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Staying in the Takings Lane: The Compensation Issue in *Cedar Point Nursery*

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STAYING IN THE TAKINGS LANE: THE COMPENSATION ISSUE IN *CEDAR POINT NURSERY*

Mark Kelman†

The Supreme Court held in Cedar Point Nursery v. Hassid *that a California regulation mandating that union organizers have occasional access to privately owned farms was a per se taking because it stripped the farm owners of the right to exclude. The decision almost certainly departed from prior law, and I briefly review some of the critiques of the majority opinion. But my focus is on questions that arise if one accepts the Court's conclusion that the regulation is indeed a taking: First, I briefly discuss whether we should permit the taking so long as the owners are compensated or enjoin the taking either because it is not "for public use" or because compensation, a form of damages, is not an adequate remedy for losses that are either not readily commensurable with money or are extraordinarily difficult to measure. Second, I discuss how we should measure compensable losses and, more particularly, whether we should compensate owners because the regulation makes them more vulnerable to what they see as profit-reducing unionization. I note that the fact that a plaintiff might not have sustained reputational losses absent a trespass that gave the trespassers access to reputation-damaging information does not mean that the damages for trespass should incorporate the damages for reputational losses (which should instead be assessed by reference to a different "track" of law, defamation law). What the owners in* Cedar Point Nursery *are entitled to is compensation only for the loss of rights that physical takings law protects—in cases like this of temporary access mandates, losses that inhere in having to share use of*

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a portion of the property with others—and we must deal with the validity of laws limiting the capacity to suppress unionization efforts in their own right.

TABLE OF CONTENTS

INTRODUCTION

In *Cedar Point Nursery v. Hassid* (hereafter *CPN)*,[1] the Supreme Court decided that California regulations passed pursuant to the California Agricultural Labor Relations Act of 1975, mandating that union organizers have access to privately owned farms, 120 days a year, during three non-work hours, constituted a *per se* taking. The Court held that the regulation took the regulated owners' property because it stripped them of the right to exclude, thereby constituting the sort of physical taking that the Court first announced in *Loretto v. Teleprompter Manhattan CATV Corp.* would require compensation.[2] The Court did so without regard to the explicit factors articulated in *Penn Central Transport Co. v. New York City*[3] that courts use to ascertain if a regulation has gone "too far" in asking an owner to bear the costs of meeting a public

1 141 S. Ct. 2063 (2021) (holding that California's mandate that union organizers have access to private property constituted a taking of the owner's property).

2 458 U.S. 419 (1982) (holding that government authorization of third-party cable company to physically occupy a small portion of landlord's roof to install a cable box permitting cable access for tenants constitutes a *per se* taking). In his *CPN* dissent, Justice Breyer persuasively argues that the regulation in *Loretto appropriated* the owner's property, divesting the owner of the ability to use or profit from the portions of the property to which the cable company was given exclusive access, while the *CPN* regulation merely regulated how the owners could *use* their retained rights to exclude and employ their property without substantial interference. *CPN*, 141 S. Ct. at 2081–83 (Breyer, J., dissenting). In his view, only appropriations are *per se* takings under *Loretto*. *Id.* I largely leave this doctrinally important issue aside.

3 438 U.S. 104 (1978).

end.[4] Less doctrinally, but more substantively, the Court acted without regard to whether the regulation forced a particular owner to bear unreasonably high costs that should be more widely borne or interfered with aspects of control over how one's resources are used that should be protected.[5]

The decision poses a multitude of questions, and I will make but modest reference to many of the problems in the decision that its critics have pointed out.[6] I will also attend even more briefly to the question of

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4 Broadly speaking, the ad hoc balancing test articulated in *Penn Central* requires the court, in deciding whether a regulation should be deemed a compensable taking, to consider: (1) The economic impact of the regulation (comparing the value that has been taken from "the property"—however the physical and conceptual scope of the owner's property is defined—with its unregulated value); (2) The degree to which the owner has already made substantial investments in reasonable reliance on the legal regime remaining as it did before the regulation at issue in the takings case came into effect; and (3) The character of the government action (including among other concerns whether it is more intuitively described as harm averting or benefit conferring; whether there is a reasonable reciprocity of advantage so that the owner gains from parallel regulations of others' property even though the owner loses from the imposition of those regulations on her particular property). *Id.* at 124–28.

I completely set aside questions of whether each of these factors is well-defined individually or whether the Court gave adequate guidance as to how the factors ought to be balanced. For a representative critique of the clarity of the test, see Holly Doremus, *Takings and Transition*, 19 J. LAND USE & ENV'T L. 1, 7 (2003) ("The Court has many times repeated the list of *Penn Central* factors, but has never refined the meaning of those factors, or explained how they should be weighted."). I also ignore questions of whether the test is too deferential to state actions that limit property rights without compensation. *See, e.g.*, Richard A. Epstein, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 57 (1985) (arguing that when government diminishes "the rights of an owner in any fashion," there is a prima facie taking "no matter how small the alteration"). I also set aside the claim that, from an Originalist perspective, the *Penn Central* test demands compensation too often, requiring compensation outside the simple condemnation cases that were the sole subject of the Takings Clause. *See, e.g.*, William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995); John F. Hart, *Colonial Land Use and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996).

5 The uncompensated owners in *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980), mandated by the California Supreme Court to allow orderly political pickets and petitioners on the shopping centers that they owned*,* bore far greater financial burdens than the landlord in *Loretto*. In *Loretto*, the rental property likely *increased* in value when the cable boxes were installed on the building's roof while the presence of political speakers likely diminished shopping. *Loretto*, 458 U.S. at 452 (Blackmun, J., dissenting). Moreover, to the degree to which owners felt *their* resources were being used to subsidize speech they disapproved of, some would believe they were stripped of a form of control over resources that is not readily commensurable with compensation and perhaps ought to be barred altogether if one seeks to use takings law to protect non-economic interests in ownership. Moreover, however reprehensible most of us would find a public accommodation's owner's desire to exclude people on the basis of a potential customer's race, an owner's desire to exclude may reflect profit-increasing motivations if many of the owner's customers prefer segregated environments and/or "control" motivations if the owner highly values his ability to choose the people he will associate with, even for bad reasons. Nonetheless, the Court in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964), readily dismisses the takings challenge to the 1964 Civil Rights Act.

6 *See* discussion *infra* Part II.

whether the nursery owner should be entitled to enjoin the access-granting regulation or merely be awarded monetary compensation, a question the district court might well face on remand, although the owners in the case initially sought only declaratory and injunctive relief, not compensation.[7]

What I will focus on a bit more is a question the district court might well have to face on remand if the state presses the point that the Fifth Amendment protects owners against *uncompensated* takings for public use, not the takings themselves: how to measure just compensation in this case. The critical point I will pursue is that it would be inappropriate simply to ascertain and compensate for *all* the losses the owner bears as a result of the regulation. We should make sure that we do not use takings law to protect economic interests that we have rightly decided are not worthy of protection, either through takings law or outside of it. In reaching this conclusion, I draw on analogies from other areas of law. For instance, it is appropriate to protect only certain interests that a landowner has against what might be considered technical trespasses, even when the economic losses borne that could be said to be caused by these putative trespasses may be considerably more extensive than the properly compensable ones.[8] Similarly, it is inappropriate to defeat a defendant's claim that her use of copyrighted material was a fair use by noting that she caused a high level of economic harm to the copyright holder, rather than that she harmed a narrower set of economic interests appropriately protected through copyright law.[9] I will briefly argue, further, that the properly compensable losses in this case are likely to be trivial,[10] though perhaps not as trivial as the lower courts found them to be in the canonical *Loretto* case.[11]

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7 *See* discussion *infra* Part III.

8 In this regard, I will draw heavily on Judge Posner's thoughtful opinion in *Desnick v. American Broad. Cos.*, 44 F.3d 1345 (7th Cir. 1995).

9 In this regard, I will draw heavily on judicial opinions in cases such as *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

10 *See* discussion *infra* notes 61–63 and accompanying text.

11 On remand, lower courts approved and ratified decisions made under New York's statutory scheme to provide just $1 in compensatory damages. *See* Loretto v. Teleprompter Manhattan CATV, 446 N.E.2d 428, 434–35 (N.Y. 1983). This seems sensible at first blush since the value of the landlord's building almost surely *increased* when the cable company installed a cable box facilitating access. Of course, though, the apartment owners could argue that what was taken from them when their exclusion right was taken was the ability to extract economic rents from the cable company: landlords had monopoly power over access to customers. This view of the landlord's loss is supported in Richard A. Epstein, *The Unfinished Business of* Horne v. Department of Agriculture, 10 N.Y.U. J.L. & LIBERTY 734, 754–55 (2016). In the discussion *infra* text accompanying notes 64–66, I argue that the interest in extracting monopoly profits arising from a natural monopoly that the landlords in *Loretto* had, like most of the economic interests that the nursery owners have in *CPN*, is precisely the sort of interest not properly protected by the just compensation mandate.

I. SOME STANDARD CRITIQUES OF THE *CPN* DECISION

Most of the critiques of *CPN* focus either on whether the Court's efforts to distinguish the case from *PruneYard Shopping Ctr. v. Robins* or *Heart of Atlanta Motel v. United States* are successful; whether the ways in which the cases might indeed be distinguishable are meaningful or merely expose the substantive hollowness of treating either exclusion/physical appropriation cases differently than use regulations; or whether the holding in the case dictates (or at least modestly foreshadows) problematic rulings that would require the government to pay compensation when it sends inspectors (e.g. health and safety or environmental enforcement inspectors) on to private property.

Property owners in both *PruneYard* and *Heart of Atlanta Motel* were certainly stripped of the legal privilege to exclude persons that they desired to exclude (political protesters; non-White potential customers respectively). How might one differentiate the cases from *CPN*?[12] And why might the distinctions seem problematic, either because they cannot be administered in a sensible or predictable fashion or in the sense that the distinctions, even if discernible enough to predict outcomes, are substantively empty—differentiating situations along dimensions that ought to be of no moment?

One might argue that the owners in both *PruneYard* and *Heart of Atlanta* did not seek to exclude persons generally from entering their

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It is worth noting that one might argue that we ought not to think of the government as taking property at all when properly compensable losses are sufficiently trivial. Joseph William Singer, *Justifying Regulatory Takings*, 41 OHIO N.U. L. REV. 601, 643 (2015).

12 *See generally* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (holding that in enacting the 1964 Civil Rights Act, the federal government did not owe compensation to a motel owner forbidden from excluding potential customers on the basis of race); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (holding that California is permitted to mandate that shopping center owners allow peaceful, non-disruptive picketing and leafleting on their premises without compensating the owners). The *CPN* court overrules, rather than distinguishes, *PruneYard* on one issue. The *PruneYard* majority relied to some considerable extent on the fact that the state authorized merely temporary, rather than permanent, third-party use and occupancy of some of the parcel owner's property. *Id.* at 78, 83–85. The *CPN* majority still attends to temporal duration in drawing a distinction between a compensable taking and a trespass, subject to tort suits (depending on sovereign immunity rules) but not constitutionally-mandated compensation for a taking. *CPN*, 141 S. Ct. 2063, 2078 (2021) ("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."). But the majority is willing to find a taking even when, as in *CPN* itself, the authorized third parties do not have continuous, perpetual access. *Id.* at 2080. Questions about when intrusions are sufficiently isolated that the owner can only invoke trespass law may indeed prove difficult as are questions about the consequences of making the distinction. See, for example, Justice Breyer's dissent, reflecting on the question of whether the majority would find that a public-school bus letting kids off to picnic on private property several times a year would be trespassing or have taken the property. *Id.* at 2088 (Breyer, J., dissenting). *See generally* Sandra B. Zellmer, *Takings, Torts, and Background Principles*, 52 WAKE FOREST L. REV. 193 (2017).

property and the governmental regulations at issue (merely?) sought to bar the owners from banning invitees on the basis of their *identity* or the *uses* that the invitees would make of the property. By contrast, in the majority's view, *CPN* generally maintained a robust right to exclude, inviting in only people to perform a narrow set of functions.[13]

But of course, one can readily describe the *CPN* owners as inviting a wide range of strangers (e.g. workers, suppliers), such that they would not be said to have the sorts of privacy-protecting, anti-intrusion interests that, say, a homeowner would have, and argue that the *CPN* owners were acting to exclude solely on the basis of something akin either to the identity of the invitees (union organizers barred, not those delivering alternative political messages) or, even more plausibly, the use they intended to make (labor organizing, not supplying inputs for the nursery business). Or, conversely, one can say that the owners in *PruneYard* sought to issue a limited invitation rather than to open the shopping center to all comers: we want shoppers, browsers, and mall rats, but not those who have come to engage in political speech, particularly because political speakers may suppress shopping.

Determining when an entity is sufficiently open to the public to permit this sort of regulation without compensation will plainly pose serious administrative challenges even if one ignores the degree to which it is a substantively irrelevant basis to distinguish among fundamentally commercial enterprises. If *CPN* had a small retail store or wholesale showroom on the premises, would that have been enough to change the result? Are a nursery's suppliers the sort of limited invitees who do not count as members of the public generally that the Court has in mind if they come only by appointment, and do they lose that status and become more like the members of the public who come to the mall if they come at unscheduled times?

The Court notes that an owner has no right to demand compensation when the state's regulation "merely asserts a preexisting limitation upon an owner's title."[14] The Court here is drawing on its decision in *Lucas v. South Carolina Coastal Council*,[15] in which the Court noted that a regulation that wiped out the entire economic value of an owner's parcel by requiring him to abate a nuisance would not constitute a taking, even though it had wiped out all economic value, because the owner never had the right to create a nuisance in the first instance.[16] The *Lucas* background principles/nuisance exception that the *CPN* court carries forward has two

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13 The Court states that "[l]imitations 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." *CPN*, 141 S. Ct. at 2077.

14 *Id.* at 2079.

15 505 U.S. 1003 (1992).

16 *Id.* at 1030.

plausible interpretations in my view. The first is, as dissenters in both *Lucas* and *CPN* noted, both extraordinarily difficult to apply and subject to the charge that utilizing it invokes the specter of unwarranted imposition of judicial policy predilections.[17] The second interpretation is somewhat more defensible, but it is fairly plainly inapplicable to the owners in *CPN*.

The first interpretation I would proffer is that the supposed *pre-existing* limits on exclusion or use rights are the only apt limits to account for because they have the historical pedigree that entitles committed Burkeans to believe they are wise or because the Court has concluded that these well-pedigreed limits are the only ones consistent with pre-political natural rights. In this view, the owner is protected from value-destroying regulation unless the regulation merely imposes justified limits on his use rights, and the only *justified* limits are these long-recognized ones.

Any rule that respects pre-existing limits is difficult to apply both because the content of historically established limits is difficult to discern,[18] and, more importantly, because it is not clear how long a limit on rights has to be established (or by whom?) before it qualifies as a pre-existing limit. Is Title II of the 1964 Civil Right Act (or the older-still state antidiscrimination laws that preceded it) old enough now that limits on discriminatory exclusion would count as pre-existing if there were a 2022 *Heart of Atlanta* challenge? Are the nearly fifty-year-old legislative limits set by the state of California to exclude farm union organizers pre-existing enough? And if the Court is fixated, consciously or not, on the distinction between legislative and judicially imposed limits, would we consider limits on the reach of trespass law imposed by the New Jersey court in the 1971 case of *State v. Shack*,[19] pre-existing limits on the right to exclude?[20]

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17 *Lucas*, 505 U.S. at 1054 (Blackmun, J., dissenting); *CPN*, 141 S. Ct. at 2089 (Breyer, J., dissenting).

18 *See* Brief of Legal Historians as Amici Curiae In Support of Respondents, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (No. 20-107) (noting a wide range of historically recognized but shifting limits on rights to exclude (e.g. communal grazing rights; rights to enter lands up to high tide line; overflight rights)).

19 277 A.2d 369 (N.J. 1971) (forbidding the use of trespass law to bar Legal Aid attorneys from coming on owner's lands to advise migrant workers living on that privately owned land).

20 The dissenters in *Lucas* noted that Justice Scalia did little to clarify the status of "pre-existing" principles that limit an owner's rights that did not arise from common law nuisance judicial opinions but from both other bodies of common law property adjudication and from legislation. In the quarter century after the case was decided, lower courts frequently rejected takings claims finding that use-limiting "background principles" precluded the claims, even when the background principles did *not* arise from common law nuisance decisions. For a far fuller discussion of both the ambiguities in the initial decision, the dissenters' objections, and the behavior of post-*Lucas* courts, see Michael C. Blumm & Rachel G. Wolfard, *Revisiting Background Principles in Nuisance Law*, 71 FLA. L. REV. 1165 (2019).

And, of course, if the idea is that there is some set of identifiable pre-existing rights that get the balance between access and exclusion claims or use and immunity claims just right, we face obvious problems of judicial overreach and the illegitimate translation of the ideological preferences of some set of common law judges into immutable legal rules. Justice Blackmun made that point forcefully in his dissent in *Lucas*[21] as does Justice Breyer in his *CPN* dissent.[22]

The nuisance exception in *Lucas* might, however, be defended not because judges in bygone nuisance cases had special insight into what uses should be protected and which banned as a substantive matter, but because only owners who expected to make uses that were already barred by pre-existing law were at fault for purchasing the property for more than it is worth in its regulated state. In that sense, the pre-existing law exception is meant to distinguish cases in which an owner reasonably relied on her property having a particular level of value that was wiped out by regulation she should not have been expected to anticipate and those in which the owner simply overpaid for the property and now seeks to be insured against her own bad decisions. This second argument is quite problematic on its own terms: it is hardly clear in the *Lucas* context that an owner who does not see restrictive environmental legislative regulation coming is any more reasonable in his purchasing decisions than one who does not see how a nuisance suit might be resolved if he engages in his favored activity. But even if one is persuaded by this version of the argument generally, it would not help the owners in *CPN* because they did not, and likely could not, allege that they (or their predecessors in interest) paid a substantial premium for the parcel relying on the ability to exclude labor organizers.

In attempting to defend the decision from what even the majority seem to see as an unwanted result—that it would demand that government compensate owners if government inspectors were granted the privilege to enter an owner's property to check for health, safety, or environmental violations—the majority argue that these inspections would not require compensation because the right to inspect would be a

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21 "Even more perplexing, however, is the Court's reliance on common-law principles of nuisance in its quest for a value free takings jurisprudence. In determining what is a nuisance at common law, state courts make exactly the decision that the Court finds so troubling when made by the South Carolina General Assembly today: They determine whether the use is harmful. . . . There is nothing magical in the reasoning of judges long dead. . . . If judges in the 18th and 19th centuries can distinguish a harm from a benefit, why not judges in the 20th century, and if judges can, why not legislators?" *Lucas*, 505 U.S. at 1054–55 (Blackmun, J., dissenting).

22 "[The majority says that] a court must focus on 'traditional common law privileges to access private property.' [But] what are they? . . . Do only those exceptions that existed in, say, 1789 count? Should courts apply those privileges as they existed at that time, when there were no union organizers? Or do we bring some exceptions (but not others) up to date, *e.g.*, a necessity exception for preserving animal habitats?" *CPN*, 141 S. Ct. 2063, 2088–89 (2021) (Breyer, J., dissenting).

valid "condition" that the government demands in exchange for the gratuitous privilege to engage in regulated activity.[23] If one makes the majority's argument broad enough—everyone who is allowed to operate a business has surrendered rights to be free from reasonable inspection in exchange for that privilege to operate—then the conditional benefit line of cases proves too much. The Court in *Horne v. Department of Agriculture* specifically rejects the idea that the "privilege" to engage in a generally legal business is the sort of special governmental permit or privilege that might justify an uncompensated exaction, a surrender of a property interest that would correct the "problems" caused by permitting the activity.[24] And while it is true that *some* businesses that are subject to inspection require special licenses to operate, in the same way that the Nollans required a specifically granted building permit, inspectors frequently inspect land that is not operated under permit.[25]

By relying on the line of cases that differentiate breaches of the right to exclude (which may or may not be fully coterminous with cases in which the state appropriates property),[26] the Court continued to distract

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[23] *Id.* at 2079 ("[T]he government may require property owners to cede a right of access as a condition of receiving certain benefits . . . .When the government conditions the grant of a benefit such as a permit, license, or registration on allowing access for . . . inspections, both the nexus and rough proportionality requirements of the constitutional conditions framework should not be difficult to satisfy."). The constitutional conditions framework is first applied to takings law in *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987) (finding that the state could not demand that the owner surrender an easement to cross the dry sand adjacent to its coastal property in exchange for a building permit because the easement to be exacted bore no nexus to the problem that development would cause but noting that had the state instead seized a viewing easement on the property, it would have been permissible because doing so would have made up for otherwise lost views of the ocean that development caused). The *CPN* majority cites both *Nollan* and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (holding that a permit condition must not only serve the same purpose as a permit refusal would have served but that there must be "rough proportionality" between what is exacted and the impact of the permitted activity).

[24] 576 U.S. 351, 365–66 (2015). "Selling produce in interstate commerce, although certainly subject to reasonable government regulation, is similarly not a special governmental benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection." *Id.* at 366.

[25] *See, e.g.*, 42 U.S.C. § 9604(e)(3) (permitting inspection of *any* place where hazardous material is stored, may have been released, or where there is a hazardous waste threat). The Court arguably used the exactions cases not to highlight the fact that inspectors should be allowed to enter property without compensating owners because the exclusion privilege is exchanged for a license or permit but simply because it is exchanged for a government-provided benefit. *CPN*, 141 S. Ct. at 2079–80. That seems a very weak argument: the nursery owners may (or may not) have been given the benefit of a regime guaranteeing higher levels of labor/management cooperation when they "surrender" the ability to bar folks on to their land who would make workers' decisions about unionization seem more procedurally fair.

[26] *See* discussion *supra* note 2. The historical argument for sharpening the distinction between cases involving appropriations (that ought to give rise to *per se* compensation obligations) and cases simply involving physical invasion/limits on exclusion rights that should, like other "police power" exercises be treated as regulations (that should not be *per se* takings) is carefully laid out in Jessica L. Ashbridge, *Redefining the Boundary Between Appropriation and Regulation*, 47 BYU L. REV.

attention from the relevant substantive question: should either the owner or the state, as a matter of course, find use regulation any more or less troubling than exclusion regulation?

Professor Michael McConnell argues that the state must be restrained more (by requiring compensation) when it chooses to appropriate rather than regulate because it will always be more tempted to grab property that it can (re)distribute to favored constituents rather than merely limit what an owner can do with her own property.[27] He makes this argument in the context of defending the *Horne* decision that he had litigated.[28] The government would be far less prone to stop farmers from producing or selling raisins (the deferentially reviewed regulatory method of supply-reducing cartelization, to put it in negative terms, or the preservation of industries with high average cost/very low marginal cost structures to put it more positively) than to seize raisins, which would be attractive not only if in the interests of the rent-seeking/industry-protecting farmers but attractive because the raisins could be distributed to other favored constituencies.[29]

Even if this were marginally true in *Horne* itself—and how incremental the change in the government's motive to act would have been depends on the relative weight of its motive to support crop prices compared to the desire to distribute food to schoolchildren or foreign aid programs—it is hardly a general feature distinguishing use regulation from "appropriation." This has seemed obvious both to those on the Right, like Richard Epstein, who favor more aggressive policing of regulation,[30] and those who are far more skeptical that there is a coherent set of starting place entitlements that permit us to identify when constitutional property rights are breached. If the state is trying to satisfy demands by those seeking to reduce development density (whether to increase the value of their already-developed properties or out of other-regarding environmental sentiments) it does so just as well through use regulation as through condemnations to convert previously developable

809 (2022). I find her arguments that one can apply the distinctions she believes exist to any of the cases that have actually turned on making the distinction unpersuasive, and her normative argument that the distinctions matter, even if administrable, even weaker. But I leave those disagreements aside because Ashbridge herself remains unsure which side of the line *CPN* (and *Loretto*) falls on, because the contested state rules in each case can (but need not) be described as efforts to regulate how the owner serves already-invited employees and tenants respectively. *Id.* at 855–56.

27 Michael McConnell, *The Raisin Case*, 2014 CATO SUP. CT. REV. 313 (2015).

28 *See id.* at 318–20.

29 I believe that the Court's statements in *Horne* that a regulation forbidding sale or limiting production should be reviewed more deferentially in terms of compensation obligations than the seizure of "excess" raisins was wrong and demonstrated a deep misunderstanding of the *Nollan* decision. I explore my criticisms of this aspect of *Horne* in Mark Kelman, *Untangling* Horne*; Resuscitating* Nollan, 104 CORNELL L. REV. ONLINE 50 (2018).

30 His skepticism about the distinctions Professor McConnell (and Chief Justice Roberts in *Horne* itself) chose to draw is set out in Epstein, *supra* note 11, at 750–55.

property to open space. If the state is trying to transfer housing resources, in-kind, to disadvantaged renters, it does so just as well through regulatory rent control as through using the condemnation power to acquire land for low-cost housing development. And, ironically perhaps, in *CPN* itself, if the state's goal is to give a goodie to politically favored unions, it can do so far more readily by taking actions that force owners to allow union organizers to be able to interact with workers that are at worst at the border of use regulation, than to appropriate the nursery owner's property outright. If the state had engaged in more unambiguous appropriative conduct, seizing some of the nursery's property and declaring it the "Union Organizer Speaking Place," the nursery could still, absent further regulation, have taken steps to ensure workers did not come anywhere near the government-owned physical parcel.[31]

II. INJUNCTION VERSUS COMPENSATION: OF PUBLIC USE AND THE INADEQUACY OF DAMAGES

Under the deferential "public use" tests articulated by the majority in *Kelo v. City of New London*,[32] it is plain that the taking, if it is indeed a taking, in *CPN* would meet the public use requirement and therefore merely be compensable, rather than barred. The state's action would be in furtherance of a plan to further a "public purpose" and that would be that.[33] It seems equally clear to me that were today's Court to decide a case like *Kelo*, it would adopt Justice Thomas's dissenting opinion in the case, arguing that the state has not condemned property for public use (and therefore cannot proceed with the condemnation) unless post-condemnation, the property is "owned" by the state or an entity with common carrier obligations.[34]

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31 I discuss further implications of this observation in more detail. *See infra* text accompanying notes 59–60.

32 545 U.S. 469 (2005).

33 *Id.* at 483–84. It is unimportant in this context to figure out whether the *Kelo* majority actually adopted what political scientists might dub a pluralist view of public purpose—the "public" is (and cannot logically be thought of as anything but) the aggregation of individual private purposes (because only individuals *have* purposes) so that the taking is justified even if it merely seeks to increase the welfare of a particular group of workers, without regard to its impact on consumers, producers, or those workers who would prefer the odds of unionization to decline. It is possible as well that the Court would have felt bound to describe the public purposes in vaguer, universal-sounding policy-aspirational fashion: the taking was designed to "promote labor peace."

34 *Id.* at 508–10 (Thomas, J., dissenting).

Thomas's test is ambiguous in many ways,[35] and ill-conceived as a policy matter in still more ways,[36] but in thinking about *CPN*, only one ambiguity matters: Did Thomas consider whether the public use requirement as he understood it applies not just to condemnations but to regulatory takings in which others are either granted use rights or merely benefit from the curtailment of another's use, disposition, or exclusion rights (arguably the case in, for example, zoning, restrictive environmental regulation, rent control, disability accommodation requirements, perpetuities reforms that wipe out reversion interests that would have vested had the traditional rule remained in force or reforms limiting the life of defeasible fees)?

To the degree that he would forbid the taking unless there is something like public (or common carrier) ownership of the benefits of that taking, I am skeptical that the purported taking in *CPN* should be permitted under his test. Only a small subset of the public (union organizers) gains a right as a result of the regulation. Read this way, though—and I am not really sure how to read Justice Thomas on this issue—a wide swath of regulatory takings should be barred, not merely subject to compensation duties. Only tenants benefitted by rent control directly gain anything from the controls or could be said to *own* the landlord's *taken* freedom of disposition; only those whose use of public accommodations is facilitated by accommodation requirements directly *use* the facilitative accommodations;[37] and, even more obviously, only

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35 I have highlighted some of the ambiguities in Mark Kelman, *The Conceptual Conundrum at the Core of the* Kelo *Dissent*, 16 DUKE J. CONST. L. & PUB. POL'Y 121, 135–39 (2021). Among other problems, it is impossible to determine what public "ownership" means, particularly when private parties may be bound (contractually or in fact) to use state-seized property in particular ways; equally impossible to determine when property is truly employed by the public, given heterogeneity among members of the public in their interest in and capacity to access or benefit from nominally "public" property.

36 *Id.* at 150–69. The test is grounded in a profound misunderstanding of the functional nature of takings. Condemnations (alongside conventional monetary taxes and regulations) are simply ways of mustering the resources that the state controls (directly, by taxing-and-spending or condemning-and-using, or indirectly, by regulating-and-directing). Constitutional takings law distinguishes compensable from non-compensable governmental actions to ensure that this power to garner resources is exercised so that no one is singled out to contribute an unfair share of resources to government projects. "Public use" doctrine, on the other hand, at its core regulates the (functional) "spending" power. It attempts to limit the ways in which the resources garnered through condemnation, a quasi-tax, are expended, regulating whether these resources are used on adequately public, rather than inappropriately parochial, projects. For a host of compelling reasons, courts do not scrutinize conventional spending programs to guarantee that they are adequately "public." Supporters of the strict view of the public use requirement offer no persuasive functional reasons to believe that it is any more sensible for courts to try to fix the judicially unfixable, conceptually muddy problem of unwarranted parochialism when resources are garnered through eminent domain rather than taxation or regulation.

37 This is true even if one believes, as I do, that many accommodations most useful to a particular named beneficiary class help others. A standard example is that sidewalk cutouts aid not only those using wheelchairs to meet mobility needs but also those wheeling around kids in

those whose property is unencumbered when old possibilities of reverter get wiped out directly *own* the taken property. Think also about right-to-farm laws that at least arguably take the immunity rights of potential plaintiffs in nuisance suits: the use rights that the farmers gain when potential plaintiffs are stripped of immunity rights are owned by the farmers, not by the public generally or a common carrier. If we conceptualize the farmers as gaining an easement through the legislation (the right to create a nuisance), that easement, too, is privately owned.[38]

One could also imagine that courts hostile to regulations will choose, going forward, to enjoin regulations that interfere with property rights whose value is not seen as commensurable with money (or perhaps merely extraordinarily difficult to compute).[39] For instance, if the shopping center owners in cases like *PruneYard* were bothered above all by being forced "to use their own property" to help those they find morally or politically repugnant to spread their message, a court might find that compensation grounded simply in the decline in the market value of the property caused by the presence of unwanted political speakers did not really meet the legitimate interests of those whose property would be taken, and that the only way of vindicating those interests would be to enjoin the regulatory taking entirely.[40]

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strollers. It is still not the case that, say, the widened aisle in a store is owned by the state or its benefits "directly used" by all members of the public.

[38] For a case finding that the right-to-farm laws indeed took the would-be nuisance plaintiff's rights, effectively granting an easement to farm operators to create a nuisance, see *Bormann v. Board of Supervisors*, 584 N.W.2d 309 (Iowa 1998).

[39] One way of thinking about the incommensurability issue is to consider an owner who finds the speakers' messages morally intolerable. If we asked the owner whether she would tolerate the speech occurring on her property for $2x rather than $x, she might sincerely reply that the distinctions in proposed compensation level had literally no impact on her willingness to tolerate their speech.

[40] There are plainly cases outside the takings domain where courts use injunctive or quasi-injunctive remedies because they think damages inadequate to protect an interest that is either not wholly financial or well-measured simply by looking to shifts in market value: (1) Co-owners may successfully resist judicial sale in favor of partition in kind because, given their sentimental attachment to the co-owned land, the court may believe that receiving their proportionate share of the market price of the property would be an inadequate remedy. *See, e.g.*, Ark Land Co. v. Harper, 599 S.E.2d 754 (W. Va. 2004). (2) Future interest holders were historically able to enjoin ameliorative waste, absent contractual terms giving greater freedom of action to present interest holders, in part on the supposition that their desire to receive a particular parcel in a particular form is worthy of protection. For a discussion of the traditional rule and its modern displacement, see Thomas W. Merrill, Melms v. Pabst Brewing Co. *and the Doctrine of Waste in American Property Law*, 94 MARQ. L. REV. 1055 (2011). (3) Courts may order specific performance of contractual promises in cases in which money damages are thought be to be inadequate either because it is difficult to compute loss (assessing the cost of "substitutes" is difficult) or because losses are not readily commensurable with money. For a good, brief discussion of these distinct arguments for specific performance, see Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 843–47 (1994).

III. WHICH ECONOMIC LOSSES SHOULD BE COMPENSATED?

If we assume that the access-mandate constitutes a taking and that it will not be enjoined but permitted so long as the state provides just compensation for the regulatory taking, how should we measure just compensation? In his dissent, Justice Breyer noted that the majority did not address the remedies issue but stated that on remand, "California should have the choice of foreclosing injunctive relief by providing compensation."[41]

But Justice Breyer did not address the most critical conceptual question the lower courts must face if addressing the compensation issue. If, as is almost surely the case, the decline in the market value of the property resulting from the regulation comes in part (or almost in whole) from the fact that the regulation makes the owner more vulnerable to what employers/owners perceive as profit-reducing unionization,[42] should the owner be compensated for the entire economic loss, or is the just compensation due to an owner only for some narrower set of losses that the prohibition on uncompensated takings is suited to protect against?[43] Can we distinguish between non-compensable economic losses and compensable ones? If the owners' real complaint here is that the state is facilitating union organizing, is the complaint any different than it would be if they had challenged regulations that had no relationship to real property, each of which would have been adjudicated under far different legal standards? If an employer whose employees worked off-site is mandated to share contact information for all workers eligible to vote in a certification election with union organizers, that might or might not be legally problematic (it might be troubling because we might think the workers merit legal redress for their loss of privacy). But it would certainly not be problematic because the regulation breached the owners'

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41 *CPN*, 141 S. Ct. 2063, 2089 (2021) (Breyer, J., dissenting).

42 I leave aside long-standing debates about whether unionization actually suppresses profits by suppressing labor market competition and thus raising wages or increases profits by providing efficiency-enhancing collective goods. Anti-union employers clearly perceive that unionization is not in their economic self-interest. For the classic discussion, emphasizing the less intuitive efficiency gains associated with unionization, see RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? (1984).

43 I set aside issues we would have to face if we did deem the losses that (arguably) occurred from increasing the odds of unionization compensable. One would have to calculate how likely unionization would be to succeed without the on-site access versus how likely it would be to succeed *with* the access (neither number presumably being 100%) and then multiply the loss in profits (and determining lost profits would require courts to intercede in the debates over the impact of unionization I mentioned in *supra* note 42 that they are not likely to be competent to resolve). Must we also determine how likely organizers are to avail themselves of access to determine the compensation that is owed, or should we treat each occasion on which the organizers enter as its own taking?

purportedly sacrosanct right to exclude physically or block appropriations. And, if we compensate owners for the precise same injury that they would suffer if forced to share email lists when they do not get compensation for whatever economic injury that unionization-facilitating regulation may cause, we should rightly worry that we are adjudicating a claim that "belongs" in the bucket of assessing regulations that facilitate what the state sees as fair union certification battles in a bucket that has little or nothing to do with the injury they actually suffer.

In thinking about the potential mismatch between injury *level* and injury *type*, it is tremendously instructive to consider *Desnick v. American Broadcasting Cos*.[44] In the case, the plaintiff ophthalmic clinic (and several clinic employees) sued the defendant TV reporters for trespass, arguing that they assented to the reporters' entry into their establishment only because the reporters misrepresented their intentions (which were predominantly to expose the clinic for doing unneeded cataract surgery on Medicare-eligible patients).[45] The key to understanding Judge Posner's dismissal of the trespass claim is that one must, in assessing the propriety of granting a trespass remedy, look not to the generic features of trespass but to the legally cognizable interests that trespass law is bound to protect. Posner acknowledges that a defendant may well be a trespasser if he elicits assent (what he calls "express consent") to his presence on the plaintiff's property by misrepresenting his intentions,[46] but emphasizes that an action in trespass should be used only to vindicate a particular narrower set of interests, not the full panoply of economic losses that the putative trespass may have facilitated.[47] The *real* injury in this case to the plaintiffs was the injury they incurred because the report on their activities damaged their reputation (and perhaps subjected them to criminal investigation or civil suit). But *that* injury, though economically substantial, must be adjudicated according to the fairly

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44 44 F.3d 1345 (7th Cir. 1995).

45 *Id.* at 1347–49 (reporters' intentions are to expose the clinic), 1351 ("The Desnick Eye Center would not have agreed to the entry of the test patients into its offices had it known they wanted eye examinations only in order to gather material for a television expose of the Center . . . .").

46 "To enter upon another's land without consent is a trespass. . . . [T]here can be no implied consent in any nonfictitious sense of the term when express consent is procured by a misrepresentation or a misleading omission." *Id.* at 1351. Among the examples he highlights are a defendant who poses as a meter reader to gain entry into a home that he is simply curious to enter or a defendant who poses as a doctor's assistant to witness a birth. *Id.* at 1352.

47 "There was no invasion in the present case of any of the specific interests that the tort of trespass seeks to protect. The test patients entered offices that were open to anyone . . . . The activities of the offices were not disrupted . . . . Nor was there any 'inva[sion of] a person's private space,' . . . it was not an interference with the ownership or possession of land." *Id.* at 1352–53 (alteration in original).

elaborate defamation rules we have collectively established to deal with reputation-damaging conduct.[48]

Desnick may be an administratively easier case to handle than *CPN* because Posner readily finds that the plaintiff sustained *no* damages that trespass law is designed to protect against and thus dismisses the trespass claim entirely.[49] But there is every reason to believe that Judge Posner would have thought it appropriate to assess damages for *trespass* that made no reference to the losses that occurred because of the trespass-facilitated gathering and publication of reputation-damaging content had he believed there were in fact some trespass damages. The task in *CPN* might well be more administratively complex because it seems most credible to believe that *some* of the losses the owners experience are properly compensable because they are the sort of protect-against-property-intrusion losses that takings law is indeed designed to protect against, while other economic losses are losses that arise from increasing vulnerability to unionization.

Although specifying which losses an owner bears are compensable and which are not when all we may most readily observe is that the value of the owner's interests have diminished may be difficult, it is a task courts face in other settings. For instance, in fair use cases, courts believe themselves capable of distinguishing injuries that the copyright regime is designed to protect against from losses that should be adjudicated under a distinct set of legal rules in situations in which the copyright holding plaintiff arguably sustains both sorts of losses.[50] The fourth factor in determining whether the defendant has made a fair use of the plaintiff's copyrighted work under § 107 of the 1976 Copyright Act demands that we attend to the (economic) impact that the infringing fair user's work will have on the market for or value of the copyrighted work.[51] But in many cases in which a putative fair user appropriates a significant portion of the copyrighted work to produce a parody, the copyright holder could

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48 The plaintiffs in *Desnick* in fact also did sue for defamation. Among the complex, defamation-regime-specific issues associated with that aspect of the suit include questions about which reputation-damaging actions could reasonably be attributed from defendants' speech to which plaintiffs and whether a single untrue reputation-harming statement is actionable if it does not diminish reputation any more than the true (and therefore defamation-law-protected) statements do. *Id.* at 1349–51. But if we simply measure all of the economic loss that would not have occurred but-for what might be deemed a trespass, we will have adjudicated the substantive claim using the wrong bucket of rules, obliterating all of the qualifications we have put into place that tailor our approach to reputation-damaging speech.

49 Judge Posner concludes, "the entry was not invasive in the sense of infringing the kind of interest of the plaintiffs that the law of trespass protects; it was not an interference with the ownership or possession of land. We need not consider what if any difference it would make if the plaintiffs had festooned the premises with signs forbidding the entry of testers or other snoops. Perhaps none . . . but that is an issue for another day." *Id*. at 1353.

50 *See generally* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

51 17 U.S.C. § 107(4).

be economically damaged *both* because people may treat the parody as a substitute for the original *and* because the parody, a form of critique of the copyrighted work, makes potential buyers of the copyrighted work disdain it. Copyright law protects against the injuries from market substitution for the original or suppression of the market for derivative works—in fact, the prototypical copyright violation consists of simply reproducing the copyrighted work and selling it at the (low) cost of reproduction, undercutting the copyright holder's ability to charge monopoly prices—but does *not* protect against what might be more significant economic losses that occur because the copyrighted work is seen by consumers as less desirable once they have confronted the critical parody.[52] Thus, in *SunTrust Bank*,[53] injuries arising from possible market substitution or suppression of the derivative market would be cognizable in determining whether the appropriation of significant elements of *Gone With the Wind* by the author of *The Wind Done Gone* was or was not a fair use of the appropriated elements, but the suppression of demand for *Gone With the Wind* that might result from the critique of the book's sentimentalization of slavery and the white planter class would not be.[54] Again, whatever protections a copyright holder does or does not have against the economic injuries that arise from effective critique must be judged in accord with the (highly speaker-protective) regime governing defamation and First Amendment-protected speech.

But consider cases in which we determine that both market substitution and effective critique economic effects are present: perhaps most typically, this might occur with parodies of songs by artists like Weird Al Yankovic which are sufficiently well-produced musical reproductions of the parodied songs that some consumers would find it duplicative to buy the original once they have purchased the parody. A court evaluating a fair use claim in such cases cannot merely look at the aggregate impact of the defendant's work on the plaintiff's economic interest but must do its best to determine if the losses attributable to market substitution standing alone are sufficient to (help) defeat the fair use claim. To do so of course requires disaggregating the losses in just the same way one might do in *Desnick* and must almost surely do in *CPN*.

In *CPN*, the losses attributable to increased vulnerability to unionization should be adjudicated simply as an aspect of the (state or federal) regime designed to ensure fair contests over unionization, a

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52 See *generally* SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).

53 *Id.*

54 Quoting the Supreme Court's decision in *Campbell*, 510 U.S. at 593, the *SunTrust* court noted: "[T]he only harm to derivatives that need concern us . . . is the harm of market substitution. The fact that a parody may impair the market for derivative uses by the very effectiveness of its critical commentary is no more relevant under copyright law [than] the like threat to the original market." *SunTrust* at 1274.

regime that frequently increases employer vulnerability to unionization, in the same way that Desnick's substantial economic losses should be adjudicated under defamation law and the copyright holder's reputational losses under critique-protective First Amendment/defamation regimes. It is possible of course that we would decide that the "vulnerability" losses that result from forcing physical access are less tolerable or reasonable for employers to bear than equivalent economic losses that arise from other requirements that may aid unionization efforts (e.g. requirements that employers not give anti-unionization speeches to "captive audiences" of employees forced to attend the speeches within twenty-four hours of a union election;[55] requirements that employers share names and contact information for employees who will vote on unionization).[56]

I largely set aside a point that might well be determinative for lower courts in *CPN*: just compensation law across the board is unreceptive to claims of consequential losses that do not arise directly from the fact that the property owner has lost a generic property interest but arise instead from the higher losses that result from the fact that he had made a particular use of his property right. Losses are typically measured by reference to the objective losses that *most* owners of the property right would sustain (and these are what the government gained when it appropriated the right) rather than the subjective losses borne by a particular owner.[57]

When an owner raises concerns specific to takings law access requirements (e.g., hedonic losses that arise from compromised privacy; economic losses arising from diminished ability to charge potential customers for access; hedonic and/or economic losses that arise from increased congestion), she should be compensated under Fifth

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55 *See* Peerless Plywood Co., 107 N.L.R.B. 427 (1953).

56 *See* Excelsior Underwear Inc., 156 N.L.R.B. 1236 (1966).

57 *See generally* United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945) (noting that consequential harms from takings are not compensable); United States v. 564.54 Acres of Land, 441 U.S. 506 (1979) (finding that owners should only be compensated at fair market value of the property, even though they could not find property to operate their summer camp on for the market price of the condemned land because the camp was exempt from certain regulations that were costly to comply with only so long as they operated on the condemned premises). In simple condemnation cases, federal law does not require compensation for lost goodwill, even though an owner might have used a parcel with a particular generic market value to operate a particular business that is more valuable to maintain on that parcel. *See* Mitchell v. United States, 267 U.S. 341 (1925).

Seen in that light, the fact that *Cedar Point Nursery* arguably might lose more than the typical owner would lose when mandated to surrender the exclusion right because it intended to use that right in an atypically, economically valuable way is of no moment. Since I do not find the cases holding lost goodwill to be non-compensable—whether grounded in the idea that the state does not gain the goodwill even if the parcel owner loses it, that goodwill may not be lost but recaptured in a new location, or in the idea that we should avoid inquiries into the subjective reservation prices of condemnees and stick to more readily measured market values for physically similar parcels in similar locations—I would not rely as much on this account of the impropriety of accounting for the losses arising from increased vulnerability to unionization as I suspect many judges would.

Amendment standards.[58] When a taking is needed to facilitate the establishment of a profit-dampening regulatory scheme (as this one is simply part of a scheme of regulating managerial prerogatives to dampen potentially pro-union sentiments), the losses that result from the regulatory scheme should be adjudicated according to a range of standards we must develop to deal with that regulatory matter. I should reiterate a point I made earlier in a different context on the state's need to "take" property to meet purely regulatory goals because it is germane here[59]: Had the government simply seized some of the nursery owner's property that the union organizers in fact used and then granted them access to that condemned land, it would simply have paid for the sliver it seized (without regard to the potential lost profits that unionization might cause).[60] But that form of property appropriation would not have been efficacious because it would not have ensured that the organizers had access to workers if the employer, after the condemnation, kept the workers physically separated from the spot the state had seized and then allowed organizers to use. The (non-appropriative) add-on regulation needed to meet the state's ends would have forbidden employer limitations on worker/organizer contact would plainly have been assessed (in taking terms) under a deferential *Penn Central* use regulation test and, more pointedly, be judged as part of a regime regulating union organizing.

What is the best measure of the Fifth Amendment losses? Professor Lee Fennell proposes that the taking of what amounts to a rental of a portion of the land for part of the year for use by the organizers (or perhaps an easement granting third party access to a relatively small strip of the nursery's land) cannot merit more compensation than taking this rental interest in the same small strip would merit.[61] She further notes that if that is the case, the compensation ought to be relatively trivial: the cost of the nursery land per acre suggests that the government "took" a property interest worth no more than five dollars per year.[62]

Professor Fennell's general claim—an easement over a strip of land or a rental of the land cannot be worth more than the interest in that

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58 *See generally* Kaiser Aetna v. United States, 444 U.S. 164 (1979) (directing lower court on remand to determine the full range of economic losses arising from the lost legal right to exclude, including the loss of ability to charge user fees for access, that the owners of a marina-style subdivision suffered when mandated to permit public use of the pond that the owners had created through a dredging project).

59 *See supra* text accompanying note 31.

60 *See* discussion *supra* note 57 (compensation is based solely on the fair market value of the condemned property, where measurable, not the value to the condemnor nor the consequential damages to the condemnee).

61 Lee Anne Fennell, *Escape Room: Implicit Takings after Cedar Point Nursery*, 17 DUKE J. CONST. L. & PUB POL'Y 1, 55 (2022).

62 *Id.* at 55–56.

amount of land would be worth—is unconvincing. A hypothetical farmer might well require much more to sell an easement running right next to her house, or to rent that particular strip, where access holders would interfere with her privacy interests, than she would require to sell the amount of land covered by the easement or rental at the outer edge of her property. But Professor Fennell is clearly on to something. She is coming close to stating the same kind of point that I am emphasizing here, albeit in a way I find less satisfactory: The hypothetical farmer is entitled to compensation for the grant of an easement or leasehold interest that exceeds the value of the acreage covered by the grant only because the taking deprives her of a privacy interest that takings law is in fact suited to deal with.

There is a counterargument that the owner might make that Professor Fennell does not adequately attend to.[63] One of the reasons owners want to retain the right to deny access—and one of the reasons that they would charge more to surrender the right to control access—is that they want to be able to exclude those (like union organizers) who will impact their profits more than generic access-seekers would. But, at core, this misses the point of the California access requirement, which is simply to help establish a regulatory scheme in which the right to dole out access in that way is simply not a stick in the bundle of exclusion rights that the nursery owner retains.

Reconsider the question of whether landlords in *Loretto* were entitled to substantial compensation, as Richard Epstein argued, because after the state mandated cable company access, they could no longer sell access rights to the cable company.[64] But the whole point of mandating cable company access is to deprive a landlord of the ability to take advantage of its natural monopoly over access to cable customers in order to divide profits from cable service with the cable company.[65] The state

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63 She does attend to the argument to an extent but dismissed the owner's claim largely by arguing, as I did more hesitantly *supra* note 57, that the owner is not entitled to be compensated at her reservation price to make the particular sale. Fennell, *supra* note 61, at 57. I am skeptical of the force of the argument in this case, a case which does not seem to me to turn on whether owners need be indemnified rather than compensated at fair market value. If the land would, if sold, typically be sold to other nursery operators who would increase their bids if entitled to exclude labor organizers, I am skeptical that this is a case in which the particular owner would demand more than the market price to sell the relevant interest.

64 *See* discussion *supra* note 11.

65 Justice Marshall's description of the New York state statute's purpose sounds in traditional accounts of the regulation of monopolistic public utilities: "To facilitate tenant access to CATV, the State of New York enacted § 828 of the Executive Law, effective January 1, 1973. Section 828 provides that a landlord may not 'interfere with the installation of cable television facilities upon his property or premises,' and may not demand payment from any tenant for permitting CATV, or demand payment from any CATV company 'in excess of any amount which the [State Commission on Cable Television] shall, by regulation, determine to be reasonable.' The landlord may, however, require the CATV company or the tenant to bear the cost of installation and to indemnify for any

could certainly have regulated the price at which sales of access occurred, and this price regulation would be subject to deferential review of whether the price control itself constituted a taking.[66] Because the competitive price of allowing access to one's tenants is its zero marginal cost (and that may well be the optimal price a regulator would set), a simple price control scheme without an access requirement (i.e. demanding that there be a contract at some price, which proves to be the regulated price of zero) is obviously inefficacious: *no* sales contracts whose price terms would be subject to deferentially reviewed regulation would be entered into. But what we also see is that the landlord was not deprived of the ability to charge a monopoly price because he never had that power in a reasonable regulatory regime. We should judge whether the regulatory deprivation of the right to charge a high price that takes advantage of the natural monopoly is a taking—it is not a close question under existing law—but we cannot measure the just compensation that is owed as a result of the *per se* taking of the exclusion right by noting that had the taking not occurred, the owner would have exercised his exclusion right to increase the value of his holdings in ways that he is simply not entitled to.

CONCLUSION

In reflecting on *Cedar Point Nursery*, there is a significant, familiar jurisprudential point to be made. We should read rights purposively. Plaintiffs can vindicate rights using trespass law only when doing so would meet the purposes we ascribe to trespass law. Owners merit compensation under takings law only if doing so meets the purposes we ascribe to protecting an owner against takings. There is also very practical point here: We should not measure the compensation that plaintiffs merit by asking whether they would have sustained fewer economic losses absent some rights violation. We should look instead to measure only the losses we seek to avoid by establishing the right.

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damage caused by the installation. Pursuant to § 828(1)(b), the State Commission has ruled that a one-time $1 payment is the normal fee to which a landlord is entitled." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 423 (1982) (alteration in original).

66 That price controls, like rent controls, are (deferentially) reviewed as legitimate exercises of the state's police power rather than as compensable takings was last reaffirmed by the Court in *Pennell v. City of San Jose*, 485 U.S. 1, 12–13 (1988). The initial Supreme Court case finding that rent control was not a taking was *Block v. Hirsh*, 256 U.S. 135 (1921). Other significant Supreme Court cases reviewing price control laws deferentially include *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987) (approving limits on rates charged to cable companies for access to telephone poles) and *Federal Power Comm'n v. Texaco Inc.*, 417 U.S. 380 (1974) (recognizing that federal regulation of prices in the natural gas market was a legitimate response to the threat of monopoly pricing). Obviously, *Florida Power Corp.* is particularly on point.

What we should learn from *Desnick* is that the fact that the plaintiff might not have sustained reputational losses absent a trespass that gave the trespassers access to reputation-damaging information does not mean that the damages for trespass should incorporate the damages for reputational losses. This is particularly vital to note because the limitations on what damages can and cannot be assessed for reputational losses given existing defamation doctrine are less protective of the plaintiff than a rule that gave a trespass plaintiff compensation for all economic losses facilitated by the trespass would be. Trespass law must stay in its lane.

We must similarly keep takings law in its lane. In *CPN,* the fact that the nursery owners might have had the ability to suppress what they see as profit-dampening unionization efforts absent the taking does not mean they are entitled to be compensated for the loss of the ability to suppress unionization. Just as we must assess reputation-damaging statements under the law of defamation, we must deal with the validity of laws limiting the capacity to suppress unionization efforts in their own terms. What the owners in *CPN* are entitled to is compensation for the loss of the rights takings law protects against—in cases like this of temporary access mandates, losses that inhere in having to share use of a portion of the property with others. If the owners' losses are occasioned not by the taking but solely by their increased vulnerability to unionization, though, they deserve no compensation at all.