Takings Doctrine and *Cedar Point Nursery v. Hassid* (page 812)

On page 812 we mention that an important indication of the willingness of the Supreme Court's conservative majority to expand takings doctrine could come in Cedar Point Nursery v. Hassid. This case was decided on June 23, 2021, after this edition of the casebook went to press. In Cedar Point Nursery v. Hassid, 141 S.Ct. 2063 (2021), the Court held that a regulation allowing union organizers a limited right of access to the property of agricultural employers constituted a *per se* physical taking of private property. Both the district court and the Ninth Circuit had rejected Cedar Point's takings claim. The Ninth Circuit noted that the regulation was not the kind of "permanent physical occupation" as installation of a cable connection held to be a *per se* physical taking in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). The court also noted that the limited physical access permitted by the regulation was not the kind of physical easement to reach the beach as in Nollan v. California Coastal Commission, 483 U.S. 825 (1987).

In a decision that reflected the Court's 6-3 conservative/liberal split, the Court held that California's access regulation constitutes a *per se* physical taking because it appropriates a right to invade the growers' property. Chief Justice Roberts authored the majority opinion, which was joined by Justices Thomas, Alito, Gorsuch, Kavanaugh and Barrett. The Court majority declared that when the government physically appropriates property the *Penn Central* balancing test has no place regardless of whether it is accomplished by regulation, statute, ordinance or decree. It concluded that the Labor Board's regulation appropriated the grower's right to exclude others from property closed to the public. The Court majority dismissed concern that treating the access regulation as a *per se* physical taking will endanger a host of government activities involving entry onto private property. First, the Court's holding does nothing to efface the distinction between trespass and takings. The Court's precedents make clear that isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right. Second, many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights, including traditional common law privileges to access private property. Third, the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking. Thus, the majority concluded that government health and safety inspection regimes will generally not constitute takings.

Writing in dissent, Justice Breyer, joined by Justices Sotomayor and Kagan argued that the decision "threatens to make many ordinary forms of regulation unusually complex or impractical." Although "the majority attempts to create exceptions to narrow its rule, the law's need for feasibility suggests that the majority's framework is wrong.

The Public Trust Doctrine and the *Illinois Central Railroad Co.* Case (page 797)

Professors Joseph D. Kearney and Thomas Merrill have a new book that explores in great detail the events that gave rise to the U.S. Supreme Court's public trust decision in *Illinois Central Railroad Co. v. Illinois*. Published by Cornell University Press, the book is called *Lakefront: Public Trust and Private Rights in Chicago.* They explore the complicated factors that produced Chicago's magnificent waterfront today, but conclude that the public trust doctrine as

reformulated during the Twentieth Century “has played relatively little role in creating the Chicago lakefront celebrated today." Id. at 306.