Supreme Court win for property rights is hardly a loss for the regulatory state

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In one of the first signs of the Supreme Court's new 6-3 alignment, Cedar Point Nursery v. Hassid, decided recently, heralds a sea-change in the Court's property rights jurisprudence. The Fifth Amendment specifies that private property shall not be "taken for public use, without just compensation." The Court ruled that a California law permitting union activists to "take access" of agricultural facilities, like Cedar Point's strawberry-packing plant, for three hours per day, for up to one-third of the year, is a *per se* taking of the fundamental "right to exclude" — that is, a taking regardless of the regulation's spatial or durational extent.

The ruling will benefit all property owners, from homesteaders and suburbanites to side-hustlers and small businesses, whose protection against state-sanctioned invasions now has the same constitutional protection as their right to be free from unreasonable searches and seizures.

Yet it hasn't taken long for doomsayers to warn that this broad advance is somehow a social loss. That fatalism is nothing new. For decades, controversial rulings or changes to the Court's membership have caused frenzied panic of all political stripes; warnings that *this* is the case or the nominee that permanently changes American life for the worse. Most of the more hyperbolic takes on landmark cases, from abortion to campaign finance, don't come close to the final result. It takes years (if ever) for the extent of a crucial holding's impact to be fully known. And when it is, the results are often mixed.

When Lucas v. South Carolina Coastal Council came before the Court's docket in 1992, the pro-regulation crowd feared the worst. The ruling, which established that a regulation resulting in the total loss of a property's value would be analyzed using the *per se* takings test, did not write the obituary for the regulatory state. As one contemporary land-use expert put it, Lucas was "in no way a radical departure . . . It continues to allow government to go quite far in regulating land use."

Despite Chief Justice John Roberts's measured opinion, Cedar Point has sparked existential dread similar to that of previous landmark rulings. Take the Washington Post, which before oral

arguments warned, "[t]he dispute threatens havoc . . . outside the union context." Child welfare checks, "nursing home visits, and food safety inspections."

All of these and more, the Post claimed, are on the chopping block. All an owner would have to do is say those magic words — "I invoke my right to exclude" — and that would be that (unless, of course, the state compensated for these official trespasses). Just after the ruling's release, Slate declared that the "consequences of . . . the maximalist decision will be swift and severe." Vox offered its own dire warning, writing that the decision "reads like something out of Ayn Rand's darkest fantasies."

But the alarmists ignore or misrepresent the countless exceptions — so numerous, in fact, that the right to exclude may be the true exception — in which the state may regulate and even enter onto private property without effecting a taking.

Like other rights, property ownership isn't absolute. There are regulatory costs to living in a society, and most of us bear them with varying degrees of acceptance. But these costs sure beat the state of nature, where life, as Thomas Hobbes put it, is "solitary, poor, nasty, brutish, and short." The myriad limitations rooted in what Justice Antonin Scalia in Lucas called the "background principles" of state property and nuisance law should dispel concerns voiced by Cedar Point doomsayers.

As Chief Justice Roberts makes clear, "many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights." Union activism on premises is not one of those longstanding restrictions on property — and, as Justice Brett Kavanaugh pointed out in a concurring opinion, the Court's 1956 ruling in NLRB v. Babcock & Wilcox explained how Cedar Point's employees have ample means of reaching union representatives off-premises.

And just as owners can't simply yell "property rights!" and harm their community by creating nuisances or violating others' rights, neither can they exclude state actors who are entering their premises to confirm that the owner's activities accord with a host of legal regimes, from child-protective services to food-safety rules.

Like many previous landmark cases, Cedar Point is the opposite of catastrophic. It protects the rights of ownership while recognizing the innumerable ways in which the state ensures those rights aren't used to abuse the public. Far from being another float in a never-ending parade of horribles, Cedar Point protects the public realm as much as it does the private.

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