to

[91] Margaret Jane Radin, The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 Colum. L. Rev. 1667, 1676 (1988); see also Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1191–92 (1967) ("Is it the preexisting value of the affected property, or is it the whole preexisting wealth or income of the complainant?").

[92] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992); id. at 1054 (Blackmun, J., dissenting) (critiquing the majority's approach to the problem); see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 331 (2002) ("[D]efining the property interest taken in terms of the very regulation being challenged is circular. With property so divided . . . [all regulations] would constitute categorical takings.").

[93] Murr v. Wisconsin, 137 S. Ct. 1933, 1944–45 (2017).

[94] Richard A. Epstein, Disappointed Expectations: How the Supreme Court Failed to Clean Up Takings Law in *Murr v. Wisconsin*, 11 N.Y.U. J.L. & Liberty 151, 151, 183–89 (2017) (complaining that *Murr* "dodged the hard questions latent in applying the 'parcel-as-a-whole' test").

[95] Brady, *Penn Central* Squared, supra note 45, at 66 ("*Murr* represents a new and different threat to property federalism than these previous rulings" because it "permits courts applying federal takings law to incorporate the property law of other jurisdictions to determine the scope of the interests protected.").

[96] See, e.g., Kelo v. City of New London, 545 U.S. 469, 482–83 (2005); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984) (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980)).

be distinguished from impermissible uncompensated takings? The Court has considered this question under the rubric of "judicial takings."[97] These come about when a state court declares "what was once an established right of private property no longer exists."[98] No decision from the Court, however, provides clear guidance on the question of how to draw the line around extant, constitutionally protected property interests, and thereby winnow out impermissible state-law changes.[99]

A third, related difficulty is defining "background principles" under *Lucas*. This category is drawn by the Supreme Court to encompass a range of "statutes as well as common law principles."[100] But the Court has otherwise left the contours of "background principles" unclear. Although it has said that "a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title,"[101] the Court has provided no positive guidance as to how to separate this "background" from novel—and hence potentially unconstitutional—precepts of law. The result is yet another problem of knowing when takings even start to be a worry.

Uniting all three problems is the common constitutional challenge of defining "the baseline from which measurements are made."[102] In many other domains of law, "the baseline frequently consists of existing distributions of wealth and entitlements."[103] This strategy could be pursued in the property context only at the expense of sacrificing states' authority to define the scope of real and chattel property. Yet the Court has to date been unwilling to federalize completely the law of real and personal property. So, it has not been able to plot with any clarity all of the spatial, temporal, and legal baselines against which property

[97] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 741–42 (2010) (Kennedy, J., concurring in part and concurring in the judgment).

[98] Id. at 715 (Scalia, J., plurality opinion).

[99] In the *Stop the Beach* case, the Court found no change in state law. Id. at 731 ("Thus, Florida law as it stood before the decision below allowed the State to fill in its own seabed, and the resulting sudden exposure of previously submerged land was treated like an avulsion for purposes of ownership. The right to accretions was therefore subordinate to the State's right to fill.").

[100] Blumm & Wolfard, supra note 88, at 1182, 1207 ("[R]ecent case law has uncovered many more statutory background principles than common law principles.").

[101] Palazzolo v. Rhode Island, 533 U.S. 606, 629–30 (2001).

[102] Cass R. Sunstein, Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy), 92 Colum. L. Rev. 1, 5–6 (1992).

[103] Id.

deprivation is measured. In consequence, where one of these baselines is murky—or where it is successfully contested by a private litigant—present jurisprudence provides little guidance and instead much uncertainty.

And yet what is striking about these problems is how marginal they seem. In each case, there appears to be little evidence of seething confusion in the lower courts.[104] Indeed, the actual litigation involving these problems that reaches the Supreme Court has idiosyncratic features: litigants, that is, have to work to manufacture these boundary problems. They appear not to arise in the ordinary operation of state property law. In most imaginable litigation, a takings problem can therefore be resolved without addressing any of these baseline problems. The property in question is usually clearly demarcated; there is no question of the state redefining property with a new common law rule; and no need even to ask what a "background principle" might be (hence the absence of post-*Lucas* jurisprudence on that issue from the apex court). As a result, these problems may dominate property law exams—but they are of limited relevance beyond that in the world.

4. The Surprising Clarity of Takings Law

The constitutional law of takings satisfies few people. This is hardly surprising given the diversity of views about property in American society. Whether one decries or embraces it, though, the doctrine cannot fairly be condemned as too muddled or confused to provide guidance. The law instead "tell[s] its citizens where they stand, what their rights and duties are."[105] Unless the law meets this criterion—unless, that is, it "can actually guide human conduct,"[106] including, and perhaps especially, the conduct of officials tasked with flexing state power—the rule of law cannot be satisfied. This does not mean that the law must be wholly without ambiguity—sometimes, a measure of ambiguity is compelled by the need for compromise in complex, pluralistic societies.[107] And sometimes, vague laws can provide not just adequate guidance, but can conform better than precise rules to widely shared social expectations.[108]

[104] See Brown & Merriam, supra note 87, at 1849–50.

[105] Endicott, supra note 31, at 3.

[106] Marmor, supra note 20, at 5.

[107] Id. at 26–27 (discussing the trade-off between pluralism, management, and clarity).

[108] Endicott, supra note 31, at 7–8 (explaining why "an increase in precision is not a guaranteed step closer to eliminating arbitrary government").

So long as the appropriation/regulation line remains clear at the threshold, and the problems of defining a baseline remain segregated into a distant annex, this Fifth Amendment jurisprudence generates a tolerably workable doctrinal structure to elicit and stabilize public expectations over the content of property rights. As such, it instantiates and advances directly the rule of law.

Or at least it did until *Cedar Point*.

II. DESTABILIZING TAKINGS DOCTRINE: *CEDAR POINT* AS ANTI-LEGALITY

In June 2021, the Supreme Court handed down a 6-3 decision that promises to reorder dramatically the jurisprudence of takings, as well as have potentially large ripple effects in the real world. This Part analyzes *Cedar Point Nursery v. Hassid*[109] as a potential break-point in Fifth Amendment law from two perspectives of special relevance to legality concerns. First, from the backward-looking vantage point of proper legal sources, I show that *Cedar Point* deviates from ordinary meaning, original understandings, and applicable precedent. From a methodological perspective, therefore, the decision is hard to reconcile with the values of predictability and reason-giving central to the rule of law.[110]

Second, the decision can also be evaluated in terms of its practical consequences. Here, the effect will be slow but, in the end, perhaps dramatic. It is not so much that *Cedar Point* opens some floodgate immediately. Rather, the central effect of the *Cedar Point* decision, I contend, is to undermine, and so open the door to a repudiation of, the longstanding dichotomy between appropriations and regulations. After *Cedar Point*, that vitally important threshold sorting rule in takings jurisprudence works as an ambiguous standard. It is no longer clear what falls on each side of its line. In the long term, indeed, the decision may signal the collapse of regulatory takings doctrine. This would not, however, foster clarity and predictability. In short, the paradoxical effect of a judgment bottomed on rule-of-law theory is in one way to dissipate the rule of law in practice. Identifying this tension sets up the broader theoretical inquiry pursued in Part III.

[109] 141 S. Ct. 2063, 2067–68 (2021).

[110] See Marmor, supra note 20, at 3, 5–7 (citing clarity, lack of contradiction, stability, and consistent application as conditions that enhance the law's ability to guide human conduct).

A. Cedar Point *as Inflection in Takings Jurisprudence*

1. The Cedar Point *Litigation*

At issue in *Cedar Point* was a 1976 California "take access" regulation that permitted union organizers to approach and talk to agricultural workers on company property three times a day, during their lunch breaks, and for an hour before and after work, provided the union gave notice to the state and employer, and avoided disruption.[111] The regulation was promulgated under the California Agricultural Labor Relations Act of 1975.[112] This gives agricultural employees a right to self-organize and makes it an unfair labor practice for employers to interfere with it.[113] This 1975 Act emerged out of decades of "strikes, boycotts, and interunion disputes" in California's agricultural sector, and "gave California farm workers protections comparable to those in [federal labor law] . . . to bring certainty and a sense of fair play to a presently unstable and potentially volatile condition in the state."[114]

The California law was enacted against a context of racialized struggle over the terms of production in California's farmlands. Since the late nineteenth century, largely white land owners there had depended on "Chinese, Japanese, Filipino, and other (mainly Asian) immigrants" for cheap labor, and had mobilized "race-based reactionary movements," as well as "racism, xenophobia, and violence," to keep their costs low.[115] Asian immigrants were over time displaced by Mexicans, either drawn into the United States through the Bracero program or arriving without documents.[116] These laborers were successfully organized by the National Farm Workers led by Cesar Chavez and Dolores Huerta "to strike on a

[111] Cal. Code Regs. tit. 8, § 20900(e)(3)–(4); see also Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2069 (2021) (describing the regulatory framework).

[112] *Cedar Point*, 141 S. Ct. at 2069.

[113] Cal. Lab. Code §§ 1152–53(a).

[114] Miriam J. Wells, Legal Conflict and Class Structure: The Independent Contractor-Employee Controversy in California Agriculture, 21 L. & Soc'y Rev. 49, 55–58 (1987); see also Bowie, supra note 24, at 185–89 (discussing the situation of agricultural workers in California in the 1960s and 1970s).

[115] Maywa Montenegro de Wit, Antonio Roman-Alcalá, Alex Liebman & Siena Chrisman, Agrarian Origins of Authoritarian Populism in the United States: What Can We Learn from 20th-Century Struggles in California and the Midwest?, 82 J. Rural Stud. 518, 520 (2021); Susan Ferriss & Ricardo Sandoval, The Fight in the Fields: Cesar Chavez and the Farmworkers Movement 5–6 (Diana Hembree ed., 1997).

[116] Ferriss & Sandoval, supra note 115, at 6.

multiracial basis."[117] They did so aligned with "organized church leaders, college students, and urban residents across the country to boycott food grown by employers who hired strikebreakers."[118]

Nevertheless, the Agricultural Labor Relations Act did not generate high levels of farmworker unionization, in part because of intramural disputes among unions[119] and in part because of employers' capture of a state labor relations board.[120] Still, unionization efforts continued. A pair of firms, representing Cedar Point Nursery and Fowler Packing Company, challenged the "take access" regulation. Cedar Point Nursery and Fowler Packing Company were Northern California growers of strawberries, grapes, and citrus.[121] The former had previously faced complaints of low wages, unclean bathrooms, harassment, and intimidation.[122] Both had some cause for concern at the prospect of unionization. Both objected to the union organizers' efforts to uphold the "take access" regulation on state law and federal constitutional grounds. Both also made no attempt to demonstrate that the regulation ran afoul of *Penn Central*'s test for regulatory takings, and instead focused their constitutional fire on the claim that the "take access" regulation was a "per se" taking.[123]

A 6-3 majority of the Court agreed. It held that the "take access" regulation "appropriate[d] a right to invade the growers' property and therefore constitute[d] a *per se* physical taking."[124] The majority opinion, written by Chief Justice Roberts, seemingly accepted the

[117] Bowie, supra note 24, at 186.

[118] Id.

[119] Jennifer Gordon, Law, Lawyers, and Labor: The United Farm Workers' Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today, 8 U. Pa. J. Lab. & Emp. L. 1, 40–44 (2005) (describing the "[u]nraveling" of the United Farm Workers ("UFW")); accord Miriam Pawel, The Union of Their Dreams: Power, Hope, and Struggle in Cesar Chavez's Farm Worker Movement 213–24, 229–34, 238–41, 244–47 (2009) (same).

[120] William B. Gould IV, Some Reflections on Contemporary Issues in California Farm Labor, 50 U.C. Davis L. Rev. 1243, 1253–54 (2017) (documenting the Board's mixed record).

[121] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2069–70 (2021).

[122] David Bacon, The Real Target in the Supreme Court's '*Cedar Point*' Decision, The Nation (July 2, 2021), https://www.thenation.com/article/activism/cedar-point-organizing-labor [https://perma.cc/TF77-TZSN]. Theirs was the second challenge to the law. The regulation had been challenged and upheld in 1976 in state court. Agric. Lab. Rels. Bd. v. Superior Ct., 546 P.2d 687, 693 (Cal. 1976).

[123] *Cedar Point*, 141 S. Ct. at 2070.

[124] Id. at 2072.

appropriation/regulation distinction described in Part I.[125] At least on the surface, therefore, his argument was a conventional and legalist application of settled law. Yet both the particular application of the central organizing dichotomy of takings law in *Cedar Point* and the reasons supplied for that conclusion suggest something more at stake, for neither the specific result nor the more abstract logic of *Cedar Point* can be harmonized with a rule-like appropriation/regulation distinction. Before reaching that conclusion, however, it is necessary to unpack the Court's logic.

At the core of the Court's analysis was the idea that "the regulation appropriates for the enjoyment of third parties the owners' right to exclude."[126] The latter, posited the Court, was of "central importance to property ownership."[127] Three cases were identified in support of this idea. Chief Justice Roberts described the first, *United States v. Causby*,[128] as an instance in which government overflight of land was a "direct invasion" and thus created a "servitude" on that land.[129] The second case cited by the *Cedar Point* majority, *Kaiser Aetna v. United States*, concerned a "real-estate developer [who] dredged a pond, converted it into a marina, and connected it to a nearby bay and the ocean."[130] According to Chief Justice Roberts, a taking occurred there because a mandated right of way along the new watercourse equaled "the imposition of the navigational servitude."[131] The third case was *Loretto v. Teleprompter Manhattan CATV Corp.*, in which "a permanent physical occupation [was treated as] a per se taking" even though it resulted in "only . . . trivial economic loss."[132] The Court further held that the intermittent quality of the intrusion allowed by the "take access"

[125] Id. at 2071–72 ("The essential question is . . . whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property.").

[126] Id. at 2072; see also id. at 2077 ("We cannot agree that the right to exclude is an empty formality, subject to modification at the government's pleasure. On the contrary, it is a 'fundamental element of the property right,' that cannot be balanced away." (quoting Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979))).

[127] Id. at 2073.

[128] 328 U.S. 256 (1946).

[129] *Cedar Point*, 141 S. Ct. at 2073 (citation omitted).

[130] Id. (citing *Kaiser Aetna*, 444 U.S. at 167).

[131] Id. (quoting *Kaiser Aetna*, 444 U.S. at 180).

[132] Id. (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434–35 (1982)). The Court also cited its exactions case law for the idea that "appropriation of an easement constitutes a physical taking." Id. (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987)).

regulation did not distinguish it from those cases.[133] Nor was its "slight mismatch" with California property law's definition of an easement relevant.[134]

In response to an argument offered by Justice Breyer in dissent about the sweeping effects of the ruling, Chief Justice Roberts carved out three caveats. First, "[i]solated physical invasions, not undertaken pursuant to a granted right of access," would not count as takings.[135] Second, echoing *Lucas*, the Court exempted "longstanding background restrictions on property rights."[136] Third, the Court cited its exactions jurisprudence for the idea that "the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking."[137] Where these exceptions (or limitations) are in place, the Court suggested, the main rule of decision in the case would have no application.

2. Cedar Point *in the Lower Courts*

At least in the short run, the impact of *Cedar Point* beyond the specific context of California's agricultural sector has not been substantial. No lower court decision in 2021 applied that ruling to classify a government action as a per se taking. If *Cedar Point* represents a sea change in the law—as I shall argue below—it is not one apparent from the immediate reactions of lower court judges.

In the six months after it was handed down, the decision was cited in only forty-one lower court opinions. None of these decisions extended or amplified the decision's holding, and some pro-plaintiff decisions within the sample can be explained under pre-existing law.[138] Perhaps the most

[133] Id. at 2074 ("There is no reason the law should analyze an abrogation of the right to exclude in one manner if it extends for 365 days, but in an entirely different manner if it lasts for 364.").

[134] Id. at 2076.

[135] Id. at 2078.

[136] Id. at 2079.

[137] Id.

[138] In some of the decisions, the invocation of *Cedar Point* seemed like a "Hail Mary" move by otherwise desperate litigants. See, e.g., Golf Vill. N., LLC v. City of Powell, 14 F.4th 611, 619 (6th Cir. 2021) (finding that landowners had not been denied their right to exclude); see also Skatemore, Inc. v. Whitmer, No. 1:21-cv-66, 2021 WL 3930808, at *5 (W.D. Mich. Sept. 2, 2021) (finding that a state order closing bowling alleys during the COVID pandemic did not constitute a per se physical taking). One instance in which *Cedar Point* was successfully invoked concerned a permanent physical taking that would have run afoul of *Loretto*. Blundell v. Elliott, No. 1:20-cv-00143, 2021 WL 4473426, at *9–11 (D. Utah Sept. 30, 2021).

obvious applications (or perhaps extensions) of *Cedar Point* would be to fair housing law, rent control ordinances, and certain environmental regulations. The Fair Housing Act's prohibition on rental and retail discrimination,[139] for example, might be read as a legal mandate to open one's residential property to strangers who would otherwise be subject to the right to exclude.[140] Rent control ordinances might be attacked as measures that prevent a landlord from evicting tenants, again compromising a right to exclude. Read aggressively, *Cedar Point* might even be read to cast into doubt statutes that limit landlords' self-help options and instead require their use of judicial eviction procedures[141] or other governmental limits on evictions.[142] Justice Gorsuch has also already penned a separate opinion casting down certain elements of federal environmental law that limit property owners' right to remove pollutants from land without seeking permission from a federal agency.[143]

[139] 42 U.S.C. § 3604(a) (making it unlawful "to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin").

[140] For an exploration of this possibility, see Bowie, supra note 24, at 197.

[141] In an important unpublished article, Rebecca Hansen and Lior Strahilevitz persuasively show that *Cedar Point*'s impact should be circumscribed by two longstanding rules of takings litigation: first, that "claims [such as those] brought by Cedar Point Nursery were time-barred because physical takings claims accrue when a regulation authorizing third parties to enter private property is promulgated, not when the third party actually enters the land," and "[s]econd, only the party that owned the land at the time the physical taking cause of action accrued can prevail." Rebecca Hansen & Lior Jacob Strahilevitz, Toward Principled Background Principles in Takings Law 1 (Jan. 2022) (unpublished manuscript) (on file with author). The timing and standing rules they perspicaciously identify and analyze, however, are rules of federal common law or else embedded in statutory interpretation questions. Their analysis raises the question of why (or whether) the Court would be willing to make a major change to the substance of takings law, but then be unwilling to alter underlying statutory constructions or federal common law rules. Why, that is, should the Court be willing to change the meaning of the Constitution, but then allow sub-constitutional doctrine to hinder the effects of this change? To be clear, I think there are instances in which the Court at times seems to make seminal changes to constitutional law, only to defang them with other doctrinal tools (think of *Lucas* itself)—but it is very hard to be confident in advance that *Cedar Point* will be one of those instances. Certainly, other decisions of the Roberts Court in the late 2010s inspire very little confidence on this score.

[142] See, e.g., Heights Apartments, LLC v. Walz, 30 F.4th 720, 733 (8th Cir. 2022) (casting into doubt the federal eviction moratorium). But see 301, 712, 2103 & 3151 LLC v. City of Minneapolis, 27 F.4th 1377, 1383 (8th Cir. 2022) (finding *Cedar Point* inapplicable to a Minneapolis ordinance that prohibited landlords from rejecting prospective tenants purely on the basis of their criminal records, credit, or rental history).

[143] Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1364 (2020) (Gorsuch, J., concurring in part and dissenting in part).

To date, no court has taken a step in these directions. There is no decision on point concerning the Fair Housing Act—perhaps because claims under that statute are difficult to get off the ground in the first instance. The pandemic, however, has precipitated a number of eviction moratoriums. To date, though, none of these has been invalidated on Fifth Amendment grounds,[144] and plaintiffs' efforts to invoke *Cedar Point* have generally been unavailing. One district court declined to apply *Cedar Point*'s per se rule to a statewide eviction moratorium, reasoning that "[n]o physical invasion has occurred beyond that agreed to by Plaintiffs in renting their properties as residential homes, which is naturally subject to regulation by the state."[145] Other courts have reached the same result because they have perceived themselves bound by the Court's 1992 decision in *Yee v. City of Escondido*, which upheld a rent control ordinance.[146] Until a litigant is able to persuade a judge that *Cedar Point* and *Yee* cannot plausibly coexist, such lower courts judges are likely to experience themselves as bound by the 1992 decision. Finally, another district court declined to apply *Cedar Point* to intellectual property, and in so doing, developed the important point that the right to exclude does not have precise application outside the real and chattel property contexts.[147]

[144] The Supreme Court invalidated an order from the Centers for Disease Control and Prevention ("CDC") suspending evictions on the ground that it fell outside the agency's statutory authority. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2488 (2021) ("[I]t is a stretch to maintain that § 361(a) gives the CDC the authority to impose this eviction moratorium.").

[145] Jevons v. Inslee, No. 1:20-cv-3182, 2021 WL 4443084, at *1106 (E.D. Wash. Sept. 21, 2021).

[146] 503 U.S. 519, 528 (1992). Rent control laws were, indeed, upheld at the apogee of Lochnerism. Block v. Hirsh, 256 U.S. 135, 156 (1921). For post-*Cedar Point* decisions relying on *Yee*, see S. Cal. Rental Hous. Ass'n v. County of San Diego, 550 F. Supp. 3d 853, 865 (S.D. Cal. 2021) (upholding COVID-related moratorium on the basis of *Yee*); accord Bldg. & Realty Inst. of Westchester & Putnam Cntys., Inc. v. New York, No. 19-cv-11285, 2021 WL 4198332, at *22 n.26 (S.D.N.Y. Sept. 14, 2021).

[147] Valancourt Books, LLC v. Perlmutter, 554 F. Supp. 3d 26, 36 (D.D.C. 2021) ("It is not at all clear how this principle developed in the context of 'real property,' or even actual personal property such as the raisins, would apply to a requirement that can be fulfilled by the transmission of digital copies that would not divest the publisher of its interest in any tangible property whatsoever."). But the Supreme Court occasionally uses the language of exclusion to talk of property rights. See, e.g., eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 392 (2006) ("[T]he Patent Act also declares that 'patents shall have the attributes of personal property,' § 261, including 'the right to exclude others from making, using, offering for sale, or selling the invention,' § 154(a)(1)." (quoting 35 U.S.C. §§ 154, 261)).

Of course, what binds the lower courts does not tie the hands of Supreme Court Justices. The *Cedar Point* decision is important, not just because of its effect on lower court behavior, but also because it sends a signal of how the high court might well develop takings law in the coming years and decades. While it is not possible to be certain about the future path of the law, there is enough kindling in the Chief Justice's decision to help spark some dramatic changes in the law.

B. Legal Methodologies in Cedar Point

Cedar Point breaks important new analytic ground: it destabilizes a previously secure and predictable doctrinal structure. It does this through a rupture from the apparently canonical sources of law that informed takings jurisprudence to that point. To illustrate this point, I consider here how the Court handled those traditional sources of legal support in reaching its outcome. I focus in particular on ordinary meaning, originalist sources,[148] and precedent. Through a close reading of the Court's majority opinion, and the sources upon which it rests, I demonstrate that its disposition cannot be deduced from standard legal sources.

Close reading instead highlights several surprising slippages or outright migrations in the opinion's legal mechanics. On the one hand, the majority opinion deploys some accoutrements of legal reasoning conspicuously aligned with a constrained scope of judicial discretion—the citation of dictionaries; an appeal to the ordinary, lay meaning of a term; and an ostentatious rehearsal of fidelity to precedent. On the other hand, none of these devices in fact signal de facto constrained judicial discretion. None imposes meaningful friction on the *Cedar Point* majority's choices. Dictionaries are cherry-picked; "ordinary" meaning is asserted in counter-intuitive and disruptive ways; and precedent is filtered in selective and arguably distorted ways. Rather than demonstrating the value of legal methods as an instrument for achieving the rule of law, the decision in *Cedar Point* suggests a profound difficulty: standard tools of legal hermeneutics can be consistent with radical and disruptive destabilization of the rule of law *in the name of legality*. This conclusion

[148] I largely bracket different flavors of originalism. For useful overviews of that variation, see Lawrence B. Solum, The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning, 101 B.U. L. Rev. 1953, 1965 (2021), and Lawrence B. Solum, What is Originalism? The Evolution of Contemporary Originalist Theory, *in* The Challenge of Originalism 12, 32–33 (Grant Huscroft & Bradley W. Miller eds., 2011).

sets the stage for Part III's extended analysis of the relationship between property and legality after *Cedar Point*.

1. Ordinary Meaning

Begin with the terms the Court has used to sort takings cases into easy wins for plaintiffs and likely wins for defendants: "appropriation" and "regulation."[149] On the account offered by the *Cedar Point* majority, the dictionary definitions of those terms conduced to its preferred result because "[i]n 'ordinary English' 'appropriation' means '*taking* as one's own.'"[150] Citing the title of the "take access" regulation as evidence, the Court suggested that the "ordinary meaning" of "appropriate" extended to *any* transfer of a property right related to exclusion from an owner to a third party, even if transient, temporary, and indefinite in scope and duration.[151]

This way of identifying the semantic content of precedent is of a piece with the Court's insistence in other cases on the priority of "ordinary meaning" in statutory interpretation cases.[152] Yet it suffers from distinct rule-of-law defects.

For starters, the Court omitted the first sentence of the dictionary definition it was citing, which defined "appropriation" as "[t]he making of a thing private property, whether another's or (as now commonly) one's own."[153] Temporary or intermittent intrusions, including those envisaged by the "take access" regulation do not "appropriate" in this sense. Moreover, the Court cited a thirty-year-old, outdated dictionary. The present edition of the same dictionary primarily defines "appropriate" as "[t]o make over (a thing) to a person, institution, etc., as his, her, or its own, or for his, her, or its use; to make the private property of a person, etc.; to set apart."[154] This is narrower than the definition cited by the Court in a critical sense: it requires a durable change in ownership. Another

[149] See supra text accompanying notes 44–54.

[150] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2063, 2077 (citing 1 The Oxford English Dictionary 587 (2d ed. 1989)).

[151] Id. at 2074–75 (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987)).

[152] BP P.L.C. v. Mayor of Baltimore, 141 S. Ct. 1532, 1537 (2021) ("When called on to interpret a statute, this Court generally seeks to discern and apply the ordinary meaning of its terms at the time of their adoption."); accord Niz-Chavez v. Garland, 141 S. Ct. 1474, 1479–80 (2021).

[153] Appropriation, 1 The Oxford English Dictionary 587 (2d ed. 1989).

[154] Appropriate, OED Online, https://www.oed.com/view/Entry/9871?rskey=8FK6K7&result=2&isAdvanced=false#e [https://perma.cc/W2EX-65FY] (last visited Nov. 15, 2022).

leading dictionary, which is more frequently cited by the Justices,[155] defines "appropriate" as "to take exclusive possession of" or "to set apart for or assign to a particular purpose or use."[156] Standard dictionaries, that is, suggest that the word "appropriate" ordinarily connotes not just an intrusion, but a *transfer* of "possession"—taking something completely from *A* and giving it exclusively to *B*. These definitions do not include temporary intrusions that do not alter possession or otherwise preclude control of a property's disposition.

The *Cedar Point* majority's approach to "ordinary meaning" is representative of what other scholars have criticized as a "highly subjective and ad hoc approach to choosing dictionaries."[157] It is, to crib a phrase from another context, looking out over a sea of faces at a party and picking out one's friends. The irony is that, whereas once "charges of judicial activism may have driven Supreme Court Justices to shroud their opinions in the seeming legitimacy conferred by dictionary citations,"[158] now the use of dictionaries is itself an instrument of free-ranging judicial discretion. Rather than apply the standard dictionary definition of "appropriate" as a permanent taking from *A* to give to *B*, the Court reached back to an older edition of a rarely used dictionary to conjure a larger and far more ambiguous definition, one that supported a different result in the case at bar.[159]

This semantic sleight-of-hand embodied in the majority's strategic choice among dictionaries has wider implications. Before *Cedar Point*, the distinction between appropriations and regulations accorded with widely shared understandings: It is one thing to say that the government "appropriate[s]" when it "take[s] exclusive possession,"[160] "take[s] to

[155] James J. Brudney & Lawrence Baum, Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras, 55 Wm. & Mary L. Rev. 483, 489 (2013) (noting that most citations of dictionary are to *Webster's Second New International* and the *American Heritage Dictionary*); accord Stephen C. Mouritsen, Note, The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning, 2010 BYU L. Rev. 1915, 1915–16, 1951–55 (criticizing dictionaries as "inadequate objects of our devotion").

[156] Appropriate, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/appropriate [https://perma.cc/S48E-9EAE] (last visited Oct. 13, 2022).

[157] Brudney & Baum, supra note 155, at 566.

[158] John Calhoun, Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use, 124 Yale L.J. 484, 515 (2014).

[159] The dictionary used, moreover, was not temporally indexed to any specific historical event, such as the ratification of constitutional text or promulgation of a statute or precedent.

[160] Appropriate, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/appropriate [https://perma.cc/S48E-9EAE] (last visited Oct. 13, 2022).

itself" or "set[s] apart" a property.[161] It is another thing entirely to say that the government "appropriates" when it allows a third party temporarily, for a defined number of minutes, to enter onto a piece of land. In ordinary English, we simply do not use the word "appropriate" to mean "allow someone to enter for a few minutes, but not stay, on my land." We do not talk of an uninvited guest, or even a trespasser, as "appropriating" our property.[162] Nor do we speak of someone picking up and quickly tossing aside a chattel as "appropriating" it. Yet this is what the Court said was obviously the word's ordinary, everyday meaning.[163]

Another oddity follows from the Court's unusual gloss on the "ordinary meaning" of the term "appropriate": on the Court's understanding of that term, the word has to mean something different for land than for intellectual property. As one district court delicately observed, it is "not at all clear" how that definition "developed in the context of 'real property'" would apply to intellectual property.[164] Copying the latter

[161] Appropriate, OED Online, https://www.oed.com/view/Entry/9871?rskey=8FK6K7&result=2&isAdvanced=false#e [https://perma.cc/ESP7-WDV4] (last visited Nov. 15, 2022).

[162] Chief Justice Roberts suggested that the scope of takings liability was distinct from trespass law. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2078 (2021) ("[O]ur holding does nothing to efface the distinction between trespass and takings."). The Court here seemed to suggest that only a "continuance of [trespasses] in sufficient number and for a sufficient time" amounted to a taking. Id. (quoting Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 329–30 (1922)). But that still means that a taking is achieved when someone "(a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove," Restatement (Second) of Torts § 158 (Am. L. Inst. 1965), provided it is done repetitively. It is hard to see how repeated entries onto land become an appropriation of that land.

[163] *Cedar Point* also found support in earlier decisions that had treated temporary seizures as physical appropriations. 141 S. Ct. at 2074 ("[A] physical appropriation is a taking whether it is permanent or temporary."); see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 322 (2002) ("[C]ompensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary."). This argument rests on an elision between two quite different kinds of government action: (1) the absolute appropriation of a parcel for a defined period of time, which comes to an end, and (2) a statutory rule allowing third parties to intermittently enter that parcel, without otherwise limiting the owner's control or ousting the owner from possession or use. The *Cedar Point* Court treated precedent concerning (1) as covering cases of (2), without any further explanation. It is hard to see any logical justification for the claim that case (1) covers case (2). Moreover, the Court has been clear that a "temporary" taking must "deny a landowner all use of his property," so as to be akin to "permanent takings, for which the Constitution clearly requires compensation." First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318 (1987). So, *Tahoe-Sierra* or other temporary takings cases provide no support for the result in *Cedar Point.*

[164] Valancourt Books, LLC v. Perlmutter, 554 F. Supp. 3d 26, 36 (D.D.C. 2021).

"would not divest the publisher of its interest in any tangible property whatsoever."[165] As a result, the Takings Clause now offers divergent levels of protection for different genres of property—seemingly an unintentional side-effect of a definitional twist on the Court's part.

2. Original Understanding

The dominant modality of constitutional interpretation of the Roberts Court is originalism. Bracketing the many complications of this term, that method entails generally "enforcing the Constitution's 'original meaning' rather than whatever meaning the same words would have if adopted today."[166] Many recent judicial opinions on constitutional questions hence begin by invoking a clause's "original and historical understanding."[167] *Cedar Point*, however, offers no such temporally-anchored account of its key term "appropriation."[168] Instead, the opinion appeals to ordinary meaning and precedent, and largely ignores originalist evidence.

Originalist evidence plays no role in the Court's analysis for the simple reason, explored in depth by Professor Bethany Berger, that "early American law was full of formal, statutory entitlements to enter" akin to California's "take access" regulation, that were not treated as per se takings—or any kind of takings at all.[169] As Professor Berger explains,

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[165] Id.

[166] Caleb Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. 519, 519 (2003); see also Lawrence B. Solum, Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate, 113 Nw. U. L. Rev. 1243, 1251 (2019) ("Most contemporary originalists aim to recover the public meaning of the constitutional text at the time each provision was framed and ratified; this has been the dominant form of originalism since the mid-1980s."). On the many different flavors of originalism, see, e.g., William Baude, Is Originalism Our Law?, 115 Colum. L. Rev. 2349, 2355–56 (2015) (enumerating four approaches).

[167] Bucklew v. Precythe, 139 S. Ct. 1112, 1122 (2019).

[168] Chief Justice Roberts instead observed that "[b]efore the 20th century, the Takings Clause was understood to be limited to physical appropriations of property." *Cedar Point*, 141 S. Ct. at 2071. As discussed below, this may be understood as a prelude to the dismantling of the constitutional category of regulatory takings. See infra text accompanying notes 236–41.

[169] Bethany R. Berger, Eliding Original Understanding in *Cedar Point Nursery v. Hassid*, 33 Yale J.L. & Humans. 1, 3, 10 (2022). Colonial and state experience is pertinent because of the dearth of early federal practice. William Baude, Rethinking the Federal Eminent Domain Power, 122 Yale L.J. 1738, 1774 (2013) ("States continued to condemn land for federal projects, and the federal government continued not to even attempt any federal condemnations."); see also Matthew P. Harrington, Regulatory Takings and the Original Understanding of the Takings Clause, 45 Wm. & Mary L. Rev. 2053, 2082 (2004) ("[T]he founding generation did not expect the clause to apply to so-called regulatory takings simply

the English common law described by Blackstone was replete with "rights to cross over private lands" as public ways, to access public resources such as fisheries, or graze cattle on fallow land.[170] These access rights remain part of British law today.[171]

In the early American Republic, a right to hunt on others' unenclosed private land—and hence enter that land—was not merely recognized but often constitutionalized.[172] Other states recognized "broad public rights to enter unfenced land to graze livestock and forage."[173] As Chief Justice Shaw of the Massachusetts Supreme Court explained in 1842, real property was also "acquired and held under the tacit condition that it shall not be so used as to . . . destroy or greatly impair the public rights and interests of the community."[174] The specific result in *Cedar Point*—that a statutory right of access to private land represents a per se taking—thus rests on an account of property that has no warrant in either pre-ratification or early Republican practice. To the contrary, these significant common law and legislative exceptions to a right to exclude undermine *Cedar Point*'s conclusion about the core sense of the Takings Clause in

because no one believed that the national government would ever possess the power to engage in land use regulation.").

[170] Berger, supra note 169, at 10–11.

[171] The right to roam is protected by statute in the United Kingdom. Countryside and Rights of Way Act 2000, c. 37 (Gr. Brit.). For an account of recent conflicts over the right to roam in Scotland, for example, see Severin Carrell, Highland Landowner Faces Legal Challenge over Right to Roam, The Guardian (Dec. 26, 2021, 2:22 PM), https://www.theguardian.com/uk-news/2021/dec/26/highland-landowner-faces-legal-challenge-over-right-to-roam [https://perma.cc/R7G5-VVCD].

[172] Berger, supra note 169, at 16–17.

[173] Id. at 18; see also John F. Hart, Colonial Land Use Law and Its Significance for Modern Takings Doctrine, 109 Harv. L. Rev. 1252, 1272 (1996) [hereinafter Hart, Colonial Land Use Law] ("[C]olonies allowed members of the public to use private land for certain purposes. For example, the Plymouth colony permitted members of the public to hunt and fish on private land, subject only to liability for actual damage."). For contemporary recognition of rights of access to private land, see the canonical case of State v. Shack, 277 A.2d 369, 372–73 (N.J. 1971) ("[A]n owner must expect to find the absoluteness of his property rights curtailed by the organs of society, for the promotion of the best interests of others for whom these organs also operate as protective agencies. The necessity for such curtailments is greater in a modern industrialized and urbanized society than it was in the relatively simple American society of fifty, 100, or 200 years ago.").

[174] Commonwealth v. Tewksbury, 52 Mass. (1 Met.) 55, 57 (1846). For a similar formulation by Chief Justice Taney, see Thurlow v. Massachusetts (License Cases), 46 U.S. (5 How.) 504, 583 (1847) (portraying the police power as "nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions"); see generally Harry N. Scheiber, Public Rights and the Rule of Law in American Legal History, 72 Calif. L. Rev. 217, 221–24 (1984) (discussing scope of public rights in early nineteenth century).

its original context. They suggest that the Court has departed significantly from the meaning of property at the time of the Founding.

The absence of a categorical right to exclude, and hence deflect even temporary intrusions, in colonial and early Republican law is consistent with a more general point about the limited scope of the Takings Clause. Professor John Hart has provided compelling historical evidence of the "conventional . . . distinction between compensated appropriation and uncompensated regulation" recognized in both colonial and early American practice.[175] Hart explained, further, that "the Takings Clause was originally intended and understood to refer only to the appropriation of property,"[176] and not to regulation.

While *Cedar Point* refrained from offering an originalist justification for its result, commentators tried to develop such a foundation. Sam Spiegelman and Gregory Sisk describe the opinion as evincing a "strong commitment to the Lockean view of property" because of its categorical quality.[177] In their view, the English thinker John Locke was committed to a "conception of property . . . as inviolable save for a superseding public *need*."[178] To demonstrate this point, they rest upon a citation from Locke's work to the effect that:

> [f]or a man's property is not at all secure, though there be good and equitable laws to set the bounds of it between him and his fellow-subjects, if he who commands those subjects have power to take from any private man what part he pleases of his property, and use and dispose of it as he thinks good.[179]

[175] John F. Hart, Land Use Law in the Early Republic and the Original Meaning of the Takings Clause, 94 Nw. U. L. Rev. 1099, 1101 (2000) ("Compensation was generally paid . . . when the legislature appropriated land for a public use or authorized private parties to appropriate land for a public purpose." (emphasis omitted)).

[176] Id. at 1103; accord Treanor, supra note 62, at 792–93; Harry N. Scheiber, Property Law, Expropriation, and Resource Allocation by the Government, 1789-1910, *in* American Law and the Constitutional Order: Historical Perspectives 132, 133–34 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978).

[177] Spiegelman & Sisk, supra note 25, at 170–71, 184.

[178] Id. at 167.

[179] Id. at 170 (citing John Locke, Limitations Upon Government, *in* Francis William Coker, Readings in Political Philosophy 560, 563–64 (1938)). This is a quotation from chapter eleven of Locke's Second Treatise of Government, and not from chapter five—which contains Locke's account of private property.

From this fragment, they draw the conclusion that the Takings Clause "was . . . one of the means to protect American constitutionalism and its Lockean foundations from the vagaries of civic republicanism."[180]

This argument suffers a number of flaws. First, it pays no attention to the less-than-categorical nature of real property rights at the Founding, a state of affairs with which Locke was likely familiar given his deep involvement in colonial affairs in the Carolinas.[181] Second, Spiegelman and Sisk propound a plainly erroneous reading of Locke's text. As Jeremy Waldron has underscored, Locke held no such absolutist view of property rights.[182] Nor were constraints on his conception of property indexed to some concept of "public need." To the contrary, Locke imposed a strong constraint on property "not just at the moment of acquisition but at *any* point in time when one man's wealth could relieve another's necessity."[183] Charity, not "public need," limited his account of property rights.[184] Spiegelman and Sisk tear a fragment of Locke's text from context and ignore its place in the larger pattern of his thought.

Finally, even if their reading of Locke were accurate, Spiegelman and Sisk simplify and distort the complex intellectual context of the Founding period by falsely assuming that a purely "Lockean" account of constitutionalism reigned supreme. They flatten and distort its interaction with other important intellectual currents in constitution-making.[185] By singling out one strand of the complex tapestry of intellectual current swirling around the Founding, and then distorting that single thread by selective reading, Spiegelman and Sisk demonstrate the way in which "the original public meaning of a constitutional provision is partly a function of the theory by which the original public meaning is defined."[186] Absent "a sufficiently specified theory to tell reasonable inquirers what they ought to look for and ultimately how to produce correct results,"[187] it risks

[180] Spiegelman & Sisk, supra note 25, at 172.

[181] See supra text accompanying notes 169–73.

[182] Jeremy Waldron, Locke, Tully, and the Regulation of Property, 32 Pol. Stud. 98, 105–06 (1984).

[183] Jeremy Waldron, Enough and as Good Left for Others, 29 Phil. Q. 319, 327–28 (1979).

[184] Id. at 326–27.

[185] The classic texts elaborating the complex intellectual debates of the Founding Era are Gordon S. Wood, The Creation of the American Republic, 1776–1787 (1969), and Bernard Bailyn, The Ideological Origins of the American Revolution (1967). Both underscore contestation, rather than a single-minded focus on Locke.

[186] Richard H. Fallon, Jr., The Chimerical Concept of Original Public Meaning, 107 Va. L. Rev. 1421, 1433 (2021).

[187] Id.

becoming a way for interpreters to cloak their own normative preferences in the Founders' more august robes.

3. Precedent

Rather than relying upon original understandings, *Cedar Point* leans primarily on earlier decisions as justification. The practice of stare decisis advantages "the values of stability, reliability, and equality in the application of the law."[188] It thus embodies a "commitment to the rule of law."[189] The way in which the *Cedar Point* majority employs precedent, however, raises awkward questions about the relation of stare decisis to the rule of law. None of those cases it cited involved a statutory or common law grant of access to land to private third parties. So none provide direct support for *Cedar Point*'s peculiar gloss on the term "appropriate." Further, none of the precedent upon which Chief Justice Roberts relied offer a general principle that supported invalidation of the "take access" rule. There is instead a wide gap between the law before *Cedar Point* and the outcome of that case.

The first and most important case upon which the *Cedar Point* Court relied,[190] *United States v. Causby*, concerned government overflights of private property that disrupted the agricultural and residential uses of that land.[191] A first problem with using *Causby* as authority is that it did not involve a physical intrusion by an official or a third party onto private land. So it offers no direct support for the result of *Cedar Point*. Nor does its logic apply.

Causby is not about intrusions; it is about activity that disrupts the way an ordinary person uses land. The *Causby* Court hence observed that "if the flights over respondents' property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment."[192] While the Court found that the land was not made uninhabitable by activity occurring beyond its bounds, it reasoned that a "direct invasion of

[188] Sebastian Lewis, Precedent and the Rule of Law, 41 Oxford J. Legal Stud. 873, 881 (2021).

[189] Id. at 887.

[190] See Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2073 (2021).

[191] 328 U.S. 256, 259 (1946) (noting that "respondents had to give up their chicken business" and "are frequently deprived of their sleep and the family has become nervous and frightened").

[192] Id. at 261. Puzzlingly Chief Justice Roberts cited the aircraft in *Causby* as an example of a "physical invasion." But the aircraft in *Causby* traveled along paths owned by the state, not by private landowners. There was, therefore, no "physical invasion" in *Causby*.

respondents' domain," *coupled to* "substantial" damage, "determines the question whether it is a taking."[193] Both an indirect invasion of land and substantial damage, that is, were required to find a taking, in an echo of the *Penn Central* balancing test.

Even if the "invasion" envisaged by the "take access" regulation counts as "direct," there was no evidence in *Cedar Point* of "substantial" damage to the growers' interests. The *Cedar Point* Court avoided this embarrassing fact by simply omitting the last element of *Causby*'s holding.[194] The majority never asked about damage, substantial or otherwise, to the defendants. An under-the-table defenestration of a necessary element of *Causby* hence yielded the result opposite to the case's direct application. Hardly a resounding victory for the rule of law then.

The other cases cited by the *Cedar Point* majority were even less salient than *Causby*. They concerned permanent physical occupations of land, where an owner completely lost possession. *Kaiser Aetna v. United States* turned on whether the government's claim to *permanent* public access to plaintiffs' marina was a taking.[195] Like *Causby*, it was an application of *Penn Central*'s multifactor test. Its result turned on "[m]ore than one factor," rather than being the result of a per se rule.[196] Similarly, *Loretto v. Teleprompter Manhattan CATV Corp.* concerned a "permanent physical occupation" quite unlike the statutory right of access at issue in *Cedar Point*.[197] Its analysis opened with the *Penn Central* test for regulatory takings, and its conclusion sounded in the latter's factors, not a per se rule.[198] *Loretto* has subsequently been rechristened, without

[193] Id. at 265–66 (quoting United States v. Cress, 243 U.S. 316, 328 (1917)).

[194] *Cedar Point*, 141 S. Ct. at 2073. A further difficulty is the nature of the *Causby* rule. Justice Douglas's opinion in that case does not clearly state whether it is applying a per se test for an appropriation, or a balancing test in the spirit of *Mahon*. The *Cedar Point* Court assumed it was the former, even though there is ample evidence in Justice Douglas's opinion for the latter.

[195] 444 U.S. 164, 167 (1979). *Kaiser Aetna*, however, does suggest that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Id. at 176. Here, its language (if not its logic) supports the outcome in *Cedar Point*.

[196] Id. at 178 ("[T]he Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking under the logic of *Pennsylvania Coal Co. v. Mahon*."); see also Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982) (noting that in *Kaiser Aetna*, "the easement of passage, not being a permanent occupation of land, was not considered a taking *per se*").

[197] *Loretto*, 458 U.S. at 426.

[198] Id. at 425–26.

explanation, an appropriations case.[199] Yet *Loretto* is, on its face, clear that there is a "constitutional distinction between a permanent occupation and a temporary physical invasion."[200] *Cedar Point* used *Loretto* without citing or addressing this key limit on its holding—one that had been affirmed less than a decade before the latter case was handed down.[201]

There is, in short, a wide gulf between the precedent invoked by the *Cedar Point* majority and the result that the latter reached. It just assumes away the constitutional question teed up by California's "take access" regulation to say that precedent concerning permanent physical occupation extend to, and determine the result in, *Cedar Point*. None of the relevant decisions supports the Court's per se rule. Of course, a tribunal developing the law in a stepwise, common law fashion is likely to extend and amend principles articulated in earlier cases. But *Cedar Point* went far beyond this sort of common law reasoning when it torqued beyond recognition precedent to do load-bearing work.

* * *

In sum, close reading suggests *Cedar Point* is indeed an unusual case. The ordinary tools of constitutional interpretation—ordinary meaning, original understanding, and a careful reading of precedent—point uniformly against the result that the Court reached. To say the least, this means that its outcome stands in tension with the rule-of-law constraints nominally imposed by the standard tools of legal analysis. *Cedar Point* suggests that the application of ordinary meaning and fidelity to precedent are compatible with a judicial power to unsettle—dramatically and without warning—the substance of the law.

C. The Path of the Law After Cedar Point

Just as *Cedar Point* challenged legal methodologies linked to the rule of law, so also its outcome is likely incompatible with aspirations toward clarity, stability, and predictability that travel under the rubric of the rule

[199] Horne v. Dep't of Agric., 576 U.S. 351, 358 (2015); see also Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 713 (2010) (also characterizing *Loretto* as an appropriations case). Even though these cases would have offered support, the *Cedar Point* Court did not cite either of these cases or offer any analysis of how properly to characterize *Loretto*.

[200] *Loretto*, 458 U.S. at 434.

[201] Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 38–39 (2012).

of law.[202] The effect of the unorthodox legal methods described above is a doctrinal structure that is neither stable nor predictable. Paradoxically, a legal change notionally justified in terms of its effect on property rights will disrupt expectations over property. Working out this logic reveals a second way in which the new takings dispensation heralded by *Cedar Point* is sharply at odds with rule-of-law values.

1. Legal Uncertainty After Cedar Point

As explained in Subsection II.B.1, *Cedar Point* is a dramatic pivot in takings law because of how it reconfigures the appropriation/regulation dichotomy. Until *Cedar Point*, the term "appropriation" had been glossed in the case law as an indefinite deprivation of a distinct property interest—a durable deprivation of possession. So it tracked the conventional meaning of the term found in dictionaries. It was clear in the sense of having a reasonably unambiguous meaning that tracked lay expectations.

While superficially genuflecting to ordinary meaning, *Cedar Point* detaches the term "appropriation" from lay people's expectations, and indeed from any predictable set of corresponding applications. After *Cedar Point*, the concept of "appropriation" is not linked to indefinite physical occupations or seizures. Instead, it captures a larger, indefinite, and poorly defined class of cases. What had largely been understood as a clear and easily applicable rule has been transformed into a nebulous standard.

On its own, this is not necessarily a problem in the sense that it undermines predictability and legal stability. The law of property, after all, is replete with standards. Nuisance, to take an obvious example, is an "extraordinarily shapeless doctrinal" domain.[203] This does not necessarily create a legality problem. As Professor Carol Rose has explained, property standards may promote "clarity and certainty" when "a muddy term like 'commercial reasonableness' is regarded as . . . more predictable" than any constellation of rules.[204] But *Cedar Point* transforms "appropriation" into a standard with no clear or predictable class of applications. It is a standard without mooring in shared lay or legal expectations, and so is dissimilar from "nuisance." Potential

[202] See Fuller, supra note 8, at 39 (summarizing those elements of the rule of law); Raz, Rule of Law and its Virtue, supra note 14, at 214–18 (same).

[203] Carol M. Rose, Crystals and Mud in Property Law, 40 Stan. L. Rev. 577, 579 (1988).

[204] Id. at 609.

litigants can no longer safely predict how a specific set of facts will be characterized.

This move from predictable rule to inchoate and elusive standard has a correlative effect on judicial, and in particular Supreme Court, discretion. It vests the Justices with new freedom in ranking governmental actions as either regulation or appropriation. Lower court judges remain constrained by the mass of earlier decisions, such as *Yee*'s rule on rent control, and thus have plotted a more predictable path to date. The same cannot be said for the Justices—who have unlocked a distinctively disruptive species of free-wheeling jurisprudential discretion in defining "appropriation." This discretion is unbounded, as we have seen, by the ordinary, disciplining tools of dictionary sense, original meaning, or precedent.

To make good on this claim, I explore in the balance of this Section how the Court's new understanding of "appropriation" might be more precisely defined. Short of retiring the idea of regulatory takings, I show, *Cedar Point* fosters unavoidable uncertainty about the scope of a previously "very narrow" rule.[205] There is no principled way of constraining the understanding of "appropriation." To the contrary, all of the distinctions suggested by the *Cedar Point* majority turn out to be fragile and likely to prove insubstantial. If there is a stable equilibrium in sight after that decision, it may well be one in which the category of appropriation will expand—to the point of collapsing the category of regulatory takings.

2. The Scope of "Appropriation" After Cedar Point

Cedar Point takes the distinction between appropriation and regulation as good law but then transforms the meaning of "appropriation." A state action does not need to completely transfer a property interest from a plaintiff in order to be an appropriation. The action does not need to be permanent, or even indefinite. And there is no need to show that plaintiffs experienced a "substantial" setback to the manner in which their property can be used.[206] What then marks the outer boundary of "appropriation," and the beginning of regulatory takings?

[205] *Loretto*, 458 U.S. at 441. The Court later rejected a lower court's efforts to pry open that "very narrow" rule. FCC v. Fla. Power Corp., 480 U.S. 245, 251 (1987) (citing *Loretto*, 458 U.S. at 441).

[206] United States v. Causby, 328 U.S. 256, 261–66 (1946).

No complete answer is forthcoming from the *Cedar Point* Court itself. But drawing on hints in the majority opinion, it is possible to reconstruct a number of possible boundary lines to the category of appropriations. That is, appropriations for Fifth Amendment purposes might occur: (a) when the law allows persons—but not things—to intrude on real property; (b) with *any* legal constraint on the right to exclude; or (c) with substantial and continuous limits on the right to exclude, but not elements of the property right.

The problem is that none of these demarcations is likely to be stable. Each is vulnerable to crippling attack based on existing case law. Worse, each is in an important sense arbitrary. None of them, that is, embodies a clear and distinct reason for a given line between regulation and appropriation. The takeaway from this analysis is that the Court's decision to abrogate the familiar appropriation/regulation distinction leaves in place a status quo in which there is no obvious means of stabilization.

a. Persons vs. things. First, an appropriation might be indexed by a "physical invasion[]" by a *person* who is authorized by law to enter real property.[207] The union organizers in *Cedar Point* were an impermissible physical invasion. Absent someone entering real property, no appropriation arises.

The problem with this theory is that an appropriation can occur when no one enters a plaintiff's land. Things, as well as people, can be unwelcome visitors.[208] In the 1871 decision of *Pumpelly v. Green Bay Co.*, for example, the Court found a taking "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material."[209] Subsequent cases affirm that seasonally recurring flooding due to state dam construction can be a taking.[210] The Fifth Amendment is about both things and people, and *Cedar Point* offers no reason for distinguishing between them when using the term "appropriation."

[207] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2075 (2021).

[208] Indeed, some courts have extended the concept of trespass to inanimate objects. See, e.g., Martin v. Reynolds Metals Co., 342 P.2d 790, 792–94 (Or. 1959) (sustaining finding of trespass by fluoride compounds in gas and particle forms). Reading *Cedar Point* for its face value, a series of legally authorized incursions by inanimate objects should count as a taking.

[209] 80 U.S. (13 Wall.) 166, 181 (1871). *Pumpelly* involved the Wisconsin Constitution's Takings Clause, id., but today is generally construed as authority in federal constitutional matters. *Causby*, 328 U.S. at 261 n.6.

[210] United States v. Cress, 243 U.S. 316, 328 (1917); accord Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 32 (2012).

b. Brief vs. sustained invasions. A second possibility is that the word "appropriate" captures temporally durable and substantial intrusions by people or things onto a plaintiff's land. Chief Justice Roberts intimated this possibility when he distinguished takings from "[i]solated physical invasions, not undertaken pursuant to a granted right of access, [which] are properly assessed as individual torts rather than appropriations of a property right."[211]

But this too provides an illusory boundary on the category of appropriations. On the one hand, the category of "isolated" state actions or state-authorized actions that it saves is likely a null set. The measure could apply to either regulations or discrete actions by state officials. The latter is likely to be an empty set because the Court separately exempted laws that "allowed individuals to enter property in the event of public or private necessity."[212] It is hard to think of an instance in which a state official or private actor will make an "isolated" entrance to land that does not fall into this exception. What of statutes and regulations? The problem here is that laws that envisage the possibility of access to private land are unlikely to do so in an "isolated" way: either an intrusion is generally legally authorized by law, or it is not. There is no half-way house. To see this, consider again the facts of *Cedar Point*: the record in that case showed that union organizers had tried to enter each of the two plaintiff firms' farms on just a single occasion.[213] The Court found that there was a per se taking on the basis of a factual showing that each landowner had experienced one intrusion each. It is not hard to imagine subsequent litigants leveraging this record fact to assert that a legal scheme creating even the *possibility* of an intrusion—without any actual intrusion—is a per se taking.

c. Exclusion vs. other property rights. A final way of cabining "appropriations" turns on Chief Justice Roberts' emphatic assertion that "[t]he right to exclude is 'one of the most treasured' rights of property ownership."[214] This argument leverages the metaphor of property as a

[211] *Cedar Point*, 141 S. Ct. at 2078.

[212] Id. at 2079.

[213] Id. at 2069–70.

[214] Id. at 2072 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982)). Treasured by whom? The Court offers no explanation, but it is to be presumed that it means property owners *qua* owners—and not by society in general, not in its capacity as a group of owners.

"bundle of sticks,"[215] i.e., a "complex aggregate" of rights each protected by distinct "jural relations."[216] If the right to exclude is indeed distinctive in its importance, then the category of per se takings would reach minimal or abstract incursions, while excluding broader restrictions on the rights to transfer, bequeath, alienate, let, or destroy.

There are three reasons to think that this distinction cannot plausibly define the outer limit of "appropriations." The first is that there is no consensus among property scholars on the idea that the right to exclude is indeed central or the "most treasured" strand of property. Legal theorists have alternatively suggested that core to property is the right to "exclusive *control* of a thing and the right to remain in control."[217] Another influential law-and-economics approach defines property as "a right to *use* [an] asset in certain ways" that is "enforceable, not just against the original grantor of the right, but also against other persons to whom" the asset is transferred.[218] This lens draws attention to the way property rules solve a problem of third-party verification by setting conditions under which "a given right in a given asset will run with the asset."[219] Yet another influential philosophical treatment focuses on who controls present uses. It asserts that property exists if: (1) *A* has the right to use *P*, (2) others may use *P* if, and only if, *A* consents, and (3) *A* may permanently transfer the rights under (1) and (2) to other specific persons by consent.[220] Yet a different view takes owners as agenda-setters on behalf of the state, with exclusion being simply an instrument to this

[215] See Henneford v. Silas Mason Co., 300 U.S. 577, 582 (1936) ("The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. . . . A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively."); Shane Nicholas Glackin, Back to Bundles: Deflating Property Rights, Again, 20 Legal Theory 1, 3 (2014) (discussing the etiology of this metaphor).

[216] Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 26 Yale L.J. 710, 746–47 (1917).

[217] Anthony M. Honoré, Ownership, *in* Oxford Essays in Jurisprudence 107, 113 (A.G. Guest ed., 1961) (emphasis added).

[218] Henry Hansmann & Reinier Kraakman, Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights, 31 J. Legal Stud. S373, S378 (2002) (emphasis added).

[219] Id. at S384.

[220] Frank Snare, The Concept of Property, 9 Am. Phil. Q. 200, 202–03 (1972); cf. J.E. Penner, The "Bundle of Rights" Picture of Property, 43 UCLA L. Rev. 711, 742 (1996) (arguing that "property protects the exclusive use of an owner").

end.[221] Even Blackstone, the theorist upon whom the *Cedar Point* Court relied most, did not treat the right to exclude as absolute or unfettered. Instead, "the free use, enjoyment, and disposal of all his acquisitions," was "without any control or diminution, *save only by the laws of the land*."[222] The centrality of the right to exclude, therefore, cannot be described as the axiomatic core of property law. It is further reasonable to infer that each of these theorists is picking up on an important intuition shared by many of the public. This suggests that there is no reason to assume a strong public consensus on the most important element of the property right.

Second, the right to exclude does not exist for many kinds of real property. So it is a bit odd to call it definitional or even especially "treasured." As 1L students learn (often to their cost), there is a large and heterogeneous class of incorporeal hereditaments, such as easements and *profits à prendre*, for which the right to exclude has no application.[223] Yet it is quite clear that these kinds of property interests can be a predicate for a takings claim.[224]

Or consider the diverse array of future interests. It makes little sense to talk of a right to exclude from a nonpossessory interest such as a possibility of reverter or a shifting executory interest.[225] Moreover,

[221] Larissa Katz, Exclusion and Exclusivity in Property Law, 58 U. Toronto L.J. 275, 277–78 (2008) ("[O]wnership, like sovereignty, is an exclusive position that does *not* depend for its exclusivity on the right to exclude others from the object of the right. What it means for ownership to be exclusive is just that owners are in a special position to set the agenda for a resource."). A similar view is developed by Professor James Stern, who identifies a principle of "mutual exclusivity" as axiomatic of property. James Y. Stern, The Essential Structure of Property Law, 115 Mich. L. Rev. 1167, 1177–83 (2017).

[222] 1 William Blackstone, Commentaries *109, *138 (emphasis added); see also David B. Schorr, How Blackstone Became a Blackstonian, 10 Theoretical Inquiries in L. 103, 105–06 (2009) ("Property in the *Commentaries* . . . was full of complex arrangements of rights, creating communities with respect to specific assets and recognizing the rights of the community in what was nominally private property.").

[223] See generally Restatement (Third) of Prop.: Servitudes (Am. L. Inst. 2000) (detailing property rights that do not require a complete right to exclude). For a useful survey, see Susan F. French, Highlights of the New Restatement (Third) of Property: Servitudes, 35 Real Prop. Prob. & Tr. J. 225, 228–29 (2000).

[224] See, e.g., United States v. Va. Elec. & Power Co., 365 U.S. 624, 629–30 (1961).

[225] See, e.g., State Dep't of Transp. v. Tolke, 586 P.2d 791, 794 (Or. Ct. App. 1978) (holding that the grantor of land to a railroad company "so long as said property . . . [shall be used] as a railroad right of way" retained a possibility of reverter not subject to the rule against perpetuities); see also Restatement (Second) of Prop.: Donative Transfers § 1.5 cmt. b (Am. L. Inst. 1983 & Supp. 2003) ("If the donative transfer creates an interest in fee simple determinable with an executory interest limited to take effect on the termination of the fee

whereas the right to exclude applies in a straightforward fashion to spatial, presently extant interests, it is "unnatural" to say that "a person can be 'excluded' from a necklace," or some other chattel.[226] As Professor James Stern has noted, what is "really" at stake with chattels is the right to "use . . . [by] touching, deploying, or similar forms of active and direct interaction."[227] He also observed that "the Court has not limited the Takings Clause to situations in which a right to exclude others is impaired."[228] Treating the right to exclude as central to the legal architecture of property thus has the odd consequence of creating two tiers of property—"true" property from which one can exclude, and "second-rate" property from which the core stick in the bundle of entitlements is oddly missing.

A third problem is that the Court has not in fact previously treated the right to exclude as distinctive, and so more important than other elements of the property right. Rather than reflecting a tradition, *Cedar Point* embodies an innovation. It is not just that the Court has been willing to recognize Fifth Amendment violations when we would not ordinarily speak of exclusion from an asset.[229] It is also that the Court has recognized takings when another interest is altogether compromised. In *Hodel v. Irving*, for example, the Court held that a federal statute preventing Native Americans from bequeathing an "undivided fractional interest in any tract of trust or restricted land within a tribe's reservation" so as to prevent the fragmentation of tribal lands.[230] Justice O'Connor explained that the statute led to "virtually the abrogation of the right to pass on a certain type of property—the small undivided interest—to one's heirs," or "the right to pass on property—to one's family in particular," that "has been part of the Anglo-American legal system since feudal times."[231] She also

simple determinable which fails under the rule against perpetuities, such failure may leave remaining the interest in fee simple determinable with a possibility of reverter in the transferor."). The same is true for the statutory right to integrity discussed by Hansmann and Kraakman, supra note 218, at S385–95.

[226] James Y. Stern, What is the Right to Exclude and Why Does It Matter?, *in* Property Theory: Legal and Political Perspectives 38, 49 (Michael Otsuka & James Penner eds., Cambridge Univ. Press 2018).

[227] Id.

[228] James Y. Stern, Property's Constitution, 101 Calif. L. Rev. 277, 289 (2013) (citing Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537–38 (2005)).

[229] See supra note 69.

[230] Hodel v. Irving, 481 U.S. 704, 709, 718 (1987) (quoting Indian Land Consolidation Act, Pub. L. No. 106-462, § 207, 114 Stat. 1995 (2000) (codified at 25 U.S.C. § 2206)).

[231] Id. at 716.

explicitly equated the right of "descent and devise" to the right to exclude.[232] So much then for the uniqueness of the right to exclude.

To summarize, *Cedar Point* replaced a clear and predictable rule with an ambiguous standard without a discernable ambit of applications. The majority opinion offers a number of clues as to how to draw the line between appropriations and regulations. But on close inspection, the three leading possibilities for a limiting principle are all untenable. The result is that the category of per se takings after *Cedar Point* remains hopelessly nebulous: while rule-like in its form, it is murky in practice. For litigants, this means deep uncertainty over the scope and nature of property rights in lieu of what had been, for almost a century, stable expectations.

3. Retiring Regulatory Taking?

This is not to say that that there is *no* conceivable stopping point for a post-*Cedar Point* regime. The latter might entail retiring regulatory takings as a category and subsuming its contents into the "appropriations" category. This victory for property rights advocates, however, would likely prove less fruitful and more unpredictable than first appears: because *Cedar Point*'s category of "appropriations" contains its own internal exit hatch, and because the latter's scope is again uncertain, the retirement of regulatory takings does not provide a pathway to more stability in the law.

There are a number of reasons to think that *Cedar Point* might toll the bell for regulatory takings doctrine. For one thing, there is a ready supply of litigants who have incentives to push on it: "[P]roperty rights proponents like the Pacific Legal Foundation are repeat players to an increasingly conservative Supreme Court."[233] These interest groups likely will find an increasingly sympathetic ear for arguments that the category of regulatory takings should be subsumed within the broader reach of an "appropriation" standard to the benefit of present property owners, and to the detriment of those who experience property's negative externalities.

[232] Id. at 715–16. Congress amended the statute to cure the constitutional concerns, and the Court invalidated that later enactment too. Babbitt v. Youpee, 519 U.S. 234, 241, 245 (1997). To be sure, *Hodel* was a regulatory takings case. Yet it is worth recalling that the canonical touchstone for the right to exclude, *Loretto*, also started out under the rubric of regulatory taking—and yet later took flight as a per se rule.

[233] Carol M. Rose, Rations and Takings, 2020 Wis. L. Rev. 343, 361; see also Jefferson Decker, The Other Rights Revolution: Conservative Lawyers and the Remaking of American Government 57–59 (2016) (discussing origins of organizational resources for property rights advocates).

Indeed, the Court routinely invokes, with seeming unease, the absence of an originalist grounding for regulatory takings doctrine.[234] It seems plausible that a Court comprising a majority of originalists at some point finds it unacceptable to keep up a doctrine without antecedents before the twentieth century. In that vein, Justice Thomas has recently called for a "fresh look at . . . regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment."[235] (No doubt, the paper arguing the latter theory is already in the works. Such is the production logic of contemporary originalism.)

Cedar Point points the way toward a reconstruction of takings jurisprudence aligning the pro-property and the originalist impulses of the present Supreme Court majority. Retiring the concept of regulatory takings, that is, would not necessitate any increase in the scope of government's power to influence property without compensation. If "regulation" can be recharacterized as "appropriation," and if the category of "appropriation" is sufficiently elastic and open-ended, federal courts would have a large measure of discretion to shackle government regulation. Following this route would, to be sure, only partially integrate original understandings into takings doctrine. On the one hand, it would acknowledge the ahistoricity of regulatory takings. On the other hand, it would need to elide the awkward fact that colonial and early Republican law defined property to permit many kinds of regulation, including access mandates for third parties, without compensation.[236] But, of course, this historical evidence did not give the *Cedar Point* Court much pause.

Retiring regulatory takings, moreover, might be accomplished without overruling several precedents. Earlier decisions in which a state action was invalidated as going "too far" might be recharacterized as instances of appropriation without compensation. *Pennsylvania Coal Co. v. Mahon*,

[234] See, e.g., Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021) ("Before the 20th century, the Takings Clause was understood to be limited to physical appropriations of property."); accord Horne v. Dep't of Agric., 576 U. S. 351, 360 (2015).

[235] Murr v. Wisconsin, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting); accord Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n, 141 S. Ct. 731 (2021) (Thomas, J., dissenting). Justice Thomas seems to assume that regulatory takings doctrine needs to be replanted, rather than abandoned. He does not explain why he makes this assumption—which is far from obvious as an originalist perspective.

[236] For a summary of relevant evidence, see Berger, supra note 169, at 316–23; Hart, Colonial Land Use Law, supra note 173, at 1272.

for example, might be read as a case in which state regulation isolated and took "what [was] recognized in Pennsylvania as an estate in land" called the support estate.[237] Justice Holmes, consistent with that reading, declared that by making it "commercially impracticable to mine certain coal," the state law being challenged had "very nearly the same effect for constitutional purposes as appropriating or destroying it."[238] Just as *Loretto* has been over time repurposed as an appropriation rather than a regulatory takings decision,[239] *Mahon* itself can be conscripted into a new, more capacious understanding of "appropriation."[240]

Yet even if regulatory takings doctrine were to be abandoned, this would not necessarily result in more predictability. *Cedar Point* did not hold that all appropriations (however defined) constitute per se takings: it also carved out three exceptions to that general rule. The most important of these exceptions was extricated from the Court's earlier decision in *Lucas*, which picked out "longstanding background restrictions on property rights" as carve-outs from the Fifth Amendment compensation regime.[241] This exception is also so opaque as to undermine owners' and officials' stable expectations.

The category of "background principles" is now almost thirty years old. Yet it remains entirely unclear how the Supreme Court thinks it is to be defined or what it contains.[242] Perhaps the most important post-*Lucas* clarification of the idea of background principles is negative in character: the age of a given regulation appears to be irrelevant.[243] The Court has also said in passing that the class of background principles is "relatively

[237] 260 U.S. 393, 414 (1922).

[238] Id.

[239] See cases cited in supra note 199.

[240] Alternatively, since "Holmes and the 1922 Court agreed that *Mahon* should be decided under the Contract and Due Process Clauses, not the Takings Clause," it can be construed as irrelevant to takings law. Robert Brauneis, "The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in *Pennsylvania Coal Co. v. Mahon*, 106 Yale L.J. 613, 666 (1996); see also Rose, *Mahon* Reconstructed, supra note 28, at 570 (noting that *Mahon* can be explained by the absence of a "public use").

[241] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2079 (2021) (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028–29 (1992)). The other exceptions were for "isolated physical invasions" and exactions. Id. at 2078–79.

[242] See Glicksman, supra note 87, at 126–40; accord Andrew S. Gold, The Diminishing Equivalence Between Regulatory Takings and Physical Takings, 107 Dick. L. Rev. 571, 577 (2003).

[243] Palazzolo v. Rhode Island, 533 U.S. 606, 629–30 (2001) ("[A] regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title.").

narrow." But, in practice, lower courts have interpreted the idea "expansively" to include public trust ideas, navigable servitudes, customary rights, and burial rights.[244]

More profoundly, the *Lucas* category of "background principles" has no clear conceptual or constitutional foundation. The formulation suggests that there are a number of timeless norms of property that subsist across varying state law. It is utterly unclear how these are to be determined. Property law has never been static. At the mid-eighteenth-century context of the Founding, even basic ideas such as nuisance were mutating under the tremendous pressure of nascent industrialization.[245] Given the persistence of change and transformation across the historical sweep of property law, it is quite unclear what it would mean to say that some principles are "core," or whether a core to property could be identified without making contestable normative judgments that have no relation to constitutional jurisprudence.

Worse, it is unclear why the Constitution should be understood to draw a distinction between some strands of the real property bundle and others. If the "background principles" of property is taken to be a constitutional concept, then this implies that the Framers had an implicit theory with which to rank different elements of property. Applying the concept of "background principles," in effect, calls upon the Justices to act as philosophers of property law (or, perhaps just as implausible, to reconstruct a single theory of property from the tangled and contested mass of late eighteenth-century debates). In effect, this invites free-ranging inquiry into diverse legal and intellectual practices. It invites jurists to read into the Constitution their own, potentially idiosyncratic, views of what property entails.[246]

Consider, by way of example, the status and importance of the California "take access" regulation. This regulation had been part of California law for almost fifty years. It was enacted as the result of fierce, closely contested political fights over basic questions of economic

[244] Blumm & Wolfard, supra note 88, at 1183.

[245] Joel Franklin Brenner, Nuisance Law and the Industrial Revolution, 3 J. Legal Stud. 403, 431–32 (1974) (finding a gradual assimilation of nuisance into trespass law as courts tried to accommodate industrialization); see also Maureen E. Brady, Turning Neighbors into Nuisances, 134 Harv. L. Rev. 1609, 1613–14 (2021) [hereinafter Brady, Turning Neighbors] (finding "cracks in the dominance of nuisance law" by the beginning of the twentieth century).

[246] See supra text accompanying notes 180–85 (observing this risk in respect to Lockean theories of property).

organization in one of the state's most important business sectors.[247] And it was intended to realize rights of organization and association with a First Amendment connection.[248] Those rights had a statutory pedigree back to the 1930s, especially given the primordial national struggle over the Wagner Act: for the California law might even be glossed as an effort to correct a regrettable omission in the initial coverage of federal labor law, which as originally drafted reached agricultural workers.[249] Yet the Court did not even pose the question whether the "take access" regulation, given its age and political importance, could have been construed as a background principle.[250] It also did not ask whether the regulation had any warrant in constitutional values (say, of association, due process, or even more elemental qualities of human dignity). It simply assumed that this possibility was off the table.

The worry here is obvious: rather than drawing on principled or legalistic grounds, the meaning of "background principles" reflects unstated, and perhaps untheorized, raw intuitions on the part of the Justices.

* * *

Retiring regulatory takings, in short, does little to promote certainty, stability, or rationality in the law of takings. To the contrary, once the appropriation/regulation distinction has been undermined, and the term "appropriation" transformed from crisp rule into muddy mire, the law of takings becomes less law-like.

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[247] See supra text accompanying notes 111–20.

[248] For the constitutionally protected nature of association in unions, see, e.g., Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar, 377 U.S. 1, 5 (1964) ("It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another . . . .").

[249] Michael H. LeRoy & Wallace Hendricks, Should "Agricultural Laborers" Continue to be Excluded from the National Labor Relations Act?, 48 Emory L.J. 489, 506 (1999) (arguing that the "exclusion sprang from the bill's broad inclusion of virtually all private sector employees and the controversy that ensued from this sweeping definition"). For an account that focuses on Southern Senators' wish to preserve labor relations in the agricultural sector, see Jim Chen, Of Agriculture's First Disobedience and Its Fruit, 48 Vand. L. Rev. 1261, 1281 (1995).

[250] Perhaps this inattention to the positive constitutional quality of union organizing efforts is unsurprising given the current jurisprudential context. The Roberts Court has only viewed unions as a constitutional problem, and as a "target" of First Amendment challenges since the New Deal. Cynthia Estlund, Are Unions A Constitutional Anomaly?, 114 Mich. L. Rev. 169, 173 (2015). If unions are only viewed as a problem for constitutional law, we should not be surprised when their constitutional rights are slighted or marginalized.

This is primarily because the idea of an "appropriation"—which triggers a per se demand for compensation under the Fifth Amendment—is now unmoored from any readily accessible ordinary public meaning. It is impossible to know what it means. Nor is there guidance in the various clues scattered across the *Cedar Point* opinion. None yield firm boundaries to the concept of appropriation. Instead, property owners and the organized interests that advocate on their behalf have every reason to push each of these ambiguities as far as it will go. Given the influence of those lobbies, there is every reason to think that the barrier between appropriations and regulatory takings will falter. If that distinction falls, however, and the context of appropriations soaks up, blob-like, much of the terrain covered previously by regulatory takings, no more real stability will ensue. Instead, the quality of property rights will likely remain an inconstant result of judges' intuitions decoupled from legalistic premise or guiderails.

Here again, a close reading of *Cedar Point* and its consequences reveals a conflict between property and the rule of law. On the one hand, the rule of law is associated with stability and predictability in the content of primary law.[251] These formal qualities promote a substantive end: they ensure that officials are kept circumscribed within a clearly defined ambit of legal authority. As a result, those subjected to the state's authority gain a measure of comfort that they will not be subject to arbitrary power. On the other hand, the constitutional regime in the wake of *Cedar Point* employs a verbal formulation of "appropriation" that provides little guidance even to those able or willing to dig into the minutiae of doctrinal detail. So the doctrine is short on certainties, and long on ambiguities. It is also intrinsically unstable because it invites legal mobilization of powerful, concentrated interest groups. It is also not clear where the category of "appropriation" ends for purposes of the Fifth Amendment. Nor is it clear whether and when the "background principles" savings clause might spring into life. This category seems to turn on the idiosyncratic preferences of the Justices, rather than any rule or standard. None of the elements of the law is constrained or guided by original understandings or precedent. What ensues is better understood as the proverbial "rule of men" (a sexist term, to be sure, but still the resonant one) rather than a "rule of law." It results in a legal scheme that vests judges with a lot of unbridled discretion, while also leaving potential

[251] See supra text accompanying notes 30–33.

litigants with substantial legal uncertainty. Indeed, it is not too much to say that the doctrine now invites litigants to look to the political, policy preferences of judges rather than the law to predict legal outcomes. It is an arrangement, in short, at some distance from canonical understandings of the rule of law.

Simply stated, the standard story of profound complementarity between property rights and the rule of law is breaking down. That account has no room for the possibility that the law might be aggressively deployed in ways that diverge from legalist principles as an instrument for the vindication of property. It has no vocabulary for theorizing the ensuing conflict. However well the standard story captures *some* cases—no doubt, important ones—it is therefore incomplete. But what might be said to fill the ensuing gap?

III. PROPERTY AND THE RULE OF LAW RECONSIDERED

It follows from my analysis of *Cedar Point* that property and the rule of law are not as intimately hitched as the standard account of takings doctrine would have us believe. Their dissonance in *Cedar Point* further raises a more general question of how to understand the origins and vectors of conflicts between the rule of law and not just property rights, but the Fifth Amendment's Takings Clause in particular: How does a seemingly foundational legal shield against arbitrary state action itself become a source of legally unbounded discretion for state actors? How does the decoupling of legality from property scramble the benefits supposedly generated by the rule of law, and does it create new costs? To explore these questions, this Part moves away from the particulars of *Cedar Point* to develop two more general theoretical perspectives from which to analyze the more contingent and potentially conflictive relationship between the rule of law and property rights.

In the first approach, I distinguish between the two strands of "legality" that the rule of law might strive toward. I draw here on a distinction offered by the legal theorist H.L.A. Hart, echoed by other scholars: On the one hand, "first-order legality" concerns the extent to which the rules directly applicable to private persons remain stable and predictable. On the other hand, "second-order legality" concerns the stability of rules that officials must apply when deploying, changing or eliminating primary rules. These are meta rules, in the sense of being rules about rules. In conventional legal theory, first-order and second-order legality run together. *Cedar Point* illustrates how they can come apart in the course of

vindicating property rights. The case hence tees up the question of which sort of legality is central (or more central) to the project of the rule of law.

Second, I examine more closely the relationship between property rights, arbitrary state action, and the quality of various liberties. The key point here is that the right to exclude upon which *Cedar Point* dwelled must often be enforced by the state, and so entails the use of state violence against third parties at the discretion of private property owners. In this fashion, property offers not merely a shield against arbitrary state action, but also a device for vesting private parties with functionally similar call options on state power. This allows fickle and unpredictable applications of state power. The net result of an expansive view of property rights, therefore, is not necessarily *less* arbitrary state action. It may instead lead to different *kinds* of arbitrary state action, at the behest of different actors, exploiting different forms of vulnerability. That is, it changes the *distribution*, but not necessarily the *quantity* of arbitrary state action.

I finally consider whether there could be a welfarist justification for erring on one side of this balance. On this point, I conclude that under present conditions, the narrow economic case for identifying the rule of law with property's right to exclude rests on shaky empirical foundations.

These points, I want to be clear, are quite general in character: they extend beyond the particulars of *Cedar Point*. My main ambition here, indeed, is to provide a more robust and sophisticated theoretical architecture for our central constitutional concepts, one that facilitates a more nuanced and precise understanding of how those concepts either hang together, or else fall apart.

A. Internal Conflicts of Legality

A central aspiration of the rule of law aims toward clarity and predictability. The law must be made "available" and "understandable" to those private persons subjected to it.[252] It must, that is, exist and preferably be written down before being applied.[253] This principle has a correlative implication for official action: it suggests that "personal will or arbitrary decision of government officials"—neither of which can be known in advance by regulated parties—cannot legitimately be a basis for

[252] Fuller, supra note 8, at 39; see also Raz, Rule of Law and its Virtue, supra note 14, at 214 ("[T]he law must be capable of guiding the behaviour of its subjects.").

[253] Fuller, supra note 8, at 39. For a similar set of intuitions, developed from a different starting point, see John Finnis, Natural Law and Natural Rights 270–71 (1980).

state action.[254] The sovereign and its agents must in a motivational sense be "limited by the law."[255] The law hence binds officials, even as it guides the citizenry. Indeed, the law *eo ipso* can guide because officials are bound. Put these two complementary principles together, and what results is "a kind of reciprocity between government and the citizen with respect to the observance of rules."[256] The canonical accounts of the rule of law—by Joseph Raz, Lon Fuller, and others—all work through and celebrate this Janus-faced relationship between the constraining role of law and the repudiation of free-wheeling official discretion.[257]

But in so doing these theorists treat law as if it had a singular, undifferentiated quality, and as if it necessarily applied to citizens and officials in the same way. To be sure, their accounts are consistent with the possibility of intermittent lapses in the rule of law. But in general, their concept of law is not disjunctive but unitary: if it fails in respect to citizens, it fails for officials—and vice versa.

The first contribution I make here is to complicate these accounts of the rule of law by suggesting that the rule of law is neither a smooth nor a uniform phenomenon. Rather, important, general fissures run from one side of the rule of law to another. In consequence, it is perfectly possible for the qualities of certainty, predictability, and stability to be satisfied in respect to the part of the law that binds private citizens, but not at all in respect to the part that purportedly constrains officials such as judges. The variation of intensity between these different regimes of legality, which I call "first order" and "second order," allows for the possibility of internal dissonance in the rule of law. It opens up a conceptual space in which legality's institutional apparatus can be wielded against the goals that we hope the rule of law will advance.

[254] Solum, supra note 11, at 122; see also John Phillip Reid, Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries 4 (2004) (noting the pedigree of concerns about arbitrary rule); see also F.A. Hayek, The Constitution of Liberty 152–57 (1960) (arguing that general applicability of abstract rules of law is an important attribute which allows individuals to predict consequences of their actions).

[255] Tamanaha, supra note 15, at 114.

[256] Fuller, supra note 8, at 39.

[257] See, e.g., Raz, Rule of Law and its Virtue, supra note 14, at 212 (noting that the rule of law means both that "people should obey the law and be ruled by it" and also that "government shall be ruled by the law and subject to it").

1. Law for the Public, and Law for Officials

To flesh out this dynamic requires a distinction between the law as applied to ordinary persons within a jurisdiction, and the law governing officials—particularly judges—within that jurisdiction. Such a distinction has been developed by two different theorists, with slightly different vocabularies.

First, the legal philosopher H.L.A. Hart famously argued that the law is characterized by a union of "primary" and "secondary rules."[258] The emergence of such a union, for Hart, marks the break between "primitive" and "modern" societies.[259] He defined, on the one hand, primary rules as the familiar "rules of obligation"[260] that most people experience in daily life in the form of criminal law, tort law, and the like. Secondary rules, in contrast, comprise three sorts of rules that speak more directly to officials charged with administering the law, rather than to the general public. The three kinds of secondary rules identified by Hart are: first, rules of recognition, for determining what counts as a rule of law[261]; second, rules of change (or legislation), to "empower[] an individual or body of persons to introduce new primary rules for the conduct of the life of the group, or of some class within it, and to eliminate old rules"[262]; and third, rules of adjudication, which "empower[] individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken."[263] For Hart, primary and secondary rules occupied different social domains characterized by distinct epistemological practices. Indeed, he suggested that "the acceptance of the rules as common standards for the group [of officials] may be split off from the relatively passive matter of the ordinary individual acquiescing

[258] Hart, Concept of Law, supra note 21, at 94–99 ("The union of primary and secondary rules is at the centre of a legal system . . . ."). For an earlier use of takings law as a lens to critique Hart, see F. Patrick Hubbard, Power to the People: The Takings Clause, Hart's Rule of Recognition, and Populist Law-Making, 50 U. Louisville L. Rev. 87, 88 (2011) (arguing that Hart's "theory fails to achieve his goal of providing a morally neutral descriptive model that applies to all legal systems").

[259] Hart, Concept of Law, supra note 21, at 94–99. For a skeptical reconstruction of Hart's notion of "primitive" societies, see Coel Kirkby, Law Evolves: The Uses of Primitive Law in Anglo-American Concepts of Modern Law, 1861-1961, 58 Am. J. Legal Hist. 535, 557–58 (2018).

[260] Hart, Concept of Law, supra note 21, at 94.

[261] Id. at 94–98.

[262] Id. at 95–96.

[263] Id. at 96–97.

in the rules by obeying them for his part alone."[264] The ultimate result of such a turn of event, warned Hart in a vivid turn of phrase, might well be citizens who are "deplorably sheeplike" and a risk that the "sheep might end in the slaughter-house."[265]

We might say, as a rough generalization, that Hartian primary rules are those that ordinary citizens must concern themselves with most of the time, and that secondary rules are of special concern to the coterie of officials assigned the task of putting the law into practice.[266] This usually includes judges, but there is no reason it would be limited to judges.[267] The secondary rule of recognition must hence be "effectively accepted as common public standards of official behaviour *by its officials*"[268] for a legal system to have any purchase. The distinctive morality of law, on Hart's view, arises out of officials' experience of constraint by secondary rules.

Second, a related distinction between different genres of legal rules has been developed by Professor Meir Dan-Cohen. He distinguishes between "conduct rules," that govern regulated parties' actions, and "decision rules," which officials are meant to follow.[269] Although Dan-Cohen does not make this comparison, his distinction is analytically similar to Hart's distinction between primary and secondary audiences in terms of the way that both carve up law's distinct audiences into two parts—one comprises private citizens while the other is made up of officials. As Dan-Cohen explains, "[t]he general public engages in various kinds of conduct, while officials make decisions with respect to members of the general public."[270] He usefully flags, further, "the potential independence of these two sets of rules," recognition of which "opens up for investigation the nature of their relationship."[271]

Unlike Hart, Dan-Cohen focuses on the positive case for an acoustic separation of citizens from the body of rules applied by officials. He

[264] Id. at 117.

[265] Id.

[266] See, e.g., id. at 115 (underscoring the "relationship of the officials of the system to the secondary rules which concern them as officials").

[267] In his postscript, Hart identifies judges as especially important in respect to the rule of recognition. Id. at 256 ("[T]he rule of recognition, which is in effect a form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts.").

[268] Id. at 116 (emphasis added).

[269] Dan-Cohen, supra note 22, at 629.

[270] Id. at 630.

[271] Id. at 629.

points out that sometimes the public must know the general principle, but it would be better if they did not know the procedural or evidentiary doctrines courts apply. Otherwise, members of the public would adjust their behavior to the decision rules. This would then undermine the deterrence value of primary rules. Acoustic separation, however, also implies the possibility (or at least the risk) of improper behavior by officials out of sight of the general public.[272] Even if official behavior cannot be observed, after all, how can a public ignorant of its conditions of legality identify violations of the law?

2. Legality and the Disunion of Primary and Secondary Rules

I explore here one form of what Dan-Cohen calls the "independence" of conduct rules from decision rules. I will not distinguish his terminology here from Hart's distinction between primary rules that apply to citizens and the secondary rules that address officials. Rather, I assume here that Hart and Dan-Cohen are describing (very roughly) convergent conceptual terms for a key dichotomy in modern legal systems.

The potential independence of primary and secondary rules plays out in respect to the rule of law. Specifically, the central attributes of legality—such as clarity, predictability, and stability—can apply differentially to the regime of primary rules for citizens and to the corresponding regime of secondary rules for officials. The rule of law can hence be systematically bifurcated. It can work for primary rules, while failing for secondary rules.

To capture this possibility, it is useful to deploy the terms "first order" and "second order" in respect to *legality*. "First-order" legality persists when the law for citizens is stable. In contrast, "second-order" legality requires unchanging and predictable second-order rules. Dan-Cohen's "independence" between different domains of law arises in respect to the rule of law when either first-order or second-order legality is absent. The law, as a result, is characterized by an uneven legality. *Cedar Point* illustrates the possibility of this divergence between these two registers of legality with respect to property law. But the general distinction between first-order and second-order legality has a more general character. For

[272] See, e.g., Barry Friedman, The Wages of Stealth Overruling (with Particular Attention to *Miranda v. Arizona*), 99 Geo. L.J. 1, 42 (2010) (criticizing "stealth overruling," in which "the Justices . . . speak to two audiences," which is to say that "the Justices must effectively limit prior precedents and establish the legal rules they prefer in a way that lower courts and officials (because these are constitutional decisions) will follow").

instance, it is possible to imagine second-order legality without first-order legality.[273] It is useful here, though, to focus on the case where citizens, but not officials, are bound by law.

After *Cedar Point*, the primary rules of property law have a stability and a predictability that seem to accord with the rule of law. This is not a function of the binding effect of rules. Indeed, the demotic distinction between appropriation and regulation no longer offers secure guidance. Rather, owners of property can anticipate robust legal protection of their property entitlements in a fashion at least so long as the conservative majority of the Court persists. To be sure, the vagueness of the idea of "background principles" might provoke some uncertainty.[274] But, as I have suggested, the dismissive treatment of that doctrinal category by the majority in *Cedar Point* suggests that owners' worry along these lines should be minimal. In the domain of property-related first-order legality, therefore, Madison's twinned ambitions of "just government" free of "arbitrary restrictions" on the one hand and "secure" property on the other, still seem complementary to each other.[275] But this is not simply or principally because of law's binding effect. Instead, "first-order" legality seems to hold fast after *Cedar Point* as a phenomenological matter as a function of the political stability of the judiciary. This is the rule of rule, in other words, as brute hegemony.

But turn to the implications of *Cedar Point* for the secondary rules of recognition and change—rules that necessarily bite hardest on judges[276]—and a different picture emerges respecting second-order legality. As documented in Section II.B, *Cedar Point* is jurisprudentially distinctive in adopting the formal accoutrements of tightly constraining interpretive methodology—citing dictionaries, invoking ordinary meaning, and proclaiming strict fidelity to precedent—without in fact being meaningfully bound by those sources. Indeed, it is hard to discern anything binding so as far as legal methodology goes in the opinion. Further recall how Section II.C documented the open-textured and indeterminate doctrinal consequences of *Cedar Point*. Rather than tying the Justices' hands in the future, the *Cedar Point* opinion leaves it open

[273] Imagine an authoritarian ruling party that maintains a strict rule of law to suppress internecine conflicts, but which is not bound by law in its relations to citizens. Perhaps the Chinese or Russian states represent versions of this possibility.

[274] See supra text accompanying notes 245–46.

[275] Madison, supra note 3, at 267.

[276] Hart, Concept of Law, supra note 21, at 256.

to future majorities of the Justices to carve the distinction between appropriation and regulation—i.e., the line between state action that certainly does, or instead likely does not, impel compensation—in a wide variety of ways. Alternatively, they might even choose to abandon this distinction completely.

The secondary rules of legal method, and in particular the force of precedent, that nominally (and perhaps normally) bind judges have weak effect even when they are invoked. As a result, Justices (and perhaps federal judges more generally) can anticipate an important degree of discretionary freedom in respect to not just legal methods, but also in respect to the choice of formal content for constitutional rules moving forward. Ironically, the Court has recognized the existence of this discretion when exercised by state courts—and even offered the Takings Clause as a backstopping constraint against it.[277] Such recognition is absent, and conspicuously so, when it comes to the work of the federal bench. The second-order rule of law in respect to property-related constitutional norms, therefore, is of a very different, weaker nature than the first-order rule of law for property owners.

This first division between first-order and second-order legality is not well described as a momentary lapse in the rule of law. It is instead a systematic bifurcation. The first-order rule of law as applied to ordinary persons on the one hand, and the second-order legality of officials (specifically judges) on the other hand, have different strengths. As a result of this, there is a falling away of the "reciprocity between government and the citizen with respect to the observance of the rules,"[278] which is arguably constitutive of the rule of law. At least one set of officials (judges) are not constrained by the same legal constraints as ordinary state actors. So members of the public cannot expect judges to exhibit either backward-looking methodological fidelity to law, or to make decisions in a predictable, and hence stable way. Nor is there either an implicit or a tacit acknowledgment that the Court is engaged in incremental, common law-type reasoning. To the contrary, the *Cedar*

[277] See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 714 (2010) ("It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat."); see also Eduardo M. Peñalver & Lior Jacob Strahilevitz, Judicial Takings or Due Process?, 97 Cornell L. Rev. 305, 315–16 (2012) (suggesting that takings doctrine applies to "judicial lawmaking (i.e., law changing)" but not to "judicial law enforcement"). The Court's concern with the misuse of state court discretion is in some tension with its approach to the analog risk from federal courts.

[278] Fuller, supra note 8, at 39–40.

Point opinion makes much of its use of non-common law methods. Its change is also far too avulsive to be characterized in those terms. The rule of law in contrast exhibits a systematically differentiated character, with officials and citizens being bound by law to distinct degrees. First-order legality holds while second-order legality peels away.

This bifurcation is complicated by the fact that not all ordinary subjects of the rule of law benefit from greater security and predictability, and not all officials have a freer hand. Under the *Cedar Point* regime, property owners have a sort of heightened degree of legal certainty—perhaps of a kind that Madison, Hamilton, and Tucker may well have endorsed and celebrated.[279] But California agricultural workers are likely to suffer, not least from uncertainty, after *Cedar Point*. Their legal right to access to associational resources, their constitutional rights of speech and association, and their practical ability to make claims on the joint product of their labor and agricultural capital are all diminished.[280] These workers are just a few members of a much larger class who experience less certain legal protection as a consequence of *Cedar Point*.

For reasons explored in Section II.C, it is difficult to say with precision how big this class is. Yet it seems reasonable to anticipate that legal certainty will be distributed in more regressive ways. For example, if *Cedar Point* is extended to the housing discrimination and rent control context—as seems plausible but hardly certain[281]—then a rough generalization might be that when the state regulates the use of real property to benefit persons independent of their ownership of property, it is likely that the ensuing rule will be classified as an appropriation, and hence a per se taking. Thus, whereas property owners benefit from a more robust rule of law, those without real property stakes (but with liberty, dignity, or other interests at issue) will generally experience a less certain, lower quality rule of law.

This state of affairs presents a perplexing challenge to the leading accounts of the rule of law, in particular as to the role of judges in producing the rule of law. Ordinarily, the component of the state most

[279] See supra text accompanying notes 2–5.

[280] In this sense, *Cedar Point* is in sharp tension with the Lockean account of property rights, rather than following from it. See supra text accompanying notes 181–85. Locke underscores the role of labor in creating property in the first instance. See Lawrence C. Becker, The Labor Theory of Property Acquisition, 73 J. Phil. 653, 663–64 (1976) (summarizing the theory). But *Cedar Point* prioritizes capital owners' rights to the fruit of labor over those of the laborers themselves, and as such repudiates the Lockean view.

[281] See supra text accompanying notes 138–47.

closely identified with the rule of law is the judicial branch. Leading accounts of the rule of law such as Raz's emphasize that the independence of the judiciary is "essential for the preservation of the rule of law."[282] Similarly, A.V. Dicey's definition of the rule of law starts by insisting that "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land."[283] Courts assume this role for Dicey because he thinks that the "primary duty of a judge is to act in accordance with the strict rules of law."[284]

Only a handful of dissenting voices have resisted this conclusion.[285] In an important essay, Jeremy Waldon has distinguished between the Diceyan mission of courts in providing a hearing for those "threatened by the government with penalty, stigma, or serious loss," and the more dubious role played by courts when they claim a power of judicial review to "settl[e] general questions of common concern in a society."[286] For Waldron, it is one thing for courts to ensure that the executive acts in accordance with law, and quite another for them to exercise this

[282] Raz, Rule of Law and its Virtue, supra note 14, at 216–17 ("It is of the essence of municipal legal systems that they institute judicial bodies charged, among other things, with the duty of applying the law to cases brought before them and whose judgments and conclusions as to the legal merits of those cases are final."); John Gardner, Law as a Leap of Faith: Essays on Law in General 208–10 (2012) (arguing that the rule of law "requires a robustly independent judiciary that does not shy away from decision"). Interestingly, Fuller was more cautious about courts, suggesting that they may "save us from the abyss," but "cannot be expected to lay out very many compulsory steps toward truly significant accomplishment." Fuller, supra note 8, at 44. But see Sanne Taekema, Methodologies of Rule of Law Research: Why Legal Philosophy Needs Empirical and Doctrinal Scholarship, 40 L. & Phil. 33, 37–38 (2021) (explaining how Raz's argument does not require independent courts).

[283] Dicey, supra note 12, at 110.

[284] A.V. Dicey, Introduction to the Study of the Law of the Constitution, at xxxix (8th ed. 1915); see also Margaret Jane Radin, Reconsidering the Rule of Law, 69 B.U. L. Rev. 781, 809 (1989) (noting that many rule of law theories assume judges "to be rule-bound, merely instrumental functionaries").

[285] The claim here is solely about Anglo-American legal culture. In other cultural contexts, the association between the rule of law and courts can peel apart. Marc Hertogh, Your Rule of Law Is Not Mine: Rethinking Empirical Approaches to EU Rule of Law Promotion, 14 Asia Eur. J. 43, 53 (2016) (discussing the inapplicability of court-based approaches in respect to refugee settlements in Asia).

[286] Jeremy Waldron, The Rule of Law and the Importance of Procedure, *in* Nomos L: Getting to the Rule of Law 3, 24 (James E. Fleming ed., 2011). In other work, Waldron has emphasized the centrality of courts to the idea of a legal system, and hence legality. Waldron, The Concept and the Rule, supra note 13, at 20 ("I do not think we should regard something as a legal system absent the existence and operation of the sort of institutions we call courts.").

supervisory power in respect to legislatures making general law under democratic conditions.[287]

But the dichotomous account of legality developed here suggests a different, more troubling conclusion: rather than being institutional guardians of the rule of law, courts may under certain circumstances be particularly well suited to escaping from its regularizing constraints. The problem here is not just the absence of any necessary, conceptual connection between the rule of law and judicial institutions.[288] Rather, Part II's analysis of *Cedar Point* is a reminder that the extent to which an institution—whether judicial or not—is constrained by the rule of law is a contingent, empirical matter. It is not hard to imagine lawless judges and legalistic chief executives. (Indeed, examples of each may well come readily to mind.) We hence should pay attention to whether and how institutional traits lend themselves to compliance with the rule of law. But we cannot assume that compliance will persist across different historical circumstances.

The conventional view, of course, is that judges, because of their procedural apparatus perhaps, are more likely to be legalistic than other officials. Ample examples from the rule-of-law literature can be adduced to illustrate this. But consider the contrary possibility: the effect of legal constraints depends not just on institutional incentives but also on whether external observers can monitor and condemn violations. The lower the cost of identifying violations, the more likely an institution is to be legalistic.

But it is not safe to assume that courts' errors are easier to observe than those of nonjudicial institutions. To the contrary, it may be more difficult to ascertain when judges, as opposed to other officials, are constrained by law. If judges can more easily evade legal constraints than other officials, it may well follow that they have less cause to perform legality.

Many nonjudicial officials, particularly street-level agents, operate under relatively broad rules that do not admit of fine-grained distinctions.[289] It will often be relatively easy to discern rule violations

[287] For development of this view, see Jeremy Waldron, The Rule of Law and the Role of Courts, 10 Glob. Constitutionalism 91, 92–93 (2021) ("There is a massive contrast between the kind of rule-of-law control envisaged for the executive and the legal control that is envisaged—even in a system of strong judicial review—for the legislature.").

[288] This absence of such a necessary connection echoes Waldron's point about judicial review of legislation. Id. at 91–93.

[289] This is likely not so for those making broad decisions of social policy, such as legislators and agency heads.

under those conditions. In contrast, apex courts in particular operate often in domains of legal uncertainty. Here, the force of precedent and other interpretive tools may be more difficult for lay observers to pick out.[290] As Section II.B aimed to show, it will often be costly to ascertain whether these tools have been faithfully applied.[291] These judgments require, as Section II.B no doubt illustrated, contestable judgments about the strength of legal arguments. Reasonable observers will often disagree. It may well be easier for a judge under these conditions to evade the force of rule-of-law constraints than another official, without being noticed, simply because it requires more effort to determine whether such a violation has occurred in the judge's case. Rule-of-law violations may (holding all else constant) be more likely with judicial actors because they are easier to get away with. All this suggests that we cannot simply assume a sympathetic harmony between the rule of law and the rule of courts: as the differential force of legality respecting primary and secondary rules in *Cedar Point* makes clear, the actual dynamics of the rule of law may well be rather different in effect.[292]

* * *

In sum, the relative force of first-order and second-order legality in a judicial system is a contingent empirical matter, and not a conceptual truth. It may be that the effect of legal constraints on judicial behavior are at times more difficult to monitor, and hence verify, than the parallel effect of law on executive action. The divergence of first-order and second-order legality after *Cedar Point* illustrates this possibility. But it does not exhaust the case's significance for thinking about how best to realize the rule of law through concrete institutional choices.

[290] Note that this is a more modest argument than the "indeterminacy" thesis advanced by critical legal theorists, which found uncertainty all the way down. For versions of the indeterminacy critique, see, e.g., Mark V. Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 Harv. L. Rev. 781, 784 (1983); Duncan Kennedy, Legal Formality, 2 J. Legal Stud. 351, 351–54 (1973).

[291] See supra Section II.B.

[292] For a rare recognition of this point about institutional contingency, see Martin Krygier, What's the Point of the Rule of Law?, 67 Buff. L. Rev. 743, 750–51 (2019) (contending that "institutions and practices differ . . . since the circumstances in which they operate, the problems they are called upon to deal with, their capacities, the institutional practices, conventions, traditions and options from which they draw, differ hugely over time and place" (citation omitted)).

B. Legality and the Distribution of Arbitrary Power

The rule of law is associated with the absence of any "arbitrary" state power.[293] On some accounts, this is even its core justification when it comes to property.[294] In recent years, stable and predictable property rules have, in particular, been linked to the promotion of economic growth.[295] But the analysis of *Cedar Point* developed to this point suggests yet another possibility. The legalistic defense of property can yield an absolute increase in the scope for arbitrary exercises of power. It may well do so, further, without any concomitant gain in welfare via market ordering.[296] The net result is a potentially troubling disconnect between the application of first-order legality to the primary rules about property, and the larger ambitions of non-arbitrary governance and economic flourishing toward which the rule of law strives.

Consider first the relationship between a property-focused account of the rule of law and the existence (and intensity) of arbitrary power in a society. After *Cedar Point*, I have already noted, a right of real property has gained a heightened degree of constitutional protection. The Court has "privilege[d] the stability of private property as opposed to stability in other areas of law," beyond the compulsion of precedent or original understandings.[297] And while property rights are vindicated without constitutional frictions, non-property interests such as the associational rights of California farmworkers are subject to a fiscal tax that makes them less effective than they could be.[298] Absent some other defense or response, that is, the state of California must pay a supernumerary fee to ensure that constitutional rights of speech and association can be realized.

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[293] See, e.g., Reid, supra note 254, at 4.

[294] See Madison, supra note 3, at 266; see also Raz, Rule of Law and its Virtue, supra note 14, at 224 ("The law inevitably creates a great danger of arbitrary power—the rule of law is designed to minimize the danger created by the law itself."); accord Endicott, supra note 31, at 2.

[295] Stephan Haggard, Andrew MacIntyre & Lydia Tiede, The Rule of Law and Economic Development, 11 Ann. Rev. Pol. Sci. 205, 206 (2008) ("The core theoretical insight linking law to economic development runs through two distinct but closely related channels: the effects of property rights on investment and the effects of contract enforcement on trade.").

[296] Harold Demsetz, Toward a Theory of Property Rights, 57 Am. Econ. Rev. 347, 351–53 (1967) (offering a welfarist justification for the emergence of property rights).

[297] Waldron, Measure of Property, supra note 27, at 61.

[298] See supra text accompanying notes 114–20. Note that state action in the form of judicial enforcement of the growers' property rights is deployed to limit those associational rights. On the theory of state action developed in *Stop the Beach*, 560 U.S. 702 (2010), this arguably raises First Amendment questions.

Constitutional law, in this way, subsidizes private property rights while taxing the legal vindication of other rights—e.g., to association, to racial equality, and to shelter and dignified housing.[299] Stability in these other rights is also vital to human interests—perhaps more so than interests in real property.[300] Moreover, property rights are not evenly distributed. Nor are the non-property interests left in the cold entirely after *Cedar Point*. But the costs and benefits of the rule of law after *Cedar Point* depend upon how each of these kinds of rights is patterned in society. Under some plausible assumptions, the effect of elevating the legal priority of property rights over other interests may be an increase in the sheer quantity of arbitrary power.

In this way, the robust defense of property rights comes at the expense of other entitlements that protect individuals against arbitrary *private* power. Recall again that the starting point for the rule of law is often a worry about arbitrary action by the state.[301] But it is hard to see how this should be the exclusive normative concern that is relevant. Political theorists from Thomas Hobbes onward have recognized that the state's justifications in part rest on its capacity to protect citizens from arbitrary private violence.[302] A system of legalistic restraints that leaves, in net, many or most individuals within a jurisdiction *more* vulnerable to such private violence and related harms is hard to square with this justification. By elevating property rights above other entitlements of constitutional magnitude, and by allowing the state to intrude on property only to protect property (not other human goods), *Cedar Point* ushers into being a constitutional dispensation in which the state is materially deterred from protecting personal interests other than property. This is a state where security from arbitrary rule (of any sort) depends on property ownership, and hence wealth.

The same result may well follow even if the analysis is restricted to state action and takes no account of private coercion. A scheme of property organized around the owner's right to exclude creates a skewed economy of state violence. On the one hand, property owners are insulated by law from certain kinds of state depredations. But at the same

[299] See supra text accompanying notes 139–45.

[300] Waldron, Measure of Property, supra note 27, at 65–66.

[301] Reid, supra note 254, at 4; Raz, Rule of Law and its Virtue, supra note 14, at 224.

[302] Thomas Hobbes, Leviathan 114 (Oxford Univ. Press 1996) (1651) (arguing that the state is "made by covenant of every man with every man" in order to "defend them[selves] from the invasion of foreigners, and the injuries of one another").

time, those owners can also exercise a call option on state resources to enforce their right to exclude against third parties. Where everyone in the jurisdiction is a real property owner of one sort or another, this yields a rough parity in exposure to coercion. All are at least somewhat able to invoke the state's violence as protection, and as such they gain a certain buffering by law from state caprice. But under conditions in which real property is unequally distributed, state violence will also be unequally allocated. As Jeremy Waldron has explained, in analyzing the effect of property on unhoused individuals, "a property scheme that confers rights and imposes duties on X and Y but does nothing but impose duties on Z" can create a measure of insecurity greater than the security-related benefits it fosters.[303] The same imbalance may hold in respect to takings jurisprudence after *Cedar Point*. Just as in Waldron's example of homelessness, the law here vests real property owners with the ability to exercise their call option on state violence as they will. Potentially, they will do so in unpredictable, capricious, or even cruel ways. Again, the paradoxical effect would be to transform an instrument of legality into a lever for amplifying the quanta of arbitrary violence in the world.

Beyond these dynamics, the social value of strong legal protections for real property is arguably less certain than is commonly recognized. A first reason for this is the relationship between patterns of land holdings and racial and ethnic disparities in wealth. A large racial homeownership gap has persisted since World War II.[304] That gap has grown in the last decade from 28.1% in 2010 to 30.2% in 2017.[305] Over time, racial inequality in land holdings leads to other troubling forms of social stratification. For example, the present large racial wealth gap has been linked causally to an unequal distribution of real property between the races in the Civil War's aftermath: compensation for former slaves would hence likely have had durable positive effects on economic equality.[306] Today, a legal

[303] Jeremy Waldron, Community and Property—For Those Who Have Neither, 10 Theoretical Inquiries L. 161, 168 (2009).

[304] The racial housing gap has been larger than approximately twenty-five points for much of the twentieth century. F. John Devaney, U.S. Dep't of Com., Current Housing Reports H121/94-1, Tracking the American Dream: 50 Years of Housing History from the Census Bureau: 1940 to 1990, H.R. Doc. No. 94-1, at 28–29 (1994).

[305] Jung Hyun Choi, Alanna McCargo, Michael Neal, Laurie Goodman & Caitlin Young, Urb. Inst., Explaining the Black-White Homeownership Gap: A Closer Look at Disparities Across Local Markets, at v (2019).

[306] Melinda C. Miller, Land and Racial Wealth Inequality, 101 Am. Econ. Rev. 371, 375 (2011).

regime that rewards real property rights with a premium while taxing the legal protection of associational rights and antidiscrimination law exacerbates the harms of this racial homeownership gap. As Professor Nestor Davidson has observed, status competition via the acquisition of positional goods may also "cause people to seek things whose overriding purpose is simply to reinforce hierarchy" in a socially wasteful manner.[307] By increasing the returns to real property holding, the first-order legality regime around property likely accentuates the incentive to accumulate real property, even when doing so is wasteful, as a way to maintain social status. This has the likely effect of entrenching further existing racial gaps. To subsidize real property when the latter plays this significant role in the intergenerational reproduction of racial inequality seems an unworthy ambition for the rule of law.

Nor is there a clear welfarist case for aligning the rule of law with real property's right of exclusion. Scholars are increasingly questioning the social value of real property defined by a sharp exclusion power. The rigid temporal and spatial box assumed by real property as defined and defended in *Cedar Point* no longer corresponds well to how property is deployed, especially in the era of the sharing economy. As Professor Lee Anne Fennell has explained, the payoffs from exclusion as a core real property strategy "depend[] on the capacity of boundaries to group together elements that, in combination, generate value."[308] She incisively argues, however, that "[t]he costs of small-scale transactions over slices of access have fallen dramatically" thanks to social and technological developments, even as "the burdens of constant possession have grown as space has become more scarce and as the opportunity costs associated with untapped excess capacity have increased."[309] This is not just a matter of creating new technological affordances for slicing up property use (such as apps like Airbnb or Vrbo). At issue is also the increasing recognition of how important it is to foster complementary uses of real

[307] Nestor M. Davidson, Property and Relative Status, 107 Mich. L. Rev. 757, 796 (2009).

[308] Lee Anne Fennell, Property Beyond Exclusion, 61 Wm. & Mary L. Rev. 521, 550 (2019).

[309] Id. at 551; see also Lee Anne Fennell, Fee Simple Obsolete, 91 N.Y.U. L. Rev. 1457, 1461 (2016) [hereinafter Fennell, Fee Simple Obsolete] ("Spatially rooted estates of endless duration deal poorly with the problem of optimizing urban land use because they scatter everlasting vetoes among individual landowners over the most critical source of value in a metropolitan environment—the patterns in which land uses and land users are assembled in space.").

property in densely packed urban agglomerations.[310] At the same time, the rigid cookie-cutter patterning of the single-family home across American suburbs is plausibly blamed for the "affordable housing crises, racial and economic segregation, environmental damage attending suburban sprawl, and even overall losses to the United States economy."[311] Both within and beyond cities, that is, the rigid boundaries of an exclusion-based model of real property seem to be creating more costs than welfare gains.[312]

Under these conditions, it is not at all obvious that defining the rule of law in terms of rigid and immutable real property rights advances social welfare. The connection between the rule of law and economic growth is typically premised on the claim advanced by economist Douglass North that a system of "[p]erfectly specified and costlessly enforced property rights" would maximize economic growth by allowing individuals to capture best their returns on investment, and that states should move toward this ideal.[313] But if Fennell is correct that economic growth now arises from the unexpected interactions of complementary uses, and the slicing up of box-like real property, then this connection between rigid property rights and economic growth falters. The law should cultivate positive spillovers, not simply rigid demarcations. And so the rule of law defined mechanically in terms of exclusion, therefore, will have at best ambiguous welfare effects.

* * *

It has been commonplace to define the rule of law in terms of rigid and impermeable property rights, and to associate those in turn with freedom from arbitrary rule and the fostering of economic growth. *Cedar Point* offers an account of property as a cornerstone of the rule of law along these lines at a historical moment at which each link in this chain is

[310] Fennell, Fee Simple Obsolete, supra note 309, at 1474–75 (describing "a variety of mechanisms through which proximity generates value—agglomeration economies—at various scales within cities and metropolitan areas" including when "[a]t the neighborhood or block level, combinations of shops, eateries, bars, offices, and residences can produce localized synergies"); see also Daniel B. Rodriguez & David Schleicher, The Location Market, 19 Geo. Mason L. Rev. 637, 638, 645–47 (2012) (coining the term "microagglomerations" to capture this effect).

[311] Brady, Turning Neighbors, supra note 245, at 1611; see also Davidson, supra note 307, at 759 (explaining "exclusionary suburbs" in terms of socially wasteful status competition).

[312] See Demsetz, supra note 296, at 350–53 (underscoring the need for property forms to change as the costs and benefits of resource use change).

[313] Douglass C. North, Structure and Change in Economic History 5 (1981).

becoming fragile. It is no longer clear, in consequence, that centering legality around property minimizes arbitrary rule, whether public or private.[314] Nor is it clear that doing so enhances economic growth or social welfare.

CONCLUSION

The standard story is that there is no tension, and only intimate camaraderie, between the rule of law and the vindication of real property rights. *Cedar Point* puts this account to the test—and finds it radically wanting. The relationship between property and the rule of law, this test has revealed, is contingent and potentially a matter of open conflict. First-order and second-order legality can and do come apart. Law, deployed as a shield for property, can have an unraveling effect upon rule-of-law values such as certainty and predictability when it comes to third parties. Rather than constraining arbitrary government power, the project of vindicating property rights with first-order legality can, under the right circumstances, facilitate not only official action unbounded by law (and hence second-order legality's failure), but also unprincipled and arbitrary forms of private and state power. The rule of law advancing under the banner of property rights can thereby undermine the conditions for liberty and economic growth toward which the rule of law is supposedly aimed. Rather than symbiosis, property and the rule of law can be at odds with each other.

None of this means that the rule of law should necessarily be abandoned as an aspiration or a benchmark for our legal system, or that we should abandon the institution of property.[315] Rather, it suggests a need to push past simple identification of property with the rule of law, to appreciate the complex and potentially divergent pathways of first-order

[314] In a powerfully argued essay responding to this Article, Professor Larissa Katz makes the important point that "the idea that private property rights could [ever] serve to align public power with the rule of law" may well be "deeply mistaken." Larissa Katz, When Property and Legality Diverge, Jotwell (Nov. 16, 2022), https://juris.jotwell.com/when-property-and-legality-diverge/ [https://perma.cc/B79F-9GKX]. She rightly notes that this is not a question that I take up in this Article. Her arguments on this point, however, strike me as powerful and broadly consistent with my narrower claims in the main text here. I also agree with her observation that the problem highlighted by *Cedar Point* is less the presence of judicial discretion as such and more "the weakening of judicial tools for the proper exercise of that discretion." Id. Nothing in the main text is intended to be contrary to that last point.

[315] I address this question at greater length in a forthcoming book. See Aziz Z. Huq, The Rule of Law: A Very Short Introduction (forthcoming 2023).

and second-order legality, and to reconsider the relationships of property with both arbitrary rule and liberty itself. If legality, when theorized around a core of property rights, is capable of undermining the widely shared normative goals it purports to advance, then there is reason to rethink the institutional and legal infrastructure of the rule of law as that term is commonly deployed in American jurisprudence. The larger project opened up by my analysis, in conclusion, is a novel accounting of the rule of law. That new analysis would pay more attention to the actual behavior of different institutions, the distributions of security and fear they yield, and the securities against a bifurcated order of first-order legality without its second-order peer. It would indeed question whether a legal regime warrants "the title of a legal system,"[316] if it cannot supply to all the security from arbitrary rule that makes law worthwhile in the first place.

[316] Hart, Concept of Law, supra note 21, at 117.