Cedar Point: Lockean Property and the Search for a Lost Liberalism

Sam Spiegelman and Gregory C. Sisk***

Introduction

This October term, in *Cedar Point Nursery v. Hassid*, the Supreme Court heard a case with the potential to (finally) move regulatory-takings doctrine in a coherent direction. Two strawberry growers argued that a decades-old California law permitting union activists to trespass on facilities like theirs and disrupt production for up to three hours per day for almost *one-third* of the year was a taking of their "right to exclude" others.[1] The Court agreed, ruling in a 6-3 split that despite its durational and conceptual limits, the law constituted a per se taking of that right.[2]

The Takings Clause protects against the "tak[ing]" of "property" for "public use" unless the government provides "just compensation."[3] Unfortunately, the clause at times poses more questions than it answers. What qualifies as property? Where is the line between public use and private transfer? How do we calculate just compensation when the purpose of an eminent-domain action—the construction of an interstate highway, for example—may increase a property's value tenfold? While outright confiscations create questions too, these are far less complicated than those that takings-like

* Legal associate, Cato Institute, Robert A. Levy Center for Constitutional Studies. J.D., University of Virginia School of Law; B.A., University of Michigan.

** Pio Cardinal Laghi Distinguished Chair in Law, professor and co-director of the Terrence J. Murphy Institute for Catholic Thought, Law and Public Policy, University of St. Thomas School of Law. J.D., University of Washington School of Law; B.A., Montana State University.

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

2 *Id.*

3 U.S. Const. amend. V.

regulations produce. In an era of ubiquitous governmental involvement in the private sector, any meaningful right to possess property would be eviscerated if all regulations of property were regarded as exceptions to the Takings Clause.

Property regulations—directives that restrict specified uses (or non-uses) but do not confiscate anything tangible—have grown more varied over time. Between ratification of the Constitution and the dawn of the 20th century, the United States, alongside other Western countries, underwent substantial industrial and urban growth. Railroads replaced rivers and canals as the primary channels of commerce, while new (and more dangerous) manufacturing and agricultural technologies, alongside novel financing and employment arrangements, transformed the social and cultural landscapes, pressing political forces into greater oversight of an increasingly complex private sector.[4] Despite these changes, many American courts during this period continued to distinguish ordinary regulations from proto-regulatory takings based on whether a challenged state action was public-harm-preventing (regulatory) or public-benefit-conferring (takings).[5] This development tracked the classical liberal understanding of the state's police power as permissible only to the extent of protecting the public from private externalities, and not as a means of redistributing private wealth.[6]

That approach emerged in English common law and crossed the Atlantic through the writings of eminent philosopher John Locke. Long before John Stuart Mill formulated his famous "harm principle,"[7] the

[4] See generally G. Edward White, 2 Law in American History: From Reconstruction Through the 1920s (2016).

[5] Scott M. Reznick, Empiricism and the Principle of Conditions in the Evolution of the Police Power: A Model for Definitional Scrutiny, 1978 Wash. U. L.Q. 1, 2–3 (1978) [hereinafter Evolution of the Police Power] ("During its early manifestations and throughout the nineteenth century, definitional scrutiny incorporated a substantive component derived from the common law of nuisance—the maxim *sic utere tuo ut alienum non laedas*. Under this maxim, courts limited the states' use of the police power to the prospective prevention of harms (negative externalities) to the community and its inhabitants.").

[6] See Richard A. Epstein, The Classical Liberal Constitution: The Uncertain Quest for Limited Government 353 (2014) ("The proper ends under the police power are those of the private law of nuisance, no more and no less. The means are regulations that fit well with the chosen ends, by being neither overbroad nor underinclusive. . . . It is instead necessary to make sure that differential systems of enforcement do not result in the hidden wealth transfers that are prohibited under the Takings Clause.").

[7] See generally John Stuart Mill, On Liberty (1859).

Lockean conception of property—as inviolable save for a superseding public *need*—permeated American legal culture from before the Founding. It was thus that the bulk of judicially recognized police powers during the first half of American history operated under the banner of *sic utere tuo alienum non laedas*—roughly, using one's property in such a manner as not to injure that of another.[8] *In re Jacobs* is a perfect example of this principle in action. There the New York Court of Appeals (the state's highest court) struck down a law that prohibited commercial home cigar-rolling, an activity that produces no harmful effects. The court reasoned that laws

> must have some relation to [the ends of protecting public health and securing the public comfort and safety]. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the legislature . . . declare that it is intended for the improvement of the public health.[9]

The Supreme Court affirmed this approach in the latter half of the 19th century.[10] But then, on the heels of an emergent legal realism that began to question tried-and-true elements of Anglo-American law, Justice Oliver Wendell Holmes in 1922 unhelpfully declared in *Pennsylvania Coal v. Mahon* that a regulation could "go[] too far" and become a taking, even if the owner retained control; though he hinted that the state had substantial latitude before that bridge

[8] See Reznick, Evolution of the Police Power, *supra* note 5, at 10 ("*Sic utere* is the fountainhead maxim from which both the common law of nuisance and the police power arose. As originally applied, *sic utere* 'operated to protect real property from what the courts thought were injuries resulting from the use of another of his real property.' That is, the courts used *sic utere* principles to resolve cost spillover conflicts between the existing uses of neighboring landowners. This relationship in tort between property owners originally caused the maxim and the emerging police power to be defined in terms of the prevention of harms.").

[9] In re Jacobs, 98 N.Y. 98, 110 (1885).

[10] See Pumpelly v. Green Bay Co., 80 U.S. 166 (1871); Mugler v. Kansas, 123 U.S. 623 (1887).

was crossed.[11] However significant Holmes's proviso, it offered no practical instruction on *when* it should be applied, besides implying that it would be on rare occasion. Since *Pennsylvania Coal*, the precedents have grown only more complicated. Regulatory-takings doctrine seems doomed to incoherence.[12] *Cedar Point*, despite its flaws, might yet mark the beginning of the end of this muddle.[13]

To help secure that end, this article will proceed as follows: Part I will briefly discuss the evolution of regulations and takings, from Norman England to 20th-century America. It will place special emphasis on how American courts tended toward the classical liberal distinction between harmful and innocent property uses that had long guided the public-private relationship, and that fit neatly within Locke's seminal "social contract" theory. It will then discuss the early-20th-century turn from the classical liberal approach to the legal realist one, and the regressive impact this had on property rights. Part II will discuss *Cedar Point* in greater detail and in the context of the broader takings muddle, focusing on the ruling's pros and cons. Pros include its strong Lockean language, which borrows heavily from precedent, and its self-saving preservation of mere governmental trespasses and invasions falling under the "background limitations" of state law. Cons include its failure (perhaps due to institutional timidity more than doctrinal disagreement) to escape the shadow of the confounding *Penn Central Transportation Co. v. New York City* decision.[14] *Cedar Point* did not recognize that the "background limitations" of state law denote, primarily (though not universally), those public actions that through longstanding practice and judicial distillation prove to be public-harm-preventing rather than public-benefit-conferring. While *Cedar Point* did exempt the "right to exclude" from *Penn Central*'s notoriously pro-government multifactor "balancing" test, it stopped short of replacing *Penn Central* altogether. Combine this with its failure to use "background limitations" to return takings doctrine to the classical liberal approach that predominated before

[11] Pa. Coal, 260 U.S. 393, 415 (1922).

[12] See generally Mark Fenster, The Stubborn Incoherence of Regulatory Takings, 28 Stan. Envtl. L.J. 525 (2009).

[13] See generally Carol M. Rose, Mahon Reconstructed: Why the Takings Issue Is Still a Muddle, 57 S. Cal. L. Rev. 561 (1984).

[14] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

the doctrinal changes of the 20th century, and *Cedar Point* has left much to finish. Part III will discuss how *Cedar Point* barely impacts *Robins v. Pruneyard Shopping Center*, in which the Court endorsed a far-too-generous police power—one that is incompatible with the classical liberal approach. Ideally, this article will be but an early contribution to a prodigious scholarship that nudges the post–*Cedar Point* Court to return takings jurisprudence to its classical liberal roots.

II. A Brief History of Regulations and Takings

A. The Evolution of "Property" from 1066 to 1791

The bundle of property rights familiar to an Anglo-American audience did not begin with the Constitution but with the solidification of an English common law after the Norman Conquest in 1066. Under William the Conqueror, lands were divided among reliable feudal lords who in turn controlled the division of those lands among vassals. Possession would escheat to the lord upon a felony conviction and was relinquished upon death.[15] This version of feudalism "implied land *holding* rather than land *owning*, save in the case of those few great lords and princes who had no superior, and therefore owned their lands, both those they retained and those which they granted out, by absolute right."[16] And so while there was ownership, such was a *privilege* reserved to the king's deputies, and not a *prerogative*, or a right; landlords' claims, in turn, depended on their "perform[ing] the required duties," including military service.[17] "Private transactions in land . . . were insecure until [the sovereign] had confirmed them, and he had a right to be consulted before a man of any position commended himself to a new lord."[18]

For his successors, William the Conqueror's discretion crystallized into habit. "[B]y the year 1100, it became settled that the king and his tenants-in-chief would automatically accept the eldest son of a deceased feudal lord as his replacement," though still "upon the

[15] Theodore F. T. Plucknett, A Concise History of the Common Law 508 (5th ed. 1956).

[16] *Id.* (emphasis added).

[17] Bruce L. Benson, The Evolution of Eminent Domain: A Remedy for Market Failure or an Effort to Limit Government Power and Government Failure?, 12 Indep. Rev. 423, 424 (2008).

[18] F. M. Stenton, Anglo-Saxon England 616 (1943).

payment of a sum of money."[19] Though "feudal lands became increasingly alienable,"[20] it was not until 1215—when King John's aggrieved barons compelled him to sign Magna Carta—that ownership became a *right* in the modern sense: free from sovereign intervention without due procedural safeguards.[21] But Magna Carta did not make ownership inviolable. By the 16th century, the conception of property as a bundle of rights still did not prevent the English sovereign from seizing land or chattel; though it now required the taken property serve a public purpose rather than enriching the sovereign.[22]

The shift from state-crafted to natural-right property found its most eloquent articulation in the writings of John Locke. The 17th-century philosopher's views on property made their way to the American continent, where they had a profound influence.[23] Locke argued that, whether it emerged from scripture or "natural reason," things are made property through labor: "[L]abour, in the beginning, gave a right of property, wherever any one was pleased to employ it, upon what was common. . . ."[24] As such, ownership implies a *vested interest*. "Hence it is a mistake," Locke declared,

> to think that the supreme or legislative power of any commonwealth can do what it will, and dispose of the estates of the subject arbitrarily, or take any part of them at pleasure. . . . For a man's property is not at all secure, though there be good and equitable laws to set the bounds of it between him and his fellow-subjects, if he who commands those subjects have power to take from any private man what part he pleases of his property, and use and dispose of it as he thinks good.[25]

[19] Steven J. Eagle, Regulatory Takings 48 (3d ed. 2005) (citing Plucknett, *supra* note 15, at 13).

[20] *Id.*

[21] Magna Carta art. 39 ("No free man shall be seized or imprisoned, or stripped of his rights *or possessions* . . . except by the lawful judgments of his equals or by the law of the land.") (cleaned up) (emphasis added).

[22] William B. Stoebuck, A General Theory of Eminent Domain, 47 Wash. L. Rev. 553, 561 (1972).

[23] James W. Ely, Jr., The Sacredness of Private Property: State Constitutional Law and the Protection of Economic Rights Before the Civil War, 9 N.Y.U. J.L. & Liberty 620, 621–22 (2015) [hereinafter The Sacredness of Private Property].

[24] John Locke, The Rational Basis of Private Property, in Francis William Coker, Readings in Political Philosophy 537, 546 (1938).

[25] *Id.* at 563–64.

While Locke's contributions to the 13 colonies' intellectual development is undisputed,[26] there are at least two contrasting views of its extent on pre-Revolution law and jurisprudence, particularly on eminent domain and land-use regulation. Professor William Michael Treanor for majoritarian republicanism and Professor James Ely for classical liberalism draw two far different conclusions from what is quite a mixed historical record.

In Treanor's view, there is little consistency in the property law of colonial America. The colonists did *everything*, from making owners of taken property whole to providing them no compensation at all.[27] Treanor notes that "there was no consensus among the framers that majoritarian decisionmakers"—legislatures as opposed to common-law courts—"could not be trusted to determine the appropriate level of protection for property interests."[28] From this he concludes that "[m]any of the framers believed that government could . . . limit individuals' free use of their property," with the "balancing [of] societal needs against individual property rights . . . left in large part to the political process."[29]

Ely, on the other hand, sees a country enamored with the idea of ownership—and believing strongly in its protection: "To the colonial mind, property and liberty were inseparable, as evidenced by the colonists' willingness to break with England when the mother country seemingly threatened property ownership."[30] Ely continues, contra Treanor, that "[a] review of the historical evidence amply demonstrates the wide acceptance of the compensation principle by colonial Americans from the time of initial settlement."[31] This "wide

[26] Jeffrey M. Gaba, John Locke and the Meaning of the Takings Clause, 72 Mo. L. Rev. 525, 526 (2007).

[27] William Michael Treanor, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L.J. 694, 695–98 (1985) [hereinafter Original Significance]; James W. Ely, Jr., "That Due Satisfaction May Be Made": The Fifth Amendment and the Origins of the Compensation Principle, 36 Am. J. Legal Hist. 1, 4–13 (1992) [hereinafter Origins of the Compensation Principle].

[28] William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 Colum. L. Rev. 782, 818 (1995) [hereinafter Original Understanding].

[29] *Id.* at 783.

[30] James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights 13, 16–17 (3d ed. 2008).

[31] *Id.*

acceptance" indicates a general recognition that private property rights trumped public benefits, and so the public ought to compensate owners for disruptions. Who is correct—Treanor or Ely—depends upon the question asked. If the question is how the colonists *practiced* eminent domain, then Treanor's position might win by a whisker. But if the question is what the colonists *wanted* the public-private relationship to look like, then Ely's portrait, of a nascent people striving to reach the Lockean ideal, is the clear favorite:

> Revolutionary Americans shared a pervasive concern with the security of property rights against governmental interference. Far from representing an innovation, the [T]akings [C]lause simply codified a long-standing constitutional principle upholding the right of compensation for property taken for public use.[32]

The Framers recognized the dangers that freewheeling republicanism posed to property rights.[33] But they understood that majoritarian needs could supersede individual lives, liberties, and estates.[34] Requiring compensation offered a mostly[35] novel compromise—allowing public needs to be fulfilled, with payment ensuring that the intrusions made into the private realm were truly necessary.[36] The Takings Clause was thus one of the means to protect American constitutionalism and its Lockean foundations from the vagaries of civic republicanism.[37] In this sense, the clause suggests a *fusion*

[32] Ely, Origins of the Compensation Principle, *supra* note 27, at 4.

[33] The Federalist No. 10 (James Madison), in The Essential Debate on the Constitution: Federalist and Antifederalist Speeches and Writings 125 (Robert J. Allison & Bernard Bailyn eds., 2018) (1787) ("Hence it is, that such Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property.").

[34] Treanor, Original Significance, *supra* note 27, at 699–701 (discussing the balancing of public and private rights, including the insight that "a major strand of republican thought held that the state could abridge the property right in order to promote common interests").

[35] See Vt. Const. (1777), ch. I, art. II ("[W]henever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money."); Mass. Const. (1780), part I, art. X ("[W]henever the public exigency requires that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.").

[36] Treanor, Original Understanding, *supra* note 28, at 825–34.

[37] Ely, Origins of the Compensation Principle, *supra* note 27, at 2.

of Treanor's and Ely's renditions of the American conception of the public-private relationship. It shows a striving toward Locke's vision, which within it included doing what was necessary to *protect* the public (not to benefit it). While the Takings Clause and the Framers' discussion around property rights offers clues, it would take the course of the 19th century for the jurisprudential results of this fusion to fully emerge.

B. After Ratification: Strengthening, then Weakening, the Classical Liberal Approach to Regulations

In the century after ratification, immense social and technological changes led to more complex regulations.[38] Yet despite these changes, many courts still used the harm/benefit distinction to differentiate noncompensable police-power actions from regulations that Justice Holmes would in the next century deride as "go[ing] too far."[39] While some courts acquiesced to legislative uber-expansions of the police power, the tendency was to defer only on the assumption that the challenged regulations were preventing private parties from harming the public, instead of redistributing wealth.[40] Some of the most prominent legal scholars, both before and after the Civil War, shared this view.[41]

Notable among the state-court decisions, and paradigmatic of the harm/benefit doctrine of the time, was *Commonwealth v. Alger*,[42]

[38] For a general discussion of the doctrinal complications these changes created, see Errol E. Meidinger, Public Uses of Eminent Domain: History and Policy, 11 Envtl. L. 1 (1980).

[39] Pa. Coal, 260 U.S. at 415.

[40] The best example of this is the mid-19th-century treatment of prohibition-driven bans on alcohol production, a treatment that mirrors the Supreme Court's in *Mugler*. While some courts "endorsed the view that alcoholic beverages could be defined as a nuisance by the legislature, and were thus subject to forfeiture without compensation," other "jurists and commentators expressed concern that the prohibition laws amount to an uncompensated destruction of property." James W. Ely, Jr., Are Eminent Domain and Confiscation Vehicles for Wealth Redistribution? A Skeptical View, 6 Brigham-Kanner Prop. Rts. Conf. J. 211, 228 (2017).

[41] See, e.g., Joseph Postell, The Misunderstood Thomas Cooley: Regulation and Natural Rights from the Founding to the ICC, 18 Geo. J.L. & Pub. Pol'y 75, 85 (2020) (discussing post–Civil War legal giant Thomas Cooley's view that "the purpose of the police power . . . is to ensure that citizens are able to enjoy their rights more fully by preventing injuries by one citizen upon the rights of another").

[42] 61 Mass. 53 (1851).

which Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court authored in 1851. While some believe *Alger* to have articulated an almost limitless police power,[43] this is a common misconception. At the time, Shaw's opinion was correctly regarded "as a textbook restatement of the *scope* of the police power"[44]—one reflective of the general trend. As Shaw put it:

> Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment *as shall prevent them from being injurious*, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.[45]

Professor Ely concludes from the *Alger*-esque class of rulings that "[u]nder the police power, state officials enjoyed broad authority to prevent an individual from using property in a manner detrimental to public order or safety."[46] Still, acknowledging that "new methods are needed to deal with new problems"[47] does not mean that modern exercises of the police power are no longer limited to the "overruling necessity" of protecting the public from *harm*.[48]

Professor William Novak argued that the concept of *salus populi suprema lex* ("the welfare of the people is the supreme law"—to some

[43] See generally, e.g., Kevin P. Arlyck, What Commonwealth v. Alger Cannot Tell Us about Regulatory Takings, 82 N.Y.U. L. Rev. 1746 (2007).

[44] Eric R. Claeys, Takings, Regulations, and Natural Property Rights, 88 Cornell L. Rev. 1549, 1599 (2003) [hereinafter Natural Property Rights] (emphasis added).

[45] Alger, 61 Mass. at 85 (emphasis added).

[46] Ely, Guardian of Every Other Right, *supra* note 30, at 61 ("To modern eyes, most of these economic regulations appear modest. Far from comprehensive, they were typically piecemeal and directed against specific problems. Although many of these controls did impose costs on businesses or property owners, their objective was to safeguard the general public interest. Antebellum regulations were not generally designed to transfer wealth from one portion of the population to another, and thus they produced little redistributive effect.").

[47] Robert Kratovil & Frank J. Harrison, Jr., Eminent Domain—Policy and Concept, 42 Cal. L. Rev. 596, 609 (1954).

[48] Scott M. Reznick, Land Use Regulation and the Concept of Takings in Nineteenth Century America, 40 U. Chi. L. Rev. 854, 860 (1973) [hereinafter Takings in Nineteenth Century America] (citing Sir Edward Coke's Mouse's Case, 12 Coke 63 (c. 1600), as an early use of what we now call the "police power").

meaning the public's benefit) was as influential to 19th-century regulatory rulings as *sic utere* (harm-preventing) was.[49] He concluded that the public welfare theme convinced many courts to expand traditional police powers to cover civic-republican (read: benefit-conferring) aims rather than just anti-harm purposes. Novak's argument is incorrect, both in view of courts' longstanding depiction of such cases in harm-preventing versus benefit-conferring terms, and in their general tendency to view regulations as protective enterprises, not as means for the majority to secure windfalls at the expense of the private realm.[50] Projecting a 20th-century understanding of "regulation," Novak overlooks that most of the categories of 19th-century regulation he cites were designed to prevent physical, moral, or economic injury.[51] They were not, as some modern utilitarians view them, understood as means for resource redistribution.[52] Nineteenth-century regulations of property were much easier to stomach because, at bottom, they sought (even if they did not always succeed) to advance a public-private relationship that gave individuals free

[49] See generally William J. Novak, The People's Welfare: Law & Regulation in Nineteenth-Century America (1996) [hereinafter The People's Welfare]. See Claeys, Natural Property Rights, *supra* note 44, at 1562 ("The examples Novak gives," to justify *salus populi* regulations, "closely track a conception of the police powers similar to" those relating to "health and safety laws, public morals controls, and laws regulating the use of public commons.").

[50] Danaya C. Wright, A Requiem for Regulatory Takings: Reclaiming Eminent Domain for Constitutional Property Claims, 49 Envtl. L. 307, 336 (2019) [hereinafter A Requiem for Regulatory Takings] ("[C]ourts had relied for nearly two centuries on the distinction between harm-prevention and benefit-conferr[al]" to distinguish between permissible and impermissible interferences with property.); Glenn H. Reynolds & David B. Kopel, The Evolving Police Power: Some Observations for a New Century, 27 Hastings Const. L.Q. 511, 519 (2000) ("The limitations on the police power . . . cast considerable doubt on the correctness of the conventional-wisdom interpretation of *salus populi*. . . . [T]he notion that the government can rob A for B's benefit, and conclusively pronounce the robbery to be 'for the public good' and therefore beyond judicial review is not the dominant view of nineteenth-century legal thought.").

[51] See generally Novak, The People's Welfare, *supra* note 49.

[52] Claeys, Natural Property Rights, *supra* note 44, at 1621–22. Claeys argued that *Pennsylvania Coal*'s focus on "values" of property over property as a value in itself exemplified the utilitarian view: "Property consists of 'value,' and this value is subject to 'implied limitation[s]' to make room for government action. The government is presumed to have the power to pursue any object that has public value for society at large. To secure public value, the government may increase, diminish, transfer, or even abolish private uses of property." *Id.* at 1622 (quoting Pa. Coal, 260 U.S. at 413).

use of what they owned up to the point at which such uses began to interfere with others' freedoms. As Professor Eric Claeys puts it:

> If one could ask nineteenth-century jurists to reduce the natural-right approach to a slogan, they might say that the object of all property regulation is to secure to every owner an "equal share of freedom of action" over her own property. On this understanding, every owner is entitled to some zone of non-interference in which to use her possessions industriously, productively, and consistent with the health, safety, property, and moral needs of her neighbors.[53]

Regarding public health and safety measures, Claeys explains that 19th-century courts "were obliged to uphold state laws as 'regulations' whenever legislatures could demonstrate a 'real' or 'actual' nuisance"—that is, a harm—but "in the few cases where legislatures passed laws that could not credibly be called 'health and safety' regulations," those laws were swiftly struck down.[54] The same goes for public morals, such as prohibitions on the production or consumption of spirts. Here "courts . . . were inclined to presume that prohibition prevented alcoholism and its concomitant social problems."[55] Professor Scott Reznick summarized these courts' general understanding of the scope of states' "chartered" police powers—that is, "delegations of legislative power to deal with problems of local concern":[56]

> Exercise of this power was implicitly limited to conditions within the traditional, narrow common law nuisance categories. Generally, police regulations dealt with such matters as fire limits, the storage of gunpowder, and placement of cemeteries, and perpetuated a narrow application of the principle that no man should use his property so as to injure that of his neighbor—*sic utere tuo alienum non laedas*.[57]

In 1871, in *Pumpelly v. Green Bay Co.*, the Supreme Court reasoned "[i]t would be a very curious and unsatisfactory result" that "if the government refrains from the absolute conversion of real

[53] *Id.* at 1556.

[54] *Id.* at 1579.

[55] *Id.* at 1582.

[56] Reznick, Takings in Nineteenth Century America, *supra* note 48, at 862.

[57] *Id*.

property . . . it is not taken for the public use, . . . in the narrowest sense of that word."[58] Regulatory takings now had the Court's theoretical endorsement. In 1887, in *Mugler v. Kansas*, the Court elaborated that a state statute restricting production of liquor on premises was a valid exercise of the state's police power, rather than a taking, because it did "not disturb the owner in the control or use of his property for *lawful* purposes, nor restrict his right to dispose of it."[59] And what does lawful mean? The statute was not targeting an innocent use without compensation, but "merely prohibited a use of property that the legislature had determined 'to be *injurious* to the health, morals, or safety of the community.'"[60] In a word, it means *harmful*. "In contrast to the government action in *Pumpelly*, which took 'unoffending property . . . away from an innocent owner,' the Kansas statute only abated a nuisance. As a result, the [law in *Mugler*] was a noncompensable police power regulation, while the physical invasion in *Pumpelly* was a compensable taking."[61]

Pumpelly and *Mugler* should have put to rest the notion that the regulation/confiscation distinction was somehow dispositive in takings analysis. And for a time it did. The natural-rights/harm-prevention mode of analyzing the public-private relationship culminated in *Lochner v. New York*, decided at the turn of the 20th century. *Lochner* held that freedom to contract was a substantive right immune from unjustified social-management-style regulatory efforts (as opposed to harm-preventing regulations, which under *sic utere* were still permitted).[62] But soon, a new generation of legal-realist thinkers and jurists derided *Lochner*'s supposed anti-regulationism. Courts increasingly blurred the lines between *sic utere* (i.e., harm-preventing) and *solus populi* (i.e., benefit-conferring) regulations.[63] Justice Holmes exemplified this drift

[58] 80 U.S. at 177–78.

[59] 123 U.S. at 669 (emphasis added).

[60] Glynn S. Lunney, Jr., Responsibility, Causation, and the Harm-Benefit Line in Takings Jurisprudence, 6 Fordham Envtl. L.J. 433, 442 (1995) (quoting Mugler, 123 U.S. at 668).

[61] *Id.*

[62] Lochner v. New York, 198 U.S. 45 (1905).

[63] Claeys, Natural Property Rights, *supra* note 44, at 1605 ("The nineteenth-century constitutional order did not recede during the New Deal in the face of an external political assault; it collapsed from 50 years' worth of internal dry rot.").

in *Pennsylvania Coal* when he offered that "[g]overnment hardly could go on if to some extent *values* incident to property could not be diminished without paying for every such change in the general law."[64] *Penn Central*, decided five decades after *Pennsylvania Coal*, represents the apex (or nadir) of the takings muddle.

II. *Cedar Point* and the Classical Liberal Approach to Regulations and Takings

A. Existing Regulatory Takings Doctrine Is a Mess

The Supreme Court's modern reluctance to impose bright-line rules has created confusion about the definition and scope of regulatory takings. Claims brought in the last four decades have for the most part been analyzed under the *Penn Central* test.[65] That test holds that whether a regulation effects a taking depends upon an ad hoc, factual inquiry into the economic impact on, and the distinct investment-backed expectations of, the owner, as well as the character of the government action (i.e., its purpose and the plan to achieve it).[66] In *Loretto v. Teleprompter Manhattan CATV Corp.* and *Lucas v. South Carolina Coastal Council*, the Court carved out per se exceptions for permanent physical occupations and regulations resulting in total value loss, respectively.[67] Once the plaintiff proves one or the other (or both), the regulation is a taking, regardless of the government's purpose, and there is no need for *Penn Central* balancing.

But even these seemingly bright lines become dimmer at second or third glance. When is an occupation permanent? What if the occupation is a boon to the owner rather than a burden? What if the government proves that a parcel retains .0001 percent of its preregulation value? In seeking to rescue takings jurisprudence from its post–*Penn Central* tangle, *Loretto* and *Lucas* moved a few steps forward, but also a couple back. The Court acknowledged that certain property rights are fundamental, their disruption requiring overwhelming justification. But it declined to limit these justifications, primarily, to those

[64] Pa. Coal, 260 U.S. at 413.

[65] Cedar Point, 141 S. Ct. at 2082 (Breyer, J., dissenting).

[66] Penn Cent., 438 U.S. at 124.

[67] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

that prevented public harms.[68] Harm-prevention, though not the *only* basis for restricting the essential elements of ownership,[69] was the most pervasive one for centuries. Its "perpetual appeal" is the result of its "beguiling simplicity."[70]

But since *Pennsylvania Coa*l, and especially after *Penn Central*, the Supreme Court has rejected this "beguiling simplicity." For instance, in *Miller v. Schoene*, decided six years after *Pennsylvania Coal*, the Court held:

> [T]he state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, *in the judgment of the legislature*, is of greater value to the public. . . . [W]here the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.[71]

Then, in *Berman v. Parker*, the Court declared that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[72] By the time the Court decided *Penn Central* in 1978, it had all but abandoned the classical liberal approach to judging regulations.

In *Lucas*, Justice Antonin Scalia did not seek a return to the harm/benefit distinction. Indeed, he outright rejected it. Yet the decades of *Berman*-esque deference to legislators' view of what was harmful, or even merely in the "public interest" to stop or prevent, troubled the

[68] See Lucas, 505 U.S. at 1026 ("When it is understood that . . . the distinction between regulation that 'prevents harmful use' and that which 'confers benefits' is difficult, if not impossible, to discern on an objective, value free basis[,] it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory 'takings'. . .").

[69] Penn Cent., 438 U.S. at 145 (Rehnquist, J., dissenting) ("The nuisance exception to the taking guarantee is not coterminous with the police power itself."). See, e.g., John D. Echeverria, The Public Trust Doctrine as a Background Principles Defense in Takings Litigation, 45 U.C. Davis L. Rev. 931, 933 (2012) (describing the "public trust" doctrine—under which some lands are held under implied public ownership even if a private party holds title—e.g., a stretch of beachfront—to "certainly qualif[y] as a background principle that defeats a takings claim").

[70] Joseph L. Sax, Takings and the Police Power, 74 Yale L.J. 36, 48 (1964).

[71] Miller v. Schoene, 276 U.S. 272, 279–80 (1928) (emphasis added).

[72] Berman v. Parker, 348 U.S. 26, 32 (1954).

late justice. To limit it, Scalia invented a new phrase—"restrictions that background principles of the [s]tate's law of property and nuisance already place upon land ownership"[73]—in other words, restrictions on one's use of property that have stood the test of time. "[A] law or decree" does "no more than duplicate the result that could have been achieved in the courts—by adjacent landowners . . . under the [s]tate's law of private nuisance, or by the [s]tate under its complementary power to abate nuisances that affect the public generally. . . ."[74] Scalia's slight detour did not help clear the takings muddle. Instead, it added an extra layer of confusion, with some courts bending "background principles" to include those state actions that in their normative view should *become* longstanding practice. This is not a logical stretch if the court presumes, not without some doctrinal merit, that background principles have to start somewhere.

In 1980, in *Agins v. Tiburon*, the Court ruled that a regulation of property is only permissible if it "substantially advance[s] legitimate state interests."[75] In 2005, in *Lingle v. Chevron*, it reversed itself.[76] In 1987, in *First English Evangelical Lutheran Church v. County of Los Angeles*, it held that temporary takings "deny a landowner all use of his property" and thus "are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[77] But then in 2002, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, the Court ruled, on a slightly different set of facts, that "a permanent deprivation of the owner's use of the entire area is a taking . . . whereas a temporary restriction that merely causes a diminution in value is not."[78] These and other doctrinal zigzags have sowed confusion in the lower courts, alongside *Penn Central*'s muddle and *Lucas*'s "background principles" miasma.[79] Returning

[73] Lucas, 505 U.S. at 1029.

[74] *Id.*

[75] Agins v. Tiburon, 447 U.S. 255, 260 (1980).

[76] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 531 (2005).

[77] First English Evangelical Lutheran Church v. Cty. of Los Angeles, 482 U.S. 304, 318 (1987).

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

[79] See generally Michael C. Blumm & Lucus Ritchie, Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses, 29 Harv. Envtl. L. Rev. 321 (2005) (surveying lower-court interpretations of "background principles" to uphold a number of regulations that Scalia likely would not have expected).

to the classical liberal approach—distinguishing regulations as takings based on a harm-versus-benefit analysis—could solve a great many of the takings puzzles that the 20th-century departure has produced.

B. Cedar Point*'s Strong Lockean Approach*

Especially in light of the Takings Clause's recent poor treatment, there is much in Chief Justice John Roberts's opinion in *Cedar Point* for property-rights advocates to celebrate. Not only does it designate a crucial element of ownership for per se takings analysis, it is steeped in Lockean views of property and the public-private relationship, and even references William Blackstone's "exuberant" definition of ownership.[80] Roberts cited with approval a number of previous rulings that emphasized the special position property occupies in the Anglo-American legal tradition. He began with "the Founders['] recogni[tion] that the protection of private property is indispensable to the promotion of individual freedom," quoting with approval John Adams's adage that "[p]roperty must be secured, or liberty cannot exist."[81] Roberts agreed with the Court's proposition, in *Murr v. Wisconsin*, that "protection of property rights is 'necessary to preserve freedom' and 'empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.'"[82]

But the majority was not prepared to extend Adams's view of property—as the essence of liberty—to its logical conclusion, whereby any non-harm-preventing regulation that causes even a *partial* (rather than a *Lucas*-esque *total*) value loss works a total taking *of that interfered-with portion*, regardless of whether the regulation effects a physical interference. If this were not so, then *Murr*'s recitation that property "'empowers persons to shape and to plan their own destiny'" would be meaningless in practice. Under *Lucas*, so long as even .0001 percent of a property's value remains, regulations could impose

[80] Cedar Point, 141 S. Ct. at 2072 (citing 2 William Blackstone, Commentaries on the Laws of England 2 (1766) [hereinafter Commentaries] (describing ownership as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe").

[81] *Id.* at 2071. (citing Discourses on Davila, in 6 Works of John Adams 280 (C. Adams ed. 1851)).

[82] *Id.* (quoting Murr v. Wisconsin, 137 S. Ct. 1933, 1943 (2017)).

burdens functionally equivalent to confiscation. If the majority had applied *Lucas*, as some might have expected, the union-trespass law would almost certainly have been upheld because it does not result in a total-value loss. Thankfully, the Court instead used a remarkably expansive view of *Loretto*'s physical-invasion test, finding that "the duration of an appropriation—just like the size of an appropriation . . . bears only on the amount of compensation."[83] The majority read that case, alongside its progenitors and progeny, to have carved out a special status for the "right to exclude" stick in the proverbial "bundle of rights." It found that *any* abrogation of the right to exclude is subject to a per se analysis, which involves a far more exacting standard than *Penn Central*'s "factual inquiries." As Roberts put it:

> The upshot of [*Loretto*, its predecessors, and successors] is that government-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation.[84]

The "invasions" Roberts referred to are quite varied in form and scope. Some, like *Loretto*, involved permanent and continuous invasions. Those that did not, like *United States v. Causby*, together teach that the rules in *Loretto* and *Lucas* do not comprise the sole exemptions to the *Penn Central* test—even though until *Cedar Point*, the Court had refrained from expressly extending the per se category beyond them. *Causby*, decided three decades before *Penn Central*, involved the federal government's recurrent flight of "military aircraft low over the Causby farm, grazing the treetops and terrorizing the poultry."[85] This constituted "a servitude . . . imposed upon the land," even though it was not continuous and did not "take" any portion of the land itself.[86] In *Kaiser Aetna v. United States*, decided the term after *Penn Central*, the Court held that the right to exclude "'falls within [the] category of interests that the [g]overnment cannot take without compensation.'"[87] As in *Causby*, the taking in *Kaiser Aetna* was of a "servitude," this time "navigational," stemming from the

[83] *Id.* at 2074.

[84] *Id.*

[85] *Id.* at 2073 (summarizing United States v. Causby, 328 U.S. 256 (1946)).

[86] *Id.*

[87] *Id.* (quoting Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979)).

government's assertion that a marina "could not exclude the public" because the dredging of the pond that had opened the marina's waters to "a nearby bay and the ocean" rendered them "navigable" and therefore open as a matter of public right.[88]

Before *Loretto* or *Lucas*, *Causby* and *Kaiser Aetna* went the furthest in establishing a baseline perimeter for owners' exercise of their "sole and despotic dominion," as Blackstone had put it.[89] And in both cases, that line was not drawn at "continuous" invasion; the invasion in each was or would have been intermittent. The flights in *Causby* were frequent, but not unending. And while in *Kaiser Aetna* the public would have been allowed to cross the marina's waters, it would not have been permitted to dock. Thus as long as there is no superseding public need to interfere with private property—the essence of the classical liberal approach—the form an invasion takes is irrelevant. Whether a confiscation of an owner's fee simple estate or a mere "taking" of access (i.e., a gross easement), what is taken in *Causby*, *Kaiser Aetna*, and *Cedar Point* is a "right to exclude"—which Professor Thomas Merrill called the "*sine qua non*" of ownership.[90]

The majority's use of these and similar cases is telling. It reveals something of a return to Locke's "life, liberty, and estates." According to James Madison, the latter—synonymic of property—"embraces every thing to which a man may attach a value and have a right; and *which leave to every one else the like advantage*."[91] After *Penn Central*, the protections afforded to the sticks in the bundle of rights seemed to have become negotiable. As long as one or more remained, then the others could be scrambled with relative ease. *Cedar Point*, in finally affording the "right to exclude" per se protection, moves the needle in favor of the Lockean over the positivistic view. And though it did not do so through the classical liberal approach of distinguishing public-harm-preventing from public-benefit-conferring regulations (the latter properly viewed as takings), it has at least not closed this door.

[88] *Id.* (summarizing Kaiser Aetna, 444 U.S. 164).

[89] Blackstone, Commentaries, *supra* note 80, at 2.

[90] Thomas Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730, 730 (1998) (emphasis original).

[91] James Madison, Property, Nat'l Gazette (Mar. 29, 1792), in James Madison: Writings 515 (Jack N. Rakove ed. 1999) (emphasis original).

C. Cedar Point*'s Weak Classical Liberalism*

Despite the majority's strong commitment to the Lockean view of property, its attachment to the classical liberal view of takings versus regulations is anything but. Chief Justice Roberts backed the majority into something of a corner in responding to Justice Stephen Breyer's suggestion, in dissent, that the holding threatens "large numbers of ordinary regulations in a host of different fields that, for a variety of purposes, permit temporary entry onto (or an 'invasion of') a property owner's land."[92] Roberts used "background limitations" or "restrictions"—akin to *Lucas*'s "background principles"—to preserve some essential state interferences of private property rights. Roberts failed to recognize that these traditions, like "standard health and safety inspections,"[93] are not carveouts that empower state interference where it would otherwise constitute a taking. Instead, these are better described as examples of the broad (but not boundless) universe of police-power actions that Anglo-American courts since at least Edward Coke's time have recognized as necessary for the public's protection from harm to its safety, health, welfare, or morals.[94] This is the approach the Supreme Court endorsed in *Pumpelly* and *Mugler*, before the era of high deference began in the first quarter of the 20th century. Scalia's focus in *Lucas* on background principles maintained the post–*Pennsylvania Coal* break from the classical liberal approach—necessary if *Penn Central*'s balancing test was to be preserved. Scalia apparently was not prepared to abandon it:

> The transition from our early focus on control of "noxious" uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between "harm-preventing" and "benefit-conferring" regulation is often in the eye of the beholder.[95]

Never mind that courts were able to make this distinction for centuries, producing common-law rules and standards that Englishmen

[92] Cedar Point, 141 S. Ct. at 2087 (Breyer, J., dissenting).

[93] *Id.* at 2080 (majority op.).

[94] Mouse's Case, 12 Coke 63 (c. 1600).

[95] Lucas, 505 U.S. at 1024.

everywhere—from the Americas to Australia—sought to emulate.[96] Roberts continues the modern error of distinguishing "background principles" or "limitations" from the common-law core of anti-harm justifications to which most of them belong:

> 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[97] or *any risk posed to the public*.[98]

It is difficult to see how the italicized phrases are distinguishable: "[B]ackground principles" refer, in almost all cases, to public-harm-preventing measures. As discussed in Part I, the historical treatment of regulations, as in line with the Lockean (though perhaps not Blackstonean) view of property—acceptable *only* insofar as they are harm-preventing—strongly suggests that the two are indistinguishable. Roberts alludes to this logic, noting, "[w]ith regard to the complexities of modern society, we think they only reinforce the importance of safeguarding the basic property rights that help preserve individual liberty, as the Founders explained."[99] But "safeguarding" must mean more than protecting a select few property rights (e.g., the right to exclude) from *Penn Central*'s ad hoc-ery, mustn't it?

Professor Lynda Oswald made a persuasive case for placing the harm/benefit distinction at the center of regulatory-takings analysis, as had been the Court-endorsed practice before the rise of legal realism.[100] Oswald argued that the harm principle "provides a rough-and-ready analytical tool for resolving most takings questions."[101] Oswald's approach leans on Professor Robert

[96] Wright, A Requiem for Regulatory Takings, *supra* note 50, at 336.

[97] That is, it is not comparable to a safety inspection directly related to a commercial enterprise's maintenance of its license from the relevant state board.

[98] Cedar Point, 141 S. Ct. at 2080 (emphasis added).

[99] *Id.* at 2078.

[100] Lynda J. Oswald, The Role of the "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in a Comprehensive Takings Analysis, 50 Vand. L. Rev. 1447 (1997).

[101] *Id.* at 1481.

Ellickson's insight that "[e]valuative terms like good, bad, beneficial, and harmful are easily used because people have remarkably consistent perceptions of normal conditions and thus can agree in characterizing deviations."[102] These "perceptions of normal conditions" sound an awful lot like the process by which communities develop behavioral norms and ordering, perhaps originating outside the law,[103] that through gradual, widespread acceptance evolve into the "background principles" of state law. As the Court sought to clarify in *Palazzolo v. Rhode Island*, "[o]ur description [in *Lucas*] of the concept [of background principles] is explained in terms of those common, shared understandings of permissible limitations derived from a State's legal tradition."[104]

And what are more permissible limitations than those that prevent harm to others? After all, protecting members' lives, liberties, and estates from the violence and vagaries of others is the very purpose for which individuals enter into the social contract to leave the Hobbesian state of nature and adopt a Lockean rule of law.[105] Roberts could have easily grounded *Cedar Point*'s reasoning in the harm/benefit distinction at the core of the classical liberal formulation of the public-private relationship. His failure to do so means that *Cedar Point* is far from the end of the story. The return to a full "safeguarding [of] the basic property rights that help preserve individual liberty" will require a more comprehensive ruling than one that depends upon an unknown set of exempted "background limitations" to commend it.

[102] Robert C. Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls, 40 U. Chi. L. Rev. 681, 729 (1973).

[103] See Robert C. Ellickson, Order without Law: How Neighbors Settle Disputes 1 (1991) (formulating a theory "to predict the content of informal norms, to expose the processes through which norms are generated, and to demarcate the domain of human activity that falls within—and beyond—the shadow of the law").

[104] Palazzolo v. Rhode Island, 533 U.S. 606, 630 (2001).

[105] Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 310 (1795) ("The preservation of property . . . is a primary object of the social compact.").

III. *Pruneyard*, *Cedar Point*, and the Dangers of a Generous Police Power

There remains one more problem with *Cedar Point* that will require correction: its "read[y] distinguish[ment]" of *Robins v. Pruneyard Shopping Center*.[106] In that case, the California Supreme Court granted political activists a state constitutional right to solicit petition signatures in the common area of a privately owned shopping center.[107] The U.S. Supreme Court affirmed the California Supreme Court and rejected the argument that this state-sanctioned trespass constituted a taking.[108] For four decades, *Pruneyard* has stuck out like a sore thumb in takings jurisprudence and highlights the dangers of overbroad police-power justifications, which *Cedar Point* failed, expressly, to condemn.

Today, "the constitutional legitimacy of state-sanctioned trespass in the name of speech into a private shopping center has become increasingly difficult to sustain."[109] Explicit adoption of the classical liberal approach would deal a fatal blow to the *Pruneyard* detour, and the whataboutist cover it could provide critics of *Cedar Point* and its future progeny. In each of the Court's post–*Pruneyard* rulings upholding private property rights against state overreach, the Court has distinguished *Pruneyard* rather than revisit it. In *Nollan v. California Coastal Commission*, for example, the Court observed in a footnote that the shopping center owner in *Pruneyard* "had already opened his property to the general public."[110] *Cedar Point* made the same distinction: "*Pruneyard* was open to the public, welcoming 25,000 patrons a day."[111] *Cedar Point* apparently has carved out a different takings rule for "how a business generally open to the public

[106] 592 P.2d 341 (Cal. 1979), aff'd, Robins v. Pruneyard Shopping Ctr., 447 U.S. 74 (1980).

[107] *Id*. at 341–42, 347–48.

[108] Pruneyard, 447 U.S. 74.

[109] Gregory C. Sisk, Returning to the Pruneyard: The Unconstitutionality of State-Sanctioned Trespass in the Name of Speech, 32 Harv. J.L. & Pub. Pol'y 389, 393 (2009) [hereinafter Returning to the Pruneyard].

[110] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 832 n.1 (1987).

[111] Cedar Point, 141 S. Ct. at 2076.

may treat individuals on the premises."[112] But factual differences like this would—and should—become meaningless when using the harm-preventing-versus-benefit-conferring distinction.

The right to trespass at a private shopping center to engage in political or other social expression falls on the public benefit side of the harm/benefit distinction. Nothing about a claimed state right for the public to enter a business for a political or social cause could be framed as abating a public harm *created* by that business. Indeed, the argument for access to prevent a public harm was stronger in *Cedar Point*, where the labor organizers sought to empower the property owners' own agricultural workers to organize for better pay and working conditions. But in *Cedar Point*, the unions had ample means of accessing and communicating with employees without trammeling the employers' rights,[113] as did the trespassers in *Pruneyard* in exercising their political views.

When a state invents a new right,[114] it is attempting to extend a benefit to the public. The state is free to expand the venues for political or social speech, whether that be requiring shopping malls to accommodate political gatherings or requiring homeowners to permit political protests on their front lawns. But the state may do so only if it compensates the burdened private parties. The just compensation principle "prevents the public from loading upon one individual more than his just share of the burdens of government."[115] Germane to *Pruneyard* and *Cedar Point*, "[a] state court declaration of a permanent easement on private property for third-party political speech is the exercise of eminent domain for which the state must pay."[116]

Put simply, when the state seeks to expand the places open to would-be trespassers to exercise their constitutional rights, as in *Pruneyard*

[112] *Id.* at 2077.

[113] *Id.* at 2080–81 (Kavanaugh, J., concurring).

[114] For an extended critique of the California Supreme Court's decision in *Pruneyard* as a policy decision untethered to the constitutional text, history, context, and developed legal reasoning, together with a careful analysis of the typical state liberty-of-speech clause and an examination of original historical sources on state constitutional drafting, see generally Gregory C. Sisk, Uprooting the Pruneyard, 38 Rutgers L.J. 1145 (2008).

[115] Monongahela Navigation Co. v. United States, 148 U.S. 321, 325 (1893).

[116] Sisk, Returning to the Pruneyard, *supra* note 109, at 414.

and *Cedar Point*, or to confer some other public benefit, it risks creating new police powers that are far from justified under the common law, background limitations of state law, or a version of the harm principle that tracks the classical liberal approach to regulations. As long as it remains good law, *Pruneyard* could at any point be used to limit *Cedar Point* to fact-patterns identical to its own. Therefore, any post–*Cedar Point* opinion worth its weight must overturn *Pruneyard* and any other precedents keeping open the door to ostensible exercises of the state's police power that, on closer inspection, are takings.

Conclusion

Cedar Point moves regulatory takings in a direction that accords far better with the history of Anglo-American property law than does *Pennsylvania Coal*—at least as that ruling has been understood in the post–*Penn Central* cases. Instead of balancing competing values, it focuses on the claimed right or interest interfered with, asking whether the ancient common law or evolving "background principles" of state law removes that claimed right or interest from the ambit of ownership, almost invariably because its use does or will produce a public harm.

Still, *Cedar Point* omitted some crucial pieces from the latter-day takings puzzle. What is the content, scope, and elasticity of the "exceptions" to the otherwise absolute character of ownership? *Cedar Point* recites a few examples of when the state may appear to take the right to exclude but is in fact exercising its legitimate police powers. But the majority does not discover in those the thread of the classical liberal approach to regulations, by which the question is whether or not the regulation stops or prevents a harm, not whether it physically deprives an owner of their property. Its distinguishing of *Pruneyard* demonstrates this oversight. Despite arguments that it is too subjective to be workable,[117] the harm/benefit distinction controlled much of the public-private relationship for centuries[118] and aligns far better with Locke's social contract—with

[117] See, e.g., John S. Harbison, Constitutional Jurisprudence in the Eyes of the Beholder: Preventing Harms and Providing Benefits in American Takings Law, 45 Drake L. Rev. 51, 55–57 (1997).

[118] See generally Daniel R. Coquillete, Mosses from an Old Manse: Another Look at Some Historic Property Cases about the Environment, 64 Cornell L. Rev. 761 (1979) (surveying the early English treatment of indirect *injuria* to property).

its ultimate end of preserving individual life, liberty, and estates—than does the modern positivistic style. The survival of the Lockean view of property could well depend upon whether the Court has in it the want and wherewithal to move its takings jurisprudence back in a classical liberal direction.