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## Eliding Original Understanding in Cedar Point Nursery v. Hassid

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## Eliding Original Understanding in *Cedar Point Nursery v. Hassid*

Bethany R. Berger\*

*Cedar Point Nursery v. Hassid* is a triumph of the conservative majority of the Supreme Court. In holding that temporary entries to land are takings without regard to duration, impact, or the public interest, the Court fulfilled the decades-long ambitions of anti-regulatory advocates of private property. Progressive and conservative scholars agree that the decision runs roughshod over precedent. This essay focuses on a less obvious aspect of *Cedar Point*: its flagrant departure from original understanding.

American law at the time of the founding recognized a robust right to enter private property. Trespass law did not even reach entries unless they caused economic damage, and statutes often placed additional limits on suits for unauthorized entry. Starting with Massachusetts Bay's 1641 Liberties Common and continuing well into the nineteenth century, colonies and states also created numerous formal entitlements to enter. Such rights were enshrined in the constitution of Vermont—the first American constitution to include a takings provision—and the Anti-Federalist report that led to the Bill of Rights. With or without constitutional guarantees, courts dismissed challenges to these entries as frivolous, contrary to American culture, even a rejection of what made the new nation a land of liberty.

Although originalism is a watchword of the Court's conservative majority, the Court rejected this legal tradition in *Cedar Point*. The new *per se* rule does include exceptions that, if read broadly, may limit this departure from original understanding. Time will tell whether the Justices take this second opportunity to make good on their originalist commitments.

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\* Wallace Stevens Chair, University of Connecticut School of Law. Thanks to all who participated with me in filing an amicus brief on these issues in *Cedar Point v. Hassid*: Gwendolyn Hicks and Katherine Mapes of Spiegel McDiarmid LLC, and Professors Gregory Ablavsky, Eric T. Freyfogle, Herbert Hovenkamp, Kenneth W. Mack, K-Sue Park, Anna di Robilant, Carol M. Rose, Joseph William Singer, and Steven Wilf. Thanks also to Claire Priest, who encouraged me to write up my research for the brief for this symposium issue on her wonderful book, *Credit Nation: Property Laws and Institutions in Early America* (2021), and to Larry Solum for giving me a crash course on how a rigorous originalist would view these issues.

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#### INTRODUCTION

Originalism—at least in name—is a watchword of the conservative majority of the U.S. Supreme Court.<sup>1</sup> Although originalism takes many forms, at a minimum it means that original meaning should constrain personal preference in constitutional interpretation.<sup>2</sup> So a non-cynic might

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1. “At least in name” because both scholars and the Justices themselves debate whether the Justices are originalists and to what extent. In his confirmation hearings, for example, Chief Justice Roberts stated “I do think it’s the—that the Framers’ intent is the guiding principle that should apply,” but also made clear that original intent had different applications to different issues and that precedent should play a large role. *Confirmation Hearing on the Nomination of John Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 182 (2005). Chief Justice Roberts clerked for future-Chief Justice Rehnquist, author of the first scholarly salvos pitting originalism against “living constitutionalism,” William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 697-99 (1976). Chief Justice Roberts also served in President Reagan’s White House Counsel’s Office as the administration forged a new conservative strategy under the mantle of originalism, Paul Baumgardner, *Originalism and the Academy in Exile*, 37 L. & HIST. REV. 787, 788-89 (2007), but some have described his approach as closer to living originalism. See Doug Kendall & Jim Ryan, *Do Kagan, Roberts Actually Agree?*, POLITICO (Aug. 4, 2010), <https://www.politico.com/story/2010/08/do-kagan-roberts-actually-agree-040600>. Justice Kavanaugh, meanwhile, more forthrightly claimed to be an originalist relying on the original meaning of the constitutional text in his confirmation hearings, *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 115th Cong. 195 (2018), but many say his decisions have little resemblance to originalism. See, e.g., Emily Bazelon & Eric Posner: *Who Is Brett Kavanaugh?: Contrary to What Supporters Say, He’s No Originalist*, N.Y. TIMES (Sept. 3, 2018), <https://www.nytimes.com/2018/09/03/opinion/who-is-brett-kavanaugh.html>. Justice Gorsuch’s writings and opinions more consistently claim that “originalism is the best approach to the Constitution,” see Justice Neil Gorsuch, *Why Originalism Is the Best Approach to the Constitution*, TIME (Sept. 6, 2019), <https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution>, but his relative commitment to following precedent would lead some scholarly originalists to declare him unworthy of the name. See, e.g., Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CINN. L. REV. 7 (2006) (critiquing Justice Scalia’s originalist credentials for his unwillingness to disregard precedent).

2. See Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1924 (2017); Larry Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 269-70 (2017).

hope that *Cedar Point v. Hassid*,<sup>3</sup> a triumph of the conservative majority, would reflect either precedent or the original understanding of the right to enter or exclude. Because we are all cynics now,<sup>4</sup> readers will be unsurprised to learn that it does not. What may be surprising is how much the founding generation valued rights to enter private property and enshrined them in law.

This essay examines the numerous and robust rights to enter private property recognized in early American law. Some of these rights were adopted from English common law, but many were distinctly American innovations. Although these rights often originated in statutes, courts saw the statutes as creating important customary and common law rights. And although advocates of expanding the takings doctrine describe it as a matter of individual liberty and property rights, early Americans saw rights to enter private property as important aspects of both. Public rights to enter constituted a “title paramount to the title of” individual property owners,<sup>5</sup> one that should not “be defeated at the mere will and caprice of an individual.”<sup>6</sup> They were part of what made America a “land of liberty” compared to England,<sup>7</sup> and restricting them would be “oppressive” and “contrary to the fundamental rules of law.”<sup>8</sup>

Although *Cedar Point v. Hassid* wraps itself in a façade of constitutional history, it violates this tradition. The opinion holds that (aside from three exceptions) it is a per se taking whenever the government authorizes an involuntary entry to land.<sup>9</sup> It condemns California’s regulation allowing union organizers to enter farms employing migrant workers for limited times because it created a “formal entitlement” to enter.<sup>10</sup> As this essay shows, starting with Massachusetts Bay’s 1641 Liberties Common,<sup>11</sup> and continuing well into the nineteenth century, early American law was full of formal, statutory entitlements to enter. *Cedar Point*, therefore, erases legal understandings that, like the Court’s takings jurisprudence, are “as old as the Republic.”<sup>12</sup>

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3. 141 S. Ct. 2063 (2021).

4. For a recent book-length argument that no justice ever really follows original intent, see ERIC SEGALL, ORIGINALISM IS FAITH (2018). For a review by a committed originalist agreeing that “professing originalists . . . sometimes make things up” and “do not fully live up to their principles,” see Christopher Green, *Originalism as Faithfulness*, CHI. L. REV. ONLINE (Oct. 31, 2019), <https://lawreviewblog.uchicago.edu/2019/10/31/originalism-as-faithfulness-by-christopher-r-green>.

5. *See Lay v. King*, 5 Day 72, 77 (Conn. 1811).

6. *McConico v. Singleton*, 9 S.C.L. (2 Mill) 244, 352-53 (1818).

7. ERIC T. FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON OWNERSHIP OF LAND 51 (2007).

8. *Percy Summer Club v. Astle*, 145 F. 53 (C.C.D.C.N.H. 1906).

9. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021).

10. *Id.*

11. THE COLONIAL LAWS OF MASSACHUSETTS, REPRINTED FROM THE EDITION OF 1660, WITH THE SUPPLEMENTS TO 1672, CONTAINING ALSO, THE BODY OF LIBERTIES OF 1641, at 170 (William H. Whitmore ed., 1889).

12. *Cedar Point*, 141 S. Ct. at 2071 (quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002)).

This essay is not, however, just more evidence of judicial originalists' casual relationship with original understanding. The *Cedar Point* exceptions may yet allow original intent to prevail. As Justice Stevens said of *Lucas v. South Carolina Coastal Council*'s categorical regulatory takings rule, the *Cedar Point* rule "is only 'categorical' for a page or two in the U.S. Reports."<sup>13</sup> *Cedar Point* creates three exceptions from its per se rule, and courts may read them capaciously.

First, the Court declares, "our holding does nothing to efface the distinction between trespass and takings. Isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right."<sup>14</sup> This "distinction" is confusing and perhaps meaningless—the power to shape the law of trespass is at the heart of the physical takings inquiry.<sup>15</sup> But it can be read to acknowledge the original role of the state in shaping the common law of trespass.<sup>16</sup> Second, the opinion continues, "many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights."<sup>17</sup> Lower courts interpreted the identical exception in *Lucas* to incorporate the long tradition of adjusting property rights in the public interest,<sup>18</sup> and they may do the same here. Third, *Cedar Point* held that "the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking," stating that "[u]nder this framework, government health and safety inspection regimes will generally not constitute takings."<sup>19</sup> Although the Court inserts an ahistorical assumption that these benefits must satisfy the "rough proportionality" test of its exactions jurisprudence,<sup>20</sup> the broad historical understanding of the government power to enter for purposes of regulation may play a role here as well. In short, the *Cedar Point* exceptions create a second chance for originalist judges to make good on their originalist commitments.

This essay first provides a brief background on *Cedar Point* and how its per se rule departs from precedent. It then discusses the ways that *Cedar Point* first invokes original intent and then departs from the original public understanding of the right to enter private property. It concludes with the hope that courts will recognize the right to enter as central to property law.

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13. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1067 (1992) (Stevens, J., dissenting).

14. *Cedar Point*, 141 S. Ct. at 1278.

15. *Pruneyard v. Robbins*, 447 U.S. 74, 89-94 (1980) (Marshall, J., concurring) (discussing link between takings and trespass jurisprudence).

16. *Pruneyard*, 447 U.S. at 93.

17. *Cedar Point*, 141 S. Ct. at 1279.

18. Michael C. Blumm & J.B. Ruhl, *Background Principles, Takings, and Libertarian Property: A Reply to Professor Hoffman*, 37 *ECOLOGY L.Q.* 805, 806 (2010).

19. *Cedar Point*, 141 S. Ct. at 1279.

20. *Id.*

## I. PASSING ON PRECEDENT

*Cedar Point v. Hassid* held that a California law designed to protect migrant farmworkers may be a per se taking of property under the Constitution. The regulation gives unions a limited right to enter growing sites to organize and provide information about worker rights.<sup>21</sup> The unions must provide notice to the growers first, can only enter for up to four 30-day periods a year, and can only speak to workers during the hour before work, the hour after, and during the lunch break.<sup>22</sup> In place since 1975, the regulation survived the California Supreme Court,<sup>23</sup> federal trial and appellate courts,<sup>24</sup> and a 2015 administrative review<sup>25</sup> before falling to a six-three majority of the U.S. Supreme Court in 2021.

California adopted the access regulation in recognition of the unique vulnerability of migrant farmworkers.<sup>26</sup> The 1935 National Labor Relations Act excluded farmworkers from its protections, a measure that affirmed employer control over predominantly non-White workers.<sup>27</sup> In 1975, however, in response to the advocacy of largely Latino farmworkers through the United Farm Workers of America, California adopted the California Agricultural Labor Relations Act.<sup>28</sup> The legislature stated the law was enacted to “ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations,” and “bring certainty and a sense of fair play to a presently unstable and potentially volatile condition in the state.”<sup>29</sup>

The newly-created Agricultural Labor Relations Board immediately adopted the access regulation because “organizational rights are not viable in a vacuum” but depend “on the ability of employees to learn the advantages and disadvantages of organization from others,” and “unions seeking to organize agricultural employees do not have available alternative channels of effective communication.”<sup>30</sup> The California Supreme Court upheld the regulation against takings and due process challenges in 1976.<sup>31</sup>

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21. CAL. CODE REGS. tit. 8, § 20900 (2021).

22. *Id.*

23. *Agric. Labor Relations Bd. v. Superior Court*, 546 P.2d 687 (Cal. 1976).

24. *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 529 (9th Cir. 2019).

25. Memorandum of Thomas Sobel, Administrative Law Judge, & Eduardo Blanco, Special Legal Advisor, on Staff Proposal for an Education Access Regulation for Concerted Activity to the Bd. (Nov. 23, 2015), <https://www.alrb.ca.gov/wp-content/uploads/sites/19612018106/StaffRecommendationWorksiteAccess.pdf> [hereinafter Sobel Memo].

26. Brief for United Farm Workers of America as Amicus Curiae in Support of Respondents at \*3, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (“UFW Brief”).

27. 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. CAL. LAB. CODE § 1140 et seq. (West 2022); UFW Brief, supra, at \*3.

29. *Agric. Lab. Relations Bd. v. Superior Court*, 546 P.2d 687 (Cal. 1976) (quoting 1975 Cal. Legis. Serv. 304 (West)).

30. CAL. CODE REG. tit. 8 § 20900(b) (2021).

31. *Agric. Labor Relations*, 546 P.2d at 411.

In 2015, the Board conducted new public hearings, and found access remained necessary to enable workers to exercise their rights, perhaps even more so than they had been in the 1970s.<sup>32</sup> Farmworkers, the Board found, were more likely to be Indigenous and speak neither English nor Spanish, most lacked the literacy to access information in writing, and while many had cell phones, almost none could afford internet or smart phones.<sup>33</sup> Farmworkers had “little to no knowledge” of their rights, and most greatly feared retaliation from their employers.<sup>34</sup>

In 2016, strawberry grower Cedar Point Nursery and grape and citrus grower Fowler Packing Company challenged the regulation as a taking per se.<sup>35</sup> As per se takings, entries under the regulation would demand “just compensation” regardless of their duration, the public interest, or economic impact. The district court rejected the claim but gave the growers leave to amend.<sup>36</sup> The leave was presumably to allege a taking under the ad hoc *Penn Central* test, which considers governmental purpose and economic impact on owners and interference with their investment-backed expectations.<sup>37</sup> After the growers declined to amend their complaint, the district court dismissed, and the Ninth Circuit affirmed.<sup>38</sup> The Supreme Court reversed, holding that all “government-authorized invasions of property” are per se takings regardless of their length or economic impact.<sup>39</sup>

*Cedar Point*’s departure from originalism would be understandable if it was mandated by, or even consistent with, precedent. In *Lucas v. South Carolina Coastal Council*, for example, the late Justice Scalia—a dean of the modern originalist movement—rested on precedent to brush aside the reality that use restrictions were not takings under the original understanding of the Takings Clause.<sup>40</sup> With the exception of Justice Thomas, all of the members of the conservative wing have opined that adherence to precedent should sometimes result in departures from the original understanding.<sup>41</sup>

But *Cedar Point*’s departures from existing precedent are stark. Although physical invasions are far more likely to result in takings than restrictions on property use, past decisions were clear that many such invasions are

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32. Sobel Memo, *supra* note 25.

33. *Id.* at 4-5, 9-13.

34. *Id.* at 4, 7-9.

35. *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 529 (9<sup>th</sup> Cir. 2019).

36. *Shiroma*, 923 F.3d at 530.

37. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (discussing factors).

38. *Shiroma*, 923 F.3d at 534.

39. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021).

40. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992).

41. *See, e.g., NEIL M. GORSUCH WITH JANE NITZE AND DAVE FEDER, A REPUBLIC, IF YOU CAN KEEP IT 110, 212-220* (2019) (discussing importance of precedent while opining that “originalism is the method of interpretation most consonant with the Constitution.”); Barrett, *supra* note 2 (describing how originalists can adhere to stare decisis in many cases); Barnett, *supra* note 1 (calling Justice Thomas the only committed originalist on the court because of his disregard for precedent).

simply not takings. See, for example, *Pruneyard v. Robbins*,<sup>42</sup> which future Chief Justice Rehnquist penned the year before future Chief Justice Roberts became his law clerk. *Pruneyard* held that a California decision requiring a shopping mall to permit petitioners to access the mall for free speech purposes did not constitute a taking. Justice Rehnquist wrote that “one of the essential sticks in the bundle of property rights is the right to exclude others,” and that “here there has literally been a ‘taking’ of that right.”<sup>43</sup> Nevertheless, the Court held, the California requirement “clearly does not amount to an unconstitutional infringement of appellants’ property rights under the Taking Clause,” and “the fact that they may have ‘physically invaded’ appellants’ property cannot be viewed as determinative.”<sup>44</sup> The majority in *Cedar Point* distinguished *Pruneyard* on the grounds that the mall was open to the public,<sup>45</sup> and that clearly was important to the application of the *Penn Central* test to the facts. But it was irrelevant to *Pruneyard*’s unanimous agreement that despite the taking of the property owner’s right to exclude, the ad hoc *Penn Central* test rather than a per se test applied.

*Cedar Point* also misrepresents the opinions it relies on for support. The opinion repeatedly cites *United States v. Causby*<sup>46</sup> as supporting its per se rule. *Causby* held that the United States took property by repeatedly flying military aircraft so low over the plaintiff’s property that it resulted in “the destruction of the use of the property as a commercial chicken farm.”<sup>47</sup> The *Causby* Court, however, made clear that without “substantial” damage, such invasions would not be takings: “[f]lights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.”<sup>48</sup>

Another core precedent for the *Cedar Point* majority is *Loretto v. Teleprompter Manhattan CATV Corporation*.<sup>49</sup> Although *Loretto* held that permanent physical invasions were always per se takings, the Court emphasized that temporary entries were not. Instead, the Court explained, its decisions had always recognized a distinction between “a permanent physical occupation, on the one hand, and cases involving a more temporary invasion” and that “[a] taking has always been found only in the former situation.”<sup>50</sup>

But you don’t have to take my word on the Court’s departure from past precedent. You could take the reactions of conservative constitutional and

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42. 447 U.S. 74 (1980).

43. 447 U.S. at 82.

44. 447 U.S. at 84.

45. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2076-77 (2021).

46. 328 U.S. 256 (1946); see *Cedar Point*, 141 S. Ct. at 2073-74 (discussing *Causby*).

47. *Causby*, 328 U.S. at 260.

48. *Causby*, 328 U.S. at 266.

49. 458 U.S. 419 (1982) (cited by *Cedar Point*, 141 S. Ct. at 2072-74).

50. *Loretto*, 458 U.S. at 428.



property scholar Josh Blackman published in the libertarian magazine *Reason*.<sup>51</sup> His article is titled *Cedar Point Nursery v. Hassid Quietly Rewrote Four Decades of Takings Clause Doctrine* and subtitled *For the first time, the 6-3 conservative majority powered a hard-right change in the law*.<sup>52</sup> For Blackman, it is a welcome change—he just objects to the pretense of following past decisions. “In a perfect world,” he opines, “the Court would overrule *Penn Central*.”<sup>53</sup> “Instead,” he laments, “the majority misreads old precedents, and alters wide swaths of the law.”<sup>54</sup>

When takings fans like Blackman and takings skeptics like myself agree, you can trust our conclusions. The Court ran roughshod over past takings decisions. Precedent provides no cover for faint-hearted originalists in *Cedar Point*.

## II. ORIGINAL UNDERSTANDINGS OF THE RIGHT TO ENTER

The *Cedar Point* majority wraps its opinion in historical garb. After reciting the Takings Clause, the opinion declares that:

The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom. As John Adams tersely put it, “[p]roperty must be secured, or liberty cannot exist.” Discourses on Davila, in 6 Works of John Adams 280 (C. Adams ed. 1851). . . . The Court’s physical takings jurisprudence is “as old as the Republic.”<sup>55</sup>

The Court also reinforces the importance of the right to exclude by invoking Sir William Blackstone, whose *Commentaries on the Laws of England* were essential legal reading for the founders: “According to Blackstone, the very idea of property entails ‘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.’”<sup>56</sup>

Although these phrases seem to enlist original understandings in support of the holding, they say nothing about what the Constitution defines as a taking of property. James Madison, the drafter of the Takings Clause, used the word property in his writings to signify “the property which individuals have in their opinions, their religion, their persons, and their faculties . . . in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares,” with

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51. Josh Blackman, *Cedar Point Nursery v. Hassid Quietly Rewrote Four Decades of Takings Clause Doctrine*, REASON (June 25, 2021), <https://reason.com/volokh/2021/06/25/cedar-point-nursery-v-hassid-quietly-rewrote-four-decades-of-takings-clause-doctrine>.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Cedar Point v. Hassid*, 141 S. Ct. 2063, 2071 (2021) (quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002)).

56. *Cedar Point*, 141 S. Ct. at 2072 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES \*2).

no intention that these should be protected by the Takings Clause.<sup>57</sup> Indeed, although covenants restricting use were a property interest traded at the time of the founding, most agree that the founders did not believe government restrictions on use were takings.<sup>58</sup>

This essay, therefore, focuses on how the law-informed public understood rights to enter and exclude in the years leading to and soon after the ratification of the Constitution. This examination reveals that for the founding generation, as for Blackstone, rights to enter in the public interest were part of the idea of property. These rights arose from statute, constitution, custom, and common law. Even beyond these rights, simply entering land without causing damage did not give rise to trespass claims. In the rare cases where owners authorized entries as takings of private property, courts dismissed them out of hand.

The understanding of property at the time of the founding, in other words, wholly contradicts *Cedar Point*'s new per se rule.

#### A. Blackstonian Entry

First, let's take that quote from Blackstone. Blackstone was indeed a key legal source for early American lawyers. But (in Professor Carol Rose's pithy phrase) those who think that Blackstonian property included absolute dominion or exclusion, "have not read much Blackstone."<sup>59</sup> Even Professor Thomas Merrill, whom the majority cites for his argument that the right to exclude is the "sine qua non" of property, agrees that "there is no question that [Blackstone's] statement is hyperbolic."<sup>60</sup> The quote itself, moreover, describes the "imagination" of property, not necessarily its legal reality.<sup>61</sup> Those that read beyond Blackstone's rhetorical flourish will find that "at every turn, on every page, less-than-absolute property rights are explicated, delimited and qualified."<sup>62</sup> Among the qualifications are numerous rights to enter the land of others, protected both by common law and by statute, which Blackstone justifies as consistent with the public interest and individual expectations.

Blackstone describes multiple rights to enter another's land to take

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57. William Michael Treanor, *The Original Understanding of the Takings Clause*, 95 COLUM. L. REV. 782, 837-38 (1995).

58. See *id.* at 782; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992) (agreeing that "our description of the "understanding" of land ownership" prevents certain use restrictions "that informs the Takings Clause is not supported by early American experience").

59. Carol M. Rose, *Canons of Property Talk, or Blackstone's Anxiety*, 108 YALE L.J. 601, 601 (1998).

60. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 753 (1998).

61. Here is the full quote: "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or 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." 2 WILLIAM BLACKSTONE, COMMENTARIES \*2.

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

resources from it.<sup>63</sup> As “a matter of most universal right,” for example, farmers could graze livestock on private waste or fallow lands in a village.<sup>64</sup> This right did not arise from grant, but from the public interest in “the encouragement of agriculture.”<sup>65</sup> The same public interest might lead to commons of piscary (fishing in another’s stream), turbary (digging peats for fuel), and estover (collecting wood).<sup>66</sup>

Blackstone also discusses the long English tradition of rights to cross over private lands.<sup>67</sup> These “ways” included not only familiar rights on government highways and private easements by grant, but also “common ways, leading from a village into the fields,” and broad ways by prescription-based “immemorial us[e].”<sup>68</sup> The United Kingdom has retained a robust tradition of public ways over private land, expanding them by statute in recent decades.<sup>69</sup>

Blackstone further recognized that private innkeepers and other businesses serving travelers not only had to admit all travelers but also could be sued if they excluded them. “[I]f an inn-keeper, or other victualler, hangs out his sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way; and . . . an action on the case will lie against him for damages, if he without good reason refuses to admit a traveler.”<sup>70</sup> Or, in the words of Sir John Holt, Lord Chief Justice of the King’s Bench, “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.”<sup>71</sup>

English law also recognized broad rights in the public to enter tidal rivers to fish. With respect to public rivers, Blackstone wrote, no man could assert exclusive fishery except by royal franchise.<sup>72</sup> In 1215, the Magna Carta prohibited all new grants of exclusive fisheries on such rivers and required removal of fences obstructing public fishing in such rivers.<sup>73</sup> Later statutes required removal even of fences created before 1215.<sup>74</sup> Blackstone’s treatise approved of this destruction of property. Removing the fences, he wrote, corrected the appropriation of “what seems to be unnatural to restrain, the

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63. See 2 WILLIAM BLACKSTONE, COMMENTARIES \*33-34.

64. *Id.* at 33.

65. *Id.*

66. *Id.* at 34.

67. 2 WILLIAM BLACKSTONE, COMMENTARIES \*35.

68. *Id.* at \*35-36.

69. See John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 NEB. L. REV. 739, 769-77 (2011) (discussing the National Parks and Access to the Countryside Act of 1949 and Countryside and Rights of Way Act of 2000 in England, and the Land Reform (Scotland) Act of 2000).

70. 3 WILLIAM BLACKSTONE, COMMENTARIES \*166.

71. *Lane v. Cotton* (1701) 88 Eng. Rep. 1458, 1464-65.

72. 2 WILLIAM BLACKSTONE, COMMENTARIES \*39.

73. *Id.*

74. *Id.*

use of running water.”<sup>75</sup>

Other English treatises made clear that the public right to fish included the right to cross over private land to access the water. In the 1660s, Sir Matthew Hale declared in his celebrated *De Jure Maris* that “the common people of England have a regular liberty of fishing in the seas or creeks or arms thereof, as a publick common of piscary, and may not without injury to their right be restrained of it.”<sup>76</sup> The public therefore had a right of passage over such waters: although submerged and tidal lands “might be a private man’s freehold, yet it is charged with a publick interest of the people which may not be prejudiced or damnified.”<sup>77</sup> These rights were a product of statute: beginning with the Magna Carta, England had enacted “numerous statutes for the regulation and preservation of them.”<sup>78</sup> Property owners who built fish weirs or traps on their submerged lands could have them torn down as public nuisances.<sup>79</sup> Even where owners had a grant of exclusive fishery, others had the right to dock boats on their banks absent evidence of abuse of the right.<sup>80</sup>

Despite *Cedar Point*’s invocation of Blackstone, in other words, Blackstonian property reflects no absolute right to exclude. Instead, individuals had the right to enter private property for many different purposes. Sometimes this was because the particular business of the property owner created an implied obligation, like the innkeeper’s duty to serve. Sometimes it was to achieve goals of society writ large, like the right to graze on fallow land “for the encouragement of agriculture.”<sup>81</sup> Sometimes it was through statutes vindicating the rights of the public, as the Magna Carta and later statutes protected public rights to fish.<sup>82</sup> While total exclusion might “strike[] the imagination” of Blackstone’s Englishman, the legal reality was far different.

### *B. Entry and American Liberty*

Whatever Blackstonian property might be, English law is not American law, and the U.S. Constitution deliberately included greater protections for property than England guaranteed. But early American law enshrined even greater rights to enter private land than Blackstone recognized. When those rights were challenged, Americans—and often courts—defended them as reflections of distinctly American liberties and interests.

The rights to enter catalogued here thrived at several periods relevant to

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75. *Id.*

76. Matthew Hale, *De Jure Maris*, reprinted in STUART MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 377 (1888).

77. *Id.* at 404-05.

78. JOSEPH CHITTY, A TREATISE ON THE GAME LAWS AND OF FISHERIES 245-46 (1812).

79. *Id.* at 244.

80. *Id.* at 269-75.

81. 2 WILLIAM BLACKSTONE, COMMENTARIES \*33-34.

82. *Id.* at \*39-40.

original intent.<sup>83</sup> They originate in the seventeenth century, when the colonies first began to sketch the unique outlines of American law. They flourished and were captured in statutes, cases, and state constitutions in the period around drafting and ratification of the U.S. Constitution. State courts and legislatures defended and occasionally expanded these rights in the 1850s and 1860s, suggesting that the generation that ratified the Fourteenth Amendment did not consider such entries violations of constitutional property rights. Although states curtailed some of these rights to enter in the latter part of the nineteenth century, history shows they did so not to protect constitutional property rights, but instead to react to changing economic interests, protect large businesses, and undermine racial equality.

(1) *Early American Law Restricted Challenges to Entry to Land*

Although Americans adopted much of English common law, they insisted on their right to depart from it to serve the needs of their new country. Early American trespass law provided no general right to exclude, requiring damage to land or taking of valuable resources to give rise to trespass actions. Most states and colonies even required dismissal of trespass suits and payment of the defendant's costs where the defendant claimed the trespass was inadvertent and offered to pay damages. Statutes of limitations for suits seeking recovery or ejection were also often far shorter than they were in England, allowing entries of dubious legality to quickly ripen into full title. These limitations reflect a sense that the public was better served by protecting those who entered and used land over those with formal title.

a. *Entry without Damage Was Not a Trespass*

Before *Cedar Point*, takings challenges to temporary entries to land were evaluated under the multifactor *Penn Central* test that considers whether the entry damaged the owners' economic interests.<sup>84</sup> *Cedar Point*, however, declares that government-authorized entries take property even if they cause no economic damage. This departs from the understanding of trespass when

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83. Originalist interpretation in the Court has not settled on a fixed methodology, e.g., Randy Barnett & Evan Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 *GEO. L.J.* 1, 7-10 (2018) (describing need for a "unified theory" of originalism), and judicial invocations of history in interpretation of the Bill of Rights have turned to legal understandings at multiple times. Such invocations most frequently focus on the time of drafting and ratification of the provision at issue (here, 1791), but often turn to colonial and early English materials to shed light on the understanding at that time. Where the question is the application of the Bill of Rights to states, courts sometimes also consider the understanding of that right at the adoption of the Fourteenth Amendment, which (most believe) incorporated much of the Bill of Rights against states. *McDonald v. Chicago*, for example, turns to all four potential sources of evidence: early English and colonial, ratification of the Bill of Rights, and ratification of the Fourteenth Amendment. 561 U.S. 742, 768-73 (2010).

84. See, e.g., *Arkansas Game and Fish Com'n v. U.S.*, 568 U.S. 23, 31-32, 38-39 (2012) (noting that aside from "permanent physical occupation of property" and "a regulation that permanently requires a property owner to sacrifice all economically beneficial uses of his or her land . . . takings claims turn on situation-specific factual inquiries" and time, foreseeability, and extent of interference with property were all factors in determining whether repeated flooding constituted a taking).

the Constitution was enacted.

Temporary entry to land without damage was not a trespass under early American law. A comprehensive study of eighteenth-century trespass statutes by legal scholar Brian Sawers found that the statutes only applied to those who stole or damaged the landowner's property or otherwise caused a particular harm after entry.<sup>85</sup> Between 1723 and 1806, Connecticut, New Hampshire, Vermont, Pennsylvania, and New York all enacted laws declaring it a trespass to log on another's land without permission.<sup>86</sup> The colonies, for example, generally provided that entry by livestock was only a trespass if the landowner had a "good and sufficient" fence to keep them out or if the entry was by animals considered particularly destructive, like swine and "unruly" cattle.<sup>87</sup> But if cattle damaged unfenced land, the landowner could not recover damages.<sup>88</sup> Other trespass statutes were more idiosyncratic. New Hampshire, for example, sought to restrain "sundry evil minded persons" by declaring it a trespass to settle on unclaimed state lands in 1778 and made it a trespass to enter a saltmarsh and remove flatsweed without the landowner's permission in 1794.<sup>89</sup> Sawers concludes, "[n]one of the colonial or early Republic statutes proscribed entering private land without permission. None of these statutes challenged or modified the distinctively American common law rules that entering open land without permission was not a trespass. Instead, the statutes penalized impositions on the landowner's rights much greater and more severe than merely crossing private land."<sup>90</sup>

Early trespass decisions also reveal none arising from entry to land alone.<sup>91</sup> Of the 409 reported cases using the word "trespass" between 1701 and 1801, most reflect the old sense of "trespass on the case," a writ encompassing many torts, while others were disputes over ownership of land.<sup>92</sup> The three cases that arose from entry to land all involved not only entering land but taking something of value, whether mussels, timber, or

85. See Brian Sawers, *Original Misunderstandings: The Implications of Misreading History in Jones*, 31 GA. ST. U. L. REV. 471, 499 (2015).

86. *Id.* at 499-501.

87. See, e.g., *The Laws and Liberties of Connecticut Colonie* (Oct. 1672), reprinted in *LAWS OF CONNECTICUT: AN EXACT REPRINT OF THE ORIGINAL EDITION OF 1673*, at 24 (Brimley ed., 1865); *An Act for Regulating Cattle, Corn-Fields, and Fences* (May 1718), *ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF NEW HAMPSHIRE, WITH SUNDRY ACTS OF PARLIAMENT* 121-22 (Fowle 1771); *An Act for Regulating Fences* (Mar. 1713), reprinted in *SAMUEL NEVILL, ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW-JERSEY, FROM THE TIME OF THE SURRENDER OF THE GOVERNMENT IN THE SECOND YEAR OF THE REIGN OF QUEEN ANNE, TO THIS PRESENT TIME* 209 (Bradford 1752).

88. *Studwell v. Ritch*, 14 Conn. 292, 295 (1841); *Cattel, Cornfields & Fences* (1642), reprinted in *BOOK OF THE GENERAL LAWEES AND LIBERTYES CONCERNING THE INHABITANTS OF MASSACHUSETTS* 8 (1648) ("Provided also that no man shall be liable to satisfie for damage done in any ground not sufficiently fenced except it shall be fore damage done by swine or calves under a year old, or unruly cattle which will not be restrained . . .").

89. Sawers, *supra* note 85, at 500.

90. *Id.* at 503.

91. *Id.* at 491-92.

92. *Id.*

honey.<sup>93</sup>

Later cases confirm the limited nature of trespass at early American law. In an 1818 case, for example, the plaintiff's attorneys argued that the English rule was that "every entry on the lands of another is a trespass, and the least injury, as treading down grass, and the like, will support it."<sup>94</sup> The South Carolina high court rejected the argument, finding "there must be some actual injury to support the action [and] it will not be pretended that riding over the soil is an injury."<sup>95</sup> Similarly, in 1841, the Connecticut Supreme Court rejected a trespass claim alleging damage by cattle to the plaintiff's unfenced land.<sup>96</sup> The court agreed that "according to the English common law, the defendant's plea" that the land was unfenced "would be insufficient," but "such is not the law of Connecticut."<sup>97</sup>

Even if the defendants caused damage, state and colonial statutes required certain trespass actions to be dismissed. These statutes typically provide that in actions for trespass *quare clausum fregit* (unprivileged entry to another's property) where the defendant (1) disclaimed title or right to enter, (2) claimed the trespass was involuntary or negligent, and (3) offered amends for the damages, the plaintiff would be "clearly barred from the said actions, and all other suit concerning the same."<sup>98</sup> As one Massachusetts treatise described it, these statutes deviated from the common law's distaste for trespassers.<sup>99</sup> Defendants satisfying these conditions could even demand costs from the plaintiffs.<sup>100</sup>

Early American law, in other words, contradicts the notion that simply entering land violated the owner's property rights or was worthy of adjudication by the court.

*b. The Time to Challenge Entry to Land Was Often Shorter Than in England*

Many American states and colonies also sharply limited how long one could challenge unprivileged entry to land. Such statutes of limitations are

93. *Id.*; see also John T. Farrell, *Introduction to SUPERIOR COURT DIARY OF WILLIAM SAMUEL JOHNSON, 1772-1773*, at xxix (Farrell ed., 1942) (noting that trespass cases before Connecticut superior court in 1772-1773 included two for false imprisonment, one where defendant entered and destroyed an acre and a half of good grass, and one where defendant carried away mown grass from plaintiff's salt meadow).

94. *McConico v. Singleton*, 9 S.C.L. (2 Mill) 244, 352-53 (1818).

95. *Id.*

96. *Studwell v. Ritch*, 14 Conn. 292, 295 (1841)

97. *Id.*

98. See Act of Feb. 25, 1819, No. 2, § 22, reprinted in REVISED CODE OF THE LAWS OF VIRGINIA 493-94 (Ritchie 1819); Limitation of Actions—1767 (Mar. 26, 1767), reprinted in DIGEST OF THE LAWS OF THE STATE OF GEORGIA 317 (Oliver H. Prince ed., 1822); An Act concerning old titles in lands; and for limitation of actions and avoiding suits at law (1715), reprinted in LAWS OF THE STATE OF NORTH-CAROLINA 97 (Henry Potter et al. eds, 1821); An Act for Limitation of Actions (1712-1713), reprinted in STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 13 (Busch 1896).

99. WILLIAM CHARLES WHITE, COMPENDIUM AND DIGEST OF THE LAWS OF MASSACHUSETTS 1248 (1811).

100. *Id.*

significant because, under the doctrine of adverse possession, “[t]he lapse of the time limited by such statutes not only bars the remedy, but it extinguishes the right, and vests a perfect title in the adverse holder.”<sup>101</sup> The shortest statute of limitations for recovery of land or entry to land under English law was twenty years, and periods of thirty or sixty years were available for certain actions.<sup>102</sup> Some American jurisdictions adopted similar periods, but others adopted shorter ones. Between 1646 to 1765, for example, Virginia cut off any suits for land after five years of “peaceable possession.”<sup>103</sup> In the eighteenth and early nineteenth centuries, North Carolina,<sup>104</sup> Georgia,<sup>105</sup> Tennessee,<sup>106</sup> and Mississippi<sup>107</sup> all limited suits for recovery or title to land to seven years. In the later nineteenth century, western states like California, Arizona, and Montana adopted five-year limits.<sup>108</sup>

These statutes reflect policy preferences for those who entered and used land over those with formal title to it. The Virginia colony, for example, feared that if absentee owners could claim the land, it “must in a short time leave the greatest part of the country unseated and unpeopled.”<sup>109</sup> North Carolina’s 1712 statute decried those with royal patents who had “deserted” their lands and failed to perform their patents or pay their quit-rents.<sup>110</sup> In Western states, public opinion favored squatters over absentee landlords who resisted local expenditures and failed to improve their lands.<sup>111</sup> Local governments responded with shorter statutes of limitation, foreclosure for failure to pay taxes, color of title statutes, and other measures to facilitate transfers from title owners to trespassing occupiers.<sup>112</sup>

When the U.S. Supreme Court confronted these doctrines, it held that it

101. See *Leffingwell v. Warren*, 67 U.S. 599, 605 (1862).

102. Blackstone stated that the right of possession passed after thirty years adverse possession, and that title passed after sixty years. 3 WILLIAM BLACKSTONE, COMMENTARIES \*199. Blackstone apparently ignored other English statutes which limited causes of action for possession of land to twenty years. *Braue v. Fleck*, 127 A. 1, 9 (N.J. 1956) (discussing English law).

103. See Act LXXII (Oct. 6, 1646), reprinted in 2 HENING, STATUTES OF VIRGINIA 97 (1823); Act of Feb. 25, 1819, No. 1, § 3, reprinted in REVISED CODE OF THE LAWS OF VIRGINIA 488 (Ritchie 1819) (“Former acts of limitation of real actions . . . by al which, the limitationo f all actions for lands for five years only.”).

104. An Act concerning old titles in lands; and for limitation of actions and avoiding suits at law (1715), reprinted in LAWS OF THE STATE OF NORTH-CAROLINA 97 (Henry Potter et al. eds, 1821).

105. Limitation of Actions—1767 (Mar. 26, 1767), reprinted in DIGEST OF THE LAWS OF THE STATE OF GEORGIA 317 (Oliver H. Prince ed., 1822).

106. Act of Nov. 16, 1819, §§ 1-2, 1819 Tenn. Pub. Acts 53 (limiting right of entry and suit for recovery of land to seven years).

107. Act of Feb. 24, 1844, §§ 1-3, 1844 Miss. Laws 101-03 (limiting cause of action for land and right of entry to seven years, and providing for adverse possession after ten).

108. Act of Apr. 22, 1850, ch. II, §§ 6-10, 1850 Cal. Stats. 344; FIRST LEGISLATIVE ASSEMBLY OF THE TERRITORY OF ARIZONA, THE HOWELL CODE ch. 35, §§ 4-10, at 254 (1864); Act of Feb. 21, 1879, tit. 3, ch. 2, §§ 29-36, 1879 Mont. Laws 45-47.

109. Act LXXII (Oct. 6, 1646), reprinted in 2 HENING, STATUTES OF VIRGINIA 98 (1823).

110. An Act concerning old titles in lands; and for limitation of actions and avoiding suits at law (1715), reprinted in LAWS OF THE STATE OF NORTH-CAROLINA 97 (Henry Potter et al. eds, 1821).

111. Eduardo Peñalver & Sonia Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1109 (2007).

112. *Id.* at 1110.



must respect the state law.<sup>113</sup> *Leffingwell v. Warren* concerned a Wisconsin land transferred via color of title under an allegedly flawed tax foreclosure.<sup>114</sup> The Court believed the equities of the case were “strong,” as the plaintiff “[w]ithout any fault on his part . . . has been divested of the title to his land.”<sup>115</sup> “But,” the Court found, “our duty is to apply the law—not to make it. If this statute be unwise or unjust the remedial power lies with the Legislature of the State, and not with this Court.”<sup>116</sup> The modern Court might benefit from this sense of the balance between state and federal regulation of property law.

(2) *American Law Adopted and Extended Affirmative Rights to Enter Private Land*

Early American law recognized affirmative rights to enter private property that matched and went beyond those in English law. From rights to hunt and graze on unfenced land, to rights to enter public businesses, to official rights to enter for inspection or survey, the law reflects robust powers to enter land in the public interest.

*a. Rights to Enter Unfenced Land*

A particularly striking example of a distinctly American right is the public’s right to hunt and graze on private unfenced land. In 1788, when the Founders drafted and adopted the U.S. Constitution, “the entire country was open range.”<sup>117</sup> Indeed, until the mid-nineteenth century, “A full right to exclude was thus the exception for private lands, not the norm.”<sup>118</sup> Far from a violation of rights, these entries were considered part of the fundamental rights of Americans.<sup>119</sup>

*i. Hunting*

When early Americans described their country as a “land of liberty,” they meant that their citizens had freedom to do things not possible in England.<sup>120</sup> They invoked hunting on unenclosed lands as a core example: “[i]n England, a person needed to own land and possess wealth in order to hunt; not so in America, where all citizens possessed the positive liberty to hunt

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113. See *Leffingwell v. Warren*, 67 U.S. 599 (1862).

114. *Id.*

115. *Id.* at 606.

116. *Id.*

117. Brian Sawers, *Property Law as Labor Control in the Postbellum South*, 33 L. & HIS. REV. 351, 352 (2015).

118. ERIC T. FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON OWNERSHIP OF LAND 30-31 (2007).

119. See *id.* at 46-47.

120. *Id.* at 51.

on open lands everywhere.”<sup>121</sup>

The right to hunt on unenclosed private lands was enshrined in early constitutional law. Pennsylvania’s 1776 Constitution guaranteed the right of all to hunt “on the lands they hold, and on all other lands therein not inclosed.”<sup>122</sup> Vermont’s 1777 Constitution does the same,<sup>123</sup> and its current constitution still guarantees the right.<sup>124</sup> Vermont’s constitution is particularly significant, because Vermont was the first state to create a constitutional right to compensation for taking of property.<sup>125</sup> The Anti-Federalist objectors to the U.S. Constitution also proposed including a right to hunt on all lands “not inclosed . . . without being restrained therein by any laws to be passed by the legislature of the United States.”<sup>126</sup> Again, this is significant. Anti-Federalist concerns about government imposition on the rights of the people led to the Bill of Rights, and with it, the Takings Clause.<sup>127</sup> For the founders most concerned about protection of property, in other words, temporary entries for public purposes were perfectly consistent with property rights.

With or without constitutional guarantees, courts embraced hunting on unenclosed lands as a distinctly American right. Blackstone believed that English law initially restricted the right of hunting to the king, extending it only grudgingly to those who hunted on their own lands.<sup>128</sup> American courts recognized this and celebrated their departure from the Blackstonian baseline. In 1818, the Constitutional Court of Appeals of South Carolina firmly rejected English law in a trespass claim against a hunter, opining that it “never yet entered the mind of any man” that the right to hunt on unenclosed lands could “be defeated at the mere will and caprice of an individual” owner.<sup>129</sup> A 1906 federal court in New Hampshire similarly noted that “at the date of the settlement of New England the [English] ‘forest laws, the game laws, and the laws designed to secure several and exclusive fisheries,’ . . . were regarded here as oppressive,” and “contrary to the fundamental rules of law” in “excluding the rest of the community” from benefitting from fish and game.<sup>130</sup>

In 1922, Justice Oliver Wendell Holmes approved this tradition in *McKee*

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121. *Id.*

122. PA. CONST. of 1776, § 43.

123. VT. CONST. of 1777, ch. 2, § 39 (guaranteeing inhabitants the right to hunt in season “on the lands they hold, and on other lands (not enclosed)”).

124. VT. CONST. of 1777, ch. 2, § 67.

125. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 790 (1995).

126. *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents* prop. 8 (Dec. 12, 1787), [www.loc.gov/item/90898134](http://www.loc.gov/item/90898134).

127. Matthew P. Harrington, *Regulatory Takings and the Original Understanding of the Takings Clause*, 45 WM. & MARY L. REV. 2053, 2063-64 (2004).

128. 1 WILLIAM BLACKSTONE, COMMENTARIES \*263-65.

129. *McConico v. Singleton*, 9 S.C.L. (2 Mill) 244, 352-53 (1818).

130. *Percy Summer Club v. Astle*, 145 F. 53 (C.C.D.C.N.H. 1906)

*v. Gratz*.<sup>131</sup> The year is significant—in the same term, Justice Holmes’ opinion in *Pennsylvania Coal v. Mahon* created the doctrine of regulatory takings.<sup>132</sup> Nevertheless, *McKee* refused to hold it was trespass “as [a] matter of law” to enter private land, harvest mussels from a marked bed, and take the shells to make buttons because American practice had mitigated the “strict rule of the English common law” prohibiting hunting on private property.<sup>133</sup>

### *ii. Grazing*

Early American law also recognized broad public rights to enter unfenced land to graze livestock and forage.<sup>134</sup> As discussed above, most of the original colonies and states had laws providing that entry by livestock to unfenced lands was not a trespass. And as with the right to hunt, courts explicitly rejected application of the English law of trespass to such entries. In the words of the Mississippi Supreme Court, the English common law rule was “inapplicable to the condition and circumstances of the people of those States, and repugnant to the custom and understanding of the people, from their first settlement down to the present time.”<sup>135</sup> The U.S. Supreme Court affirmed this departure from the common law in 1890, rejecting an action for damages from sheep herds grazing on private unfenced lands interspersed with lands in the public domain. The English principle, the Court declared, would violate the “custom of nearly a hundred years, that the public lands of the United States . . . shall be free to the people who seek to use them, where they are left open and uninclosed.”<sup>136</sup>

The statutes of Southern states went further, making landowners liable for damages to livestock that wandered onto their unfenced land.<sup>137</sup> In the 1850s and 1860s, railroads sought to avoid liability by invoking English common law to argue that the livestock were trespassing. Courts vehemently rejected this defense. In the words of the Georgia Supreme Court:

Such Law as this would require a revolution in our people’s habits of thought and action. A man could not walk across his neighbor’s unenclosed land, nor allow his horse, or his hog, or his cow, to range in the woods nor to graze on the old fields, or the ‘wire grass,’ without subjecting himself to damages for a trespass. Our whole people, with

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131. 260 U.S. 127 (1922).

132. 260 U.S. 393 (1922).

133. *McKee*, 260 U.S. at 136.

134. FREYFOGLE, *supra* note 118, at 33.

135. *Vicksburg & Jackson Railroad Co. v. Patton*, 31 Miss. 156, 184-85 (1856); *see also* Studwell v. Ritch, 14 Conn. 292, 295 (1841).

136. *Buford v. Houtz*, 133 U.S. 320, 326 (1890).

137. *See, e.g.*, Act of Nov. 19, 1771, ch. 6, § 4, *reprinted in* JAMES DAVIS, COMPLETE REVISAL OF ALL THE ACTS OF ASSEMBLY, OF THE PROVINCE OF NORTH-CAROLINA, NOW IN FORCE AND USE 499, 500 (1773); Act of Oct. 27, 1748, ch. 20, § 4, *reprinted in* ACTS OF ASSEMBLY, NOW IN FORCE, IN THE COLONY OF VIRGINIA 308-09 (1752).

their present habits, would be converted into a set of trespassers. We do not think that such is the Law.<sup>138</sup>

The Mississippi Supreme Court agreed that under a policy “sanctioned by strong reasons of public convenience,” unfenced lands “have been understood, from the early settlement of the State, to be a common of pasture.”<sup>139</sup> The Alabama Supreme Court similarly declared that since its founding, Alabama statutes were “in direct repugnance to the common law on this subject, and to the extent of this repugnance repealed it.”<sup>140</sup>

*Cedar Point* condemned the California regulation because it created a “formal entitlement to enter Growers’ land.”<sup>141</sup> Yet from their earliest statutes, these states and colonies created such “formal entitlement[s]” in the public. These statutes, created for “public convenience,”<sup>142</sup> became part of the American legal tradition. *Cedar Point*, by curtailing legislative authority to authorize temporary entries, implicitly rejects that tradition.

### *iii. Race and the End of Entry*

States sharply limited the open range in the latter nineteenth century, but it was not to protect individual rights.

As railroads crossed the countryside, they advocated for expansion of trespass laws to avoid the nuisance of wandering livestock and potential liability.<sup>143</sup> Market-oriented growers joined them, eager to be relieved of costs of fencing the land.<sup>144</sup> As fewer people made their living from subsistence farming, they offered less resistance to control by large landowners.<sup>145</sup>

Some states expanded exclusion specifically to limit individual liberty. Southern states closed the range after the Civil War to maintain White control over Black workers.<sup>146</sup> Plantation owners needed Black labor to work their farms.<sup>147</sup> But they complained that free Black people were unwilling to work year-round for low wages if they could support themselves by hunting, grazing a few livestock, and foraging in the open range.<sup>148</sup> States responded by expanding trespass laws and closing the range.

Between 1865 and 1866, Louisiana, Georgia, South Carolina, North Carolina, and Alabama enacted their first general statutes criminalizing

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138. *Macon & W. R.R. Co. v. Lester*, 30 Ga. 911, 914 (1860).

139. *Vicksburg*, 31 Miss. at 185.

140. *Nashville & Chattanooga R.R. Co. v. Peacock*, 25 Ala. 229, 232 (1854).

141. 141 S. Ct. 2063, 2079 (2021).

142. *Vicksburg*, 31 Miss. at 185.

143. FREYFOGLE, *supra* note 118, at 45.

144. *Id.*

145. *Id.* at 44.

146. *Sawyers*, *supra* note 85.

147. *Id.* at 356.

148. *Id.* at 357-58.

trespass on enclosed or unenclosed lands.<sup>149</sup> Texas, Mississippi, and Tennessee enacted statutes forbidding hunting on unenclosed lands if landowners had posted signs forbidding entry.<sup>150</sup> Four southern states also criminalized hunting in majority-Black counties, leaving hunting in majority-White counties untouched.<sup>151</sup>

Restricting grazing rights took longer, in part because lower-income Whites dependent on the range fiercely resisted it.<sup>152</sup> States responded by closing the range selectively. Alabama, South Carolina, Mississippi, and Arkansas began closing the open range immediately after the Civil War, starting with majority-Black counties.<sup>153</sup> In Georgia, White and Black voters successfully resisted initial attempts to close the range; by 1889, however, Georgia had closed the range throughout its Black Belt, leaving it open in all but three majority-White counties.<sup>154</sup>

The right to hunt on unenclosed lands still shapes U.S. property law. A 2004 survey found that twenty-nine states still allow it unless the owner had posted a written prohibition.<sup>155</sup> But the expansive right that formerly symbolized America as a “land of liberty” is today a shadow of its former self.

*b. Rights to Enter Submerged and Waterfront Land*

Early American law embraced the English right to access riparian property and extended it. From the earliest colonial laws to today, public riparian rights have been regarded as a “title paramount to the title of” individual property owners.<sup>156</sup>

The right to fish, fowl, and navigate bodies of water is preserved in the earliest colonial laws. Massachusetts Bay’s Liberties Common (1641-1647), for example, sandwiches public rights in bays, coves, tidal rivers, and “Great Ponds” between the right to petition and the right to travel.<sup>157</sup> These common liberties included that no proprietor could “stop or hinder the passage of boates or other vessels, in or through any sea, creeks or coves,” and that all might “fish and fowle” on the Great Ponds, and “pass and repass on foot through any man’s propriety for that end” so long as they did not damage the owner’s corn or meadow.<sup>158</sup> The founding documents

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149. *Id.* at 361.

150. *Id.* at 362.

151. *Id.* at 365.

152. *Id.* at 368.

153. *Id.* at 370-71.

154. *Id.* at 372-73.

155. Mark R. Signon, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549, 560-61 (2004).

156. *See Lay v. King*, 5 Day 72, 77 (Conn. 1811).

157. THE COLONIAL LAWS OF MASSACHUSETTS, REPRINTED FROM THE EDITION OF 1660, WITH THE SUPPLEMENTS TO 1672, CONTAINING ALSO, THE BODY OF LIBERTIES OF 1641, at 170 (William H. Whitmore ed., 1889).

158. *Id.*

of Southhampton, New York, similarly guaranteed that “ffreedom of fishing, fowling and nauigation shall be common to all within the bankes” of all “seas, rivers, creekes, or brooks howsoeuer bounding or passing through [private] grououde.”<sup>159</sup> In *Martin v. Waddell’s Lessee* in 1842, the U.S. Supreme Court endorsed “the public and common right of fishery in 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.”<sup>160</sup>

Some states went further than the English common law, rejecting trespass actions against those who had been granted exclusive fisheries, who fished on non-tidal waters, or even fished on non-navigable waters. Reviewing New Hampshire law, for example, the federal court in *Percy Summer Club v. Astle* found that “the interest of the public at large,” created a “natural presumption . . . in favor of free fishing and free fowling in the nonnavigable rivers, ponds, and lakes in New Hampshire.”<sup>161</sup> In 1821 in *Arnold v. Mundy*, the New Jersey Supreme Court famously held the state could not grant an exclusive fishery in submerged lands; divesting “the citizens of their common right” the court ruled, “would be contrary to the great principles of our constitution, and never could be borne by a free people.”<sup>162</sup> As early as 1810, the Pennsylvania Supreme Court rejected the English common law principle that riparian owners had exclusive fisheries in freshwater rivers unaffected by the tide.<sup>163</sup> Declaring that “the uniform idea has ever been, that only such parts of the common law as were applicable to our local situation have been received in this government,” the court denied a landowner’s trespass claim against defendants fishing from an island in the middle of the Susquehanna River.<sup>164</sup>

By the end of the nineteenth century, American law broadly accepted public rights in submerged and waterfront land that went beyond those recognized under English law. While some states initially rejected the extension of public rights to non-tidal navigable waters,<sup>165</sup> the Supreme Court accepted the principle in 1870,<sup>166</sup> and so it remains. And although the New Jersey Supreme Court once backed away from the public trust principle of *Arnold v. Mundy*,<sup>167</sup> the U.S. Supreme Court adopted it in 1892, spurring a rebirth of its popularity.<sup>168</sup> Recent decades have seen a new wave

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159. *The Disposall of the Vessell* 4 (1639), reprinted in *FIRST BOOK OF RECORDS OF THE TOWN OF SOUTHAMPTON* (John H. Hunt ed., 1874).

160. 41 U.S. 367, 414 (1842).

161. 145 F. 53, 64 (C.C.D.N.H. 1906).

162. *Arnold v. Mundy*, 6 N.J.L. 1, 78 (1821).

163. *Carson v. Blazer*, 2 Binn. 475, 477-78 (Pa. 1810).

164. *Id.* at 477-78, 483-84.

165. See *Adams v. Pease*, 2 Conn. 481 (1818).

166. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

167. *Gough v. Bell*, 22 N.J.L. 441, 457, 467, 473 (1850), *aff’d*, 23 N.J.L. 624 (1852).

168. *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387 (1892); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 735-740.

of attention to the public trust in submerged and waterfront lands.<sup>169</sup> New Jersey and other states have lately extended access to dry sand beaches and recreational activities under various legal doctrines.<sup>170</sup> Public access to the waterfront and submerged lands retains a powerful hold on American law.<sup>171</sup>

*c. Rights to Enter Public Businesses*

Early American law also adopted the English right of the public to enter businesses serving the public. Unlike the relative stability of riparian rights, this right eroded after the Civil War to permit exclusion of free Black Americans. Not until the 1960s did Congress prohibit racial exclusions, but the “right to refuse service to anyone” is a continuing legacy of the erosion of the common law right.

In the antebellum period, states followed the English common law doctrine that common carriers were obliged to serve all who acted civilly on the premises.<sup>172</sup> This doctrine arguably applied not just to places of public accommodation, like railways and inns, but to all businesses that held themselves out as open to the public.<sup>173</sup> As Chancellor James Kent explained in his *Commentaries on American Law*, common carriers “are bound to do what is required of them in the course of their employment . . . and if they refuse without some just ground, they are liable to an action.”<sup>174</sup> Chancellor Kent included innkeepers, farriers, porters, and ferryman in this rule.<sup>175</sup> In an 1837 case, for example, the New Hampshire Supreme Court held that an innkeeper could not exclude a stagecoach driver for soliciting passengers in the public rooms.<sup>176</sup> The court declared “[t]here seems to be no good reason why the landlord should have the power to discriminate in such cases . . . any more than he has the right to admit one traveller [sic] and exclude another, merely because it is his pleasure.”<sup>177</sup> Although many common carriers excluded African Americans as a matter of practice, the

169. Rose, *supra* note 168, at 730.

170. See *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 360-61 (N.J. 1984); *Raleigh Avenue Beach Ass’n v. Atlantis Beach Club, Inc.*, 879 A.2d 112 (N.J. 2005) (public trust creates access for recreational purposes); *State ex rel. Thornton v. Hay*, 462 P.2d 671, 674 (Or. 1969) (access to beachfront property by long custom); *Diamond v. State Bd. of Land & Nat. Res.*, 145 P.3d 704, 712 (Haw. 2006) (public access to a “stable vegetation line” under Hawaiian custom).

171. Rose, *supra* note 168, at 730.

172. See 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 464-65 (1827) (explaining that innkeepers “are bound to do what is required of them in the course of their employment . . . and if they refuse without some just ground, they are liable to an action.”); see also *id.* at 445, 499 (including common carriers, innkeepers, farriers, porters, and ferrymen in this rule); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (noting that public accommodations statutes “but codify the common-law innkeeper rule which long predated the Thirteenth Amendment.”).

173. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 *Nw. U. L. Rev.* 1283, 1292-93 (1996).

174. 2 KENT, *supra* note 172, at 464-65.

175. *Id.* at 445, 499.

176. *Markham v. Brown*, 8 N.H. 523 (1837).

177. *Id.* at 529-30.

first cases challenging such exclusions held they were inconsistent with the common law.<sup>178</sup> In the first years after the Civil War, twenty-four states enacted statutes affirming the public right to be served regardless of race.<sup>179</sup>

The common law right faded with the end of Reconstruction. Some states ended businesses' obligation to serve in reaction to the Civil Rights Act of 1875, which banned racial discrimination in places of public accommodation.<sup>180</sup> A month after the statute's passage, Tennessee enacted a statute declaring, "[t]he rule of the common law giving a right of action to any person excluded from any hotel, or public means of transportation, or place of amusement is hereby abrogated," and no owner was under obligation to admit "any person whom he shall for any reason whatever choose not to entertain."<sup>181</sup> The same year, a Delaware statute stipulated that "[n]o keeper of an inn, tavern, hotel, or restaurant, or other place of public entertainment or refreshment of travelers . . . shall be obliged," to serve "persons whose reception or entertainment . . . would be offensive to the major part of his customers, and would injure his business."<sup>182</sup> Other jurisdictions narrowed the right to enter by judicial decisions. Courts in Massachusetts and Iowa, for example, held for the first time that the right of accommodation did not apply to places of amusement in cases involving Black patrons.<sup>183</sup>

"Separate but equal" measures reduced the need for explicit rejections of the common law rule, but *Brown v. Board of Education*<sup>184</sup> and sit-ins by civil rights activists triggered a new wave of exclusion statutes. In 1954, Louisiana repealed its Reconstruction-era act that prohibited refusals to admit anyone in a public inn, hotel, or public resort, and conditioned business licenses on providing service regardless of race.<sup>185</sup> A 1956 Mississippi statute authorized "any public business . . . of any kind whatsoever . . . to refuse to sell to, wait upon or serve any person that the owner, manager or employee of such public place of business does not desire to sell to, wait upon or serve," authorizing a fine or imprisonment for those that refused to leave.<sup>186</sup> Arkansas enacted virtually the same provision in 1959, repealing it only in 2005.<sup>187</sup>

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178. *State v. Kimber*, 3 Ohio Dec. Reprint 197 (Ct. Common Pleas 1859) (holding train conductor liable for assault and battery for evicting mulatto woman from trolley car).

179. Singer, *supra* note 173, at 1374.

180. Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

181. Act of 1875, ch. 130, § 1, *reprinted in* THE CODE OF TENNESSEE 399 (Marshall & Bruce 1884) (now codified at Tenn. Code Ann. §§ 62-7-109, 62-7-110 (2020)).

182. Act of Mar. 25, 1875, § 1, 15 Del. Laws 322 (now codified at Del. Code Ann. tit. 24, § 1501 (2021)).

183. *Bowlin v. Lyon*, 25 N.W. 766 (Iowa 1885); *McCrea v. Marsh*, 78 Mass. (12 Gray) 211 (1858).

184. 347 U.S. 483 (1954).

185. Harold J. Brouillette & Charles A. Reynard, *Index-Digest of Acts of the 1954 Louisiana Legislature*, 15 LA. L. REV. 103, 129 (1954).

186. Act of Feb. 221, 1956, 1956 Miss. Laws 307-08 (now codified at Miss. Code Ann. § 97-23-17).

187. Ark. Code Ann. § 4-70-101, *repealed by* Act of Apr. 11, 2005, 2005 Ark. Acts 1994, § 534.



Congress prohibited racial restrictions on the right to enter public accommodations in the Civil Rights Act of 1964.<sup>188</sup> In rejecting a challenge to congressional authority to enact the measures, the Supreme Court noted that they “but codify the common-law innkeeper rule which long predated the Thirteenth Amendment.”<sup>189</sup> The Court also rejected the claim that the statute unconstitutionally took the plaintiff’s right to exclude in just two sentences. “Neither do we find any merit in the claim that the Act is a taking of property without just compensation. The cases are to the contrary.”<sup>190</sup>

*d. Rights to Enter for Public Purposes*

Early American statutes also frequently authorized public officials and others to enter private property for public purposes. Like the California access regulation, these statutes did not rest on licenses or reciprocal benefits to the property owner but rather the broader public interest. Sometimes this interest arose from the owner’s own actions or business, sometimes it did not. Whatever the justification, courts rejected challenges to these entries as without merit.

Government officials and private persons acting under official authority could enter land to survey it in preparation for exercise of eminent domain.<sup>191</sup> Courts repeatedly found that such entries were not takings unless the surveyors damaged the land. As Justice Baldwin wrote in a Circuit Court opinion, “[a]n entry on private property for the sole purpose of making the necessary explorations for location, is not taking it . . . nothing is taken from him, nothing is given to the company.”<sup>192</sup> The Massachusetts Supreme Court similarly clarified that in takings, the property was “permanently subjected to a servitude,” but temporary “interference with the absolute right of the owner of real estate . . . is one of every day’s occurrence; indeed, so common, as to be acquiesced in without remonstrance, or even a question as to the right so to do.”<sup>193</sup> This principle is applied to this day, most recently in a 2015 federal district of West Virginia decision.<sup>194</sup>

States regularly authorized officials to enter private property for other purposes. Such officials could, for example, “enter on board any ship or vessel whatsoever, lying and being in the harbor where such inspector is

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188. 42 U.S.C. § 2000a.

189. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964); *see also* *Bell v. Maryland*, 378 U.S. 226, 255 (1964) (Douglas, J., concurring) (opining that “the good old common law” enshrined in the Fourteenth Amendment, included “[t]he duty of common carriers to carry all, regardless of race, creed, or color”).

190. 379 U.S. at 261.

191. *E.g.*, Act of Apr. 15, 1782, § 7, 1782 Pa. Laws 63.

192. *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. 821, 831 (C.C.N.J. 1830), *see also* *Cushman v. Smith*, 34 Me. 247, 260-62 (1852) (rejecting takings claim).

193. *Winslow v. Gifford*, 60 Mass. (6 Cush) 327, 329-30 (1850).

194. *Klemic v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 673 (W.D. Va. 2015) (Virginia statute authorizing natural gas companies to enter land and survey it for pipelines did not result in a taking).

authorized to inspect.”<sup>195</sup> More idiosyncratically, Connecticut law gave towns “authority, at all times, to enter and inspect” all schools and medical institutions using cadavers.<sup>196</sup> Statutes also permitted entry to enforce civil and criminal law. In 1801, for example, the Northwest Territory authorized officers to “demand admittance, in the day time, into any house or chamber” upon oath or affirmation by any credible person that goods subject to civil attachment were there.<sup>197</sup>

The *Cedar Point* majority inadequately exempted such official entries from its per se rule. The Court, for example, stated that most health and safety inspections would not be takings because the “government conditions the grant of a benefit such as a permit, license, or registration on allowing inspections,” so there was a “rough proportionality” between the benefit and the right of entry.<sup>198</sup> But the statutes authorizing entry to private property were not conditioned on any benefit to the property owner “unless,” in Justice Brandeis’s phrase, “it be the advantage of living and doing business in a civilized community.”<sup>199</sup> For the founding generation, limited rights of entry in the public interest were part of what it meant to own property.

#### CONCLUSION

By holding that all physical invasions of property are per se takings, *Cedar Point v. Hassid* elides the public understanding of property at the time of the founding. Beginning with the original colonies, through the ratification of the Constitution, and well into the nineteenth century, American law embraced rights to enter as part of property itself. These rights might originate in statute, constitution, common law, or custom; they might derive from English legal traditions or respond to new, distinctly American interests and ideologies. But whatever their source, the Americans that drafted and ratified the Takings Clause accepted them as part of their legal heritage. Denying such rights, they opined, would be “inapplicable to the condition and circumstances of the people of those States, and repugnant to the custom and understanding of the people, from their first settlement down to the present time.”<sup>200</sup> They were part of the people’s “liberties common,”<sup>201</sup> and removing them “would be contrary to

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195. See, e.g., 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); see also N.Y. Rev. Stat., ch. 17, art. 10, § 185(6) (Duer 1846) (allowing inspectors to enter the vessels to search for hops).

196. Conn. Rev. Stat. § 139 (1849).

197. Acts of the Second General Assembly of the Northwest Territory, ch. 144, § 4 (1802), reprinted in 1 THE STATUTES OF OHIO AND OF THE NORTHWESTERN TERRITORY, ADOPTED OR ENACTED FROM 1788 TO 1833 INCLUSIVE 311 (Chase 1833).

198. 141 S. Ct. at 2079.

199. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922) (Brandeis, J. dissenting).

200. *Vicksburg & Jackson Railroad Co. v. Patton*, 31 Miss. 156, 184-85 (1856); see also *Studwell v. Ritch*, 14 Conn. 292, 295 (1841).

201. THE COLONIAL LAWS OF MASSACHUSETTS, REPRINTED FROM THE EDITION OF 1660, WITH THE SUPPLEMENTS TO 1672, CONTAINING ALSO, THE BODY OF LIBERTIES OF 1641, at 170 (William H.

the great principles of our constitution, and never could be borne by a free people.”<sup>202</sup> Judges also scoffed at the notion that temporary non-damaging entries took property rights.<sup>203</sup> Temporary entries were not even trespasses if the defendant did not damage the land.<sup>204</sup> Even if there was damage, courts might demand costs from plaintiffs who challenged trespasses after offers to pay.<sup>205</sup>

The original understanding of property, in other words, contradicts the notion that a “formal entitlement”<sup>206</sup> to temporarily enter land is always a taking. *Cedar Point v. Hassid* violates this understanding. All is not lost for judges seeking to make good on their originalist commitments. The Court’s exceptions to *Cedar Point*’s per se rule provide an opportunity to affirm limited government-created rights as part of the “background restrictions on property rights.”<sup>207</sup> A non-cynic might even hope that originalist Justices, if they are not (in Justice Amy Coney Barrett’s words) “partisan hacks” but are instead guided by “judicial philosophies,”<sup>208</sup> may take this opportunity.

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Whitmore ed. 1889).

202. *Arnold v. Mundy*, 6 N.J.L. 1, 13 (1821)

203. *See Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. 821, 831 (C.C.N.J. 1830) (“An entry on private property for the sole purpose of making the necessary explorations for location, is not taking it . . . nothing is taken from him, nothing is given to the company.”); *Winslow v. Gifford*, 60 Mass. (6 Cush) 327, 329-30 (1850) (calling such entries “one of every day’s occurrence; indeed, so common, as to be acquiesced in without remonstrance, or even a question as to the right so to do”).

204. WILLIAM CHARLES WHITE, *COMPENDIUM AND DIGEST OF THE LAWS OF MASSACHUSETTS* 1248 (1811).

205. *Id.*

206. *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2080 (2021).

207. *Id.* at 1279-80.

208. Mary Ramsey, *Justice Amy Coney Barrett argues US Supreme Court isn’t ‘a bunch of partisan hacks’*, LOUISVILLE COURIER J. (Sept. 12, 2021), <https://www.courier-journal.com/story/news/politics/mitch-mccconnell/2021/09/12/justice-amy-coney-barrett-supreme-court-decisions-arent-political/8310849002>.