ORIGINAL UNDERSTANDING OF "BACKGROUND PRINCIPLES" IN *CEDAR POINT NURSERY V. HASSID*

MARY CATHERINE JENKINS & JULIETTE TURNER-JONES

INTRODUCTION

Unless their children are angels, parents are familiar with the indignant cries of "she took my toy!"; "he broke it!"; or "she's touching my toys!" These children must learn to share with their siblings. Property owners facing analogous injustices from their federal, state, and local governments, however, are not always required to share—at least, not without compensation. Instead, they can rely on the Fifth Amendment Takings Clause.[1] The Takings Clause entitles property owners to "just compensation" if the government "took" property through eminent domain,[2] if a governmental regulation "broke" or devalued property,[3] or—most recently—if a governmental regulation authorized others to merely "touch" or temporarily enter property.[4]

The idea that the Takings Clause requires compensation when a government uses the power of eminent domain is uncontroversial.[5]

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1. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

2. *See* Kelo v. City of New London, 545 U.S. 469, 469 (2005).

3. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1031–32 (1992).

4. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 419 (1982); Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2063 (2021).

5. *See* Kohl v. United States, 91 U.S. 367 (1875) (establishing the federal eminent domain power); *Cedar Point*, 141 S. Ct. at 2071 (citing Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 321 (2002)); William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1743 (2013). *But cf. id.* at

What is more controversial is the idea that the Takings Clause requires compensation when a government regulation results in property devaluation,[6] but this idea has received much discussion.[7] In such instances of "regulatory takings,"[8] courts apply a test from *Penn Central Transportation Co. v. New York City*[9] that requires landowners to satisfy a high bar to receive compensation. In a controversial move, the Supreme Court expanded the realm of compensable takings in its 2021 decision in *Cedar Point Nursery v. Hassid*.[10] Before *Cedar Point*, the Supreme Court had designated that a permanent physical occupation was a taking,[11] requiring compensation. But in *Cedar Point*, when considering a regulation that authorized union organizers to enter certain businesses, the Court held that even a *temporary* physical occupation was a per se taking requiring compensation.

The Court's shift to a per se rule is significant because it means a landowner can receive "just compensation" without satisfying

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1741 ("At the Founding, the federal government was not understood to have the power to exercise eminent domain inside a state's borders.").

6. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995) (arguing that *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) established a "new [regulatory] takings regime" that departed from the original understanding that the Takings Clause).

7. *E.g.*, *id*., John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996); Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211 (1996); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549 (2003); Bernard Schwartz, *Takings Clause — "Poor Relation" No More?*, 47 OKLA. L. REV. 417, 420 (1994); William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 711 (1985).

8. *See* Kobach, *supra* note 7, at 1212 (defining regulatory takings as "nonacquisitive, nondestructive takings") (internal quotation marks omitted).

9. 438 U.S. 104, 124 (1978).

10. 141 S. Ct. 2063 (2021).

11. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982) (holding that a state regulation requiring landlords to allow installation of a television cable on the outside of their buildings was a permanent physical occupation and thus a per se taking).

Penn Central's high bar required for regulatory takings.[12] For governments, the *Cedar Point* holding could pose a heavy financial burden if they must compensate landowners for temporary intrusions authorized under existing regulations. Due to this imposing financial burden, some have suggested that *Cedar Point* threatens existing civil rights regimes, which at first blush resemble the labor rights regulation at issue in *Cedar Point*.[13]

But *Cedar Point* also recognized three exceptions to its per se rule,[14] one of which is particularly expansive: "longstanding background restrictions on property rights."[15] Writing for the majority, Chief Justice Roberts defined this exception as "background limitations [that] encompass traditional common law privileges to access private property."[16] The opinion listed several examples, including entering private land for public or private necessity[17] or to enforce criminal law.[18] For governments, these background principles could alleviate otherwise staggering financial liability due to the *Cedar Point* rule.

While governments can rest assured that Chief Justice Roberts's "background principles" exception will mitigate the broadness of the per se rule, the exception nevertheless poses several questions for originalists and legal academics. At first, the per se rule might seem untethered from original meaning, as governments in the Founding era rarely compensated for temporary intrusions. Upon further examination, it seems that *Cedar Point*'s incorporation of background principles could align quite well with Founding-era

12. This showing is required by the default test for regulatory takings, *Penn Cent. Transp. Co.*, 438 U.S. at 124. *See* Bethany R. Berger, *Eliding Original Understanding in* Cedar Point Nursery v. Hassid, 33 YALE J.L. & HUMAN. 307, 312 (2022).

13. *See, e.g.*, Amy Liang, Comments, *Property Versus Antidiscrimination: Examining the Impacts of* Cedar Point Nursery v. Hassid *on the Fair Housing Act*, 89 U. CHI. L. REV. 1793, 1793 (2022).

14. *See Cedar Point*, 141 S. Ct. at 2078–80.

15. *Id.* at 2079.

16. *Id.*

17. *Id.* (citing Restatement (Second) of Torts § 196 (1964) (entry to avert an imminent public disaster)), *id.* § 197 (entry to avert serious harm to a person, land, or chattels), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 n.16 (1992)).

18. *Id.* (citing Restatement (Second) of Torts §§ 204–205).

views on property, depending on how one defines "background restrictions."

This Note argues that these principles are part of the original meaning of the Fifth Amendment, and then offers an originalist framework for deriving them. The Framers viewed provisions like the Takings Clause as "declaring" existing law that the American people already recognized as enforceable. When viewing the Takings Clause this way—as declarative of "general law"—it becomes apparent that the methodology of *Cedar Point* reflects the original understanding of the Fifth Amendment. In addition to confirming *Cedar Point*'s originalist pedigree, general law also informs the framework for how originalists can divine these background principles.

In Part I, this Note explains the jurisprudential lead-up to *Cedar Point* and examines how the majority concluded that a temporary physical occupation was a taking subject to the background principles exception. In Part II, this Note suggests a general law framework for deriving these background principles. This Note then applies the framework and derives three examples of background principles: the right to enter private businesses like common carriers, the right to enter for public purposes, and the right to enter unfenced land for the purposes of hunting, fishing, or grazing. It is important to note that these background principles are not comprehensive, but rather are representative examples derived from the general law of takings. In Part III, this Note uses these examples to demonstrate why *Cedar Point* likely does not threaten existing civil rights regimes, because background principles protect governmental ability to regulate many of these areas. And Part IV responds to two major criticisms of *Cedar Point*: that the exceptions swallow the rule and that the majority's holding is not originalist. Although some have questioned whether *Cedar Point* is originalist, the "per se + background restrictions" rule is consistent with an original understanding of the Takings Clause. Thus, this Note's originalist analysis of background principles is consistent with originalism and provides a principled way to apply the exception.

I. THE ROAD TO *CEDAR POINT NURSERY V. HASSID* AND THE "BACKGROUND PRINCIPLES" EXCEPTION

Before discussing the contours of *Cedar Point*'s "background principles" exception, it is helpful to understand the origins of the Court's incorporation of background principles into per se rules within property law jurisprudence. The below analysis describes the road to *Cedar Point* and its background principles exception before delving into Chief Justice Roberts's majority opinion, which provides a framework for this Note's subsequent analysis.

Background principles of the Takings Clause first appeared in Justice Scalia's majority opinion in *Lucas v. South Carolina Coastal Council*.[19] *Lucas* held that a regulation resulting in a total diminution of a property's economic value is a per se taking unless the regulation is warranted by background principles of property and nuisance law.[20] *Lucas*'s per se rule only applied to government regulations that resulted in a *total* diminution in value.[21] Requiring that the diminution in value be total meant that few regulatory takings would require compensation under *Lucas*.[22] For example, if a state regulation barred the growing of avocados in an area where a landowner was commercially farming avocados, that regulation could be financially devastating to the farmer-landowner. Despite the effective loss of the farmer-landowner's livelihood, a court might still conclude that under *Lucas* there was no compensable taking; the farmer could still plant another crop—soybeans, perhaps—or just sell the land.

Although the *Lucas* Court invoked this exception over three decades ago, we are still left without a clear definition of background principles. In particular, we are left without a clear *originalist* definition of background principles, because neither the Supreme

19. 505 U.S. 1003 (1992).

20. *Id.* at 1029 (specifically, for limitations 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," *id.* (emphasis added)).

21. *Id.*

22. *See* Michael C. Blumm & Lucus Ritchie, Lucas*'s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 322 (2005).

Court[23] nor academics[24] have settled on a coherent definition. Despite the robust legal discussion regarding the exception's potential effects,[25] few interrogated the nature of these background principles, nor how judges—specifically originalists—should apply the exception.

Enter *Cedar Point*. *Cedar Point* supplied an opportunity to reexamine *Lucas*'s open question: how to define background principles in property law. *Cedar Point* addressed a California state regulation[26] that granted labor organizations the "right to take access" to

23. *Lucas* did not provide much instruction, with the majority noting that a state may avoid paying compensation for a regulation that "duplicate[s] the result that could have been achieved in the courts . . . under the State's law of private [or public] nuisance . . . or otherwise." *Lucas*, 505 U.S. at 1029. The opinion qualified "or otherwise" as "cases of actual necessity, to prevent the spreading of a fire, or to forestall other grave threats to the lives and property of others." *Id.* n.16 (citations removed). Remanding the case, Justice Scalia counseled South Carolina that to win its case, it must "identify background principles of nuisance and property law that prohibit the uses he now intends in circumstances in which the property is presently found." *Id.* at 1031–32.

24. *See, e.g.*, Michael C. Blumm & J. B. Ruhl, *Background Principles, Takings, and Libertarian Property: A Reply to Professor Huffman*, 37 ECOLOGY L.Q. 805, 807 (2010).

25. *See, e.g.*, Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, at 58–60 (1992) (analyzing *Lucas* as a way the Court resolved tension between rules, standards, categorization, and balancing); *Note: Neutral Rules of General Applicability: Incidental Burdens on Religion, Speech, and Property*, 115 HARV. L. REV. 1713, 1730–31 (2003) (writing that *Lucas* defined background principles narrowly and that background principles created a presumption of denying a property rights-holder recourse); Timothy M. Mulvaney, *Foreground Principles*, 20 GEO. MASON L. REV. 837, 839–40 (2013) (arguing that background principles result in an antiquated approach that lacks transparency); *id.* at 841 n.16 (collecting critical sources); *see also, e.g.*, Louise A. Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28 IND. L. REV. 329, 329 (1995); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1436 (1993); Carol M. Rose, *The Story of* Lucas*: Environmental Land Use Regulation Between Developers and the Deep Blue Sea*, *in* ENVIRONMENTAL LAW STORIES 237, 268, 274–75 (Richard J. Lazarus & Oliver A. Houck eds., 2005).

26. CAL. CODE REGS., tit. 8 § 20900(e) (2024).

an agricultural employer's property to garner support for union activities.[27] The regulation mandated that agricultural employers "allow union organizers onto their property for up to three hours per day, 120 days per year."[28] Cedar Point Nursery sued, arguing that "the access regulation effected an unconstitutional per se physical taking under the Fifth and Fourteenth Amendments by appropriating without compensation an easement for union organizers to enter their property."[29] Both the district court[30] and the Ninth Circuit[31] found that the regulation did not constitute a per se taking. As the Ninth Circuit explained, unlike a per se taking, the California regulation did not "allow random members of the public to unpredictably traverse [the growers'] property 24 hours a day, 365 days a year."[32] Under the Ninth Circuit's reasoning, the statute neither deprived the agricultural employers of all economically beneficial use of their property nor imposed a permanent physical invasion.

The Supreme Court disagreed.[33] In a jurisprudential shift, the Court recognized a per se rule protecting the right to exclude even where a physical invasion is *temporary*. Writing for the majority, Chief Justice Roberts explained that "[t]he access regulation appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking."[34] Although the access regulation allowed only limited and temporary access, it appropriated "for the enjoyment of third parties the owners' right to exclude,"[35] which the Court emphasized as "one of the most essential sticks in the

27. California adopted this regulation because the National Labor Relations Act excluded farmworkers from its protections. *See* Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 96 n.1 (2011).

28. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2069 (2021).

29. *Id.*

30. *See* Cedar Point Nursery v. Gould, 2016 WL 1559271, *4–5 (E.D. Cal., Apr. 18, 2016).

31. *See* Cedar Point Nursery v. Shiroma, 923 F.3d 524, 530–31 (9th Cir. 2019).

32. *Id.* at 532.

33. *See Cedar Point Nursery*, 141 S. Ct. at 2080.

34. *Id.* at 2072.

35. *Id.*

bundle of rights that are commonly characterized as property."[36] For Chief Justice Roberts, it was "insupportable" to distinguish between "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."[37] By focusing on the right to exclude as a fundamental property interest, the Court concluded that both temporary and permanent physical invasions constitute a taking.[38]

Chief Justice Roberts then explained how the per se rule flowed from prior Takings Clause precedents. While previous cases emphasized the importance of "permanence," subsequent rulings made clear that the "appropriation of a right to physically invade a property may constitute a taking 'even though no particular individual is permitted to station himself permanently upon the premises.'"[39] The majority similarly distinguished *PruneYard Shopping Center v. Robins*,[40] in which the Court held that a regulation requiring a public shopping center to be open to the public did not constitute a taking.[41] While the shopping center in *PruneYard* was open to the public,[42] the agricultural business in *Cedar Point* was not: it

36. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); *see also id.* at 180 (holding that the government cannot "take" the right to exclude without compensation); *Cedar Point*, 141 S. Ct. at 2074; United States v. Causby, 328 U.S. 256, 265 (1946) (holding low-flying aircrafts constituted an invasion and caused damages); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 423 (1982) (holding that permanent physical occupation constitutes a per se taking regardless of economic loss); Nollan v. California Coastal Commission, 483 U.S. 825, 828 (1987) (extending the Takings Clause to appropriations of easements); Dolan v. City of Tigard, 512 U.S. 374, 384 (holding that compelled dedication of easements for public use also constitutes a taking); Horne v. Department of Agriculture, 576 U.S. 350, 364–65 (2015) (applying the Takings Clause to a regulation requiring raisin growers to relinquish a portion of their crop).

37. *Cedar Point*, 141 S. Ct. at 2074.

38. *Id.*

39. *Id.* at 2075 (quoting *Nollan*, 483 U.S. at 832). Chief Justice Roberts analogized the regulation in *Cedar Point* to the easement in *Nollan*, writing "[w]hat matters is not that the easement notionally ran round the clock, but that the government had taken a right to physically invade the Nollans' land." *Id.*

40. 447 U.S. 74 (1980).

41. *Id.* at 75.

42. *Id.* at 74, 77, 88.

was private property.[43] As such, Cedar Point had the right to exclude while PruneYard did not.

The question remains: how did the Court derive a per se rule from a property owner's right to exclude? Chief Justice Roberts highlighted Founding-era principles to support the per se rule, writing that "as the Founders explained,"[44] the government must pay just compensation for temporary physical invasions to "help preserve individual liberty."[45] The majority emphasized that "[t]he Founders recognized that the protection of private property is indispensable to the promotion of individual freedom."[46] The Court quoted John Adams ("Property must be secured, or liberty cannot exist")[47] and Sir William Blackstone, who wrote that private property requires the right to exclude, which he defined as, "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[48]

With this background, the majority emphasized that the right to exclude requires per se treatment because it is an inviolable stick in the property holder's bundle. It is not "an empty formality, subject to modification at the government's pleasure;"[49] rather, it is a fundamental element of property "that cannot be balanced away."[50] *Cedar Point* thus drew a bright line between the appropriation of the right to invade, which is a per se Fifth Amendment taking, and an

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43. *Cedar Point*, 141 S. Ct. at 2076–77. Chief Justice Roberts distinguished *NLRB v. Babcock & Wilcox Co.*, which held that courts should balance property rights and labor rights when labor regulations interfered with property rights. 351 U.S. 105, 113 (1956). Although *Babcock* regulations appeared like those in *Cedar Point*, the majority emphasized *Babcock* had not considered Takings Clause claims. *See Cedar Point*, 141 S. Ct. at 2076.

44. *Id.* at 2078.

45. *Id*.

46. *Id.* at 2071 (quoting Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 322 (2002)).

47. *Id.* (citing Discourses on Davila, in 6 WORKS OF JOHN ADAMS 280 (C. Adams ed. 1851)).

48. *Id.* at 2072 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *2).

49. *Id.* at 2077.

50. *Id.*

access regulation like that of *PruneYard*, which should be assessed under the *Penn Central* balancing test.[51]

Had the opinion ended here, the breadth of *Cedar Point*'s holding would be almost unimaginable. Any temporary invasion of private property (and any regulation infringing upon a property owner's right to exclude) would be subject to the Takings Clause. Perhaps realizing this stunning scope, the Court established three carveouts to the per se rule. First, the Chief Justice distinguished a temporary trespass from a taking, noting that courts should analyze trespasses under tort law.[52] Second, the majority highlighted, "the government may require property owners to cede a right of access as a condition of receiving certain benefits."[53] For example, the government may exercise legitimate police power to conduct health and safety inspections on private property as a condition for granting a license.[54] Third, the per se rule does not extend to physical invasions that are consistent with "the longstanding background restrictions on property rights."[55]

Chief Justice Roberts proffered no explicit definition of these background restrictions, instead listing three common categories of principles. First, the government may assert a "pre-existing limitation upon the land owner's title";[56] second, individuals may enter property in the event of public or private necessity;[57] and, third, individuals may enter property to effect an arrest, enforce criminal law,[58] or conduct a reasonable search.[59]

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51. *See id.* at 2085.

52. *Id.* at 2078.

53. *Id.* at 2079.

54. *See id.*

55. *Id.*

56. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028–29 (1992).

57. *Cedar Point*, 141 S. Ct. at 2079 (citing Restatement (Second) of Torts § 196 (1964) (entry to avert an imminent public disaster), *id.* § 197 (entry to avert serious harm to a person, land, or chattels), and *Lucas*, 505 U.S. at 1029 n.16).

58. *Id.* (citing Restatement (Second) of Torts §§ 204–205).

59. *Id.* (citing, e.g., Sandford v. Nichols, 13 Mass. 286, 288 (1816) and Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 538 (1967)).

Chief Justice Roberts categorized these exceptions as "background limitations [that] encompass traditional common law privileges to access private property."[60] However, it remains unclear whether these three categories are comprehensive or merely illustrative. As Justice Breyer remarked in dissent,[61] the majority's explanation of the background principles exception leaves more questions than answers. What are these background principles and from what source are they derived? Is this formulation of the takings-trespass exception distinct from background principles? Is the legitimate use of police power not also rooted in common law privileges to access private property? Are these background restrictions distinct from *Lucas*'s "very narrow set of such background principles,"[62] which were cabined to "the State's law of property and nuisance"?[63]

This Note seeks to address the questions raised by Justice Breyer's dissent and subsequent legal academics. Our analysis adds to the growing originalist scholarship that suggests that the Founders wrote certain constitutional provisions with the understanding that they incorporated unwritten general law and background principles.[64] The Takings Clause, like the entire Bill of Rights, was never considered the *source* of the right. Rather, the first ten amendments served merely as "confirmations of rights whose origins lay elusively elsewhere: in the authority of God or the law of nature, in the social contract men had formed long ago, or in immemorial custom."[65] Therefore, in order to understand the *Cedar Point* background restrictions exception, one must look to what principles of

60. *Id.*

61. *See id.* at 2088 (Breyer, J., dissenting).

62. *Id.*

63. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992).

64. *See* William Baude, Jud Campbell, & Stephen Sachs, *General Law and the Fourteenth Amendment*, STANFORD L. REV. (forthcoming 2023); Jud Campbell, *General Citizenship Rights*, 132 YALE L.J. 611, 611 (2023). Although Professor Campbell and others have brought more recent attention to this theory, it is not new.

65. JACK N. RAKOVE, DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS 2–3 (1998).

property our Founders intended to enshrine in the Fifth Amendment.

II. EVALUATING THE TAKINGS CLAUSE BACKGROUND PRINCIPLES

Taking *Cedar Point* to hold that the Takings Clause incorporates unwritten background principles, the next question is: "what was the common understanding of property rights at the Founding?" And in fact, the Founders' generation considered property rights as the foundation of all other liberties.[66] To add contours to *Cedar Point*'s background principles exception, below, this Note provides historical analysis of property rights before and after the Founding. From English common law, this Note derives the principle that a taking must be (1) necessary, (2) taken by reasonable process, (3) for a public purpose, and (4) compensated. And from Founding-era documents and early state court decisions, this Note derives the principle that a property owners' right is limited by obligations on common carriers, regulations facilitating navigability, and government inspection of private lands. While far from comprehensive, this Part breathes life into the background principles exception of *Cedar Point*'s per se rule.

A. English Common Law and Historical Background

Although distinct from American takings law, English common law informed general law and thus provides evidence of the original understanding of the Takings Clause. English common law recognized strong protections against takings, requiring a government taking to have been necessary to the public, taken via a reasonable process, and compensated or somehow restored to its original value.

66. Paul J. Larkin Jr., *The Original Understanding of Property in the Constitution*, 100 MARQ. L. REV. 1, 29–31 (2016).

Early echoes of the Takings Clause can be found as far back as the Magna Carta, which recognized an abstract right against uncompensated or arbitrary government takings.[67] Chapter 39 of the Magna Carta established: "No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs . . . save by lawful judgement of his peers or by the law of the land."[68] The language that no man be "disseised of his free tenement" is more vague than the Takings Clause. But this was intentional: the Magna Carta was drafted in the English common law tradition.[69] The charter itself "declared fundamental English law, meaning that the rights and remedies it declared against the king formed part of the common law."[70] Edward Coke, a champion of the Magna Carta, described Chapter 39 of the Magna Carta as declaring the ancient rights of Englishmen.[71] Instead of describing the right in extreme detail (akin to what one would see in modern agency regulation), these "declarations" merely "marked" and preserved existing ancient rights that were subsequently defined through the common law.

In the *Case of the King's Prerogative on Salt-peter*, Coke illuminated the bounds of these ancient rights, explaining that when the Crown seizes property, it must show public necessity and restore the property's original value.[72] In that case, Coke and the English Justices considered whether the King could dig for saltpeter on private lands to make gunpowder. They ruled that the King could do so only "according to the Limitations following for the necessary Defence of the Kingdom."[73] In other words, the King's ability was limited by necessity—necessity for providing for the public defense.

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67. Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 596 (2009).

68. Magna Carta ¶ 39.

69. Gedicks, *supra* note 67, at 598.

70. *Id.*

71. *Id.* at 606 (citing Coke's *Second Institute*).

72. *The Case of the King's Prerogative in Salt-peter*, 12 Coke R. 13 (1606).

73. *Id.*

This requirement unsurprisingly resembles the "public use" condition of our Fifth Amendment.[74] Applying this limitation in the *Saltpeter* case, the Justices ruled that the King was authorized to dig for saltpeter because it was necessary for national defense, but was not authorized to dig for gravel because the gravel was *not* for national defense but was simply to repair the "King's houses."[75] In addition, the King must leave the land "in so good Plight as [he] found it,"[76] in other words, "so Well and commodious to the Owner as they were before."[77] This requirement mirrors the Takings Clause's "just compensation" requirement: just as the English King was required to restore private land after using it for public necessity, the U.S. government must compensate landowners for land it takes.

As time went on, this respect for private property became embedded in English common law, especially in the works of John Locke and William Blackstone.[78] Locke's *Second Treatise of Government* emphasized the importance of property ownership, stating, "The great and chief end . . . [of men forming governments] is the preservation of their property."[79] Arbitrary *government* seizure of property thus directly undermined this goal. On this idea, Locke wrote: "[A] man's property is not at all secure . . . if he who commands those subjects [has the] power to take from any private man, what part he pleases."[80] While this theory of property would seem at first to preempt *any* government taking, Locke clarified that "even absolute power, where it is necessary, is not arbitrary by being absolute."[81] In other words, necessity provides an exception to the absolute prohibition on the government's taking of private property.

74. *See* U.S. CONST. amend. V.
75. *The Case of the King's Prerogative in Salt-peter*, 12 Coke R. 13 (1606).
76. *Id.*
77. *Id.*
78. *See* Larkin, *supra* note 66, at 18.
79. JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 124 (1690).
80. *Id.* at § 138.
81. *Id.* at § 139.

William Blackstone's *Commentaries*—a work the Framers cited often[82]—further explicated English common law on property, emphasizing that takings must not be performed "in an arbitrary matter."[83] Unlike Locke, however, Blackstone added that the legislature must give the property owner "a full indemnification,"[84] resembling the just compensation requirement in the Takings Clause.

But what does this historical analysis of English common law tell us about the Takings Clause? As discussed in Part IV below, there was little debate surrounding the ratification of the Takings Clause.[85] Some originalist scholars have opined that such a lack of debate indicates the declaratory nature of the Bill of Rights,[86] meaning that the Fifth Amendment merely declares what is already part of the natural or general law. If the text and language of the Takings Clause merely "marks" and declares a pre-existing right, one can only fully understand the contours of this right in the light of background principles. This view may seem novel, but it is not controversial. Constitutional scholars agree that, when designing the Constitution and the Bill of Rights, the Founders sought not to *establish* new fundamental principles of government, but "preserve the rule of law and the freedoms enjoyed by the Framers' generation as Englishmen . . . ."[87] Therefore, English common law can aid our understanding of the background principles undergirding the Takings Clause.

These principles of English common law bolster *Cedar Point*'s per se rule against temporary invasion of private property. As seen through the works of Coke, Locke, and Blackstone, property rights are meant to be *protected* by government and cannot be infringed unless the taking is necessary, non-arbitrary, and compensated or restored. These three factors justifying government takings sketch

82. *See* Larkin, *supra* note 66, at 23.
83. 1 BLACKSTONE COMMENTARIES *139.
84. *Id.*
85. *See infra* Part IV, pages and text accompanying notes 142–174.
86. *See, e.g.*, Baude, Campbell, & Sachs, *supra* note 64.
87. Larkin, *supra* note 66, at 26.

the contours of Chief Justice Roberts's *Cedar Point* "background restrictions" exception.

Regardless of the influence of English common law on the Court's opinion, the question remains whether the Founders intended to enshrine these principles in the Bill of Rights, specifically the Takings Clause.

B. The Framers' Views on Takings

Although some states provided takings protection prior to the Fifth Amendment's ratification,[88] the Framers insisted upon recognizing a federal right in the federal Takings Clause, indicating they agreed with the centrality of this protection in English common law.

Two state constitutions and the Northwest Ordinance included takings clauses prior to the Fifth Amendment's ratification. Vermont's 1777 constitution was the first.[89] The clause read, "[W]henever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money."[90] Massachusetts followed suit in 1780, including in its constitution that "whenever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."[91] Seven years later, the Northwest Ordinance required that "full compensation" be awarded to property owners whose land was taken in the name of "public exigencies."[92] Other states adopted a more republican view in which

88. *See, e.g.*, MASS. CONST. of 1780, pt. I, art. X; VT. CONST. of 1777, ch. I, art. II; VT. CONST. of 1786, ch. I, art. II; PA. CONST. of 1790, art. IX, § 10; MD. CONST. of 1776, Decl. of Rts., art. XXI; N.H. CONST. of 1784, pt. I, arts. XII, XV; N.Y. CONST. of 1777, art. XIII; N.C. CONST. of 1776, Decl. of Rts., art. XII; N.J. CONST. of 1776; S.C. CONST. of 1776; *see also* DEL. CONST. of 1792, art. I, § 8 (including a takings clause shortly after Fifth Amendment ratification); JAC Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 70 n.15 (1931) (noting that while Louisiana and Arkansas did not include a Takings Clause in their original constitutions, they eventually added one).

89. *See* Treanor, *supra* note 6, at 827.

90. VT. 1777 CONST. Chapter 1, § 2.

91. MASS. CONST. OF 1780, art. X, *reprinted in* Treanor, *supra* note 6.

92. Northwest Ordinance of 1787, art. 2.

taking property for public use was both allowed and encouraged.[93] For example, state courts in Pennsylvania and South Carolina relied on "ancient rights and principles," permitting the uncompensated taking of land for public convenience.[94]

During ratification of the federal Constitution, no state ratifying conventions requested a Takings Clause.[95] Despite this absence of demand, James Madison insisted that the Bill of Rights include a Takings Clause.[96] After ratification of the Bill of Rights, Madison stated, "If there be a government then which prides itself in maintaining the inviolability of property . . . and yet directly violates the property . . . such a government is not a pattern for the United States."[97] Madison's language echoed the English common law: property is inviolable and must not be taken for public use without compensation.[98]

C. Early State Courts

Early state court decisions limited the broad right against takings from the English common law.[99] Originalists find these state court decisions illuminating because property law was primarily left in the hands of the states at the time of the Founding, much as it is

93. *See* Treanor, *supra* note 6, at 824.

94. *See, e.g.*, M'Clenachan v. Curwin, 3 Yeates 362 (Pa. 1802); Commonwealth v. Fisher, 1 Pen. & W. 462 (Pa. 1830); Lindsay v. Commissioners, 2 S.C.L. (2 Bay) 38 (1796) (as cited in Treanor, *supra* note 6, at 824).

95. Treanor, *supra* note 6, at 834; *see* Maureen E. Brady, *The Domino Effect in State Takings Law: A Response to 51 Imperfect Solutions*, 2020 U. ILL. L. REV. 1455, 1458 (2020) (no state requested a Takings Clause in the Bill of Rights).

96. Treanor, *supra* note 6, at 835.

97. James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, in 14 THE PAPERS OF JAMES MADISON 267–68 (Robert A. Rutland et al. eds., 1983); *see* LOCKE, *supra* note 79.

98. *See, e.g.*, Magna Carta ¶ 39; LOCKE, *supra* note 79, at ¶ 138 ("[I]t is a mistake to think that the supreme or legislative power of any commonwealth can do what it will, and dispose of the estates of the subject arbitrarily.").

99. There is significant scholarly debate surrounding whether such state court decisions (and state constitutions) inform the contours of the general law itself or simply mark local regulations of the general law. The specificities of this academic debate are beyond the scope of this Note, but this Note asserts that these state constitutions inform the general law of Takings as it is seen by the Court today and, therefore, inform the *Cedar Point* background principles exception.

today.[100] Although few states adopted formal takings clauses, state courts held that eminent domain required just compensation, citing natural law, common law, and due process.[101] State decisions from the Founding generally added three limitations to the common law of takings: First, common carriers cannot exclude arbitrarily. Second, states may enter private property for "public purposes" such as inspection. Third, private property rights are secondary to navigability and access.

First, states almost uniformly adopted the English common law principle that innkeepers and common carriers could not exclude arbitrarily.[102] This duty was well established in English common law.[103] For example, *White's Case*[104] required innkeepers to admit guests if the inn was not full.[105] Under English common law, "where-ever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is eo ipso bound to serve the subject in all the things that are within the reach and comprehension of such an office."[106] Early American legal theorists readily adopted these principles. For instance, James Kent wrote that common carriers "are bound to do what is required of them . . . and [may not] refuse without some just ground."[107] Joseph Story echoed this, writing that "[a]n innkeeper is bound . . . to take in all travelers

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100. *See* Brady, *supra* note 95, at 1466.

101. *See id.*

102. As discussed below, *see infra* Part III, a background principle that requires common carriers to serve without arbitrary exclusion should ameliorate concerns that the per se ruling of *Cedar Point* will undermine antidiscrimination laws like the Civil Rights Act. Because antidiscrimination by common carriers was deeply entrenched in background principles adopted at the Founding, legislation permitting discriminatory exclusion is still impermissible under the *Cedar Point* framework.

103. *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1304–11 (1995–1996).

104. 2 Dyer 343 (1586) (cited in Singer, *supra* note 103, at 1304).

105. *Id.*

106. Singer, *supra* note 103, at 1306 (quoting Lord Holt's dissent in Lane v. Cotton, 88 Eng. Rep. 1458 (K.B. 1701)); *see also* Gisbourn v. Hurst, 91 Eng. Rep. 220 (K.B. 1710) (defining common carrier). English law does, however, exempt places of entertainment from this duty. *See* Singer, *supra* note 103, at 1340.

107. *Id.* at 1312 (quoting 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 465 (1826–1830)).

and wayfaring persons."[108] And state courts routinely upheld this duty to serve.[109]

Second, several early state statutes established a right to enter for certain public purposes.[110] Massachusetts, New Hampshire, and New York statutes established that private vessels could be inspected and searched.[111] Similarly, the Northwest Ordinance allowed government officers to enter a house upon oath or affirmation that goods subject to civil attachment were there.[112] This right to enter for "public purposes" resembles an early legitimate-police-power exception, much like that in the Fourth Amendment today.[113] And just because the Founders incorporated this police power in the text of the Fourth Amendment does not mean that it cannot exist in the background of the Fifth. Rather, it emphasizes how important it was to the Founders to enable legitimate police power.

Third, many states adopted riparian, hunting, and grazing exceptions to the right to exclude.[114] Some early American courts adopted the English common law approach in which riparian rights to use navigable rivers often superseded rights of those who owned property abutting a river.[115] Similarly, the founding documents of Massachusetts and New York established the preeminence of navigability over private property interests.[116] In 1842, the U.S. Supreme Court also emphasized the right to navigation in terms of fishing rights, emphasizing "the public and common right of fishery in

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108. *Id.*

109. *Id.* at 1315; *see also, e.g.*, Adams v. Freeman, 12 Johns. 408 (N.Y. Sup. Ct. 1815); Wallen v. McHenry, 22 Tenn. (3 Hum.) 245 (1842); Kisten v. Hildebrand, 48 Ky. (9 B. Mon.) 72, 74 (1848); Dwight v. Brewster, 18 Mass. (1 Pick.) 50 (1822); Bennett v. Dutton, 10 N.H. 481, 486 (1839); Markham v. Brown, 8 N.H. 523 (1837).

110. Berger, *supra* note 12, at 330–31 (2022).

111. Mass. Gen. Laws, ch. 8, § 4 (1791) (concerning the quality of "pot and pearl ashes"); Act of Dec. 29, 1828, § 6, 1828 N.H. Laws 325, 328–29 (same); N.Y. Rev. Stat., ch. 17, art. 10, § 185(6) (Duer 1846) (allowing inspectors to search vessels for hops).

112. *See* Berger, *supra* note 12, at 331.

113. *See* U.S. CONST. amend. IV.

114. *See, e.g.*, McConico v. Singleton, 9 S.C.L. (2 Mill) 244, 352–53 (1818).

115. *See* Berger, *supra* note 12; *see also, e.g.*, Lay v. King, 5 Day 72, 77 (Conn. 1811).

116. *See* Berger, *supra* note 12, at 326–27.

navigable waters, which has been so long and so carefully guarded in England, and which was preserved in every other colony founded on the Atlantic borders."[117] State courts in New Hampshire, New Jersey, and Pennsylvania similarly followed this English common law principle.[118] Sometimes, state courts explicitly rejected English common law, but they were clear when doing so. For example, in 1856, the Mississippi Supreme Court rejected the English common law rule that grazing on unfenced land was a trespass.[119] The U.S. Supreme Court followed suit in 1890,[120] further enshrining this exception as part of the background exceptions to the right to exclude and thus to the Takings Clause.

D. Synthesizing Background Principles Through Application to Cedar Point

This evidence from English common law, writings of the Framers, and early state court decisions illustrates how originalists can synthesize background principles for the Takings Clause. English common law and early Founding-era documents illustrate the principle that property owners must be indemnified for government takings, and seizures are only permitted when necessary for a public benefit (i.e. defense). Early state court decisions narrowed this principle: they held that rights relating to common carriers, navigability, hunting, and grazing on unfenced land could trump the right of the property owner. As such, government regulations authorizing these actions did not constitute a taking. These state court decisions also emphasized the government's ability to inspect private lands without violating the Takings Clause.

These background exceptions are by no means the only exceptions inherent in the Takings Clause. Such a comprehensive list is

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117. Martin v. Waddell's Lessee, 41 U.S. 367, 414 (1842).

118. Percy Summer Club v. Astle, 145 F. 53 (C.C.D.C.N.H. 1906); Arnold v. Mundy, 6 N.J.L. 1, 78 (N.J. 1821); Carson v. Blazer, 2 Binn. 475, 477–78 (Pa. 1810) (as cited in Berger, *supra* note 12, at 327 n.161–63).

119. Vicksburg & Jackson R.R. Co. v. Patton, 31 Miss. 156, 184–85 (1856) (as cited in Berger, *supra* note 12, at 324).

120. Buford v. Houtz, 133 U.S. 320, 326 (1890) (as cited in Berger, *supra* note 12, at 324).

beyond the scope of this Note. But even this cursory review gives us insight into the logic of *Cedar Point*.

The Takings Clause emerged from a common law framework and should be read against that framework. The common law tradition was clear: government takings of private property, even in the name of necessity, require compensation unless certain factors are present. None of these factors were present in *Cedar Point*. Cedar Point Nursery was not a common carrier or public accommodation; the land belonged to a private company that did not open its land to the public. Cedar Point Nursery, likewise, did not inhibit any navigation or access to public lands; the California regulation did not pertain to navigability at all. Finally, the California regulation granted union organizers, not government inspectors,[121] the right to enter Cedar Point's private property. As such, based on the background principles divined by the majority in *Cedar Point* and in this Note, *Cedar Point*'s holding is consistent with background common law principles inherent in the Takings Clause.

III. IMPLICATIONS FOR ANTIDISCRIMINATION LAWS

Cedar Point's expansion of compensable takings has potentially significant implications for antidiscrimination and public accommodation laws. If the opinion had not included any exceptions, its holding would mean that any statute or regulation that requires some kind of temporary physical occupation—including, for example, workplace antidiscrimination laws[122]—could trigger *Cedar Point*'s per se rule, requiring states to compensate all landowners who successfully allege *Cedar Point* claims.[123] Depending on how

121. In dicta, the majority clarified that its holding would not extend to law enforcement searches of private property. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2080 (2021) ("Unlike a law enforcement search, no traditional background principle of property law requires the growers to admit union organizers.").

122. *See* Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 197–98 (2021) (arguing that under *Cedar Point*, workplace antidiscrimination laws might be considered takings requiring compensation).

123. *Cedar Point* notes that regulations like health and safety inspection regimes would be considered constitutional exactions that are exempt from takings law. *See Cedar Point*, 141 S. Ct. at 1279.

much compensation a court would require for each temporary physical occupation, *Cedar Point*'s holding could make it financially impracticable for states or the federal government to enact legislation like the Fair Housing Act[124] (authorizing tenants a right of temporary occupation in rentals)[125] or the Civil Rights Act of 1964[126] (authorizing a right to access public accommodations without unlawful discrimination).[127]

Not only would this impose high financial burdens on governments, but it could also have concerning legal implications. For example, some have argued that if the Court were to recognize a *Cedar Point* taking in the Fair Housing Act's requirement that landlords not discriminate against protected classes,[128] the Court would effectively be recognizing a legal right to discriminate.[129] Likewise, with regard to the Civil Rights Act, *Cedar Point* may pave the way for hotel owners to receive compensation from the government if they successfully allege (however implausibly) that they have financially suffered because they could not discriminate against certain races,[130] as in the scenario in *Heart of Atlanta Motel v. United States*.[131]

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124. 42 U.S.C. §§ 3601–3619.

125. *See* Amy Liang, Comments, *Property Versus Antidiscrimination: Examining the Impacts of* Cedar Point Nursery v. Hassid *on the Fair Housing Act*, 89 U. CHI. L. REV. 1793, 1793 (2022).

126. 42 U.S.C. § 2000a.

127.*See* Liang, *supra* note 125 , at 1793; Bowie, *supra* note 122 , at 162 (arguing the majority in *Cedar Point* "embraced a version of [the defendant's argument in *Heart of Atlanta Motel*]" and emphasizing that the holding could "make it financially impossible" for governments to enforce antidiscrimination and labor protection laws).

128. 42 U.S.C. § 3604.

129. *See* Liang, *supra* note 125, at 1796. Liang caveats this warning by recognizing the Supreme Court's expressed desire not to overturn broad areas of regulation. *See id.* at 1796 & n.14.

130. 42 U.S.C. § 2000a (prohibiting discrimination on the ground of race in places of public accommodation, 42 U.S.C. § 2000a(a), and defining "any inn, hotel, motel, or other establishment which provides lodging to transient guests" as a place of public accommodation, 42 U.S.C. §§ 2000a(b)).

131. 379 U.S. 241, 243–44 (1964) (discussing the motel owner's allegations). This would require a court to agree with a plaintiff that there was some financial loss requiring compensation from not being able to exclude certain races, which seems implausible. However, the specter of these lawsuits might be enough to deter some governments from legislating in this area absent an applicable exception.

Although these scenarios seem legally plausible under the *Cedar Point* per se rule, scholars who sound these doomsday alarms fail to account for one thing: the background restriction exception. The exceptions to *Cedar Point*'s per se rule—particularly the broad background principles exception—prevent such draconian outcomes and permit state and federal governments to continue enforcing public accommodation and antidiscrimination laws. While this argument depends on the breadth of the background principles exception, this Note argues that the exception encompasses the very general law principles that positive laws (such as the Civil Rights Act and the Fair Housing Act) were designed to protect.

The breadth of the background principles exception diminishes the strength and scope of *Cedar Point*'s per se rule. Therefore, the concern that *Cedar Point* threatens the scope of antidiscrimination laws and rights to access is generally overstated. Antidiscrimination laws and private property rights have existed since the late–sixteenth century.[132] They were first enshrined in English common law and subsequently adopted by the Framers. Thus, the racial discrimination by common carriers and public accommodations in the Jim Crow South were *deviations* from the background principle rather than the logical consequence of a property-owner centric Fifth Amendment. If background principles remain our North Star, *Cedar Point* should only bolster antidiscrimination statutes.

As discussed in Part II, the English common law recognized the duty of public accommodations and common carriers to serve without discrimination, and early state courts uniformly adopted this principle. For example, the 1859 Ohio case of *State v. Kimber*[133] held that a railroad conductor's forcible ejection of a "mulatto" woman was impermissible.[134] The judge held that it was the "duty [of] common carriers of passengers . . . to receive and convey all persons who apply for passage . . . ."[135] Similar principles were found in

132. *See, e.g.*, White's Case, 2 Dyer 343 (1586) (cited in Singer, *supra* note 103, at 1304).

133. 3 Ohio Dec. Reprint 197 (Ct. Common Pleas 1859).

134. Singer, *supra* note 103, at 1335 (citing State v. Kimber, 3 Ohio Dec. Reprint 197 (Ct. Common Pleas 1859)).

135. *Id.*

Munn v. Illinois,[136] where the Supreme Court upheld this general principle that the state may regulate the use of private property when it is "a use in which the public has an interest."[137]

But any student of American history knows that these background restrictions did not prevent decades of racial discrimination against African-Americans. Since the Supreme Court had not yet articulated a background restrictions exception in our property law jurisprudence, many states passed statutes *entitling* places of public accommodation to exclude African-Americans.[138] After decades of racial segregation, Congress passed the Public Accommodations Act in 1964[139] (as part of the Civil Rights Act of 1964), prohibiting discrimination or segregation in any public place of accommodation, including hotels, restaurants, movie theaters, and sports stadiums.[140] While a detailed comparison between each listed public place and background common law principles is beyond the scope of this Note, the similarity between the Public Accommodations Act and cases like *White's Case* and *Lane v. Cotton* is striking.[141]

Reflecting upon this arc in property doctrine—from a robust public accommodations duty to serve, to the right to exclude rooted in racial discrimination, and back again—the concern that background principles would not preserve protection against discrimination in public accommodations is historically unsubstantiated. Background principles, as explicated in this Note, may actually be more protective against exclusionary practices than the limited positive law protections of the Public Accommodations Act.

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136. 94 U.S. 113 (1876).

137. *Id.* at 126.

138. *See* Plessy v. Ferguson, 163 U.S. 537, 548 (citing Day v. Owen, 5 Mich. 520 (Mich. 1858), Railroad v. Miles, 55 Pa. St. 209 (Pa. 1867), Railway Co. v. Williams, 55 Ill. 185 (Ill. 1870), and other cases referencing these laws).

139. 42 U.S.C. § 2000a (1964).

140. *Id.*; *see* Singer, *supra* note 103, at 1412, 1416.

141. While extending protection to places of entertainment is an aberration from English common law, this could simply illustrate the intentional use of positive law to override common law. *See* 42 U.S.C. § 2000a(b)(3) (prohibiting racial discrimination in places of entertainment).

IV. RESPONDING TO CRITICS OF *CEDAR POINT*

In its short life, *Cedar Point* elicited significant criticism. First, while some legal academics have wondered whether the background principles exception would actually limit the broad per se rule that temporary physical occupations are takings,[142] others have questioned whether the exceptions to the per se rule would swallow the rule altogether.[143] Many conservatives initially praised *Cedar Point* as a "boon to property owners" that removed the burden of satisfying the *Penn Central* balancing test for regulatory takings.[144] But this promise of protecting property owners' rights will fall flat if courts broadly interpret exceptions to *Cedar Point*'s per se rule.

Second, many have criticized *Cedar Point* as un-originalist. Despite Chief Justice Roberts's reliance on Founding-era documents, some legal academics have argued that a broad per se rule against temporary occupation is antithetical to our Founders' understanding of property law. As explained below, *Cedar Point* is an originalist opinion and reflects a Founding-era practice of defining a sweeping rule and then limiting it with broad background principles.

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142. *E.g.*, Liang, *supra* note 125, at 1793 (discussing impacts on the Fair Housing Act); Cristina M. Rodríguez, *Forward: Regime Change*, 135 HARV. L. REV. 1, 32 (2021); Bowie, *supra* note 122, at 162 (describing the *Cedar Point* exceptions as "some ad hoc exceptions").

143. *E.g.*, Karl E. Geier, *Keep out and Stay out: The* Cedar Point *Decision and the Landowner's* Sine Qua Non *Right to Exclude Others (Maybe Sometimes Even a Government Official)*, 32 MILLER & STARR REAL ESTATE NEWSALERT 3, 5 (Sept. 2021). The response to *Lucas* was similar to that following *Cedar Point*, with landowner advocates praising how the decision could compensate landowners for costly regulations, and government regulations advocates warning that the decision could threaten helpful government regulations. *See* Blumm & Ritchie, *supra* note 22, at 321 (citing Michael C. Blumm, *Property Myths, Judicial Activism, and the* Lucas *Case*, 23 ENVTL. L. 907, 916 (1993)).

144. *See, e.g.*, Jeremy S. Young, *U.S. Supreme Court Expands Definition of What Constitutes a Physical Taking*, 8 NAT'L L. REV. 110 (Apr. 20, 2023), https://www.natlawreview.com/article/us-supreme-court-expands-definition-what-constitutes-physical-taking; Berger, *supra* note 12, at 309 (2022) (characterizing *Cedar Point* as "a triumph of the conservative majority").

A. Scope of the Cedar Point *Exceptions*

One major objection that many legal academics have raised about *Cedar Point* is that the broad background principles exception swallows *Cedar Point*'s per se rule. Background exceptions to the Takings Clause are expansive, as evidenced by our incomplete survey of background principles in Part II. If background principles to the Takings Clause prevent places of public accommodation from excluding arbitrarily, or enable the state to invade private property under the legitimate use of police power (just to name a few applications), what, then, is left?

In reality, *Cedar Point*'s holding is quite narrow. It merely establishes that a private business may exclude labor organizers. The background principles exception still requires these private businesses to permit government officials who seek to conduct inspections (which could extend to investigations of labor violations). The broad background principles exception may very well trump the per se rule, limiting *Cedar Point*'s legacy to its narrow factual circumstances. In our view, while the announcement of *Cedar Point*'s per se rule initially generated shockwaves, its precedential power will likely be minimal.

But the legacy of *Cedar Point* lies beyond its per se rule. *Cedar Point* invites originalists to reexamine how to faithfully interpret constitutional provisions like the Fifth Amendment, which incorporate unwritten background principles. Below, this Note defends why originalists can and should adopt this reading of *Cedar Point*.

B. Defending The Originalist Reading

Not everyone agrees that *Cedar Point* is an originalist decision. Although the *Cedar Point* majority characterized its decision as originalist, some have pointed out that the Takings Clause was ratified at a time when there were several significant limitations on the right to exclude.[145] Thus, critics contend, the broadness of a per se rule may not reflect the more limited original meaning of the Tak-

145. *See, e.g.*, Berger, *supra* note 12.

ings Clause. Although original evidence points to significant limitations on the right to exclude, the background principles exception properly incorporates these limitations.

One compelling critique of *Cedar Point* comes from Professor Bethany R. Berger,[146] who argued that *Cedar Point*'s per se rule is contrary to original understanding and original intent for the Takings Clause.[147] Berger characterized the Court's departure from original understanding as "flagrant," citing Founding-era examples of formal entitlements for the public to enter private land. These examples included state statutes like the Massachusetts Bay's 1641 Liberties Common,[148] constitutional provisions like the Vermont Constitution of 1777,[149] and state court holdings,[150] all of which recognized formal entitlements to temporarily occupy land without paying just compensation. Rather than question Professor Berger's evidence, this Note questions her conclusion. The central disagreement is this: does Berger's originalist evidence of entitlements to enter land undermine *Cedar Point*'s per se rule, or does this evidence simply flesh out the rule by illustrating some of the background principles that limit it?[151]

Contrary to Berger's claim, *Cedar Point* can stand as an originalist decision because it reflects a Founding-era practice of defining a broad rule and then limiting it with broad background principles. This background principles exception was not a happy mistake; rather, it is a key feature of the original understanding of the Takings

146. Before writing her article, Professor Berger helped draft an amicus brief in *Cedar Point*. *See* Bethany Berger, Katherine Mapes, & Gwendolyn Hicks, *Amicus Brief of Legal Historians in* Cedar Point v. Hassid (Feb. 12, 2021), Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021).

147. Berger, *supra* note 12, at 331.

148. *Id.* at 309 (citing Massachusetts Bay's 1641 Liberties Common).

149. *Id.* at 323 (citing Vermont's 1777 Constitution).

150. *Id.* at 324 (citing the Mississippi Supreme Court's holding that protected the right to graze on unfenced land).

151. Berger acknowledged in her conclusion that the "background principles" exception in *Cedar Point* could be an "opportunity to affirm" these historic entitlements to temporarily enter private land, but this did not seem to form part of her central argument. *See id.* at 332.

Clause. The Takings Clause is representative of other broad enumerated constitutional rights in that it recognizes a broad right that is implicitly limited by background principles. If *Cedar Point* had declined to adopt a two-step structure where a per se rule was limited by background principles (perhaps by applying the default *Penn Central* balancing test), originalists would lose the benefit of a structure that reflects how the Founders understood the Takings Clause.

The Framers and ratifiers likely recognized that the Takings Clause enshrined background principles and general law that nuanced the basic declaration "[n]or shall private property be taken for public use, without just compensation."[152] This follows the rhetorical pattern of Blackstone, who influenced the thinking of many Framers,[153] and whom the majority quoted in *Cedar Point*.[154] Blackstone initially described the broad "imagination" of property as containing the absolute right to exclude,[155] but then acknowledged numerous ways property rights are "less-than-absolute."[156] The Founders seem to have adopted a rhetorical structure similar to that of Blackstone by enacting a broad Takings Clause but bounding it with background principles.

In particular, scholars of general law highlight that the Founders adopted certain constitutional provisions (particularly the Bill of Rights and the Fourteenth Amendment) expecting that unwritten general law and background principles would define the bounds of

152. U.S. CONST. amend. V.

153. *See* Berger, *supra* note 12, at 314 (describing Blackstone as "essential legal reading for the founders").

154. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021) (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *2).

155. 2 WILLIAM BLACKSTONE, COMMENTARIES *2 ("[The right of property is] that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.").

156. David B. Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQ. L. 103, 107 (2009).

these provisions.[157] Under this lens, American citizens left a hypothetical state of nature and agreed to live in society with one another in a social compact.[158] However, they carried with them certain natural rights.[159] Natural rights, such as the freedom to own property,[160] were thus enforceable even if not enumerated.[161] The Framers' own words strongly support this reading. For example, James Madison declared to the First Congress that the Bill of Rights was a collection of "simple acknowledged principles" that citizens already possessed.[162] Madison further explained that the Takings Clause could educate society about property protection.[163] This included the right enshrined in the Takings Clause against uncompensated takings.[164]

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157. *See* Baude, Campbell, & Sachs, *supra* note 64; Campbell, *supra* note 64, at 165. Although Professor Campbell and others have brought recent attention to this theory, it is not new. *See* RAKOVE, supra note 65, at 2–3 ("[B]ills of rights were never regarded as the ultimate *sources* of the rights they protected. Rather, they were confirmations of rights whose origins lay elusively elsewhere.").

158. *See* Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 87–88 (2017).

159. *Id.*

160. *See* Eric R. Claeys, *Natural Property Rights: An Introduction*, 9 TEX. A&M J. PROP. L. 415, 447–48 (2023) (discussing property ownership as a natural right that can be limited by eminent domain, but only with the legal protections of public use and just compensation).

161. *See* Jud Campbell, *Natural Rights, Positive Rights, and the Right to Keep and Bear Arms*, 83 LAW & CONTEMP. PROBS. 31, 35 (2020).

162. Statement of James Madison (Aug. 15, 1789), in 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1270, 1270 (Charlene Bangs Bickford et al. eds., 1992). The original language of the Takings Clause read "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation." JAMES MADISON, AMENDMENTS TO THE CONSTITUTION (June 8, 1789), in 12 THE PAPERS OF JAMES MADISON 197, 204–05 (Charles F. Hobson et al. eds., 1979).

163. See Treanor, supra note 6, at 837 (citing JAMES MADISON, AMENDMENTS TO THE CONSTITUTION (June 8, 1789), in 12 THE PAPERS OF JAMES MADISON 197, 207 (Charles F. Hobson et al. eds., 1979)); RAKOVE, *supra* note 65, at 38 (describing how James Madison "dismissed [the Bill of Rights] as so many 'parchment barriers' to be admired, perhaps, in principle, but not relied upon in practice").

164. *See* Jud Campbell, *Constitutional Rights Before Realism*, 2020 U. ILL. L. REV. 1433, 1438 (2020); *see also* RAKOVE, supra note 65, at 38.

Additionally, records from the First Congress indicate there was little debate about the Takings Clause.[165] Notably, there were other issues that received significant debate, such as slavery[166] and presidential removal power.[167] Some might take this to mean that the Framers believed the right against uncompensated takings was absolute and not limited by background principles. But given the natural rights and general law framework that the Framers espoused, this simplistic view is not reflective of how the Framers understood this right. Importantly, the threat of uncompensated government takings was well known at the time of the Founding,[168] and early state courts largely adopted the English common law view that background principles nuance the broad property rights declared by the Takings Clause.[169] Instead of departing from this understanding, the Framers adopted text in the Fifth Amendment that closely resembles existing takings clauses in various states.[170] This

165. *See* N.H. COGAN, THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 361–72 (2d ed. 2016) (chronicling congressional debates over the eventual Fifth Amendment); Treanor, *supra* note 6, at 791 ("There are apparently no records of discussion about the meaning of the clause in either Congress or, after its proposal, in the states."). Logically, this makes sense. The more controversial an amendment, the more debate. If the text demarcates general law the Founders agreed upon, one should expect little debate. *See* Campbell, *supra* note 161, at 40 (2020) (distinguishing between customary positivist rights, which were enumerated rights defined by historic common law, and new positivist rights, which generated more careful drafting and more debate); *id.* (citing the Establishment Clause as a new right that the First Congress "carefully drafted").

166. *See Debate on Slave Trade*, 2 ANNALS OF CONG. 1197–205, 1450–74 (1790).

167. *See Debate on Removal*, 1 ANNALS OF CONG. 455–79 (1789).

168. Notably, uncompensated takings were proscribed in the Magna Carta, see Gedicks, supra note 67, at 596 (2009), and the English common law, *see supra* Part II, both of which were influential in state common law.

169. *See supra* Part II.

170. The Vermont 1777 constitution included the clause: "[W]henever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money." VT. 1777 CONST. Chapter 1, § 2. The Massachusetts 1780 constitution stipulated: "whenever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." MASS. CONST. OF 1780, art. X, *reprinted in* Treanor, *supra* note 6. The Northwest Ordinance required that "full compensation" be awarded to property owners whose land was taken in the name of "public exigencies." NORTHWEST ORDINANCE OF 1787, art. 2.

suggests a desire to ratify state law understandings of takings law into the federal Constitution, informing the Takings Clause through background principles.

Mainstream theories of originalism would support *Cedar Point* as an originalist decision because the decision follows the practice of the Framers. Original intentions originalism[171] would point out that the ratifiers of the Fifth Amendment intended that it draw from background principles to accomplish the purposes laid out in Madison's speech to the First Congress.[172] Original public meaning originalism[173] and original legal methods originalism[174] would highlight that the original public meaning of the Fifth Amendment is best understood as how the learned public or legal scholars would have read it—in the light of background principles.

Pragmatically, incorporating this originalist evidence into the background principles exception is helpful to lower courts and parties simply because they must abide by Supreme Court precedent. Even if, like Berger, they disagree with the originalist pedigree of the per se rule in *Cedar Point*, lower courts and parties must have a consistent way to apply the holding in *Cedar Point* as a matter of original law; interpreting original public meaning in the context of background principles would help them to be faithful originalists while still following Supreme Court precedent.

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171. *See* RAKOVE, *supra* note 65, at 38 (defining as "the view that the meaning of the text is determined by the intentions of its authors").

172. *See* Treanor, *supra* note 6, at 837 (citing JAMES MADISON, AMENDMENTS TO THE CONSTITUTION (June 8, 1789), *in* 12 THE PAPERS OF JAMES MADISON 197, 207 (Charles F. Hobson et al. eds., 1979)).

173.*See* RAKOVE, *supra* note 65, at 33 (defining as "the view that the meaning of the text is determined by the conventional semantic meaning of the words and phrases at the time each provision was framed and ratified"); Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71 (2016) (expositing the theory).

174. Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 33 (Grant Huscroft & Bradley W. Miller, eds. 2011) (defining as "the view that the original meaning is the meaning that would have been derived given the methods of interpretation (and possibly also construction) that were employed at the time"); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009) (expositing the theory).

In conclusion, once one understands that the evidence of original public meaning sounds in the background principles exception rather than in the per se rule, *Cedar Point* stands as an originalist opinion.

CONCLUSION

Fervor over the background principles exception to the per se rule in *Cedar Point* exposed an area of originalist scholarship that has been neglected. In this vein, this Note suggests that three major principles exemplify the types of background principles that inform takings law: the right to enter private businesses, the right to enter for public purposes, and the right to enter unfenced land for specific public purposes (such as navigation, hunting, grazing, or fishing). Although commentators initially expressed concern that *Cedar Point* could lead to an erosion of civil rights and labor protections, this is not likely. Applying background principles that this Note would recognize as part of the Takings Clause to regimes like the Public Accommodations Act, an originalist would be hard-pressed to see *Cedar Point* as eviscerating these critical protections. While *Cedar Point*'s holding may have little practical impact, it provides a lens for more clearly understanding how the Founders conceived of background principles as limitations to legal rights that, at first glance, might appear unbounded.