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A Produce Industry Victory In The US Supreme Court

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It is not all that often that a produce company winds up with a case before the Supreme Court. So when Cedar Point Nursery v. Hassid rose up — a case involving Cedar Point, a strawberry nursery, and Fowler Packing, a shipper of grapes and mandarins — we reached out to Jeremy Rabkin, a professor at the Antonin Scalia Law School and asked if he would explain the nature of the issues that brought the produce industry to the Supreme Court.

He was kind enough to do so. The Supreme Court wound up deciding in favor of Cedar Point Nursery and Fowler Packing on June 23. We thought sharing Professor Rabkin's analysis of what the case involved would be very valuable:

The first case in this century to deal with labor law involving agricultural workers — Cedar Point Nursery v. Hassid —was heard by the Supreme Court this year.

The dispute [involved] a regulation requiring agricultural employers to grant access to union organizers to private land, so the organizers can make direct appeals to farm workers to support the union. This regulation requires growers to grant access for up to three hours a day and 120 days a year (in four 30-day periods). Cedar Point and Fowler Packing Co. refused (or tried to refuse) access to union organizers and so ran afoul of the regulatory body, the California Agricultural Labor Relations Board (CALRB).

As most of the California-based judges viewed the issue, CALRB is imposing reasonable regulation of commercial operations. The regulation is constitutional (in their view), since it does not impose costs that preclude commercially viable use of the affected land.

On the other side, advocates for Cedar Point argue that CALRB is not simply regulating how Cedar Point operates but it is taking control of its property. The right to exclude outsiders, they argue, is a fundamental aspect of ownership, and the regulation deprives Cedar Point of that right (even if the deprivation is limited and time-bound).

In the background, then, are different constitutional perspectives on property rights. These constitutional arguments about property have generated considerable interest in Cedar Point.

Seventeen amicus briefs were filed with the Supreme Court, all arguing on behalf of property rights of the growers, most from organizations with no particular connection to agriculture policy.

But the Supreme Court likely sees the background constitutional issues only after noticing the foreground dispute about labor relations in agriculture. Perceptions of that foreground setting may well have changed since California began to regulate in this area, nearly a half century ago.

Defenders of the California regulation seem to have a solid precedent on their side. In NLRB v. Babcock & Wilcox(1956), the U.S. Supreme Court held that union organizers might have a legal claim to enter isolated work sites where they could not get access to workers otherwise. In 1975, it was at least plausible to think efforts to organize farm workers in California would fall under this dispensation.

In Babcock, the Supreme Court saw the need for balance between the organizing rights of employees (under the 1935 National Labor Relations Act) and the property rights of employers. But the Court saw that rule as inapplicable to the factory in Babcock (and related cases appealed at the same time): "The plants are close to small well-settled communities where a large percentage of the employees live. The usual methods of imparting information are available." The Court concluded that the National Labor Relation Act "does not require that the employer permit the use of its facilities for organization when other means are readily available."

Such reasoning — in the 1970s — might have seemed to justify access requirements for organizers trying to reach farm workers. Back then, a large proportion of farm work was done by migrant workers who lived in temporary shelters on the farms where they worked.

In its amicus brief, the California Farm Bureau Federation (representing growers) points out that some three-quarters of crop workers now work at a single location within 75 miles of their home (and almost all within a metropolitan area); "all but a relative handful of workers" live outside the properties where they work. The UFW even operates radio stations where it can easily give notice to workers about places to seek information (or impending meetings with organizers at other locations). It is not uncommon for farm workers to have cell phones. Off-site organizers can call them (or the workers can call the organizers) to get information about the time and place of outside meetings where the benefits of unionizing will be discussed.

On the other side, defenders of the CALRB regulation say it is not a great imposition on land owners because it stipulates that organizers should only be allowed an hour before and an hour after work and an hour during the lunch break. The growers complain, however, that the actual practice of organizers was to show up with bull-horns, blaring at workers during their lunch. The regulation, they say, goes beyond provision for distribution of leaflets or scheduling subsequent voluntary meetings. It facilitates bullying tactics, with organizers showing up day after day, haranguing the workers.

The reason to fear bullying tactics is that participation in the United Farm Workers Union has fallen off considerably. It is not because CALRB has failed to support organizing efforts. Even a quite liberal state supreme court chided the board in another case — Gerawan Farming vs. ALRB —for holding back ballots in a dispute over a union election — which turned out to be overwhelmingly against joining the union.

If you accept the premise that workers can decide the question of unionizing for themselves, you might conclude they should be left to decide whether they want to attend organizing meetings at outside locations, rather than insist the organizers must come unto the land where workers happen to be engaged during the day. Or is that making too much fuss about land ownership?

The Fifth Amendment to the federal Constitution prohibits taking "private property" except for "public use" and with "just compensation." The guarantee does not emphasize "land" or "real estate" in particular. But the Supreme Court has long been more sympathetic to complaints about "taking" of physical property, even when partial and minor.

In this case, the Ninth Circuit judges previously concluded that the access rule imposed by CALRB was not a "taking" in this sense, because the access rights were of limited duration. An owner may sell a right of access or transit to a particular neighbor or affected business. The sale would not be less valid if the owner stipulated that it was only, say, for weekdays during daylight hours or alternately, only for holidays and other special days.

An amicus brief in Cedar Point, submitted by ten state attorneys general, poses the arresting question: If the government simply claimed such access rights and then handed them off to particular private parties, would that not be regarded as a taking of property?

One can object that it is overly formalistic to focus on whether there is some outside physical presence — hence "per se taking" — without analyzing how costly or intrusive it really might be in practice. But there is considerable attraction to drawing a bright line that isolates any ongoing outside presence as objectionable.

The point of private property is that the private owner gets to decide what is the best way to manage it, hence what intrusions to allow and what to reject. True, government regulations may require owners to adopt various safety devices (such as fences around pools or water) and environmental safeguards (say, by protecting endangered species), but the owners get to determine when and how to implement such obligations. It's something else — arguably — to allow outsiders to come in when they choose and operate directly on the owners' land.

The danger of letting courts weigh costs and convenience is that public agencies — with license from accommodating judges — come to make more and more substantial claims, ending up as co-managers or nearly co-owners of the property, as they weigh how much of its use can be diverted to purposes the actual owner does not approve. It makes private property less private or makes property less meaningful as a claim to control by the owner.

An amicus brief in Cedar Point by the libertarian Cato Institute makes this point by analogy with the Fourth Amendment. That includes the guarantee that police (or other government agents)

will not conduct searches except on "probable cause" [to suspect crime] and normally only after securing search warrants.

The analogy is instructive. Would we say it is acceptable for police to enter homes without warrants, so long as they only show up during the day, don't stay more than 45 minutes and merely take photographs of what can be seen from the center of each room? Would this really be so disruptive? Perhaps not, by some reckonings. But it might well undermine the point of the Fourth Amendment, to protect the home as a refuge from prying eyes.

Of course, we do empower governments to check up on things, even things on private property. Is there a danger that a sweeping decision in Cedar Point will endanger necessary government regulatory measures? It seems unlikely.

Some advocates may see union organizers as helping to implement a public purpose of bringing more workers under the protection of unions. The premise of labor legislation is not that everyone should be in a union but that workers should have a right to decide.

If workers need to be protected against pressure from employers, they may also deserve protection from bullying organizers. Perhaps growers here — who add so much to the healthfulness and variety of our meals — have some claim to be protected from disruptions, too.

The Supreme Court's willingness to take up Cedar Point suggests it wants to say more about labor law. Perhaps it also wants to say more about property rights. The immediate upshot may be little more than requiring California to pay compensation for letting union organizers march onto private property. But how the Court explains this result may cast a shadow over future legal developments (for good or ill).

The follow up to this decision has been relatively quiet, mostly because the case is complicated. There is no question, though, that it is an important win for growers and, we would say, for all who believe in the concept of private property.

In a conversation with Professor Rabkin after the decision, he pointed out that the 6-3 decision — with all the Republican appointees in favor and all the Democratic appointees opposed — that this might indicate a common line in defending property rights, even when that requires them to expand the reach of settled precedent.

The legal question revolved heavily on what was a "taking" and what was a "regulation." The majority of justices joined Chief Justice John Robert's opinion relying on the constitutional provision calling for just compensation in the event of a government taking and finding a law that allowed Union Organizers onto private property such a taking:

"Government-authorized invasions of property — whether by plane, boat, cable, or beachcomber — are physical takings requiring just compensation."

In contrast, Justice Stephen Breyer wrote for the dissenting justices:

"The regulation does not appropriate anything. It gives union organizers the right temporarily to invade a portion of the property owners' land. It thereby limits the landowners' right to exclude certain others. The regulation regulates (but does not appropriate) the owners' right to exclude."

The California law at issue was enacted in 1975, and the United States Supreme Court had, in 1976, refused to take up the case. So this is a big change of settled law.

Though it didn't seem to be a big issue in the opinion, we would argue that communications technology has made a huge change in the way these types of cases will fall in the future. The invention of cell phones, the Internet, social media, etc., changes these issues. Back in 1975, maybe workers were isolated but, nowadays, they all have cell phones and go on the Internet.

It also was disturbing that Justice Breyer's dissent did not give more credence to the rights of property owners. It is one thing to let in police, fire fighters, property inspectors or other government employees who have legal obligations in how to behave and what to do on your property. It is something else entirely to have private actors, not constrained in the same way, traipsing across one's property.