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Property and the Right to Enter

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Abstract

On June 23, 2021, the Supreme Court decided Cedar Point Nursery v. Hassid, *holding that laws that authorize entry to land are takings without regard to duration, impact, or the public interest. The decision runs roughshod over precedent, but it does something more. It undermines the important place of rights to enter in preserving the virtues of property itself. This Article examines rights to enter as a matter of theory, tradition, and constitutional law, arguing that the law has always recognized their essential role. Throughout history, moreover, expansions of legal exclusion have often reflected unjust domination antithetical to property norms. The legal advocacy that led to* Cedar Point *continues this trend, both undermining protections for vulnerable immigrant workers in this case and succeeding in a decades-long effort to use exclusion as a constitutional shield against regulation.*

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INTRODUCTION

The constitutional right to exclude is having a moment. In 2021, in *Cedar Point Nursery v. Hassid*,[1] the Supreme Court announced for the first time that government-authorized entries to private property were per se takings regardless of their duration, purpose, or impact.[2] As a result, a California law[3] allowing union organizers to enter farm sites to provide migrant workers with information on labor rights was unconstitutional unless it also provided compensation.[4] In place since 1975,[5] the

1. 141 S. Ct. 2063 (2021).

2. *See id.* at 2074–76.

3. CAL. CODE REGS. tit. 8, § 20900(e) (2022) (allowing "the right of access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support").

4. *See Cedar Point*, 141 S. Ct. at 2074 ("The regulation appropriates a right to physically invade the growers' property . . . . It is therefore a *per se* physical taking . . . in violation of the Fifth and Fourteenth Amendments.").

5. Agric. Lab. Rels. Bd., Emergency Order Adopting Emergency Regulations of the Agricultural Labor Relations Board (Aug. 29, 1975), https://perma.cc/SLA7-ZD3V (PDF).

regulation had survived the California Supreme Court,[6] a 1976 petition for certiorari,[7] federal trial[8] and appellate courts,[9] and a 2015 administrative review[10] before falling to the new conservative majority of the Supreme Court.[11] The departure from precedent was so great that conservative scholar Josh Blackman described it as "quietly rewr[iting] four decades of Takings Clause doctrine."[12] In August 2021, the Court used its shadow docket to further the moment in *Alabama Ass'n of Realtors v. U.S. Department of Health and Human Services*,[13] invoking the right to exclude in holding that the balance of equities did not favor a stay of a district court opinion vacating the federal eviction moratorium created to limit the spread of COVID-19.[14]

These judicial exclusions join increased attention to exclusion generally.[15] *Cedar Point*'s efforts to exclude union organizers are just one of a series of efforts to exclude those

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6. *See* Agric. Lab. Rels. Bd. v. Superior Ct., 546 P.2d 687, 693 (Cal. 1976) ("[T]he access regulation is valid.").

7. *See* Kubo v. Agric. Lab. Rels. Bd., 429 U.S. 802 (1976) (denying cert).

8. Cedar Point Nursery v. Gould, No. 16-CV-00185, 2016 WL 3549408 (E.D. Cal. June 29, 2016).

9. *See* Cedar Point Nursery v. Shiroma, 923 F.3d 524, 527 (9th Cir. 2019) (concluding that the access regulation did not violate the Fifth or Fourth Amendments), *rev'd sub nom.* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021).

10. *See* Memorandum from Thomas Sobel, Admin. L. Judge & Eduardo Blanco, Special Legal Advisor, to the Agric. Lab. Rels. Bd. on Staff Proposal for an Education Access Regulation for Concerted Activity at 37–38 (Nov. 23, 2015), [hereinafter Sobel Memo] https://perma.cc/2JMF-QHUW (PDF) (recommending expanding access).

11. *See Cedar Point*, 141 S. Ct. at 2074.

12. Josh Blackman, Cedar Point Nursery v. Hassid *Quietly Rewrote Four Decades of Takings Clause Doctrine*, REASON: THE VOLOKH CONSPIRACY (June 25, 2021, 12:39 AM), https://perma.cc/P53G-Y8QT.

13. 141 S. Ct. 2485 (2021).

14. *See id.* at 2489 ("[P]reventing [landlords] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude.").

15. *See, e.g.*, Jonathan Klick & Gideon Parchomovsky, *The Value of the Right to Exclude: An Empirical Assessment*, 165 U. PA. L. REV. 917, 920–22 (2017) (discussing recent scholarly debate around the right to exclude).

addressing conditions at agribusinesses.[16] Elsewhere, reports of individuals calling police to exclude Black and Brown people drinking coffee at Starbucks, playing golf at their clubs, going on college tours, or renting through Airbnb highlight the ways we create and police white spaces.[17] And images of migrants being horsewhipped, caged, and drowned at the U.S.-Mexico border create new awareness of territorial exclusion policies.[18] While many such actions reflect applications of existing law, others, like *Cedar Point* itself, reflect new incursions on legal rights of entry.[19]

Many scholars have examined and debated the right to exclude in property law.[20] This Article takes a new perspective by examining its flip side: the right to enter.[21] It reveals the ancient heritage and important modern status of entry rights,

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16. *See, e.g.*, Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1190 (9th Cir. 2018) (holding an Idaho statute barring entry to agribusinesses by use of misrepresentation to be unconstitutional under the First Amendment).

17. *See* Connecticut Editorial Board, *Napping While Black: Policing Northern Color Lines in the Modern Day*, CONN. L. TRIB. (June 8, 2018), https://perma.cc/3RK5-YVLA. *See generally* Elijah Anderson, *"The White Space"*, 1 SOCIO. RACE & ETHNICITY 10 (2015).

18. *See* Eileen Sullivan & Zolan Kanno-Youngs, *Images of Border Patrol's Treatment of Haitian Migrants Prompt Outrage*, N.Y. TIMES (Sept. 21, 2021), https://perma.cc/S8PZ-X32G (last updated Oct. 19, 2021).

19. *See infra* Part II.D.3.

20. *Compare, e.g.*, J.E. PENNER, THE IDEA OF PROPERTY IN LAW 68–73 (1997) (positing "the exclusion thesis"), *and* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 752 (1998) (describing exclusion as the "sine qua non of property") [hereinafter Merrill, *Property and the Right to Exclude*], *with* Gregory S. Alexander, *The Complex Core of Property*, 94 CORNELL L. REV. 1063, 1064 (2009) (arguing that there is a "basic difficulty" in the idea that property "is exclusion, and everything else is a deviation from property"), *and* Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 277–78 (2008) (arguing that agenda-setting rather than physical exclusion is the basis for property law). *See also* Klick & Parchomovsky, *supra* note 15, at 921 (describing the debate over exclusion as the "fault line" between opposing property theorists).

21. For somewhat different takes on property and entry, see Eduardo Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1890–1972 (2005), which explores the way individual ownership of property enters the owner into a web of community relationships, and Daniel B. Kelly, *The Right to Include*, 63 EMORY L.J. 857, 859–924 (2014), which examines the ways that owners voluntarily include others into their property. Although these articles share with this Article an appreciation of the ways in which property encourages human interaction, their focus is not on the rights of nonowners to enter property.

their importance to property law's efficiency and fairness, and their previous recognition by the Supreme Court. *Cedar Point*, therefore, risks constitutionalizing particular economic interests in ways reminiscent of the now-derided era of *Lochner v. New York*,[22] when the early twentieth-century Supreme Court held that the Constitution forbade economic and social welfare legislation.[23]

Part I shows that rights to enter resolve crucial tensions in property law by withholding the power of the state to authorize exclusion when its fiscal, liberty, and democratic costs are too high; preventing owner monopolies on resources in which the public has an overriding interest; and responding to the harms that owner actions can impose on others. Part I also argues that rights to enter are easily reconciled with rights to exclude, as none of the scholarly advocates for such rights suggest that rights to exclude are absolute, and some embrace normative arguments that support rights to enter in appropriate cases.

Part II turns to history, showing that robust rights to enter were an important part of early American law, associated not only with the most efficient use of resources but also with the freedom and virtues at the heart of American identity. Further, Part II shows that many historic and modern-day erosions of traditional rights to enter were the product of domination and discrimination antithetical to property norms.

Part III considers constitutional law, examining the *Cedar Point* decision and showing that the takings precedent that predated it wholly rejected blanket challenges to rights to enter. This departure from past precedent represents the success of a decades-long effort of conservative legal activism funded by

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22. 198 U.S. 45 (1905).

23. *See id.* at 58 (holding that a state law limiting the hours bakers could work per week violated the Fourteenth Amendment), *abrogated by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); *see also* Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 514 (1989) (stating that *Lochner* has become a "powerful antiprecedent in modern constitutional law"). As discussed below, however, for some of the forces behind *Cedar Point*, resurrecting *Lochner*-ism is the point. *See infra* Part III.C. A recent scholarly reaction to *Cedar Point* even celebrates its implicit retreat from the New Deal. *See* Julia D. Mahoney, Cedar Point Nursery *and the End of the New Deal Settlement*, 11 BRIGHAM-KANNER PROP. RTS. J. 43, 45 (2022) ("[T]he passing of the New Deal Settlement should be cause for celebration rather than alarm.").

business interests. While at times wrapped in a façade of originalism, this effort embraces the goal of constitutionalizing economic interests, occasionally deliberately harkening back to *Lochner* in doing so. The Article concludes with a call to build on the exceptions set forth in *Cedar Point* to resist constitutionalizing business interests and a more general call to reclaim rights to enter in property law and theory.

I. THEORIZING RIGHTS TO ENTER

Rights to enter are an important part of property. Property is a creature of law, creating enforceable rights between people with respect to valuable resources.[24] Assigning property rights, therefore, creates two social costs. First, it restricts the freedom and interests of others.[25] Assigning property rights to an owner means others cannot benefit from it except on such terms as the owner is willing to offer.[26] Second, property rights oblige society to enforce them,[27] and enforcement is not free. There are both

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24. *See* GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 2 (2012) ("[L]aywers . . . usually view [property] as the collection of individual rights people have as against one another with respect to owned resources . . . ."); Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1288 (2014) [hereinafter Singer, *Property as the Law of Democracy*] (describing the legal understanding of property "as legal relations among persons with respect to things.").

25. *See* Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8, 12 (1927)

> But the law of property helps me directly only to exclude others from using the things which it assigns to me. If then somebody else wants to use the food, the house, the land, or the plow which the law calls mine, he has to get my consent. To the extent that these things are necessary to the life of my neighbor, the law thus confers on me a power, limited but real, to make him do what I want.

see also Eric R. Claeys, *Labor, Exclusion, and Flourishing in Property Law*, 95 N.C. L. REV. 415, 455 (2017) (noting that the privacy, freedom, and efficiency benefits of exclusive property ownership necessarily deny others those same benefits).

26. *See* Cohen, *supra* note 25, at 12 ("In a regime where land is the principal source of obtaining a livelihood, he who has the legal right over the land receives homage and service from those who wish to live on it.").

27. *See* JEREMY BENTHAM, THEORY OF LEGISLATION 111 (Etienne Dumont ed., Richard Hildreth trans., 1864) ("[T]here is no such thing as natural property, and . . . it is entirely the work of law."); *see also* Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 361 (1954) ("[T]his

financial and democratic costs in the police, courts, and other measures society takes to make good on the promise of property.[28]

So why, in the face of these costs, does society create and enforce property rights? Because it is more costly—both as a matter of social welfare and individual rights—not to.[29] By ensuring enforceable rights in valuable resources, we encourage owners to invest in them and make it possible to transfer and coordinate their uses with others. In so doing, Jeremy Bentham wrote, the property system encourages subsistence, abundance, equality, and security.[30] At the same time, by giving owners enforceable vetoes against the desires of nonowners, we create a measure of autonomy and security against the domination of the world. Thus property, as Arthur Lee wrote in his 1775 Appeal to Great Britain, can be seen as "the guardian of every other right."[31]

The social goals and costs of property lead to protection with limitation. Lee wrote the above words to protest against the deprivation of property through taxation—but only without representation.[32] If free men were represented in the choice to levy taxes, he believed, that would be fine.[33] Lee also favored

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institution of private property . . . is not a collection of physical objects, but rather a set of relationships . . . .").

28. Economist Harold Demsetz, an influential advocate for the efficiency of property rights, recognized policing costs and the costs of establishing a market or governmental rules to govern property as important factors in determining efficient legal rules. *See, e.g.*, Harold Demsetz, *The Exchange and Enforcement of Property Rights*, 7 J. L. & ECON. 11, 16-17 (1964) (discussing costs of police and exchange systems as factors in efficiency analysis).

29. *See id.* at 16–19. *But see* Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 715 (1980) (arguing that whether enforceable property rights and contracts are more efficient than either a state of nature or distribution to all in need is an empirical question).

30. BENTHAM, *supra* note 27, at 96.

31. ARTHUR LEE, AN APPEAL TO THE JUSTICE AND INTERESTS OF THE PEOPLE OF GREAT BRITAIN, IN THE PRESENT DISPUTES WITH AMERICA 14 (4th ed. 1776).

32. *See id.* at 15 (stating that "taxation and representation are inseparable" and imposing taxes by a body "in which not one of them is represented . . . is to divest them of all property").

33. *See id.* at 19 ("[I]t seems most manifest, that it is the ancient, undoubted right of English subjects, being freemen or freeholders, to give their property by their own consent only, signified by themselves or their representatives . . . .").

abolition of slavery,[34] although his fellow Virginians considered enslaved people their property. As with Lee's conditions on this "guardian of every other right," law and society have always conditioned the scope and enforcement of property. The goal is to encourage investment, coordination, security, and autonomy without creating undue monopolies, scarcity, or domination.[35]

In striking this balance, the property system must also negotiate between stability and change,[36] and centralized and informal creation of legal rules. On the one hand, without stable rights, property lacks the security necessary to encourage investment and individual reliance. On the other, the point of investment is change, and the needs of the property system shift to accommodate it. Similarly, centralized creation and enforcement of rights is necessary to create the widespread understandings necessary to make a property system work. At the same time, however, the system must also encourage decentralized negotiation and enforcement of property norms to encourage efficient use and avoid excess control.

The tension between these goals suggests that no one arrangement of rights and values can take precedence for all time and across different resources, and this Article does not attempt one. It argues, however, that rights to enter play an important role in achieving it,[37] and that the law has always recognized this and still does.[38] This Part first explains the different property problems solved by rights to enter, and then shows how such rights can be reconciled with rights to exclude.

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34. *See* ARTHUR LEE, AN ESSAY IN VINDICATION OF THE CONTINENTAL COLONIES OF AMERICA, FROM A CENSURE OF MR. ADAM SMITH, IN HIS THEORY OF MORAL SENTIMENTS, WITH SOME REFLECTIONS ON SLAVERY IN GENERAL 42 (1764) ("[T]he bondage we have imposed on the Africans, is absolutely repugnant to justice.").

35. For a Lockean approach that arrives at a similar place, see Claeys, *supra* note 25, at 460 ("Productive labor theory justifies property understood as a presumptive right of exclusive control, and the presumption may be overridden when owners fail to labor or when non-owners have strong sufficiency or necessity claims.").

36. *See* Christopher Serkin, *What Property Does*, 75 VAND. L. REV. 891, 895 (2022) ("Property law, then, is best understood as mediating between competing reliance interests that can change over time.").

37. *See infra* Part I.A.

38. *See infra* Part II.

A. *Rights to Enter: Solving Problems, Increasing Benefits, Protecting Legitimacy*

Rights to enter help resolve the tensions of the property system in three ways. First, they allow entry in situations where the fiscal and democratic costs of exclusion do not justify the benefits. Second, they allow entry where the nature of the resource makes monopolization by any one owner inefficient or unjust. Third, they permit entry to address individual needs caused by the owners' own uses of their property.

First, enforcement costs. Property is "entirely the creature of law"[39]—without enforcement, there is no property. When, for example, a sheriff in South Africa refused to evict squatters from an owner's land without a deposit to pay for the security firm that would assist in the eviction, the Supreme Court of Appeal of South Africa held that the sheriff's actions violated the constitutional right to property in *Modder East Squatters v. Modderklip Boerdery (Pty) Ltd.*[40] But enforcement is not free.[41] In *Modder East,* the sheriff estimated that removing the 40,000 landless people would cost 1.8 million rand[42]—about $200,000. Even in more quotidian cases, property requires significant investment in police, courts, and other institutions.[43] Rights to enter often work to limit rights to exclude where the costs of exclusion exceed their benefits.[44]

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39. 1 JEREMY BENTHAM, *Principles of the Civil Code*, *in* THE WORKS OF JEREMY BENTHAM 297, 308 (John Bowring ed., 1838).

40. *See Modder East Squatters v. Modderklip Boerdery (Pty) Ltd.* 2004 (8) BCLR 821 (SCA) at para. 52(b)(i) (S. Afr.) [hereinafter *Modder East*] (declaring the State infringed the constitutional rights of Modderklip Boerdery (Pty), Ltd., and its residents by failing to help evict the squatters).

41. *See* Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 628 (1986) ("Legal rules are costly to learn and enforce.").

42. *See Modder East*, 2004 (8) BCLR 821 (SCA) at para. 4.

43. *See* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 203 (Canto Classics ed. 2015) ("Maintaining courts, police, and detention facilities to enforce rules . . . involves the use of resources that could be utilized productively for other purposes.").

44. *See infra* Part II.A; *cf.* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 717 (1986) [hereinafter Rose, *The Comedy of the Commons*] (describing common rights in "things that are either so plentiful or so unbounded that it is not worth the effort to create a system of resource management for them,

These costs increase if property laws lose public acceptance. Property, like other law, generally functions not through active state enforcement but because people know the rules and are willing to observe them.[45] Both knowledge and willingness decline as laws diverge from accepted norms.[46] In postapartheid South Africa, radically unequal land distribution and desperate need for housing land led many thousands to violate trespass law.[47] Similarly, Professor Robert Ellickson's classic study of conflicts between ranchers and farmers in California found that where formal laws regarding trespass by cattle conflicted with community norms, the norms prevailed.[48] While most norm enforcement occurred through negotiation and gossip, he found, landowners might shoot cattle of those who willfully violated these norms.[49]

To the extent that laws appear just and broadly beneficial, in contrast, individuals are more likely to voluntarily obey them and report wrongdoing.[50] Departure from formal law thus creates political as well as financial costs: when the rules as practiced diverge from the rules on the books, it becomes hard to claim compliance with the rule of law.[51] Rights to enter address this problem by allowing entry where justified by custom and public need.[52]

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or—stated differently—things for which the difficulty of privatization outweighs the gains in careful resource management").

45. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 64 (1990) ("Compliance is the basis for the effective operation of legal authorities. Widespread noncompliance leads to an unstable system.").

46. *See id.* ("The most important normative influence on compliance with the law is the person's assessment that following the law accords with his or her sense of right and wrong . . . .").

47. Sharon Lafraniere & Michael Wines, *Africa Quandary: Whites' Land vs. the Landlessness of Blacks*, N.Y. TIMES (Jan. 6, 2004), https://perma.cc/KDV6-9ME7.

48. Ellickson, *supra* note 41, at 668.

49. *Id.* at 675–79.

50. *See, e.g.*, OSTROM, *supra* note 43, at 17 ("The self-interest of those who negotiated the contract will lead them to monitor each other and to report observed infractions so that the contract is enforced.").

51. *See id.* at 51 ("When one speaks about a system that is governed by a 'rule of law,' this expresses the idea that formal laws and working rules are closely aligned and tat enforcers are held accountable to the rules as well as others.").

52. *See infra* Part II.A.

Second, monopolies. Assigning property rights creates monopoly rights in owners, giving them a veto over use by others.[53] In most cases, the law protects such monopolies to protect the autonomy, privacy, and efficiency that property promotes.[54] As Professor Carol Rose has examined, however, for some resources, public interests in access outweigh the benefits of private monopolies.[55]

Sometimes this involves uses that require assembling large amounts of property so that transaction costs and the threat of holdouts are high.[56] Property used for transportation, like roads, railroads, and navigable waters, are classic examples of this rationale.[57] In addition, for some resources—both transportation routes like railroads and paved roads and other properties like grain elevators—broader access creates economies of scale, creating "lower costs or higher average value per unit of production."[58] New England villages therefore created town grazing commons in part to distribute and lower the individual costs of fencing in livestock.[59]

In addition, Professor Rose argues, greater participation actually increases the value of some property.[60] This is true for property whose purpose is primarily social, such as land used for maypole dances, horse races, and the like.[61] It is also true for properties dedicated to commerce. As Rose writes, "[C]ommerce is an interactive practice whose exponential returns to increasing participation run on without limit. The more people

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53. Eric A. Posner & E. Glen Weyl, *Property Is Only Another Name for Monopoly*, 9 J. LEGAL ANALYSIS 51, 51 (2017).

54. *Id.*

55. *See generally* Rose, *The Comedy of the Commons*, *supra* note 44.

56. *See id.* at 750; *see also* Klick & Parchomovsky, *supra* note 15, at 936–37 (discussing the transaction cost problem in establishing rights to roam).

57. *See* Rose, *The Comedy of the Commons*, *supra* note 44, at 750.

58. *Id.* at 771.

59. *See* Bethany R. Berger, *It's Not About the Fox: The Untold History of* Pierson v. Post, 55 DUKE L.J. 1089, 1112–13 (2006) (discussing reasons for creating and policing contribution to the fences of the Southampton commons).

60. *See* Rose, *The Comedy of the Commons*, *supra* note 44, at 768–69 ("Some version of scale returns—greater value with greater participation—thus was a dominant feature in customary commons . . . .").

61. *See id.* at 760 (describing common rights to property serving social goals).

who engage in trade, the greater the opportunities for all to make valuable exchanges."[62] The value of a marketplace—whether a village square, a suburban mall, or an online retail site—depends on the number of people willing to go there. The value of access may also be political, by encouraging the public debate and interconnection necessary to make democracies function.[63]

These social, political, and commercial functions of common access are not necessarily separate. The "agora," literally the marketplace of Athens, was also the forum for the public speech and debate said to be the origins of Western democracy.[64] Eighteenth- and nineteenth-century commentators valued commerce not only as an economic but also an "educative and socializing institution," encouraging peaceful and reciprocal interaction over war.[65] Behavioral economic experiments involving dividing pots of money and the like confirm this intuition, showing that individuals in advanced capitalist economies show more cooperative and sharing behavior than those living in less economically complex ones.[66]

Finally, impact on third parties. Some rights to enter reflect the reality that "[w]e do not live alone, and the use of one's own property can affect the property and personal interests of others."[67] Such rights do not address public interests in the property or the costs of enforcing private exclusion, but rather the potential costs to others from owners' own actions. Entry may be necessary to abate classic externalities, where the owner's use creates a noxious or harmful condition that reaches beyond the borders of the property.[68] Similarly, if the property

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62. *Id.* at 769–70.

63. *See id.* at 778 ("Speech helps us rule ourselves; the more ideas we have through free speech the more refined will be our understanding and the better our self-governance.").

64. *See* Robert W. Stock, *Socrates Spoke Here*, N.Y. TIMES (Mar. 18, 1984), https://perma.cc/3749-3HT8.

65. *See* Rose, *The Comedy of the Commons*, *supra* note 44, at 775.

66. *See* Joseph Henrich et al., *The Weirdest People in the World?*, 33 BEHAV. & BRAIN SCIS. 61, 65–67 (2010).

67. JOSEPH WILLIAM SINGER, BETHANY BERGER, NESTOR DAVIDSON & EDUARDO PEÑALVER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 363 (8th ed. 2022).

68. *E.g.*, CAL. CIV. CODE § 3503 (Deering 2022) (permitting entry to another's property to abate a nuisance).

is used to create or transport products to the public, entry may be necessary to ensure that the products will not harm users.[69]

Where the owner invites others on to the land, entry may be necessary to protect their interests. Entry by third parties may be necessary to protect the safety and welfare of invitees, whether they are employees,[70] preschoolers,[71] or clients at a nail salon.[72] Invitees may also have rights to enter and remain against the owner's wishes where the invitation generates needs and expectations in them. This occurs, for example, when the property has become the home of the invitee[73] or when the reason for exclusion is discriminatory,[74] retaliatory,[75] or otherwise contrary to public interest.[76]

In each of these three situations, rights to enter protect the efficacy, fairness, and legitimacy of property law. They ensure that access is distributed efficiently, and that policing costs do not overwhelm property's benefits. They protect and facilitate social, political, and economic interaction. They prevent ownership from becoming a shield for harmful and unjust action, allowing access to protect those affected by the owner's use. In so doing, they support the legitimacy and observance of

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69. *E.g.*, 16 C.F.R. § 1118.2(a) (2013) (authorizing entry to manufacturing facilities and other locations related to product safety for inspections by the Consumer Product Safety Commission).

70. *E.g.*, 29 C.F.R. § 1960.31(a) (2013) (authorizing "unannounced inspections" by OSHA).

71. *E.g.*, CONN. GEN. STAT. ANN. § 19a-87b(a) (West 2022) (mandating a yearly "unannounced visit, inspection or investigation" of daycares located in private family homes).

72. *E.g.*, CONN. GEN. STAT. ANN. § 19a-231(b) (West 2022) (mandating annual inspection of nail salons "regarding their sanitary condition").

73. *E.g.*, UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 409(a) (UNIF. L. COMM'N 2015) (creating penalties for unlawful exclusion of tenant or interruption of essential service).

74. *E.g.*, 42 U.S.C. § 2000a (prohibiting exclusion from public accommodations on basis of race, color, religion, or national origin).

75. *E.g.*, UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 901(b)(3) (UNIF. L. COMM'N 2015) (prohibiting retaliation by landlords against lawful tenant conduct).

76. *See, e.g.*, Robins v. PruneYard Shopping Ctr., 592 P.2d 341, 346 (Cal. 1979), *aff'd on other grounds*, 447 U.S. 74 (1980) (listing the "societal goals that have been held to justify reasonable restrictions on private property rights").

property rules by conforming those rules to public norms and ideas.

B. *Reconciling Rights to Enter with Rights to Exclude*

But what, you may ask, about the right to exclude? How can rights to exclude—the darling of some property theorists, the target of others[77]—be reconciled with rights to enter? The reconciliation is easier than one might think.

First, none of the scholarly cheerleaders of the right to exclude advocate for unlimited exclusion, and the theories of some prohibit it. The leading scholarly advocate of exclusion is Professor Thomas Merrill. His essay *Property and the Right to Exclude* inspired the title of this Article and was quoted by the Supreme Court in *Cedar Point* for its proposition that exclusion is the "sine qua non" of property.[78] But Merrill made clear that he was "not suggesting anything about how extensive or unqualified this right must or should be."[79] His thesis was "not that property requires a certain quantum of exclusion rights," and he agreed that "even the fee simple absolute in land can be seen as a qualified complex of exclusion rights."[80] Merrill's asserted sine-qua-non-ness, therefore, may not conflict with robust rights to enter in private or constitutional property law.

Philosopher J.E. Penner is another prominent theorist of the right to exclude but his work supports absolute exclusion rights even less than Merrill's. For Penner, *use* forms the normative heart of property; exclusion is simply the way we facilitate use.[81] "The right to property is grounded by the interest we have in using things in the broader sense," with exclusion justified so far as it protects the right to use.[82] In other words, "use serves a justificatory role for the right, while

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77. *See supra note* 20 and accompanying text.

78. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2073 (2021) (quoting Merrill, *Property and the Right to Exclude*, *supra* note 20, at 730).

79. Merrill, *Property and the Right to Exclude*, *supra* note 20, at 753.

80. *Id.*

81. PENNER, *supra* note 20, at 69–70 ("If the link between actual use and exclusion is . . . that using something characteristically requires that . . . others be excluded from it, the link between rights to exclude and use is that all rightful exclusions can broadly be characterized as serving the interest of putting a thing to use.").

82. *Id.* at 70.

exclusion is seen as the formal essence of the right."[83] Indeed, Penner insists, "[n]o one has any interest in merely excluding others from things, for any reason or no reason at all."[84] Limits on exclusion—and corresponding rights to enter—are thus baked into the theory.

Professor Merrill's frequent coauthor Professor Henry Smith has also been dubbed an "exclusion theorist," a label he regards with annoyance.[85] Smith, similar to Penner, argues that the "purposes of property relate to our interest in using things," and "[t]here is no interest in exclusion per se."[86] For Smith, however, the core challenge of property law is managing information costs in ways that facilitate use in a world of complex and interacting resources.[87] His solution is to regard property as "the law of things,"[88] which sorts valuable resources into modules with relatively fixed boundaries within which owners have relatively complete control.[89] Property law, he argues, does this primarily through bright-line "exclusion[ary] strateg[ies]," which define boundaries of things and simplify communication regarding who has the right to use and who must keep off.[90] In contrast, "governance strategies," which are flexible and tailored to the parties and context, apply only to resolve externalities and facilitate agreement and coordination.[91]

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83. *Id.* at 71.

84. *Id.* at 70.

85. *See* Henry E. Smith, *The Thing About Exclusion*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 95, 95 (2014) (noting that he "is often considered to be an 'exclusion theorist'—whatever that means" and arguing that exclusion does not have the "ontological status" that Merrill attributes to it).

86. Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1693 (2012).

87. *See id.* ("Property is a shortcut over the 'complete' property system that would, in limitlessly tailored fashion, specify all the rights, duties, privileges, and so forth, holding between persons with respect to the most fine-grained uses of the most articulated attributes of resources.").

88. *Id.* at 1691.

89. *See id.* at 1703 ("Boundaries carve up the world into semiautonomous components—modules—that permit private law to manage highly complex interactions among private parties.").

90. *Id.* at 1702–03.

91. *Id.* at 1703.

Smith is right to focus on the systems through which we collectively manage and divide resources and within that on the relative costs of communicating and enforcing property rules.[92] His turn to exclusion strategies to limit those costs, however, does not account for the role of community acceptance within that system. Bright-line rules may be easy to learn, but if they diverge from community ideas of justice, some individuals will violate the rules and some officials will not enforce them.[93] This undermines the ability of the rule to provide accurate information about rights.[94] Rules about entry that conform to customary or intuitive norms, moreover, reduce information costs not because they are simple but because the people bound by them know and understand them.[95] But this is generally a difference of emphasis rather than necessarily a difference of result.[96]

Just as none of the so-called exclusion theorists support an absolute right to exclude, this Article does not advocate for unlimited rights to enter. Control over entry is often necessary for property to achieve its welfare- and freedom-enhancing virtues.[97] With respect to private homes, for example, rights to exclude strangers are paramount and should only cede to compelling needs.[98] Indeed, although this Article examines how historical expansion of rights to exclude have often served

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92. For more on Smith's "invaluable service to property law theory," see Singer, *Property as the Law of Democracy*, *supra* note 24, at 1291–92 (praising Smith for "conceptualizing property not simply as an individual right or bundle of rights but as a framework for 'interactions of persons in society'").

93. *See supra* notes 45–51 and accompanying text.

94. *See* Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1380–87 (2013) (arguing that bright-line rules are "[l]ess [p]redictable than [w]e [t]hink").

95. *See id.* at 1382 ("[P]roperty law rejects rigid rules and recognizes . . . informal norms and customs in order to make property rights predictable.").

96. *Cf.* Klick & Parchomovsky, *supra* note 15, at 935–36 (noting that the disagreement between "pro-exclusion scholars" and "progressive" scholars "is a matter of degree, not kind").

97. *See supra* notes 29–31 and accompanying text.

98. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 197 (AM. L. INST. 1965) (observing that, while there is a privilege to enter a dwelling if necessary to prevent serious harm to a person or chattels, "more may be required to justify it than there is entry upon other premises").

oppression and inequality,[99] one could tell similar stories of expansion of rights to enter against vulnerable groups. The doctrines that led police officers to execute a late-night no-knock search warrant for Breonna Taylor's home, for example, undermined her right to exclude in fatal and discriminatory ways.[100]

Perhaps the flaw in the reasoning of both the Supreme Court and some scholarly discussions lies in assuming that rights to enter and exclude must be absolute: one may have one or the other, but not both. But a right to enter for a particular purpose—say to provide information to vulnerable workers—does not undermine rights to exclude the public at large. This Article does depart from some theories in claiming that rights to enter are not exceptional but emerge from the logic of property itself, as well as in its attention to context and standards in the governance of entry and exclusion. These, however, are differences of emphasis that may or may not lead to differences of result. In short, theoretical tensions between rights to enter and rights to exclude are overblown, and this Article does not and need not resolve them. It does differ in its description of the history of rights to enter, which is where the Article turns next.

II. HISTORICIZING RIGHTS TO ENTER

Although proponents of the special status of exclusion frequently turn to history,[101] they often employ evidence that does not support and even undermines their claims. Professor Merrill, for example, acknowledges the consensus that the usufruct—a right to use—was the first recognized property right but enlists it as evidence of the primacy of the right to exclude by describing it as a "time-limited right to exclude others from interfering with particular uses of resources (such as growing

99. *See infra* Part II.D.2–3.

100. *See* Nicholas Bogel-Burroughs, *Federal Officials Charge Four Officers in Breonna Taylor Raid*, N.Y. TIMES (Aug. 4, 2022), https://perma.cc/Q3HX-2YQF.

101. *See* Merrill, *Property and the Right to Exclude*, *supra* note 20, at 745–47 (arguing that history supports "the primacy of the right to exclude"); Klick & Parchomovsky, *supra* note 15, at 923 ("Since antiquity, . . . exclusion has come to define the essence of the relationship between rights-holders and the rest of the world.").

crops or placing wigwams on land)."[102] Professors Jonathan Klick and Gideon Parchomovsky assert that the "right to exclude may be traced back to Roman law" at the same time as they acknowledge that the right to exclude was "not explicitly recognized by Roman law."[103] And many accounts of the importance of the right to exclude cite Sir William Blackstone's assertion that 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,"[104] even though the statement is as much about use as exclusion and scholars agree that Blackstone's own description of English law included numerous and varied rights to enter.[105] Indeed, analysis of the "right to exclude" as a distinctive right within property law seems to be a fairly modern development, beginning with Legal Realists' efforts to diminish property absolutism.[106]

This Article also turns to history, though generally of a more recent kind. In this Part, it focuses on the laws of this country, revealing the distinctive role of rights to enter within it. This examination shows that trespass law was always more contextual and less rule-like than some modern scholars

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102. Merrill, *Property and the Right to Exclude*, *supra* note 20, at 746–47.

103. Klick & Parchomovsky, *supra* note 15, at 924; *see also id.* (citing Samuel Pufendorf's commentary as evidence of the historical importance of the right to exclude, even though Pufendorf "highlighted the owner's abilities to dispose of her assets and use them as she pleases" because "both are undergirded by the owner's right to exclude").

104. *E.g.*, Cedar Point Nursey v. Hassid, 141 S. Ct. 2063, 2072 (2021); Klick & Parchomovsky, *supra* note 15, at 919–20, 924.

105. *See* Merrill, *Property and the Right to Exclude*, *supra* note 20, at 753 (agreeing that "there is no question but that Blackstone's statement is hyperbolic"); Carol M. Rose, *Canons of Property Talk, or Blackstone's Anxiety*, 108 YALE L.J. 601, 602 (1998) (arguing that those who believe that Blackstonian property is about sole and despotic dominion and total exclusion "have not read much Blackstone"); David B. Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQUIRIES L. 103, 107 (2009) (explaining that those who read beyond the quote will find that "at every turn, on every page, less-than-absolute property rights are explicated, delimited and qualified").

106. *See* Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 440–41 (2003) (discussing the origin of the bundle theory and advocating for an integrated theory); *see also* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 721 (1917) (describing property as a series of distinct rights between people).

suggest, and also that early Americans believed robust rights to enter were important to national identity and liberty. Although such rights are less expansive today than they once were, private law still recognizes numerous rights to enter,[107] and trespass enforcement is more limited than might be imagined. Further, history shows, expansions of exclusion often stem from desires to oppress or dominate particular groups in ways that are inconsistent with the norms of property itself.[108]

A. *Limiting Enforcement*

Property professors often state that any unprivileged entry to land is a trespass, but this is not quite true. As a matter of criminal law, unprivileged entries to land are only trespasses if one remains after being asked to leave or violates a posted prohibition on entry, while unprivileged entries to buildings are only trespasses if one knows that one has no right to be there.[109] Simply walking across private land, so long as one leaves when asked, is not a criminal trespass. Although the civil definition of trespass does not require notice or a request to leave,[110] courts may presume nominal damages and refuse to grant punitive damages absent intentional and malicious conduct.[111] So although disgruntled property owners could bring civil trespass

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107. The Restatement (Second) of Torts still recognizes twenty different "privileges to enter land in the possession of another, arising in a manner other than from a transaction between the parties," noting that these are only "the more usual privileges" and that the list is "not intended to be exclusive." RESTATEMENT (SECOND) OF TORTS ch. 8, topic 2, introductory note (AM. L. INST. 1965). For a description of each of these privileges, see *id.* §§ 191–211.

108. *See infra* Part II.D.

109. *See* MODEL PENAL CODE § 221.2 (AM. L. INST. 2021); CONN. GEN. STAT. ANN. §§ 53a-107–109 (West 2022).

110. *See* RESTATEMENT (SECOND) OF TORTS § 158.

111. *See, e.g.*, Hostler v. Green Park Dev. Co., 986 S.W.2d 500, 507 (Mo. Ct. App. 1999) (reversing an award of punitive damages because there was no clear and convincing evidence of malice); *see also* Ben Depoorter, *Fair Trespass*, 111 COLUM. L. REV. 1090, 1092, 1105–07 (2011) (discussing the presumption of nominal damages and judicial reluctance to grant injunctions in some cases); Gideon Parchomovsky & Alex Stein, *Reconceptualizing Trespass*, 103 NW. U.L. REV. 1823, 1827 (2009) (arguing that retrospective remedies for trespass are often insufficient). *Jacque v. Steenberg Homes*, 563 N.W.2d 154 (Wis. 1997), is a celebrated departure from this trend, awarding vast punitive damages for dragging a mobile home across a snowy field against the wishes of the property owner, *id.* at 631–32, but it is an outlier case.

actions against any who enter their land without permission, the remedies are not usually worth the effort.

This was even less true at early American law. Sir William Blackstone announced a relatively capacious standard for trespass, but even he stated that trespass required that the defendant "do[] some damage, however inconsiderable."[112] Blackstone also noted that the English definition of trespass was stricter than that at Roman law, which required a direct prohibition on entry.[113] Early American law, moreover, did not adopt Blackstonian trespass and multiple state courts proudly noted America's departure from the "strict rule of the English common law."[114]

First, unprivileged entry without damage was not criminal trespass in early America. One comprehensive study of the early American law of trespass reports that "[n]one of the colonial or early Republic statutes proscribed entering private land without permission. . . . Instead, the statutes penalized impositions on the landowner's rights much greater and more severe than merely crossing private land."[115] The statutes only reached those who took something of value from the land or settled there without permission.[116] The same study also found that no eighteenth-century trespass-to-land cases involved simple unprivileged entry; rather, all of them involved taking something of value from the land, whether mussels, timber, or honey.[117] Several early nineteenth-century cases, meanwhile,

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112. 3 WILLIAM BLACKSTONE, COMMENTARIES *209. The required damage might be slight—Blackstone opined that every entry upon another's land caused damage by "treading down and bruising his herbage." *Id.* at *210.

113. *Id.* at *209.

114. McKee v. Gratz, 260 U.S. 127, 136 (1922); *see, e.g.*, Buford v. Houtz, 133 U.S. 320, 326 (1890) (rejecting this "principle of law derived from England" by requiring a showing of injury); Studwell v. Ritch, 14 Conn. 292, 295 (1841) (noting that English common law "is not the law of *Connecticut*" (emphasis in original)); McConico v. Singleton, 9 S.C.L. (2 Mill) 244, 352 (1818) (noting that American common law did not provide a cause of action for trespass by cattle on unenclosed fields).

115. Brian Sawers, *Original Misunderstandings: The Implications of Misreading History in* Jones, 31 GA. ST. UNIV. L. REV. 471, 504 (2015).

116. *See id.* at 498–501.

117. *See id.* at 492 ("In no reported eighteenth century case did a landowner sue an authorized intruder merely for intruding . . . ."); *see also* John T. Farrell, *Introduction* to THE SUPERIOR COURT DIARY OF WILLIAM SAMUEL JOHNSON, 1772–1773, at xxix (Farrell ed. 1942) (noting that trespass

explicitly rejected arguments that injury without damage was trespass.[118]

Second, even where there was damage, early American laws almost uniformly refused the aid of the court for those who failed to fence their land. Colonial and early state statutes generally provided that entry by livestock was only a trespass if the landowner had a "good and sufficient fence"[119] to keep them out, or if the entry was by animals considered particularly destructive.[120] If other livestock damaged unfenced land, the landowner could not recover.[121] Southern states might even award damages to the owner of livestock injured on another's unfenced land.[122] While Northern states did not go so far, if landowners did not value their property enough to build a fence

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cases before a Connecticut superior court from 1772 to 1773 comprised 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).

118. *E.g.*, *McConico*, 9 S.C.L. (2 Mill) at 352–53 (rejecting an argument to apply the English law and finding that "there must be some actual injury to support the action [and] it will not be pretended that riding over the soil is an injury").

119. Act of February 24, 1786, ch. 53, § 1, *reprinted in* 2 WILLIAM CHARLES WHITE, COMPENDIUM AND DIGEST OF THE LAWS OF MASSACHUSETTS 582 (1810).

120. *See, e.g.*, The General Laws and Liberties of Connecticut Colonie (Oct. 1672), *reprinted in* LAWS OF CONNECTICUT: AN EXACT REPRINT OF THE ORIGINAL EDITION OF 1673, at 67 (George Brinley ed., 1865); An Act for Regulating Cattle, Corn-Fields, and Fences (May 1718), *reprinted in* ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF NEW-HAMPSHIRE IN NEW-ENGLAND, WITH SUNDRY ACTS OF PARLIAMENT 121–222 (1771); An Act for Regulating Fences (Mar. 1713), *reprinted in* THE 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 (Sameul Nevill ed., 1752).

121. *See, e.g.*, *Studwell*, 14 Conn. at 295–96; Cattel, Cornfields & Fences (1642), *reprinted in* BOOK OF THE GENERAL LAWES AND LIBERTYES CONCERNING THE INHABITANTS OF MASSACHUSETS 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 . . . .").

122. *See, e.g.*, Act of Mar. 27, 1759, § 2, *reprinted in* A DIGEST OF THE LAWS OF THE STATE OF GEORGIA 180–81 (Oliver H. Prince, ed. 1822) [hereinafter DIGEST OF THE LAWS OF GEORGIA].

around it, the law would not provide compensation for their losses.[123]

Most jurisdictions also barred—or even punished—trespass actions against those who had offered to pay for any damage they caused. Many state and colonial statutes provided that if the defendant in a trespass action did not claim ownership of the land, the trespass was unintentional or negligent, and the defendant offered compensation for any damages, the plaintiff would be "clearly barred from the said actions, and all other suit concerning the same."[124] Defendants satisfying these conditions could even demand costs from the plaintiffs.[125] Far from awarding nominal damages, in other words, early American law penalized litigants who sued for trespass without continuing damages.

These limitations on trespass make sense as a way to limit the information and enforcement costs of the property system. Some entries to property—say, uninvited entry of another's home—are offensive to most people and undermine the autonomy and security functions of property itself.[126] But others—say, crossing over open land, or even walking across a lawn—are not.[127] Calling on the police or invoking judicial procedures in the face of such invasions creates unjustified

123. *See, e.g.*, *Studwell*, 14 Conn. at 292 ("[T]he owners of lands are obliged to enclose them, by a lawful fence, or they can maintain no action for a trespass done thereon . . . .").

124. Act of Mar. 26, 1767, § 7, *reprinted in* DIGEST OF THE LAWS OF GEORGIA, *supra* note 122, at 317; *see, e.g.*, Act of Feb. 25, 1819, § 22, *reprinted in* 1 THE REVISED CODE OF THE LAWS OF VIRGINIA: BEING A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY, OF A PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE 493–94 (1819) [hereinafter REVISED CODE OF VIRGINIA]; An Act Concerning Old Titles of Lands; and for Limitation of Actions and for Avoiding Suits in Law (1715), § 7, *reprinted in* 1 LAWS OF THE STATE OF NORTH-CAROLINA, INCLUDING THE TITLES OF SUCH STATUTES AND PARTS OF STATUTES OF GREAT BRITAIN AS ARE IN FORCE IN SAID STATE 98 (Henry Potter et al. eds., 1821) [hereinafter LAWS OF THE STATE OF NORTH-CAROLINA]; An Act for Limitation of Actions (1713), § 3, *reprinted in* 3 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 13 (James T. Mitchell & Henry Flanders eds., 1896) [hereinafter STATUTES OF PENNSYLVANIA].

125. Act of Nov. 23, 1785, ch. 28, § 2, *reprinted in* 4 WHITE, *supra* note 119, at 1248.

126. *See supra* note 98 and accompanying text.

127. *See supra* note 118 and accompanying text.

enforcement costs and infringements on individual liberty.[128] They also impose rules that are so out of step with public norms that self-policing is unlikely and policing by the state would appear unjust and illegitimate. When, for example, free ranging livestock were common, declaring them trespassers might appear inefficient and oppressive.[129] Calling the police or awarding civil damages against those who let their labradoodles pee on other's lawns might be seen as similarly oppressive today. Bright-line barriers to entry, therefore, may not provide the most bang for the enforcement buck. Perhaps that is why the law has never fully adopted them.

The limits on rights to challenge entry of land through adverse possession reflect a distinct kind of limitation of enforcement costs. Where title owners do not care enough to act over years of open occupation, the law ceases to come to their aid in ejectment.[130] The occupation by others, moreover, gives rise to mistaken expectations by third parties in negotiations about the property.[131] Absentee owners are also less likely than occupiers to care about and contribute to the community at large.[132]

Following this logic, many American jurisdictions permitted adverse possession after far shorter periods of occupation than the twenty years demanded by English law.[133]

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128. *See* Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1874 (2007) ("Unlicensed invasions of land often trigger sharp condemnations from courts; the core prohibition applies even when the balance of benefits and costs would seem to favor the invasion . . . .").

129. *See* Studwell v. Ritch, 14 Conn. 292, 295–96 (1841) (observing that "[i]t was more convenient for [early American colonists] to enclose their cultivated fields than their pastures" and that it was therefore "the duty of every man to enclose his lands by a sufficient fence . . . before he can maintain an action for a trespass thereon by cattle").

130. *See* Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U.L. REV. 1122, 1127 (1985) ("[C]ourts often award the entitlement to the possessor rather than to the title holder [after the statute of limitations runs]—that's what adverse possession is all about.").

131. *See id.* at 1132.

132. *See id.* at 1130 ("[T]he shift in entitlement [resulting from adverse possession] acts as a penalty to deter [true owners] from ignoring their property or otherwise engaging in poor custodial practices.").

133. Blackstone stated that the right of possession passed after thirty years of 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

Between 1646 and 1765, for example, Virginia cut off any suits for land after five years of "peaceable possession,"[134] fearing that if absentee owners in England could claim the land, it "must in a short time leave the greatest part of the country unseated and unpeopled."[135] North Carolina adopted a seven-year limit on suits to recover land in 1715, decrying those with royal patents who had "deserted" their lands and failed to perform their patents or pay their quit-rents.[136] Georgia similarly adopted a seven-year limit in 1767,[137] reenacting it in 1813 with particular reference to those who obtained British grants but fled during the Revolution, seeking to protect instead those who had "settled, cultivated, and greatly improved the same" lands.[138] In the later nineteenth century, Western states like California, Arizona, and Montana adopted five-year limits[139] in order to give

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years. *See* Braue v. Fleck, 127 A.2d 1, 9 (N.J. 1956), *overruled by* J&M Land Co. v. First Union Nat'l Bank, 766 A.2d 1110 (N.J. 2001).

134. Act XIII of Oct. 5, 1646, *reprinted in* 1 STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 331 (William Walter Hening ed. 1823); Act of Feb. 25, 1819, § 3, *reprinted in* REVISED CODE OF VIRGINIA, *supra* note 124, at 488 n.* (noting that "the limitation of *all* actions for lands was *five* years only" (emphasis in original)).

135. Act LXXII of Mar. 23, 1661, *reprinted in* 2 STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 98 (William Walter Hening ed. 1823).

136. An Act Concerning Old Titles of Lands; and for Limitation of Actions and for Avoiding Suits in Law (1715), §§ 1, 3, *reprinted in* LAWS OF THE STATE OF NORTH-CAROLINA, *supra* note 124, at 96.

137. *See* Act of Mar. 26, 1767, § 1, *reprinted in* DIGEST OF THE LAWS OF GEORGIA, *supra* note 122, at 315.

138. Act of Dec. 2, 1813, *reprinted in* DIGEST OF THE LAWS OF GEORGIA, *supra* note 122, at 320; *see also* Act of Nov. 16, 1819, §§ 1–2, *reprinted in* 1 STATUTE LAWS OF THE STATE OF TENNESSEE OF A PUBLIC AND GENERAL NATURE 215–16 (John Haywood & Robert L. Cobbs, eds., 1831) (limiting right of entry and suit for recovery of land to seven years); Act of Feb. 24, 1844, §§ 2–3, *reprinted in* CODE OF MISSISSIPPI: BEING AN ANALYTICAL COMPILATION OF THE PUBLIC AND GENERAL STATUTES OF THE TERRITORY AND STATE 829 (A. Hutchinson ed., 1848) (barring the right of entry after seven years and providing for adverse possession after ten years).

139. *See, e.g.*, Act of Apr. 22, 1850, ch. II, §§ 6–10, *reprinted in* COMPILED LAWS OF THE STATE OF CALIFORNIA: CONTAINING ALL THE ACTS OF THE LEGISLATURE OF A PUBLIC AND GENERAL NATURE, NOW IN FORCE, PASSED AT THE SESSIONS OF 1850–51–52–53, at 816–17 (S. Garfielde & F.A. Snyder eds., 1853); Of the Limitations of Actions (1864), §§ 4–10, *reprinted in* THE HOWELL CODE: ADOPTED BY THE FIRST LEGISLATIVE ASSEMBLY OF THE TERRITORY OF ARIZONA 254–55 (1865); Of the Time of Commencing Actions Concerning Real Property

title to possessors instead of absentee landlords, who often resisted local expenditures and failed to improve their lands.[140] In all of these cases, the law protected entry over exclusion by refusing to enlist the power of law for those whose use undermined community interests.

B. *Protecting Public Access*

Tangible property is not unlimited; this is particularly true for land, whose supply is necessarily fixed.[141] Land is also not fungible: no one would argue that the value of an acre of land in Manhattan, New York, is the same as an acre in Manhattan, Kansas, or that the value of an acre next to a port is the same as an acre fifty miles inland. Key to this value is the extent to which the property facilitates access and interaction by the public.[142] Allowing owners to control entry to property, however, both prevents that access and may monopolize crucial resources. In many cases, that tradeoff is necessary to make the property system function. But throughout history and today the law has afforded rights to enter and remain on certain property when the social costs of the monopoly on access were too high.

Many such cases involve rights to cross over private property. Blackstone, for example, recognized the long English tradition of rights to cross over private lands.[143] These "ways" included not only familiar rights like government highways and express easements but also "common ways, leading from a village into the fields," and broad ways by prescription-based "immemorial" use.[144] The United Kingdom has retained a robust tradition of public ways over private land.[145] Both England and

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(1879), ch. 2, §§ 29–36, *reprinted in* THE REVISED STATUTES OF MONTANA, ENACTED AT THE REGULAR SESSION OF THE TWELFTH LEGISLATIVE ASSEMBLY OF MONTANA 45–46 (1881).

140. *See* Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1109–10 (2007) (describing the objections of Western residents to land speculators and the public's preference for squatters over absentee landlords).

141. Absent interplanetary settlement, of course!

142. *See supra* notes 57–63 and accompanying text.

143. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *323.

144. *Id.* at *323–24.

145. *See* John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act of 2003*, 89 NEB. L. REV. 739, 753–754 (2011).

Scotland enhanced these rights by statute in 2000, codifying public rights to traverse private natural lands for recreational purposes.[146] American law similarly includes public rights of transportation as an exception to trespass,[147] although it is less likely to hold that public ways have been created.[148]

American law more wholeheartedly adopted and even extended the English right of access to navigable water. Under English law, "the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a publick common of piscary, and may not without injury to their right be restrained of it."[149] These rights were part of the liberties of the people against the King officially protected by the Magna Carta.[150] The right went beyond the water itself, including rights to dock, fish, and dry nets on the seashore.[151]

Colonial American law adopted these rights as part of the liberties of the people. Massachusetts' 1641 "Liberties Common" declared that while individuals might have ownership to the low-water mark of tidal lands, the proprietor had no power "to stop or hinder the passage of boates or other velsels, in or through any Sea, Creeks or Coves, to other men's houses or lands."[152] The founding documents of Southampton, New York,

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146. *See id.* at 769–77 (discussing the Rights of Way Act of 2000 in England and the Land Reform (Scotland) Act of 2000).

147. *See* RESTATEMENT (SECOND) OF TORTS § 192 (AM. L. INST. 1965) (recognizing a privilege to use "public highways" on private lands—including roads, walking, and bike paths, however created); *see id.* § 195 (recognizing a similar privilege to use private lands neighboring roads when the roads are impassable).

148. *See* Rose, *The Comedy of the Commons*, *supra* note 44, at 724–26 (observing that, despite a history of American courts "focus[ing] less on the landowner's intent than on the public's acts," public claims to use of land by analogy to adverse possession were—and are—usually unsuccessful).

149. Matthew Hale, *A Treatise de Jure Maris et Brachiorum Ejusdem*, *reprinted in* STUART MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 370, 377 (1888).

150. *See* 1 JOSEPH CHITTY, A TREATISE ON THE GAME LAWS AND ON FISHERIES 244–45 (1812).

151. *See id.* at 244, 247, 269–75 (contrasting this generalized private right to fish with the sovereign's right to certain species of "royal fish" like whales and sturgeons).

152. THE BOOK OF THE GENERAL LAVVES AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS, COLLECTED OUT OF THE RECORDS OF THE GENERAL COURT, FOR THE SEVERAL YEARS WHERIN THEY WERE MADE AND ESTABLISHED (1660), *reprinted in* THE COLONIAL LAWS OF MASSACHUSETTS,

went even further, declaring that "ffreedom of fishinge, fowling, & navigation shall be Common to all" with respect to any "Seas, rivers, creekes or brooks, howsoever boundinge or passinge througe" private land.[153] But statutes were not necessary to create or preserve these rights. In its 1842 decision *Martin v. Waddell's Lessee*,[154] 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."[155]

American law often treated such rights to enter as fundamental. Vermont's Constitution, for example, which was the first American constitution to include a takings clause,[156] enshrined the right "to fish in all boatable and other waters (not private property) under proper regulations."[157] Reviewing New Hampshire law, the federal court in *Percy Summer Club v. Astle*[158] 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."[159] In 1821 in *Arnold v. Mundy*,[160] the New Jersey Supreme Court famously held that 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."[161]

If the navigable water servitude illustrates the continuity of rights to enter, the airspace servitude illustrates their evolution. As Blackstone wrote, land traditionally had "an

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REPRINTED FROM THE EDITION OF 1660, WITH THE SUPPLEMENTS TO 1672, at 119, 170 (William H. Whitmore ed., 1889).

153. THE DISPOSALL OF THE VESSELL 4 (1639), *reprinted in* FIRST BOOK OF RECORDS OF THE TOWN OF SOUTHHAMPTON (John H. Hunt ed., 1874).

154. 41 U.S. 367 (1842).

155. *Id.* at 414.

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

157. VT. CONST., ch. II, § 67.

158. 145 F. 53 (C.C.D.N.H. 1906).

159. *Id.* at 64.

160. 6 N.J.L. 1 (1821).

161. *Id.* at 13.

indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad coelum*"—whose is the soil, it is his up to the heavens—"is the maxim of the law."[162] The invention of the airplane threw that maxim into disarray. Lawyers asked whether the common law could change with the times, what it meant in the first place, and whether it really mattered at all.[163] States, property owners, and the federal government wondered who could regulate what passed above the land, and how.[164] Meanwhile, European countries began to regulate and encourage commercial aviation, building far safer and more pleasant air flight than was available in the United States.[165]

The Air Commerce Act of 1926[166] resolved the controversy in a sweeping blow, declaring "navigable airspace" to be "subject to a public right of freedom of interstate and foreign air navigation in conformity with the requirements of this Act."[167] The Supreme Court blessed this resolution in *United States v. Causby*,[168] declaring that the "ancient doctrine that at common law ownership of the land extended to the periphery of the universe . . . has no place in the modern world."[169] "Flights over private land," it continued, "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."[170] Following *Causby*, the 1965 *Restatement (Second) of Torts* decreed that "[f]light by aircraft in the air space above the land of another is a trespass if, but only if, (a) it enters into the immediate reaches of the air

162. 2 WILLIAM BLACKSTONE, COMMENTARIES *18.

163. *See* STUART BANNER, WHO OWNS THE SKY?: THE STRUGGLE TO CONTROL AIRSPACE FROM THE WRIGHT BROTHERS ON 69–93 (2008).

164. *See id.* at 202 ("Forty years after the dawn of flight, the law of aerial trespass was still partially uncertain.").

165. *See* S. REP. NO. 2, at 1 (1926), *reprinted in* CIVIL AERONAUTICS: LEGISLATIVE HISTORY OF THE AIR COMMERCE ACT OF 1926 APPROVED MAY 20, 1926, TOGETHER WITH MISCELLANEOUS LEGAL MATERIALS RELATING TO CIVIL AIR NAVIGATION 22 (1943) ("All the leading European countries have been willing to promote commercial aviation. We have done practically nothing.").

166. Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568.

167. *Id.* § 10, 44 Stat. at 574.

168. 328 U.S. 256 (1946).

169. *Id.* at 260–61.

170. *Id.* at 266.

space next to the land, and (b) it interferes substantially with the other's use and enjoyment of his land."[171]

The public right to hunt and graze on unfenced land was a distinctly American right to enter. 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.[172] He also wrote that farmers had common rights to graze livestock on private waste or fallow lands but that such rights were restricted to the inhabitants of a particular village.[173] In America, however, "the entire country was open range" until the mid-nineteenth century.[174] This right reflected not only the public need for grazing and hunting lands, but also what it meant to be a "land of liberty" compared to England.[175] As one federal court noted, 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."[176]

Some states protected hunting rights by constitutional law. The first constitutions of Pennsylvania and Vermont guaranteed the right of all to hunt "on the lands they hold, and on all other lands therein not [e]nclosed"[177] and Vermont's constitution still does.[178] The anti-federalists, who objected that the draft U.S. Constitution did not sufficiently protect the rights of the people, included a right to hunt on all lands "not [e]nclosed" among its proposed additions.[179]

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171. RESTATEMENT (SECOND) OF TORTS § 159(2) (AM. L. INST. 1965).

172. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *263–65.

173. *Id.* at *322.

174. Brian Sawers, *Property Law as Labor Control in the Postbellum South*, 33 LAW & HIST. REV. 351, 352 (2015).

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

176. Percy Summer Club v. Astle, 145 F. 53, 63 (C.C.D.N.H. 1906) (quoting Concord Mfg. Co. v. Robertson, 24 A. 718 (N.H. 1889)).

177. PA. CONST. of 1776, § 43; VT. CONST. of 1777, ch. II, § 39.

178. VT. CONST. ch. II, § 67.

179. NATHANIEL BREADING ET AL., THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF THE STATE OF PENNSYLVANIA, TO THEIR CONSTITUENTS 1 (1787), https://perma.cc/6X7T-3HAH.

Other rights emerged from statute and custom. In 1856, the Mississippi Supreme Court opined that declaring entry to unfenced land to graze was a trespass would be "repugnant to the custom and understanding of the people, from their first settlement down to the present time."[180] Indeed, the Georgia Supreme Court declared, forbidding entry to hunt, cross over, and graze on unfenced land "would require a revolution in our people's habits of thought and action . . . . Our whole people, with their present habits, would be converted into a set of trespassers."[181]

The U.S. Supreme Court affirmed this tradition in 1890, rejecting an action for damages from sheep herds grazing on private unfenced lands because of 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 unenclosed."[182] Although this distinctly American right is now a shadow of its former self, twenty-four states still permit hunting on land without posted no trespassing signs.[183]

Other rights to enter involve particular needs for particular lands at particular times. It is not a trespass, for example, to enter or remain on private lands when necessary to protect oneself or others.[184] The Massachusetts Supreme Court relied on this right in an 1873 case against individuals who entered a private beach to take and secure a boat that had washed up there during a storm[185] and again in a 2016 case against a

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180. Vicksburg & Jackson R.R. Co. v. Patton, 31 Miss. 156, 184–85 (1856); *see also* Studwell v. Ritch, 14 Conn. 292, 295 (1841) (noting Connecticut's "*peculiar laws*" around enclosure (emphasis in original)).

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

182. *See* Buford v. Houtz, 133 U.S. 320, 326 (1890); *see also* McKee v. Gratz, 260 U.S. 127, 136 (1922) (holding it was not 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).

183. Mark R. Sigmon, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549, 558 n.58 (2004).

184. RESTATEMENT (SECOND) OF TORTS § 197 (AM. L. INST. 1965).

185. *See* Proctor v. Adams, 113 Mass. 376, 377–78 (Mass. 1873) ("It is a very ancient rule of the common law, that entry upon land to save goods which are in jeopardy of being lost or destroyed by water, fire, or any like danger, is not a trespass.").

homeless man who sheltered in private businesses during a blizzard.[186] The law has also long recognized a right to enter land to survey it for eminent domain or other public purposes.[187] Courts have repeatedly ruled that entries for such purposes were not takings.[188]

The logic of these and other rights to enter still resonates today, balancing the public and individual interest in access to the property against the public and individual harm in granting it. Where the balance suggests that denying access is sufficiently inefficient and unjust, the law does not permit it.

C. *Addressing Owner Actions*

A number of rights to enter, both historic and modern, respond to the particular uses to which an owner has put the property. Sometimes this is to facilitate regulation of a business

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186. Commonwealth v. Magadini, 52 N.E.3d 1041, 1047 (Mass. 2016) ("The common-law defense of necessity 'exonerates one who commits a crime under the "pressure of circumstances" if the harm that would have resulted from compliance with the law . . . exceeds the harm actually resulting from the defendant's violation of the law.'" (alteration in original) (quoting Commonwealth v. Kendall, 883 N.E.2d 269, 272 (2008))).

187. *E.g.*, Act of Apr. 15, 1782, § 5, reprinted in 10 STATUTES OF PENNSYLVANIA, *supra* note 124, at 484; RESTATEMENT (SECOND) OF TORTS § 211 cmt. c; *see also* Klemic v. Dominion Transmission, Inc., 138 F. Supp. 3d 673, 688–90 (W.D. Va. 2015) (surveying the history of the common-law privilege to enter for survey purposes); 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 . . . ."); Cushman v. Smith, 34 Me. 247, 260 (1852) ("The exclusive occupation of that estate temporarily, as an initiatory proceeding to an acquisition of a title to it, . . . cannot amount to a taking of it . . . . The title of the owner is thereby in no degree extinguished."). 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." Winslow v. Gifford, 60 Mass. (6 Cush) 327, 329–30 (1850).

188. In the words of Justice Henry Baldwin, riding circuit in New Jersey, rejecting one such claim, "[N]othing is taken from him, nothing is given to the company." *Bonaparte*, 3 F. Cas. at 831; *see also Klemic*, 138 F. Supp. 3d at 690–91 (holding entry to survey was not a taking); *Winslow*, 60 Mass. at 329–30 (holding that such a 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").

through inspections and the like.[189] Sometimes it is because the owner is suspected of using the property in ways that harm others.[190] Sometimes it is because the owner has opened the property to others in ways that create interests in invitees and the public.[191] Whatever their source, these rights follow the general principle that property ownership is not a license to unreasonably undermine the interests of others. James Kent, the former Chancellor of New York, wrote in his 1827 *Commentaries on American Law* that it is a "general and rational principle[] that every person ought so to use his property as not to injure his neighbors, and that private interest must be made subservient to the general interest of the community."[192] Rather than cover all of these in detail, this Subpart will focus on the entries turning on the needs of others: the traditional obligations of common carriers and the modern regulation of evictions and migrant worker housing.

The traditional obligations of common carriers reflect the widespread need for reliable food and transportation and the responsibilities of those who undertake to provide it. As Sir John Holt, Lord Chief Justice of the King's Bench, opined in 1701, "[W]here-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."[193] Or, as Chancellor Kent wrote of American law, such businesses "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

189. *See supra* note 69 and accompanying text.
190. *See supra* note 68 and accompanying text.
191. *See supra* notes 70–76 and accompanying text.
192. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 276 (1827).
193. Lane v. Cotton (1701), 88 Eng. Rep. 1458, 1464; 12 Mod. 473, 484.

action."[194] Individuals had a right to enter public businesses and could win damages if denied entry without good reason.[195]

The fact that the individual was not a customer was not necessarily an excuse. In *Markham v. Brown*,[196] for example, the New Hampshire Supreme Court held that an innkeeper could not exclude a stagecoach driver who entered the common rooms to solicit travelers so long as he did not behave disruptively:

> An innkeeper holds out his house as a public place to which travellers may resort, and of course surrenders some of the rights which he would otherwise have over it. Holding it out as a place of accommodation for travellers, he cannot prohibit persons who come under that character, in a proper manner, and at suitable times, from entering, so long as he has the means of accommodation for them.[197]

The *Restatement (Second) of Torts* recognizes this as the right to use "public utilities," which it defines as "a person, corporation, or other association carrying on an enterprise for the accommodation of the public, the members of which as such are entitled as of right to use its facilities."[198] A patron of such public utilities, the *Restatement* provides, "is privileged, at reasonable times and in a reasonable manner, to be upon any part of the land in the possession of the utility which is provided

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194. 2 KENT, *supra* note 192, at 465; *see id.* at 445, 499 (including common carriers, innkeepers, farriers, porters, and ferrymen in this rule); *see also* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964) (noting that public accommodations statutes did nothing "but codify the common-law innkeeper rule which long predated the Thirteenth Amendment"); 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" (quoting CONG. GLOBE, 39th Cong., 1st Sess. 111 (1865) (statement of Senator Henry Wilson))).

195. 2 WILLIAM BLACKSTONE, COMMENTARIES, *100

> [I]f an inn-keeper, or other victualler, hangs out a 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.

196. 8 N.H. 523 (1837).

197. *Id.* at 528.

198. RESTATEMENT (SECOND) OF TORTS § 191 cmt. a (AM. L. INST. 1965).

for the use of the public or necessary for their enjoyment of its facilities."[199]

Other rights to enter depend on the interests of those the owners have already permitted onto their property. Such rights have both ancient roots and modern iterations. The sixteenth-century right of redemption in mortgagors, for example, is in fact a borrower's right to enter and remain on property of another.[200] Mortgages at the time placed title to land in the lender; lenders even often possessed the mortgaged land during the loan period.[201] If the borrower defaulted, the title was supposed to shift permanently to the lender.[202] But the equity courts created an extended period for borrowers to redeem their land after defaulting, in effect allowing them to reenter or remain upon the lender's land.[203] Over time, mortgage law evolved further to keep both title and possession in the borrower during the period of the loan—but even once title shifts to the lender, the law may still delay the lender's right to exclude to protect the borrower's interests.[204]

There is similar dynamism in landlord-tenant law. A landlord's primary recourse against a tenant is eviction, which denies a tenant's right to enter or remain on the landlord's property. At common law, landlords could perform the eviction themselves, with liability only if a court later found they had no right to evict or used unnecessary force in doing so.[205] In recognition of the importance of shelter for the tenants on the property, however, every state has now prohibited self-help eviction from residential property, requiring landlords to go to court and obtain the assistance of the state before a tenant can be removed.[206] These changes have also placed a number of

199. *Id.* § 191.

200. Ann M. Burkhart, *Lenders and Land*, 64 MO. L. REV. 249, 264 (1999).

201. *Id.*

202. *Id.*

203. *Id.*

204. *See* SINGER ET AL., *supra* note 67, at 995–95 (discussing the statutory right of redemption with the right to remain in possession in about half of states, and more recent state restrictions on foreclosure).

205. *See* Randy Gerchick, Comment, *No Easy Way Out: Making the Summary Eviction a Fairer and More Efficient Alternative*, 41 UCLA L. REV. 759, 771–77 (1994).

206. *See Unlawful Detainer*, *in* 50 STATE STATUTORY SURVEYS: REAL PROPERTY: OWNERSHIP AND CONVEYANCE (Westlaw 2022). Although the timing

limits on the right to evict, most notably by creating a warranty of habitability[207] and prohibiting eviction for nonpayment of rent from dwellings that fail to meet it.[208] Courts, and later legislatures, did this both as a matter of contractual fairness to the individual tenants and in recognition of the public interest in the vital resource of housing.[209]

As discussed further below, the law similarly recognized rights to enter to protect migrant farmworkers in the 1970s, relying on the interests of the workers and the public interest in protecting them.[210] In the words of the New Jersey Supreme Court in *State v. Shack*,[211] "[W]e find it unthinkable that the farmer-employer can assert a right to isolate the migrant worker in any respect significant for the worker's well-being."[212]

From innkeepers to landlords to farmer-employers, the law has recognized rights to enter based on the actions of the owner. Where the owner provides a scarce and valuable resource, the law often creates rights to enter to ensure that it is provided fairly to those who need it. When individuals are invited onto the property, the law may guarantee entry to protect their interests.

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of this change is often placed in the 1960s, at least in Connecticut it began in the early 1800s. Amanda Quester, *Evolution Before Revolution: Dynamism in Connecticut Landlord-Tenant Law Prior to the Late 1960s*, 48 AM. J. LEGAL HIST. 408, 409 (2006).

207. REVISED UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 302(a) (UNIF. L. COMM'N 2015) ("A landlord has a nonwaivable duty to maintain the premises in a habitable condition . . . .").

208. *Id.* § 408(a) ("If a landlord fails to comply with . . . Section 302[,] the tenant may defend an action by the landlord based on nonpayment of rent on the ground that no rent was due because of the noncompliance . . . .").

209. *See, e.g.*, Javins v. First Nat. Realty Corp., 428 F.2d 1071, 1075–80 (D.C. Cir. 1970) (relying both on the legitimate contract law expectations of tenants and the "social impact of bad housing" to hold that breach of a warranty of habitability was a defense to eviction).

210. *See infra* Part III.A.

211. 277 A.2d 369 (N.J. 1971).

212. *Id.* at 374; *see also* Folgueras v. Hassle, 331 F. Supp. 615, 623 (W.D. Mich. 1971) ("As a matter of property law, the ownership of a labor camp does not entail the right to cut off the fundamental rights of those who live in the camp."); State v. DeCoster, 653 A.2d 891, 893–94 (Me. 1995) (holding that migrant workers were entitled to receive visitors in their employer-provided residences); *In re Catalano*, 623 P.2d 228, 238 (Cal. 1981) (holding that a union representative did not violate trespass law by refusing to leave a construction site when present "to engage in lawful union activity").

D. *Expanding Exclusion*

Rights to enter may and should be contracted to reflect new needs. A stranger shooting squirrels or grazing livestock in my unfenced backyard would violate modern property expectations as much as excluding such individuals would have in the early 1800s. It is a common story that increasing rights to exclude reflect increasing land value,[213] and this surely is true in some cases. This Subpart shows, however, that expansions of exclusion and retractions of rights to enter are often far less benign.

1. English Enclosure

Economists use enclosure in England as a core example of how the right to exclude expanded to respond to increases in land value and technological advancement.[214] The example has some validity. New crop rotation methods permitted high yields on smaller plots without the open fields system that allowed commoners to graze livestock during fallow periods.[215] Increasing markets for wool made it profitable for large landowners to devote their land to sheep rearing alone.[216]

But enclosure is also famous for its high costs in human misery and political unrest. Dispossessed from the common fields and rights in the forest, thousands of peasants became impoverished (or even menacing), "sturdy Beggars" roving the

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213. *See generally* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967). For a much more nuanced description of the complex relationship between land value and exclusion, see Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property*, 31 J. LEGAL STUD. S453 (2002) [hereinafter Smith, *Exclusion Versus Governance*]. Professor Smith observes that the evolution of property in England from a system of rough individual property to semi-commons property "seems to contradict the Demsetzian view that private property will emerge as a resource gains in value," as well as contradicting earlier views "that see communal property as uniformly giving way to more individualized private property." *Id.* at S640.

214. *See* Smith, *Exclusion Versus Governance*, *supra* note 213, at S461 (noting mixed literature but stating that enclosure accords with Demsetz's thesis that individual property reflects increased land value).

215. Henry E. Smith, *Semicommons Rights and Scattering in the Open Fields*, 29 J. LEGAL STUD. 131, 134 (2000).

216. Smith, *Exclusion Versus Governance*, supra note 213, at S461–62.

land.[217] The response was increasingly punitive statutes that stigmatized the poor, preventing them from moving to find unenclosed common land and compelling them to work.[218] Historian E.P. Thompson suggests that, as the Industrial Revolution progressed, increasing the supply of dependent workers was not simply an effect but a motivation for further enclosure.[219] He quotes, for example, the warning of the *Commercial and Agricultural Magazine* in the 1700s that allowing land rights to the poor would "transform the labourer into a petty farmer[,] from the most beneficial to the most useless of all the applications of industry."[220]

Ending customary entry rights created not only poverty and dependence but also outright rebellion. The English gentry used some newly enclosed lands for agricultural production, but others for ostentatious deer parks and pleasure grounds to proclaim their status.[221] For communities who had long hunted, grazed livestock, and cut turf on forest lands, the resulting restriction on customary rights was intolerable.[222] As one vicar serving the community of Winkfield wrote, "*Liberty* and *Forest Laws* are incompatible."[223] Yeoman farmers who came to be known as "Blacks" banded together to black their faces and poach deer and destroy fish ponds on the estates of the wealthy.[224] In outright defiance of law, they threatened forest officers, seized confiscated guns and dogs, and in one instance killed an official's family member.[225] England responded with draconian measures declaring scores of related offenses

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217. DAVID THOMAS KONIG, LAW & SOCIETY IN PURITAN MASSACHUSETTS: ESSEX COUNTY, 1629–1692, at 4 (Morris S. Arnold ed., 1979).

218. *See* William P. Quigley, *Five Hundred Years of English Poor Laws, 1349–1834: Regulating the Working and Nonworking Poor*, 30 AKRON L. REV. 73, 98–99, 101–09 (1996) (discussing the Statute of Artificers of 1563, the Poor Law of 1601, and the Poor Relief Act of 1662).

219. *See* E.P. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS 218–20 (1st vintage ed. 1966).

220. *Id.* at 220 (internal quotation omitted).

221. E.P. THOMPSON, WHIGS & HUNTERS: THE ORIGIN OF THE BLACK ACT 159 (1975).

222. *Id.*

223. *Id.* at 49.

224. *See id.* at 64, 94–104.

225. *Id.* at 64–71.

punishable by death.[226] The public embraced this resistance to the extent that deer stealing became an exciting pastime, even a way to prove manhood to one's lady love.[227]

Sir William Blackstone began working on his *Commentaries* in the 1750s, while furor over enclosure and the poor still roiled England, and the Black Act controversy was a recent memory.[228] The expansive trespass rights he praised and royal monopoly on hunting rights he asserted must be understood in light of this troubled and inequitable history. American colonists were also well aware of the oppressions of enclosure in the England they had left behind.[229] For both, entry would not just be about economics—it would be about democracy, liberty, and equality, too.

2. Exclusion and Race After the Civil War

In the United States, the end of the right to hunt and graze on unfenced land is often described as a product of increasing land values and decreasing agricultural dependence.[230] Again, this is partly true. But as with enclosure, expanded rights to exclude are also a product of concentrated wealth and power. Railroads—businesses of the wealthy spreading across the country with the power of the state behind them—were important advocates of ending the right to roam.[231] If individuals and livestock had rights to cross unfenced land, railroads might be liable for hitting them; but if they were trespassers, the railroads might not have any liability.[232] Expanding trespass let railroads shift the costs of injuries onto the injured rather than working to avoid them.[233] Large,

226. *See id.* at 21–23.

227. *Id.* at 161–62.

228. *See* Pat Rogers, *The Waltham Blacks and the Black Act*, 17 HIST. J. 465, 466–67 (1974).

229. *See* KONIG, *supra* note 217, at 4.

230. *See* FREYFOGLE, *supra* note 175, at 44–45.

231. *See id.*

232. In the infamous *Erie Railroad v. Thompkins*, 304 U.S. 64 (1938), for example, the state law question was whether the Thompkins was a trespasser who could not recover for his injuries. *Id.* at 69–70.

233. *See* FREYFOGLE, *supra* note 175, at 45.

market-oriented growers joined the railroads, eager to be relieved of costs of fencing their land.[234]

Expansion of exclusion also has an even grimmer history. Southern states closed the range after the Civil War to maintain white control over Black workers.[235] After Emancipation, plantation owners still needed Black labor to work their farms.[236] They complained that free Black people were unwilling to work year-round for low wages if they could support themselves on a small plot of land by hunting, grazing a few livestock, and foraging in the open range.[237] States responded by expanding trespass laws and closing the range.[238]

Between 1865 and 1866, Louisiana, Georgia, South Carolina, North Carolina, and Alabama each enacted their first general statutes criminalizing trespass on enclosed or unenclosed lands.[239] Texas, Mississippi, and Tennessee enacted statutes forbidding hunting on unenclosed lands on which landowners had posted signs denying permission.[240] Four Southern states also criminalized hunting solely in majority-Black counties, leaving hunting in majority-white counties untouched.[241]

Restricting grazing rights took longer, in part because lower-income whites dependent on the range fiercely resisted it.[242] States responded by closing the range selectively.[243]

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234. *See id.* Incidentally, and perhaps belying the economic justification for expanded exclusion, the expansion of trespass law eliminated fences as a prerequisite to exclusion at the same time that the invention of barbed wire radically reduced its costs. *See* ALAN KRELL, THE DEVIL'S ROPE: A CULTURAL HISTORY OF BARBED WIRE 12–22 (2002) (discussing initial patents in the 1860s and subsequent spread of barbed wire).

235. *See* Sawers, *supra* note 174, at 352 (arguing that labor control "motivated direct restraints, such as criminalizing trespass and game laws," as well as closing the range "[w]here large landowners dominated").

236. *Id.* at 356.

237. *See id.* at 357–59.

238. *See id.* at 365 ("No Southern state left its antebellum trespass laws intact.").

239. *Id.* at 361.

240. *Id.* at 362.

241. *Id.* at 365.

242. *See id.* at 368.

243. *See, e.g.*, *id.* at 370 ("Almost the entire black population of Arkansas lived in two counties, which were the only two with closed ranges.").

Alabama, South Carolina, Mississippi, and Arkansas began closing their open ranges immediately after the Civil War, starting with majority-Black counties.[244] In Georgia, white and Black voters together 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.[245]

Race also played a role in eroding businesses' obligation to serve the public. Although many common carriers had long excluded free Black Americans as a matter of practice, the first cases challenging these exclusions held that they were inconsistent with the common law.[246] In the first years after the Civil War, twenty-four states enacted statutes affirming the right to be served regardless of race[247] and, in the waning years of Reconstruction, Congress enacted the Civil Rights Act of 1875,[248] banning racial discrimination in places of public accommodation.[249]

In reaction, states expanded the right of businesses to exclude anyone they chose. A month after the passage of the Civil Rights Act, Tennessee enacted a statute declaring that "[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 abrogated," and no owner was under obligation to admit "any person whom he shall for any reason whatever choose not to entertain."[250] 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,"

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244. *See id.* at 370–72, 373.

245. *Id.* at 373.

246. *See, e.g.*, State v. Kimber, 3 Ohio Dec. Reprint 197, 198 (Ct. Common Pleas 1859) (holding a streetcar conductor liable for assault and battery for evicting a "mulatto" woman from the car).

247. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U.L. REV. 1283, 1359–62, 1374 (1996).

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

249. *Id.* § 1, 18 Stat. at 336.

250. Act of Mar. 23, 1875, ch. 130, § 1, *reprinted in* THE CODE OF TENNESSEE: BEING A COMPILATION OF THE STATUTE LAWS OF THE STATE OF TENNESSEE OF A GENERAL NATURE IN FORCE JUNE 1, 1884, at 400[i] (W.A. Milliken & John J. Vertrees eds., 1884) (codified as amended at TENN. CODE ANN. §§ 62-7-109, -110 (2022)).

to serve "persons whose reception or entertainment . . . would be offensive to the major part of his customers and would injure his business."[251] Other jurisdictions narrowed the right to enter by judicial decision. Courts in Massachusetts and Iowa, for example, held for the first time that the obligation to serve did not apply to places of amusement in cases involving Black patrons.[252]

Legal acceptance of Jim Crow measures reduced the need for further explicit rejections of common-law rights to enter, but *Brown v. Board of Education*[253] and sit-ins at segregated diners by civil rights activists triggered a new wave of exclusion statutes. In 1954, Louisiana repealed its Reconstruction Era act requiring admission to public inns, hotels, and public resorts regardless of race, and conditioning business licenses on the same.[254] In 1956, Mississippi 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.[255] Arkansas enacted virtually the same provision in 1959, repealing it only in 2005.[256] Although Congress prohibited racial restrictions on the right to enter public accommodations in the Civil Rights Act of 1964,[257] the statute does not prohibit exclusions for nonracial grounds—even if unreasonable.[258] The "We Reserve the Right to Refuse Service

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251. Act of Mar. 25, 1875, § 1, 15 Del. Laws 322 (1875) (codified as amended at DEL. CODE ANN. tit. 24, § 1501 (2022)).

252. *See* Bowlin v. Lyon, 25 N.W. 766, 768 (Iowa 1885) (affirming the right of the owners of a skating rink to refuse entry to a Black patron); McCrea v. Marsh, 78 Mass. (12 Gray) 211, 212–23 (1858) (authorizing a right to refuse entry to a theater to a Black ticketholder).

253. 347 U.S. 483 (1954).

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

255. Act of Feb. 21, 1956, 1956 Miss. Laws 307-08 (codified as amended at MISS. CODE ANN. § 97-23-17 (2022)).

256. Act of 1959, No. 169, §§ 1–3, *repealed by* Arkansas Criminal Code Revision Commission's Bill, No. 1994, § 534, 2005 Ark. Acts 1994 (2005).

257. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

258. *See* 42 U.S.C. § 2000a (only prohibiting "discrimination or segregation" in places of public accommodation on the grounds of "race, color, religion, or national origin").

to Anyone" signs still posted at some establishments, therefore, do not reflect a triumph of property rights but the scars of our racial history.

3. Twenty-First Century Exclusion

Recent decades have seen new weaponizations of private exclusion. Like earlier ones, modern day expansions also target the less powerful to undermine common-law rights and protect established wealth.

Municipalities across the country have enacted trespass affidavit ordinances allowing businesses to pre-authorize police to detain and arrest people for trespassing.[259] The "Zero Tolerance Zone Trespassing Program"[260] of Miami Gardens, Florida, for example, became infamous after media reports that police had arrested the Black employee of one convenience store dozens of times for being on store property.[261] Over five years, Miami Gardens, a city of only 110,000 people, made 99,000 stops under the program.[262]

Under Grand Rapids's similar "No Trespass Letters" program, 560 people were arrested for trespass at businesses open to the public between 2011 and 2013.[263] Fifty-nine percent of the arrestees were Black, although Black people make up only twenty percent of the Grand Rapids population.[264] In 2018, a federal district court held the city lacked probable cause to arrest individuals for trespassing simply because they were not there to patronize the business.[265] The plaintiffs in that case

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259. *See* Sarah L. Swan, *Exclusion Diffusion*, 70 EMORY L.J. 847, 862–64 (2021).

260. MIAMI GARDENS, FLA., CODE ch. 14, art. III, § 14-59 (2007).

261. Conor Friedersdorf, *Asking America's Police Officers to Explain Abusive Cops*, THE ATLANTIC (Feb. 25, 2015), https://perma.cc/CBL6-WR8Y; This American Life, *Cops See It Differently—Part 2*, THIS AM. LIFE (FEB. 13, 2015), https://perma.cc/58CE-JH37; Justin Peters, *How "Zero Tolerance" Policing Helped Bad Cops in Florida Create a Civil Rights Nightmare*, SLATE (Nov. 22, 2013, 2:00 PM), https://perma.cc/2XJE-C7W9.

262. Jason Williamson, *The Orwellian Police Tactic That Targets Black Americans for Simply Existing*, SALON (April 15, 2015, 5:36 PM), https://perma.cc/AY8L-7RSA.

263. *Id.*

264. *Id.*

265. *See* Hightower v. City of Grand Rapids, 407 F. Supp. 3d 707, 731–32 (W.D. Mich. 2018) ("Plaintiffs have demonstrated that the City has an

included one man arrested while talking to a friend outside a convenience store after purchasing a soda, another waiting for his friends in the parking lot of a nightclub, and another who crossed over a private parking lot while leaving a public parking space.[266]

Similar affidavit programs also apply to public or private rental housing. Under New York City's Operation Clean Halls, for example, police could stop, question, and demand identification from anyone in a rental building, public or private, whose owner had signed a Clean Halls affidavit.[267] Many of those stopped and arrested under the program were residents or their visitors.[268] A 2008 survey of residents in one Harlem housing project found that 30% had been charged with trespassing and 72% reported that they and their regular visitors had been stopped by police multiple times that year.[269]

In other municipalities, bans may expressly exclude all nonresidents from the building, excluding even visitors and family members.[270] Other municipalities allow police and landlords to create specific lists of those banned from the building; one survey found that 85% of public housing authorities had such lists.[271] More states and municipalities are also permitting private landlords to ban particular nonresidents from their buildings, trumping the tenant's traditional right to have visitors.[272]

Although only a few of these programs have received much scrutiny, Googling "no trespass letter" reveals forms from municipalities across the United States. The Sherriff's

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unconstitutional policy or custom whereby police officers arrest individuals for trespassing on property covered by a no-trespass letter without first informing the suspect that he or she must leave the property.").

266. Williamson, *supra* note 262; *Hightower*, 407 F. Supp. 3d at 719–726.

267. M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding "Zero-Tolerance" Policing as a Form of Collective Punishment and Human Rights Violation*, 3 DREXEL L. REV. 373, 398–400 (2011).

268. *Id.* at 399–400.

269. *Id.* at 399 n.126.

270. Swann, *supra* note 259, at 860.

271. *Id.*

272. *Id.* at 864–65; *see, e.g.*, Williams v. Nagel, 643 N.E.2d 816, 818–22 (Ill. 1994) (upholding an apartment complex's ban on particular visitors and holding that, after notice, individuals placed on the "barred list" would be subject to criminal trespass).

Department of Placer County, California, allows owners to file a no-trespass letter authorizing officers to "remove individuals or request them to leave without the consent or authority of the property owner" if the business is closed or someone besides the owner reports a problem.[273] The downtown business district of Belleville, California, allows individuals to be banned from all businesses participating in its no-trespass process for offenses as minor as smoking an e-cigarette within nine meters of an entrance.[274] The Tulsa Police Department posts forms allowing owners to stipulate that owners, employees, tenants, lessees, and "authorized" guests are the only persons permitted on the property.[275] All others will be considered "trespassers" unless they have "proper documentation on his or her person" and show it to the police officer.[276]

A new wave of "crime-free housing" ordinances is expanding landlords' right to exclude even peaceful, law-abiding tenants.[277] These laws, adopted by over 2,000 municipalities in forty-eight states, either permit or require landlords to exclude people with past interactions with law enforcement.[278] Under the ordinances, landlords have excluded people because they have decades-old convictions or jaywalking offenses,[279] subjected people to frequent unjustified stops,[280] and even excluded people because of calls for protection from domestic violence.[281] Given the well-known over-policing and prosecution of Black people, the discriminatory effects of such policies are clear.[282]

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273. *No Trespass Letter of Consent*, PLACER CNTY., CAL., https://perma.cc/UJ3H-9P33.

274. DOWNTOWN BELLEVILLE, CAL., BELLEVILLE DOWNTOWN DISTRICT NO TRESPASS PROCEDURE 2, https://perma.cc/W74H-N676.

275. CITY OF TULSA & TULSA POLICE DEP'T, NO TRESPASSING LETTER 2, https://perma.cc/55SV-827D.

276. *Id.*

277. *See generally* Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173 (2019).

278. *Id.* at 175.

279. *Id.* at 179.

280. *Id.*

281. *Id.* at 187 n.64.

282. *See id.* at 209–11.

Texas is now also weaponizing trespass law against immigrants.[283] Immigration enforcement is a federal affair, and state actions that go beyond the federal scheme are preempted.[284] To evade this restriction,[285] in 2021 Texas launched "Operation Lone Star," a plan to use state trespass law to arrest and detain immigrants.[286] Under the program, Governor Greg Abbott first declared Texas border counties as "disaster areas," then flooded the area with thousands of state troopers.[287] These officers enter into agreements with border area ranchers to patrol their land and enforce trespass law on their behalf.[288] The disaster declaration gives the trespass misdemeanors enhanced charges and penalties.[289] The Texas National Guard even built fences on unfenced private land to provide the "notice" required for a trespass to be criminal under Texas law.[290] In some cases, arrestees report that the officers actually directed them onto private land to create the conditions

283. *See* Jodie McCulough, *New Federal Lawsuit Seeks to Halt Texas' Border Trespassing Arrests, Give More Than $5 Million to Illegally Detained Migrants,* TEX. TRIB. (Apr. 28, 2022, 12:00 PM), https://perma.cc/JPW9-SPH9 (describing the practice of Texas police "arrest[ing] men suspected of illegally crossing the border on misdemeanor trespassing charges").

284. *See* Arizona v. United States, 567 U.S. 387, 410 (2012) (holding that federal law preempts arrests based on possible removability by state law enforcement of people who work or are present in the United States without documentation).

285. *See* Complaint at 14, Barcenas v. McCraw, No. 22-CV-00397 (W.D. Tex. Apr. 27, 2022), 2022 WL 1261718 (quoting Governor Greg Abbott as stating that "[w]e are employing state law, as opposed to federal law, because when we make an arrest under federal law we typically have to turn people over to federal authorities").

286. *Id.* at 15–16 (quoting Abbott and various other state officials describing Operation Lone Star as a program to arrest immigrants for trespassing).

287. Arelis Hernandez, *Civil Rights Groups Ask DOJ to Investigate Texas Operation Arresting Migrants*, WASH. POST (Dec. 15, 2021, 5:26 PM), https://perma.cc/LJU4-ZW3G.

288. J. David Goodman, *Helicopters and High-Speed Chases: Inside Texas' Push to Arrest Migrants,* N.Y. TIMES (Dec. 11, 2021), https://perma.cc/T94A-ZDZV (last updated Dec. 15, 2021).

289. Complaint, *supra* note 285, at 4.

290. *Id.* at 9; *see* TEX. PENAL CODE ANN. § 30.05 (West 2022) (providing that a person commits trespass by entering or remaining on the property of another if the person "had notice that entry was forbidden" or "received notice to depart but failed to do so").

for arrest.[291] The thousands of people arrested—almost all Brown and Black men—overwhelmed local courts and jails, leading to illegal delays in prosecution, and even an emergency order waiving the state's usual indigent defense system.[292]

Each of these initiatives undermines traditional rights to enter in new and devastating ways. Trespass affidavit programs undermine traditional limits on criminal trespass, allowing arrest and imprisonment without warning on property traditionally open to the public. Operation Lone Star combines this erosion with evasion of federal authority over entry to the United States. Affidavit programs in favor of landlords, meanwhile, take from tenants the common-law right to invite friends and family onto their property. Crime-free housing ordinances take rights of entry from lawful tenants themselves. As with earlier erosions of rights to enter, the results undermine the individual liberty and community interests that property norms protect.[293]

III. ELEVATING CONSTITUTIONAL EXCLUSION

Before *Cedar Point*, it was clear that government-authorized entries to property were not necessarily takings.[294] Although permanent physical occupations by strangers were takings per se,[295] other entries were evaluated by an ad hoc inquiry known as the *Penn Central* test. This test balances the nature of and public interest in the government action, its economic impact on the owner, and whether the action undermines the owner's reasonable investment-backed expectations.[296] Under this test, some physical invasions were takings and others were not.[297]

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291. Hernandez, *supra* note 287.

292. Complaint, *supra* note 285, at 4–5, 24.

293. *Cf.* Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 176 (2021) (identifying *Cedar Point* as an example of antidemocracy at work in constitutional law).

294. *See supra* notes 187–188 and accompanying text.

295. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

296. Penn Cent. Trans. Co. v. New York City, 438 U.S. 104, 124 (1978).

297. *See id.* at 133.

Cedar Point eviscerated this precedent: "appropriations of a right to invade are per se physical takings," without regard to their duration.[298] This Part first discusses the case and the access rule it attacked, then examines the prior case law establishing that temporary government-authorized entries were not takings per se, and finally shows that *Cedar Point* was the product of a decades-long, business-financed effort to undermine the regulatory state.

A. Cedar Point Nursery v. Hassid

Cedar Point Nursery v. Hassid emerges from conflicts similar to those between the more and less powerful discussed above. As in many of those conflicts, the case pitted wealthier, generally whiter groups over poorer, generally non-white ones.[299] As in those conflicts, the decision weaponized exclusion to protect the former.

The access regulation attacked in *Cedar Point* addresses the unique vulnerability of migrant farmworkers.[300] When Congress enacted the National Labor Relations Act[301] in 1935, it excluded agricultural workers to protect employer control over mostly Brown and Black employees.[302] The Social Security Act of 1935[303] and the Fair Labor Standards Act of 1938[304] did the same, as did state workers' compensation, unemployment

298. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2077 (2021).

299. *See supra* Part II.D.2–3.

300. *See* Brief for United Farm Workers of America as Amicus Curiae in Support of Respondents at 4–5, Cedar Point v. Hassid, 141. S. Ct. 2063 (2021) (No. 20-107) [hereinafter UFW Brief] (noting that the "previous immigration or low socio-economic status" common among farmworkers "makes many vulnerable to forced labor and other human trafficking crimes").

301. National Labor Relations Act of 1935, Pub L. No. 74-198, 49 Stat. 449.

302. *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 STATE L.J. 95, 96 n.1 (2011) ("Most historians agree that the exclusion of agricultural and domestic employees in the National Labor Relations Act should be understood as part of the pattern of racist exclusions enacted in the major New Deal Era statutes."). In the 1930s, many agricultural workers were Black Americans but, as they increasingly migrated to Northern cities to escape poverty and the hardships of Jim Crow, Latino and West Indian workers took their places. *Id.* at 134.

303. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620.

304. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060.

insurance, and minimum wage laws.[305] At the same time, increasingly restrictive federal immigration laws increased worker vulnerability, leaving migrant workers with two bad options: either enter through the federal Bracero Program that made continued presence dependent on the will of employers, or enter without legal status, making continued presence even more precarious.[306]

In the 1960s and 1970s, worker-led movements drew new attention to farmworker rights.[307] Rights to enter were immediately part of the challenge. Migrant workers were typically housed at worksites or labor camps controlled by employers.[308] Although owners permitted local charity groups to enter the camps so long as they did not challenge the status quo, they vehemently excluded and sometimes assaulted those that did.[309] In 1971, three courts—in Michigan,[310] New Jersey,[311] and New York[312]—held that trespass law did not exclude those seeking to provide aid to farmworkers.[313] Perhaps in reaction to those victories, most agribusinesses no longer provide housing on their own property. Instead, most "[f]armworkers compete in the scant market for low income housing in rural areas," with

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305. Emily Prifogle, *Rural Social Safety Nets for Migrant Farmworkers in Michigan, 1942–1971*, 46 LAW & SOC. INQUIRY 1022, 1026 (2021).

306. *See id.* at 1026–29.

307. *See* Matt Garcia, *Cesar Chavez and the United Farm Workers Movement*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF AMERICAN HISTORY (2022), https://perma.cc/38YZ-3L24.

308. *See* Prifogle, *supra* note 305, at 1028 ("Farmers created and maintained physically isolated migrant camps, which . . . enabled farmers to assert private property rights against aid workers . . . .").

309. *See id.* at 1050.

310. Folgueras v. Hassle, 331 F. Supp. 615, 625 (W.D. Mich. 1971) ("[R]eal property ownership does not vest the owner with dominion over the lives of those people living on his property.").

311. State v. Shack, 277 A.2d 369, 374 (N.J. 1971) ("[T]he employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens.").

312. People v. Rewald, 318 N.Y.S.2d 40, 45 (Cayuga Cnty. Ct. 1971) ("To permit arbitrary and capricious ejection from publicly used premises would violate not only the fair intendment of the statutory privilege, but would clearly raise serious questions of fundamental constitutional rights.").

313. Prifogle, *supra* note 305, at 1026; *see id.* at 1051 ("Decisions like *Shack* and *Folgueras* gave migrants workers and their allies literal ground on which to organize").

many "quietly homeless, living in trucks, tents, cars and garages."[314]

The farmworker movement won a decisive victory in California with the passage of the Agricultural Labor Relations Act[315] in 1975.[316] The legislature stated that the law was designed 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."[317]

The Act created an Agricultural Labor Relations Board, which immediately adopted the access regulation challenged in *Cedar Point*.[318] The regulation declares that "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 that "unions seeking to organize agricultural employees do not have available alternative channels of effective communication."[319] It therefore gives unions a limited right to enter growing sites to organize and provide information about worker rights.[320] Union organizers must provide notice to the growers first, can only enter for up to four thirty-day periods per year, and can only speak to workers during the hour before work, the hour after, and during the lunch break.[321] Organizers may not engage in disruptive activity and violation of the access rules could lead to loss of access rights

314. Brief for California Rural Legal Assistance, Inc., et al. as Amici Curiae in Support of Respondents at 14–15, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (No. 20-107).

315. Alatorre-Zenovich-Dunlap-Berman Agricultural Labor Relations Act of 1975, ch. 1, 1975 Cal. Stat. 4013 (codified as amended at CAL. LAB. CODE §§ 1140–1167).

316. *See* UFW Brief, *supra* note 300, at 5 ("California adopted the [Agricultural Labor Relations Act] in 1975 in an attempt to balance the historic imbalance of power between farmworkers and agricultural employers . . . .").

317. § 1, 1975 Cal. Stat. at 4013; *see* Agric. Lab. Rels. Bd. v. Super. Ct., 546 P.2d 687, 690 (Cal. 1976) (quoting Section 1 of the Act).

318. *See supra* note 5 and accompanying text.

319. CAL. CODE REGS. tit. 8, § 20900(b), (c) (2022).

320. *Id.* § 20900(e).

321. *Id.*

across the region.[322] If organizers were present on a growing site for the maximum that the regulation allows, they would be there for less than four percent of the year. In practice, they were present far less, entering no farm site more than once or twice a year.[323]

The regulation survived multiple legal and regulatory challenges prior to 2021. In 1976, the California Supreme Court upheld the regulation against takings and due process challenges,[324] and the United States Supreme Court dismissed the employers' appeal "for want of a substantial federal question."[325] In 2015, the Board conducted new public hearings and found that access was still necessary to enable workers to exercise their rights—perhaps even more so than it had been in the 1970s.[326] Farmworkers were more likely to be Indigenous and speak neither English nor Spanish, most lacked the literacy to access information in writing, and although many had cell phones almost none could afford internet or smart phones.[327] Farmworkers had "little to no knowledge" of their rights, many had precarious immigration status, and most greatly feared retaliation from their employers.[328] The resulting report recommended that the Board increase its regulatory provisions for access. "Against the backdrop of the influx of a new and growing group of (indigenous) farmworkers with little or no understanding that they have any rights under law and ineffectiveness of traditional methods for education," it recommended an additional regulation that would give Board employees themselves the ability to access to agricultural sites directly.[329]

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322. *Id.* § 20900(e)(4)(C), (5)(A).

323. Conversation with Mario Martinez, Gen. Couns., United Farmworkers of Am. (Mar. 18, 2021).

324. *Agric. Lab. Rels. Bd.*, 546 P.2d at 699.

325. Kubo v. Agric. Lab. Rels. Bd., 429 U.S. 802, 802 (1976).

326. *See* Sobel Memo, *supra* note 10, at 4 ("[D]espite 40 years of outreach efforts by the Board, by unions and by Hispanic community legal, religious, social and cultural groups, today's farmworkers have little to no knowledge about the ALRA/ALRB and the rights and protections this law affords them.").

327. *See id.* at 4–5, 9–13.

328. *Id.* at 4–5.

329. *Id.* at 37–39. The Board had engaged in such efforts before 1979, but stopped after California courts held that access would be a trespass unless the

In 2016, Cedar Point Nursery and Fowler Packing Company challenged the original regulation.[330] Cedar Point, a strawberry grower with over 400 seasonal workers, complained that organizers from United Farm Workers (UFW) had entered its site without notice and with bullhorns at 5:00 A.M. and that some workers had stopped work and joined a labor protest in response.[331] Fowler Packing Company, a table grape and citrus shipper with over 2,000 seasonal employees, complained that UFW had filed three complaints against it for refusing to grant access rights, and that were it not for the regulation the company would "exercise its right to exclude union trespassers from its property."[332] The companies did not allege economic damage, but rather that simply by authorizing access to their property, the regulation amounted to a taking per se.[333] The federal district court rejected the claim but gave the growers leave to amend,[334] presumably to allege a taking under the ad hoc *Penn Central* test, which would require evidence of economic impact and interference with the grower's investment-backed expectations.[335] After the growers declined to amend, the district court dismissed, and the Ninth Circuit affirmed.[336]

The Supreme Court reversed.[337] In a 6–3 opinion authored by Chief Justice John Roberts and joined by the rest of the conservative majority, the Court held that "[t]he access regulation appropriates a right to invade the growers' property

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Board enacted a formal regulation governing access. *Id.* at 2; *see generally* San Diego Nursery Co. v. Agric. Lab. Rels. Bd., 100 Cal. App. 3d 128 (1979).

330. *See* Cedar Point Nursery v. Gould, No. 16-CV-00185, 2016 WL 3549408, at *1 (E.D. Cal. June 29, 2016) ("Plaintiffs argue that the Access Regulation allows third parties to take their property without providing just compensation, in violation of the Fifth Amendment . . . .").

331. *Id.* at *1. These allegations were not subject to a fact-finding but, if true, the organizers could have been excluded for violating the regulation. CAL. CODE REGS. tit. 8, § 20900(e)(5)(A).

332. *Cedar Point Nursery*, 2016 WL 3549408, at *2 (internal quotation omitted).

333. *Id.* at *3.

334. *Id.* at *5.

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

336. *See* Cedar Point Nursery v. Shiroma, 923 F.3d 524, 534 (2019).

337. Cedar Point Nursey v. Hassid, 141 S. Ct. 2063, 2080 (2021).

and therefore constitutes a *per se* physical taking."[338] "The right to exclude," the Court continued, "is 'one of the most treasured' rights of property ownership."[339] A restriction on that right was a taking "whether it is permanent or temporary,"[340] and "'no matter how small'" its impact.[341]

The Court created three exceptions to its per se rule: one for "isolated physical invasions, not undertaken pursuant to a granted right of access," which should be evaluated as trespasses, not takings;[342] one for "government-authorized physical invasions [that are] consistent with longstanding background restrictions on property rights;"[343] and one for "access as a condition of receiving certain benefits," asserting that "[u]nder this framework, government health and safety inspection regimes will generally not constitute takings."[344]

One might argue that the access regulation fit into one or more of these exceptions: the common law had long protected access to protect the rights of invitees and the access could be seen as a condition of the benefit of employing migrant workers.[345] But the Court rejected this possibility:

> Unlike a mere trespass, the regulation grants a formal entitlement to physically invade the growers' land. Unlike a law enforcement search, no traditional background principle of property law requires the growers to admit union organizers onto their premises. And unlike standard health and safety inspections, the access regulation is not germane to any benefit provided to agricultural employers or any risk posed to the public.[346]

This summary rejection shows that despite the exceptions, *Cedar Point* creates significant barriers to a vast array of

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338. *Id.* at 2072.

339. *Id.* (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982)).

340. *Id.* at 2074.

341. *Id.* at 2078 (quoting Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 322 (2002)).

342. *Id.* at 2078.

343. *Id.* at 2079.

344. *Id.*

345. *See supra* notes 70–76 and accompanying text.

346. *Cedar Point*, 141 S. Ct. at 2080 (citing Horne v. Dep't of Agric., 576 U.S. 350, 366 (2015)).

long-accepted rights to enter. The first exception, distinguishing between trespass and takings, seems not to be an exception at all, but a restatement of the obvious proposition that if an individual enters property without a government-created right of access there is no state action so the Fifth Amendment does not apply. Perhaps it could be read to protect occasional entries, like those described in Part II, that courts hold are not trespasses, but that would create substantial overlap with the second exception. The second exception, the "background principles" of property law, is potentially broader given the long American tradition of entry rights, but the Court suggested a narrower definition by referencing solely immediate necessity and entry by law enforcement.[347] As to the third exception, despite the Court's reassurance that health and safety inspections are protected as compensation for licensing benefits, the exception does not address inspections not triggered by licensing regimes. More importantly, the Court declared this exception emerged from its jurisprudence regarding exactions for land use permits, but that jurisprudence has required an increasingly restrictive nexus between the benefit and the requirement.[348] In addition, the exceptions fail to mention the range of entry rights that, like the access regulation itself, are triggered by owners' invitations to others.

Despite its sweeping impact, the decision may not actually invalidate the access regulation. The Takings Clause does not prohibit takings of property—it simply requires "just compensation" for them.[349] "Just compensation" means the impact of the government action on the fair market value of the

347. *See id.* at 2079 (citing RESTATEMENT (SECOND) OF TORTS §§ 196, 197, 205–204 (AM. L. INST. 1965)).

348. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, (1987) ("We have long recognized that land-use regulation does not effect a taking if it substantially advance[s] legitimate state interests and does not den[y] an owner economically viable use of his land." (alterations in original) (internal quotations omitted)); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (requiring a "rough proportionality" between the proposed use of a piece of land and government conditions on granting a permit); Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 619 (2013) ("[T]he government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money.").

349. U.S. CONST. amend. V.

property, not how much could be charged for the right if the owner could veto access.[350] In *Loretto v. Teleprompter Manhattan CATV Corp.*,[351] for example, the Court held that a small, permanent cable box on the property owner's roof was a taking,[352] but because the box—which the owner had not noticed in buying the house or in the years after—had no impact on the value of the building, "just compensation" was ultimately just one dollar.[353] Similarly, in *Brown v. Legal Foundation of Washington*,[354] the Court considered use of interest on lawyer trust accounts (IOLTA) to fund charitable legal services.[355] The Court held that although the program created a per se taking,[356] the individual deposits were too small to earn interest if not pooled together in the IOLTA program.[357] Such a "mere technical taking," the Court held, "does not give rise to an obligation to pay compensation."[358]

The access regulation may fall into the same category as *Loretto* and *Brown*.[359] The California regulation was carefully tailored to prevent interference with work at the grow sites. The plaintiffs below did not allege any loss in value to their property from the access. Even if it is a taking, therefore, only nominal compensation may be required.

Regardless of *Cedar Point*'s impact on the access regulation, the interests behind the growers may have achieved their goal.

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350. *See* United States v. Causby, 328 U.S. 256, 261 (1946) ("It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken. Market value fairly determined is the normal measure of the recovery." (citations omitted)).

351. 458 U.S. 419 (1982).

352. *See id.* at 441 ("Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking.").

353. *See* Loretto v. Group W. Cable, 135 A.D.2d 444, 448 (N.Y. App. Div. 1987).

354. 538 U.S. 216 (2003).

355. *Id.* at 220.

356. *See id.* at 240 ("A law that requires that the interest on those funds be transferred to a different owner for a legitimate public use, however, could be a *per se* taking requiring the payment of 'just compensation' to the client.").

357. *See id.*

358. *Id.* at 236.

359. *See* Lee Ann Fennell, *Escape Room: Implicit Takings After* Cedar Point Nursery, 17 DUKE J. CONST. L.& PUB. POL'Y 1, 4 (2022).

Laws authorizing entry for consumer protection, workers, tenants, and many other public interest purposes are now subject to plausible takings challenges. Even if they fail, the results will chill future regulation. The next Subpart discusses how inconsistent this result is with prior jurisprudence.

B. *Re-Writing Takings Law*

If *Cedar Point* was the first takings opinion you had ever read, you might think it was an application of precedent. Chief Justice Roberts's opinion for the majority is full of invocations of alleged principles from the case law. "To begin with," the Court declares, "we have held that a physical appropriation is a taking whether it is permanent or temporary."[360] "Our decisions consistently reflect this intuitive approach," the Court continues.[361] "Our cases establish that appropriations of a right to invade are *per se* physical takings."[362] The apparent reliance on precedent is not surprising. Chief Justice Roberts was an outstanding appellate lawyer and, as Chief Justice, hopes to preserve the perception that the Court is simply "calling balls and strikes."[363] But in reality, *Cedar Point* runs roughshod over established takings law.

This assessment is shared by conservative property and constitutional law scholar Josh Blackman, who wishes the Court had just abrogated *Penn Central* altogether.[364] Soon after the decision was released, Blackman published a piece in the libertarian magazine *Reason* titled "*Cedar Point Nursery v. Hassid* Quietly Rewrote Four Decades of Takings Clause Doctrine," with a subheading that reads "[f]or the first time, the 6–3 conservative majority powered a hard-right change in the

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

361. *Id.* at 2076.

362. *Id.* at 2077.

363. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr.), https://perma.cc/D25E-RR3F [hereinafter *Roberts Confirmation Hearing*].

364. *See* Blackman, *supra* note 12 ("In a perfect world, the Court would overrule *Penn Central*. It was a disastrous decision for property rights. Alas, the Court lacks the commitment to take those steps.").

law."[365] As he wrote, the *Cedar Point* "majority misreads old precedents, and alters wide swaths of the law."[366]

Before the decision, precedent was clear that although a taking "may more readily be found when the interference with property can be characterized as a physical invasion by government," for temporary invasions, the *Penn Central* balancing test applied.[367] There are three key factors in *Penn Central*'s "essentially ad hoc, factual inquir[y]": the nature and public interest in the government action, its economic impact on the owner, and its interference with the owner's reasonable investment backed expectations.[368] Although named after the 1978 decision *Penn Central Transportation Co. v. New York City*,[369] the Court had long applied these factors to temporary invasions.[370] Under this test, temporary invasions that did not significantly undermine the owners' economic interests or reasonable investment backed expectations were not takings.

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365. *Id.*

366. *Id.* For a more generous view of the decision's use of precedent, see Mahoney, *supra* note 23, at 12 (stating that *Cedar Point* "carefully reviews the relevant precedents, and (slightly) clarifies takings doctrine"). As discussed further below, I disagree with this characterization.

367. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

368. *Id.*

369. 438 U.S. 104, 124 (1978).

370. *See, e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434–35 (1934) (finding no taking from foreclosure moratorium); Sanguinetti v. United States, 264 U.S. 146, 149 (1924) (finding no taking from temporary flooding in part because owner had not shown "any permanent impairment of value"); Block v. Hirsh, 256 U.S. 135, 156–57 (1921) (finding no taking from anti-eviction and rent control law); United States v. Causby, 328 U.S. 256, 261 (1946) (holding that overflights rendering a property unusable as a chicken farm were a taking); Griggs v. Allegheny County, 369 U.S. 84, 89–90 (1962) (holding that overflights rendering a home "unbearable for . . . residential use" were a taking); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 329 (1922) (holding that it would be a taking if the United States set up "heavy coast defense guns with the intention of firing them over the claimants' land" at will where "serious loss" had been inflicted because "the public has been frightened off the premises by the imminence of the guns"); United States v. Cress, 243 U.S. 316, 326–328 (1917) (holding that repeated floodings resulting in the loss of half of land's value is a taking); Peabody v. United States, 231 U.S. 530, 539–40 (1913) (finding no taking although the presence of heavy guns reduced neighboring land's value as they had only been fired on two occasions since they were put in place).

One of the starkest examples of this is *PruneYard Shopping Center v. Robins*,[371] which future Chief Justice William Rehnquist penned the year before future Chief Justice Roberts became his law clerk.[372] *PruneYard* held that a California decision mandating access to a shopping mall for nondisruptive political speech did not constitute a taking.[373] The majority in *Cedar Point* distinguished *PruneYard* on the grounds that the mall was open to the public,[374] and that clearly was important to the opinion. But *PruneYard* relied on this only to find that access did not interfere with the owner's "reasonable investment-backed expectations," a core ad hoc factor—not to find that there was no physical invasion at all.[375]

The *PruneYard* Court agreed 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."[376] Nevertheless, the takings claim required an "inquiry into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations."[377] Under this inquiry, state-mandated invasion "clearly does not amount to an unconstitutional infringement of appellants' property rights under the Taking [sic] Clause," and "the fact that [the protestors] may have 'physically invaded' appellants' property

371. 447 U.S. 74 (1980).

372. *See* Adam Liptak & Todd S. Purdum, *As Clerk for Rehnquist, Nominee Stood Out for Conservative Rigor*, N.Y. TIMES (July 31, 2005), https://perma.cc/TR9K-KTJW.

373. *See PruneYard*, 447 U.S. at 83 ("Here the requirement that appellants permit appellees to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of appellants' property rights under the Taking [sic] Clause.").

374. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2076–77 (2021) ("Unlike the growers' properties, the PruneYard was open to the public . . . . Limitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public.").

375. *See PruneYard*, 447 U.S. at 83 ("There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center.").

376. *Id.* at 82.

377. *Id.* at 83 (citing Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)).

cannot be viewed as determinative."[378] In a concurrence that today seems chillingly prescient, Justice Thurgood Marshall wrote that the owner's claim "amounts to no less than a suggestion that the common law of trespass is not subject to revision by the State" that, if accepted, "would represent a return to the era of *Lochner v. New York*, when common-law rights were also found immune from revision by State or Federal Government."[379]

Cedar Point also distorted the opinions it relied on to support its per se rule. For example, the majority repeatedly cited *United States v. Causby*, a 1946 decision.[380] *Causby* held that the United States took plaintiff's chicken farm by repeatedly flying military aircraft so low over it that the chickens died from flying into the walls in fright, resulting in "the destruction of the use of the property as a commercial chicken farm."[381] *Causby* made clear that without "substantial" damage, such invasions would not be takings.[382] "Flights over private land are not a taking," the Court opined, "unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."[383]

Cedar Point also relied on *Loretto v. Teleprompter Manhattan CATV Corp.*, which held that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."[384] *Loretto* concerned a New York law requiring landlords to allow cable companies to install cable boxes and cables on their buildings.[385] The Court emphasized that permanent occupations took not just the right to exclude but also the right to use or transfer that property.[386]

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378. *Id.* at 83–84.

379. *Id.* at 93 (Marshall, J. concurring).

380. *See Cedar Point*, 141 S. Ct. at 2073–75, 2077, 2078.

381. United States v. Causby, 328 U.S. 256, 259 (1946).

382. *See id.* at 266 ("'[I]t is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking.'" (quoting United States v. Cress, 243 U.S. 316, 328 (1917))).

383. *Id.* at 266.

384. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

385. *See id.* at 421.

386. *See id.* at 435–36.

In such occupations, therefore, "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand,"[387] allowing strangers "to exercise complete dominion" over the property occupied.[388] *Loretto* also emphasized that while permanent invasions were per se takings, temporary entries were not.[389] Instead, as Justice Marshall wrote for the Court, its decisions had always recognized a distinction between "a permanent physical occupation, on the one hand, and cases involving a more temporary invasion . . . on the other," and noted that "[a] taking has always been found only in the former situation."[390]

Cedar Point also quoted *Kaiser Aetna v. United States*[391] for the proposition that the right to exclude "so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation."[392] *Kaiser Aetna*, however, is the classic ad hoc balancing decision. The plaintiffs in *Kaiser Aetna* owned a private lagoon and received permission from the U.S. Army Corps of Engineers to dredge a link to the sea in order to create a private marina.[393] Once the link was dredged and the marina created, however, the United States declared that because it connected to navigable water, the marina could no longer be private and they had to admit the public.[394] The Court held that an ongoing public access right was a taking.[395]

In so doing, the *Kaiser Aetna* Court emphasized that the takings analysis turned on "essentially ad hoc, factual inquiries."[396] Further, "[w]hen the 'taking' question has involved the exercise of the public right of navigation over interstate

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387. *Id.* at 435.

388. *Id.* at 436.

389. *See id.* at 433–35 (discussing "the constitutional distinction between a permanent occupation and a temporary physical invasion").

390. *Id.* at 428.

391. 444 U.S. 164 (1979).

392. *Id.* at 179–80; *see* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072, 2073 (2021) (quoting *Kaiser Aetna*, 444 U.S. at 179–80).

393. *Kaiser Aetna*, 444 U.S. at 179.

394. *Id.*

395. *Id.* at 187.

396. *Id.* at 175.

waters[,] compensation may not be required as a result of the federal navigational servitude."[397] Public welfare, not historical practice, justified the rule: "[W]hether a taking has occurred must take into consideration the important public interest in the flow of interstate waters."[398] Under the distinctive facts of the case, however, the owner's reasonable investment-backed expectations in privacy meant that the public interest did not control. The owner's investment of "substantial amounts of money" to create the marina in reliance on the consent of the government created "a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property."[399] The government could not without compensation convert "into a public aquatic park that which petitioners had invested millions of dollars in improving on the assumption that it was a privately owned pond leased to Kaiser Aetna."[400]

Other pre-*Cedar Point* decisions also support a balancing approach to rights to enter, with the level of scrutiny varying between three lines of cases. The least scrutiny comes in cases involving those the owner had already permitted to enter property. In 1921, in *Block v. Hirsh*[401] and *Marcus Brown Holding Co. v. Feldman*,[402] the Court upheld statutes preventing landlords from excluding tenants at the end of their leases or increasing the rent during World War I.[403] Writing for the Court in *Block*, Justice Oliver Wendell Holmes critiqued the "rigidity to our conception of our rights" in tangible property and held that "property rights may be cut down, and to that extent taken, without pay."[404] The only question was whether the legislature went "too far."[405] While not opining on the wisdom of the law, the Court noted the public exigency, traditional respect for a

397. *Id.*
398. *Id.*
399. *Id.* at 176, 179.
400. *Id.* at 169.
401. 256 U.S. 135 (1921).
402. 256 U.S. 170 (1921).
403. *Id.* at 199; *Block*, 256 U.S. at 158.
404. *Block*, 256 U.S. at 156.
405. *Id.*

tenant in possession, and the temporary nature of the statute in question.[406] Similarly, in *Home Building & Loan Ass'n v. Blaisdell,*[407] the Court upheld a Depression-era Minnesota statute preventing foreclosure sales for one year.[408] The case primarily discussed the Contracts Clause but encompassed the takings power within it, and relied on the public emergency and the temporary nature of the statute in upholding the law.[409]

The Court reaffirmed this line of cases since establishing the *Loretto* per se test. In *FCC v. Florida Power Corp.*,[410] the Court upheld a statute requiring owners of utility poles who had rented to cable television companies to maintain those leases at substantially reduced rents.[411] The lower court found that the measure was a per se taking, noting that "[t]he hard reality of the matter is that if Florida Power desires to exclude the cable companies, . . . they are powerless to do so" because the FCC routinely prevented the exclusion of the cable companies once a lease began.[412] The Supreme Court reversed.[413] In an opinion written by Justice Marshall, the author of *Loretto,* the Court declared that "[t]he line which separates [this case] from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license."[414]

The Court affirmed that lessors might be required to continue leasing their land, even to strangers, in *Yee v. City of Escondido.*[415] *Yee* concerned a rent control ordinance that permitted renters of mobile home lots to sell their mobile homes to others with the controlled rent in place.[416] Although this

406. *See id.* at 157–58.

407. 290 U.S. 398 (1934).

408. *Id.* at 447–48; *see also* East N.Y. Sav. Bank v. Hahn, 326 U.S. 230, 235 (1945) (upholding a decade-long foreclosure moratorium); Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242, 250 (1922) (upholding an eviction moratorium).

409. *Id.*

410. 480 U.S. 245 (1987).

411. *Id.* at 254.

412. *Fla. Power Corp. v. FCC*, 772 F.2d 1537, 1543 (11th Cir. 1985), *rev'd*, 480 U.S. 245 (1987).

413. *Fla. Power Corp.*, 480 U.S. at 254.

414. *Id.* at 252–253.

415. 503 U.S. 519 (1992); *see id.* at 539.

416. *See id.* at 523–24.

meant that uninvited tenants might occupy the land, "[b]ecause they voluntarily open their property to occupation by others, petitioners cannot assert a per se right to compensation based on their inability to exclude particular individuals."[417] Noting that a "different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy," the Court rejected the per se physical takings claim.[418] In both *Yee* and *Florida Power Corp.*, the Court upheld fairly significant restrictions on owners' economic and exclusionary interests where the owner had already admitted others on the property.[419]

A related but distinct line of cases concerns entries to property by strangers on land that the owner broadly opens to the public. One such case is *Heart of Atlanta Motel, Inc. v. United States*,[420] a challenge to the constitutionality of the Civil Rights Act of 1964.[421] In rejecting a motel owner's challenge to the law on Commerce Clause grounds, the Court noted that the motel had "no 'right' to select its guests as it sees fit, free from governmental regulation."[422] The Court also dismissed the argument that restricting this right violated the Takings Clause 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."[423]

PruneYard Shopping Center v. Robins, discussed above, also falls into this line of cases. The Court emphasized that the owner retained the right to adopt "time, place, and manner regulations that will minimize any interference with its

417. *Id.* at 531.

418. *Id.* at 528.

419. *See id.* at 527–28 ("The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land . . . no government has required any physical invasion of petitioners' property."); *Fla. Power Corp.*, 480 U.S. at 252 (finding that it was not a government taking when a tenant was invited to lease at $7.15 but the rent has to remain at the regulated amount of $1.79).

420. 379 U.S. 241 (1964).

421. *Id.* at 242.

422. *Id.* at 259.

423. *Id.* at 261 (citing The Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870); Omnia Com. Co. v. United States, 261 U.S. 502 (1923); United States v. Cent. Eureka Mining Co., 357 U.S. 155 (1958)).

commercial functions," and that "[a]ppellees were orderly, and they limited their activity to the common areas of the shopping center."[424] Because of this, "the fact that they may have 'physically invaded' appellants' property cannot be viewed as determinative."[425]

The Court gives most scrutiny to cases where entry is unrelated to the owners' own activity on the land. Even here, however, the duration, purpose, and impact of the invasion and the nature of the property invaded are relevant. As Professors David Dana and Nadav Shoked have examined, takings protection wanes on the physical and practical edges of the property.[426] Invasions of airspace and navigable water, for example, are usually not takings at all given the public interest in their use.[427] They only become takings when they cause "direct and immediate interference with the enjoyment and use of the land" as in *Causby*[428] or negate the value of reasonable investment-backed expectations as in *Kaiser Aetna.*[429]

Other cases regarding flooding and airspace similar employ an ad hoc analysis. In 2012, in *Arkansas Game and Fish*

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424. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83–84 (1980).

425. *Id.* at 84.

426. *See* David A. Dana & Nadav Shoked, *Property's Edges*, 60 B.C. L. REV. 753, 769 (2019) ("[T]he law treats property not as a binary private/public choice, but as a spectrum proceeding from a core of intensely-protected private property into much less protected edges of private property that blend into the public space.").

427. *See, e.g.*, United States v. Causby, 328 U.S. 256, 266 (1946) ("The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment. The airspace, apart from the immediate reaches above the land, is part of the public domain."); United States v. Chandler - Dunbar Water Power Co., 229 U.S. 53, 62 (1913) ("If, in the judgment of Congress, the use of the bottom of the river is proper for the purpose of placing therein structures in aid of navigation, it is not thereby taking private property for a public use . . . .").

428. *Id.* at 266; *see* Griggs v. Allegheny County, 369 U.S. 38, 91 (1962) (finding that overflights become takings when they are so low and so frequent that they render a property "unbearable for residential use").

429. Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979); *see* Monongahela Navigation Co. v. United States, 148 U.S. 312, 344–45 (1893) (finding a taking where the United States took a lock and dam built by a private company at the invitation of Pennsylvania and the United States); *see also Kaiser Aetna*, 444 U.S. at 189 n.6 (Blackmun, J., dissenting) (discussing the limitation of *Monongahela* to the government encouragement rationale by subsequent decisions).

Commission v. United States,[430] the Court considered the repeated but temporary flooding of the plaintiffs' land.[431] Although the flooding clearly invaded their property, the Court emphasized that "most takings claims turn on situation-specific factual inquiries."[432] The Court remanded for trial, noting that "time [was] indeed a factor," as were the severity of the damage and its interference with the owners' reasonable investment-backed expectations.[433]

At times, the inquiry turns on whether the asserted access is continuous or occasional. In 1913, for example, *Peabody v. United States*[434] found no taking when the United States set up a heavy artillery range on the edge of a resort, even though the range undermined the profitability of the resort, because the guns had only been fired on a few occasions.[435] In 1922, the Court ruled that the same gun range was a taking, but only because the evidence established what was in effect a continuing easement based on an ongoing "intention of firing them over the claimants' land at will."[436] Similarly, in *Nollan v. California Coastal Commission*,[437] the Court held that state demands that owners give the public a "permanent and continuous right to pass to and fro" would be takings, distinguishing cases where the access was not permanent and continuous.[438]

These cases confirm that it is far easier to find a taking for physical invasions than restrictions on use. But they wholly contradict *Cedar Point*'s holding that temporary invasions are takings per se. Instead, in case after case, the takings inquiry turns on multiple factors, including the public interest, the owner's invitations to others, and the impact on property value and owner expectations. The next Subpart discusses the coordination of interest groups that brought the Court to this distortion of precedent.

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430. 568 U.S. 23 (2012).
431. *Id.* at 26.
432. *Id.* at 32.
433. *Id.* at 38–40.
434. 231 U.S. 530 (1913).
435. *Id.* at 539–41.
436. Portsmouth Land & Harbor Co. v. United States, 260 U.S. 327, 330 (1922).
437. 483 U.S. 825 (1987).
438. *Id.* at 832.

C. *Public (Business) Interest Law Firms and the Right to Exclude*

Cedar Point's constitutional decimation of entry rights was no accident, no fortuitous intersection of aggrieved owners with a sympathetic Supreme Court. Instead it was the triumph of almost fifty years of coordinated legal advocacy to undermine the regulatory state, advocacy heavily funded by business interests. This effort came to a Court stacked with Justices selected by the similarly inclined Federalist Society.[439] This Subpart will discuss this history, focusing on the Pacific Legal Foundation, which represented the growers in *Cedar Point* and has spent decades trying—usually unsuccessfully—to elevate exclusion as a barrier against regulation.

The roots of *Cedar Point* trace to 1973, when attorney Ronald Zumbrun left then-Governor Ronald Reagan's administration to form the Pacific Legal Foundation.[440] Zumbrun had been in charge of Reagan's attempts to restrict welfare and was frustrated by public interest litigation blocking those efforts.[441] Zumbrun found a partner in Simon Fluor, head of a major engineering and construction firm specializing in mines, oil rigs, and pipelines, who became Pacific Legal's first major donor and chairman of its board.[442] Pacific Legal was the first a new kind of organization, a conservative cause-lawyering nonprofit.[443]

Pacific Legal inspired the founding of similar organizations across the country.[444] Although nonprofits, these organizations

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439. *See* Amanda Hollis-Brusky, *Exhuming Brutus: Constitutional Rot and Cyclical Calls for Court Reform*, 86 MO. L. REV. 517, 528–29 (2021) (discussing the "capture" of lower federal courts and the United States Supreme Court by the Federalist Society); Lawrence Baum & Neal Devins, *The Federalist Society Majority*, SLATE (July 6, 2018, 2:01 PM), https://perma.cc/3PEG-KC7K ("Republican presidents not only emphasize ideology in judicial appointments but *also* look to the Federalist Society as the principal vehicle to identify qualified members of the conservative legal movement.").

440. JEFFERSON DECKER, THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT 1 (2016).

441. *Id.* at 56.

442. *Id.* at 57.

443. *Id.* at 1.

444. *Id.*

were founded in cooperation with and funding from large companies.[445] The pitch to business donors was that "[b]y pooling resources of several different businesses and then litigating select cases for free, conservative legal groups could ensure that risky or low-payoff cases also saw their day in court."[446]

These organizations crossed big business at their peril. The Mountain States Legal Foundation, for example, was founded in 1977 with funding from Joseph Coors, the highly conservative co-CEO of Coors Brewing Company.[447] Its first legal director, James Watt, described Mountain States Legal as "an exclusively 'pro-business' organization,'" and the organization solicited funding from businesses not as donations but as "investments."[448] After Watt left to join the Reagan Administration, however, the organization began challenging governmental regulation on behalf of individuals and "mom and pop" businesses.[449] When the cases challenged government giveaways to large businesses, Coors withdrew his support, and the rest of Mountain States Legal's donors followed.[450]

Pacific Legal, however, found an acceptable niche for its work. Zumbrun's original vision was to provide public interest lawyering on behalf of government; his business plan even included entering into contracts with government partners.[451] But within a few years Pacific Legal discarded this vision and

445. *Id.* at 2, 8; *see* STEVEN M. TELES, THE CONSERVATIVE LEGAL MOVEMENT 239 (2008) (discussing the founding of the Institute for Justice with funding from Charles Koch of $500,000 a year for three years, conditioned on producing results).

446. DECKER, *supra* note 440, at 114.

447. *Id.* at 75.

448. *Id.* at 77, 112.

449. *See id.* at 158–60.

450. *See id.* at 160–61; *see also id.* at 113, 163–68 (describing how the Capital Legal Foundation, whose initial funding allowed it to provide lavish salaries and cushy offices, lost its donor base and had to close its doors after taking on corporations and corporate interests to protect smaller businesses and a libel case against CBS).

451. *See id.* at 58 ("Zumbrun proposed funding Pacific, in part, through consulting contracts with government agencies that were fighting off challenges to their policies.").

"declared war on the US regulatory state."[452] The organization also began with diverse priorities, like welfare reform, campus culture, and labor, and diverse projects, like fighting against sewage treatment plants and multi-passenger vehicle lanes.[453] Pacific Legal soon reoriented, however, toward a group of clients that put a sympathetic face on its deregulatory mission: property owners.[454] Ownership, it found, could form a potent constitutional shield against regulation.[455]

Pacific Legal lost many early cases[456] but succeeded in undermining the regulatory state. In its campaign against the California Coastal Commission in particular, it used litigation to "delay, frustrate, and hamstring the commission," which ultimately responded by "making smaller and smaller demands on landowners."[457]

It was by weaponizing exclusion, however, that Pacific Legal first actually changed constitutional law. Physical invasion provided a wedge issue to chip away *Penn Central*. Earlier cases like *Causby* and *Portsmouth Land & Harbor Co. v. United States*[458] had not described exclusion as a distinct constitutional right, but *Penn Central* agreed that physical invasions were more likely to be takings.[459] The following year, *Kaiser Aetna*, a case in which Pacific Legal was not involved, highlighted exclusion as a separate right that could trigger a takings finding.[460] Pacific Legal filed an amicus brief supporting

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452. *Id.* at 2; *see id.* at 60–61 (noting the new vision proposed by 1975 of not supporting but challenging government, and a 1979 brochure declaring "HALT . . . overregulation by big government").

453. *See id.* at 58–62.

454. *See id.* at 63 (describing how Pacific Legal "began to represent the property owners who wondered whether the government had the statutory or constitutional authority to extensively regulate private property").

455. *See id.* at 68 (discussing the formation of a land use division to challenge regulations on property rights grounds).

456. *See id.* at 68–69, 169–71; *see also, e.g.*, Agins v. Tiburon, 447 U.S. 255, 262–63 (1980) (holding that a state open-space requirement was not a taking).

457. DECKER, *supra* note 440, at 172–73.

458. 260 U.S. 327 (1922).

459. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by the government . . . .").

460. *See* Kaiser Aetna v. United States, 444 U.S. 164, 179–80 ("In this case, we hold that the 'right to exclude,' so universally held to be a fundamental

the *PruneYard* appellants' attempt to exploit the right to exclude in that case.[461] Despite the loss there, two years later *Loretto*, another non-Pacific Legal decision, showed that protests against entry could win in the right case.[462]

Nollan v. California Coastal Commission provided Pacific Legal with that case. The California Coastal Commission had demanded that James and Marilyn Nollan allow public access to the beach from their private property in exchange for a permit to triple the size of their home.[463] Such demands were a longstanding regulatory tactic and most of the Nollans' neighbors had already given up similar access rights.[464] In a strategy the growers also employed in *Cedar Point*, the Nollans did not demand compensation but only release from the requirement.[465] The facts and procedural history of the case presented several opportunities to reject the appeal on ripeness or lack of federal question but the case came to a Court with a new eagerness to redraw the line between property and the police power.[466]

Newly-minted Justice Antonin Scalia, who had written about the economic costs of regulation and served as the original advisor of the University of Chicago Federalist Society,[467] wrote the 5-4 opinion. The Court held that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'"[468] As Justice Brennan wrote in dissent, the decision imposed "a

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element of the property right, falls within this category of interests that the Government cannot take without compensation.").

461. *See* Brief for Pacific Legal Foundation as Amicus Curiae in Support of Appellants, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (No. 79-289).

462. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441–42 (1982).

463. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 827–31 (1987).

464. *See* DECKER, *supra* note 440, at 178 ("Several of the Nollans' neighbors had already provided access across their dry beach, which made it particularly difficult for the family to enforce its property rights, even if it had wanted to.").

465. *See id.* at 179.

466. *See id.* at 178–79.

467. *Id.* at 179–80.

468. *Nollan*, 483 U.S. at 837 (quoting J.E.D. Assoc. v. Atkinson, 423 A.2d 12, 14–15 (1981)).

standard of precision for the exercise of a State's police power that has been discredited for the better part of this century."[469] Subsequent cases litigated with Pacific Legal's support expanded on *Nollan* to impose ever tighter scrutiny[470] on ever more permit requirements.[471] And, in 2019, Pacific Legal represented the plaintiffs in *Knick v. Township of Scott*,[472] which used an alleged taking of exclusion rights to overturn state exhaustion requirements[473] established in 1985[474] and expanded in 2005.[475]

In cases like this, Pacific Legal and its emulators taught their fellow conservatives to "stop worrying and love legal activism."[476] When Ed Meese, who had been Governor Reagan's chief of staff, became Attorney General, his Department of Justice plotted new constitutional arguments to undermine

469. *Id.* at 842 (Brennan, J., dissenting).

470. *See* Dolan v. Tigard, 512 U.S. 374, 389 (1994) (demanding scrutiny of the "degree of connection between the exactions and the projected impact of the proposed development" and finding that the state's easement requirement did not meet it). *Dolan* was litigated by Oregonians in Action, a conservative cause-lawyering nonprofit on the model of Pacific Legal, and Pacific Legal filed an amicus brief in the case. Lyle Denniston, *Property Rights Collide with Public Uses in Ore.*, BALTIMORE SUN (Mar. 20, 1994), https://perma.cc/P7W7-DAEB; Dolan v. City of Tigard, 854 P.2d 437, 438 (1993), *rev'd*, 512 U.S. 374 (1994).

471. *See* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 612 (2013) (requiring a nexus between the impact of a development and the fees demanded for a permit for that development). Pacific Legal, along with other conservative lawyering nonprofits Institute for Justice and the Cato Institute, filed amicus briefs in the case. Brief for Pacific Legal Foundation as Amicus Curiae in Support of Petitioner, *Koontz*, 570 U.S. 595 (2013) (No. 09-713); Brief for Institute for Justice & Cato Institute as Amici Curiae in Support of Petitioner, *Koontz*, 570 U.S. 595 (2013) (No. 09-713).

472. 139 S. Ct. 2162 (2019).

473. *Id.* at 2179 (holding that takings plaintiffs could sue in federal court before suing in state court).

474. *See* Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 (1985), *overruled by* Knick v. Township of Scott, 139 S. Ct. 2162 (2019) (holding takings plaintiffs could not sue in federal court before exhausting state court remedies).

475. *See* San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323, 347 (2005) (holding that a state court's resolution of a takings claim under state law precludes a subsequent takings action in federal court).

476. DECKER, *supra* note 440, at 9.

administrative agencies.[477] The new crop of conservative lawyers celebrated Richard Epstein's 1985 book *Takings*, which blended unsupported arguments about original intent with law and economics claims.[478] *Takings* repeatedly referenced *Lochner v. New York*, the now-derided symbol of constitutional laissez faire,[479] for its allegedly balanced approach to economic regulation and the police power.[480] Epstein did not shrink from his departure from precedent and the status quo: "It will be said that my position invalidates much of the twentieth century legislation, and so it does. But does that make it wrong in principle?"[481] Nor did the Institute for Justice, founded in 1991 by veterans of Mountain States Legal and the Reagan Administration with Koch Foundation seed money, shy from constitutional radicalism.[482] Its strategic documents proposed "a direct assault on the *Slaughter-House Cases*" as part of a "carefully planned, long-term program to restore constitutional protection for economic liberty."[483]

Despite occasional successes like *Nollan*, however, until recently, efforts to radically expand takings doctrine lost as often—if not more often—as they won.[484] When these efforts reached the Supreme Court in 2021, however, they met a transformed Court, one that had been carefully shaped by the Federalist Society to be receptive to its claims.[485] With *Cedar*

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477. *See id.* at 184–88 (describing how the Department of Justice under Meese changed course to target administrative agencies).

478. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

479. *See* supra note 23 and accompanying text.

480. *See* EPSTEIN, *supra* note 478, at 108–09, 128, 279–80.

481. *Id.* at 281.

482. *See* TELES, *supra* note 445, at 79–85, 239.

483. *Id.* at 239.

484. *See, e.g.*, Murr v. Wisconsin, 137 S. Ct. 1933, 1944, 1946 (2017) (rejecting a "formalistic rule" for determining "the proper unit of property against which to assess the effect of the challenged governmental regulation"); Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 548 (2005) (holding that the "substantially advances" formula "is not a valid takings test"); Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 342 (2002) (rejecting a "new categorical rule" to judge the duration of a land use restriction in a regulatory takings case).

485. *See* AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 4 (2015) (showing how the Federalist Society created a judicial climate receptive to

Point, the "carefully planned, long-term program"[486] to undermine the regulatory state is bearing perhaps its most dangerous fruit.

CONCLUSION

Cedar Point Nursery v. Hassid represents the apotheosis of the new conservative radicalism. It undermines not only precedent but also the long American tradition of rights to enter in property law. This tradition reflects the norms of property law itself by balancing exclusive use against public need for scarce resources and the fiscal and liberty costs of policing property.[487] It further reflects the social function of property, which encourages interaction and exchange across a wide variety of potential users.[488] It equally protects individual rights, responding to the needs of invitees and others with justified claims to enter.[489] *Cedar Point* rejects this tradition to protect the interests of businesses to be free from regulation. Like historic expansions of the right to exclude, moreover, many of the losers in this shift are less wealthy, less white, and less politically powerful than the winners.[490]

All is not lost. The exceptions to the new per se rule, while insufficient, might yet be read broadly to preserve rights to enter. Particularly promising is the exception that entries are not takings if they are consistent with "longstanding background restrictions on property rights."[491] In *Lucas v. South Carolina Coastal Council*,[492] the Court created an identical exception to its new rule that restrictions on use that rendered property economically valueless were takings without regard to the public interest.[493] After *Lucas*, lower courts used this exception to reject takings claims in light of the long

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"revolutionary constitutional decisions"); Hollis-Brusky, *supra* note 439, at 520 (describing the 2021 Court as a "captured Court").

486. EPSTEIN, *supra* note 478, at 281.

487. *See supra* Part I.

488. *See supra* Part I.A.

489. *See supra* Part I.B–C.

490. *See supra* Part II.D.

491. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2079 (2021).

492. 505 U.S. 1003 (1992).

493. *See id.* at 1030.

common-law tradition of restricting property rights in the public interest,[494] and they may do the same here. Most of the conservative Justices on the Court, moreover, claim to care about original understanding in constitutional interpretation, so the robust American tradition of rights to enter may contribute to this possibility.[495]

Despite this possibility, *Cedar Point* should serve as a clarion call to reclaim the role of rights to enter in property law. Too long have scholars debated over the right to exclude without acknowledging their common ground that exclusion rights are not absolute. Too long have lawyers and policymakers waved a false flag of historically absolute exclusion without acknowledging parallel historical tradition of entry. Too long have many analyzed the joint project of creating and enforcing property rights as if it is solely about me and mine without acknowledging that it is also about we and us. Reclaiming rights to enter can help address all of these flaws.

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

495. *See* Bethany R. Berger, *Eliding Original Understanding in* Cedar Point Nursery v. Hassid, 33 YALE J.L. & HUMANS. 1, 2 (2022).