TAKING STOCK OF PROPERTY ESSENTIALISM

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A recent line of Supreme Court cases on the Takings Clause, most strikingly Cedar Point Nursery v. Hassid*, which held that a California law granting labor organizers a right to access agricultural property constituted a per se physical taking, has advanced an increasingly essentialist vision of property rights. Property essentialism—the view that the essence of a property right is the right of an owner to exert control over a thing, including by excluding others from the use of the thing—has historically been antithetical to the Takings Clause, which permits government acquisitions of private property so long as the government pays "just compensation." This Article argues that, taken seriously, the* Cedar Point *approach shifts Takings law from the goal of compensation to the goal of deterrence. In other words, the Court's new approach seeks to substitute what Calabresi and Melamed famously called "property rule" protection for the "liability rule" protection that the Takings Clause traditionally provided. So far, the Court's essentialist language has been little more than rhetorical, but the logic of this language opens the door to sweeping changes in Takings doctrine. The Court should not go further down this road. Not only would the introduction of property essentialism be in stark tension with the text of the Takings Clause and longstanding precedent, it would also produce adverse—and to some degree unintended—consequences, undermining the policies that the Takings Clause has traditionally vindicated and ultimately jeopardizing the Constitution's protection of private property. Moreover, property essentialism's incompatibility with the Takings Clause provides new and powerful grounds for rejecting property essentialism as both a normative aspiration for and an empirical characterization of U.S. property law.*

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INTRODUCTION

Cedar Point Nursery v. Hassid[1] raised many questions about new directions the Supreme Court may take to protect private property from government interference. The Fifth Amendment's Takings Clause requires a government to pay "just compensation" when it takes private property for public use.[2] Historically, courts have understood the just compensation provision to mean that the government must pay fair market value for private property that it takes—that is, the amount of money that a private purchaser would be willing to pay if the property were sold in an arm's-length transaction. But the language and logic of *Cedar Point* suggest some hesitance about this formula. Property essentialists claim that the essence of a property right is the right to exercise control over property, which is vindicated by the right to exclude others from its use,[3] and they implicitly balk at the marginalization of this right by the fair-market-value formula.[4] *Cedar Point*'s essentialist language suggests that a majority of justices may have some interest in revising Takings law to provide greater solicitude for owners' authority.[5] Indeed,

1. Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021).

2. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

3. *See, e.g.*, Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) ("The Supreme Court is fond of saying that 'the right to exclude others' is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' I shall argue in this Essay that the right to exclude others is more than just 'one of the most essential' constituents of property—it is the *sine qua non*. Give someone the right to exclude others from a valued resource, i.e., a resource that is scarce relative to human demand for it, and you give them property. Deny someone the exclusion right and they do not have property." (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979))).

4. In essence, property essentialists assert that property requires property-rule protection. The fair-market-value formula protects property only to the extent of its economic value, whereas the point of property-rule protection is to protect an entitlement in excess of its economic value. For more elaboration of this distinction, see *infra* Part I.

5. *See infra* Part III (explaining how the logic of *Cedar Point* opens the door to the introduction of property essentialism into Takings jurisprudence more broadly).

Justice Roberts's opinion for the Court in *Cedar Point* cited Thomas Merrill's characterization of the right to exclude as the "*sine qua non*" of a property right.[6]

Merrill is one of the leading theorists of the "new essentialism" in property theory,[7] which holds that the essence of a property right is the ability of a property owner to exercise control over the property, including by excluding others from its use.[8] This revisionist theory of property opposes the dominant view that property rights are best understood as a "bundle of rights" or "bundle of sticks."[9] According to the bundle view, a property right is simply a set of various, dissociable legal entitlements, rather than having a necessary, essential core.[10] The essentialist account of the property right makes plausible appeals to history and to logic. Blackstone famously described property as "sole and despotic dominion" over a thing.[11] And arguably the right to exclude—that is, the ability of the owner of a thing to prevent others categorically from using the thing—is what fundamentally separates property protection from other legal entitlements.[12]

Nevertheless, such a reformation of the Takings Clause would dramatically upend settled doctrine and generate far-reaching difficulties. Taken seriously, property essentialism requires deterring rather than compensating interferences with property.[13] This innovation would require governments to pay damages even for regulations that have little or no effect on the market value of property affected—as was the case in *Cedar Point*.[14] In addition to its tension with the text and logic of the Takings Clause, expanding remedies for partial takings (and, analogously, regulatory takings) would disrupt the incentives that the Takings Clause provides

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6. *Cedar Point*, 594 U.S. at 150 (quoting Merrill, *supra* note 3).

7. *See* Merrill, *supra* note 3, at 734 (adopting the "essentialist" label to characterize his own view); Jonathan Klick & Gideon Parchomovsky, *The Value of the Right to Exclude: An Empirical Assessment*, 165 U. PA. L. REV. 917, 921 (2017) (characterizing Merrill and Smith's approach as "exclusion essentialism"); AMNON LEHAVI, THE CONSTRUCTION OF PROPERTY: NORMS, INSTITUTIONS, CHALLENGES 2 (2012) (identifying a "new essentialism" in contemporary property theory); Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORO. L.J. 275, 276 (2008) (identifying the same "exclusion-based" view as the "boundary approach"); *see generally* Katrina M. Wyman, *The New Essentialism in Property*, 9 J. LEGAL ANALYSIS 183 (2017) (providing a programmatic account of property essentialism).

8. *See infra* Part I (explaining the essentialist theory of property).

9. Some scholars who take a view along the lines of the bundle theory have proposed the alternative formulation that property rights are best understood as a "web of interests," in order to highlight both the possibility that elements of the bundle may be allocated to different rights-holders and the observation that the allocation of property rights bears on the interests of agents other than the holders of the rights. *See generally* Craig Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENV'T L. REV. 281 (2002) (elaborating the understanding of property as a "web of interests" and arguing that this characterization offers an improvement on the bundle theory).

10. For further elaboration of the bundle theory, see *infra* text accompanying note 27.

11. 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

12. *See* Merrill, *supra* note 3, at 734.

13. *See infra* Part I (explaining the connection between property essentialism and property-rule protection).

14. *See infra* notes 100–06 and accompanying text.

governments. Moreover, these innovations could well produce unintended consequences. As in other areas of constitutional doctrine where the Court has sought to extend greater protection to private property, rules constraining the government's regulatory authority would create an incentive for governments to create more public footprint, not less.[15] Constitutionalizing protection for property in excess of its market value would pit property against efficiency, an encounter that does not favor property.

The development in Takings doctrine against which this Article warns is only a potential one. *Cedar Point*'s significance has not yet been determined. The decision's essentialist logic potentially has much broader application than the particular facts of the case. A future Court will have to decide whether to read *Cedar Point* for all it is worth (introducing property essentialism into Takings jurisprudence broadly) or to limit it to a narrow exception to standard Takings rules (creating a special rule to inconvenience labor organizers, and perhaps not very substantially at that). Those who hope that *Cedar Point* will be a decision of little consequence should be particularly invested in anatomizing the alternative. Making clear the stakes of a generalized property essentialism in Takings doctrine militates in favor of treating *Cedar Point* as a narrow exception rather than the doorway to a new rule.[16]

While this Article's analysis is thus somewhat speculative, the speculation is not idle. It is difficult to understand *Cedar Point*'s holding if the Court is not interested in broader changes in Takings doctrine. *Cedar Point* concerned a violation of an owner's right to exclude in the absence of demonstrable economic injury.[17]

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15. *See infra* Part IV (explaining why judicial attempts to inhibit government regulation through the creation of constitutional law risk producing unintended consequences).

16. Related objections could be leveled more generally against the ongoing project from the Supreme Court of constructing a federal common law of property, in which *Cedar Point* plays an important role, and other scholars have embarked on this important work. Molly Brady, for instance, criticizes the Supreme Court's recent invention of "a confusing national law of property specific for federal purposes." Maureen E. Brady, *The Illusory Promise of General Property Law*, 132 YALE L.J.F. 1010, 1043, 1048 (2023) (observing that "[i]n at least two of the latest major Takings Clause decisions issued by the Supreme Court [i.e., *Murr v. Wisconsin* and *Cedar Point Nursery v. Hassid*], a majority of Justices have turned to unmoored multistate law to construct property rights in ways theoretically at odds with how state-specific positive law might have defined them" and criticizing this approach for creating unpredictability). The Supreme Court's construction of a federal common law of property that displaces analogous state law is a particularly dramatic development in view of the conventional wisdom that "[t]here is no federal general common law." Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). While an exploration of this development is beyond the scope of this Article, it is worth observing that the invention of a federal common law of property may be facilitated by an essentialist understanding of property, because the essentialist understanding diminishes the importance of reconstructing and deferring to the positive law of a state for understanding whether a taking of property occurred. This is because the bundle-of-sticks theory is relentlessly positivist, whereas the essentialist theory imagines that there is an essential core to a property right that is independent of positive law. For some elaboration and critique of this feature of property essentialism, see *infra* Section V.C.

17. *See infra* note 81 and accompanying text.

Because the fair-market-value formula aims to compensate owners for the economic injury of a taking, it provides no remedy for the kind of noneconomic injury at issue in *Cedar Point*. To identify such an injury as a taking requiring a remedy flies in the face of the traditional understanding of the Takings Clause and the policies behind it.[18] Yet decoupling the remedy for a property right invasion from compensation is not only consistent with but required by an essentialist understanding of property rights.[19] *Cedar Point*'s property-essentialist language was not in dicta; it was the central basis for the Court's holding.[20] And it marked a stark departure not only from precedent but from the theoretical core of the Takings Clause.[21] Because following *Cedar Point*'s essentialist trajectory would have severe consequences,[22] scrutiny of the appetite for this trajectory—as well as criticism of it—is not only well-justified but of pressing importance.

In addition to its contribution to understanding and assessing ongoing developments in Takings doctrine, this Article also contributes more broadly to property theory's prominent ongoing debate between proponents of property essentialism and proponents of the bundle-of-sticks view.[23] The Article's analysis of the relationship between the essentialist theory of property rights and the Takings Clause has significant implications for the essentialist theory's viability. It shows that property essentialism is essentially incompatible with the Takings Clause. By demonstrating the essentialist theory's incompatibility with the Takings Clause, the Article identifies grounds for skepticism of property essentialism more generally. Defenders of the essentialist theory often invoke its advantages for understanding positive law, viewing the theory's fit with actually existing U.S. property law as a central source of the theory's attractiveness.[24] Yet the Takings Clause is a central instrument of U.S. property law. Insofar as property essentialism is supposed to be a positive theory of U.S. property law, property essentialism's inability to make sense of a central instrument of U.S. property law provides strong grounds for rejecting property essentialism.

The Article proceeds as follows. Part I provides relevant background about a central debate in property theory, between property essentialists, who view the essence of a property right as the right to exclude, and theorists who view property rights as a disaggregable "bundle of sticks." It then explains the logical difficulties of reconciling the Takings Clause with the essentialist theory. Part II surveys the policies behind the Takings Clause—fairness, accountability, and efficiency—explaining what the essentialist innovation would displace. Part III examines what *Cedar Point* might mean for developments in Takings doctrine and how these might alter the policies underlying the Takings Clause. Part IV explains why the introduction of property essentialism to the Takings Clause might produce unintended consequences—encouraging rather than discouraging vigorous

18. *See infra* Part II.
19. *See infra* Part I.
20. *See infra* Part III.
21. *See infra* Part II.
22. *See infra* Part IV.
23. *See infra* Part I.
24. *See, e.g.*, Merrill, *supra* note 3, at 730; Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1723 (2004).

governmental interference with property rights—and considers several examples. Part V draws out the Article's implications for property theory, suggesting that the bundle-of-sticks conception of property rights is more conducive to the security of private property than the essentialist conception and that the shortcomings of property essentialism in making sense of the Takings Clause reveal a broader inadequacy of property essentialism as a characterization of U.S. property law.

I. PROPERTY ESSENTIALISM

A property right necessarily has something to do with the entitlement of a person vis-à-vis a thing.[25] But property theorists divide on what rights a person must have vis-à-vis a thing to give rise to a property right. The dominant view since the realist revolution of the early twentieth century[26] understands property as a "bundle of rights" or more metaphorically, a "bundle of sticks." This bundle comprises various entitlements—e.g., the right to use something, the right to enjoy the profits of its use, the right to transfer it, the right to exclude others from using it, and the right to refrain from doing any of these—such that removing one or more sticks from the bundle does not undermine the existence of a property right.[27] On the bundle-of-sticks view, a wide range of permutations of entitlements qualify as a property right. Thomas Merrill and Henry Smith observe that the realists advanced this view in order "to facilitate more extensive collective control over property, especially

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25. *See* Henry E. Smith, *The Thing About Exclusion*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 95, 95 (2014) (arguing for the theoretical centrality of things to the law of property); *cf.* Arthur L. Corbin, Comment, *Taxation of Seats on the Stock Exchange*, 31 YALE L.J. 429, 429 (1922) (expressing the legal realist consensus about property that the term "has ceased to describe any *res,* or object of sense, at all, and has become merely a bundle of legal relations—rights, powers, privileges, immunities"). Although it has sometimes been exaggerated, the realist critique of *in rem* rights does not strictly mean that property rights are unrelated to any object. Underscoring that property rights are really a bundle of *in personam rights*, i.e., rights that can be asserted against the actions of other people, is consistent with recognizing that these *in personam* rights pertain to a particular object. Property rights might be understood as rights against other people with respect to a thing. *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 722, 733 (1917) (observing that "all rights *in rem* are against persons" and also that *in rem* rights may, but need not, have a thing as their object).

26. *See* J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 712 (1966) ("The currently prevailing understanding of property in what might be called mainstream Anglo-American legal philosophy is that property is best understood as a 'bundle of rights.'").

27. *See* Thomas W. Merrill & Henry E. Smith, *Making Coasian Property More Coasian*, 54 J.L. & ECON. 577, 582 (2011) (tracing the roots of the bundle-of-sticks view to the work of legal realists in the 1920s and 1930s, particularly that of Wesley Newcomb Hohfeld and Felix Cohen). The idea behind the bundle-of-sticks metaphor is that there is still a recognizable bundle after removing one stick (or multiple). Analogously, on the bundle-of-sticks theory, removing one right (or multiple) from the bundle does not obviate the existence of a property right. The realist rejection of an essential nature of property is consistent with realist views of law more generally, which reject the naturalization of legal categories in favor of recognizing the ubiquity of policy choices in legal doctrine, a perspective aptly captured by Justice Holmes's quip that "[t]he common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or *quasi*-sovereign that can be identified." S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917).

through programs of redistribution."[28] The bundle-of-sticks theory means that the government can substantially alter the legal rules governing property without obviating an owner's property right. As Katrina Wyman observes, the bundle-of-sticks theory "makes it easier to restrict property rights through regulation and redistribution because the limited rights that owners retain also can be deemed property."[29] When it comes to the administration of the Takings Clause, the bundle-of-sticks theory raises the bar for identifying a taking. This is because a taking occurs only when the government eliminates an owner's property right, and the bundle-of-sticks theory enables a range of interferences with an owner's dominion over a thing without constituting the abridgement of a property right. Recent years have seen the emergence of a substantial theoretical literature criticizing the bundle-of-sticks theory.[30]

Merrill and Smith advance a competing theory of property, arguing that a property right has an essential core, an owner's authority over a thing.[31] This entitlement is most straightforwardly advanced by conferring upon owners the right to exclude others from the use of the thing.[32] While Merrill and Smith differ somewhat about the precise relationship between the essence of property and the right to exclude, they both identify a connection between the essence of property and the right to exclude, and are both regarded as "exclusion theorists."[33] The right

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28. Merrill & Smith, *supra* note 27, at 582.

29. Wyman, *supra* note 7, at 189–90.

30. *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORN. L. REV. 531, 531 (2005); Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1691–92 (2012). *But see* Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. CIN. L. REV. 57, 58–59 (2013); Lee Anne Fennell, *Property Beyond Exclusion*, 61 WM. & MARY L. REV. 521, 524 (2019).

31. In addition to a number of articles, an important vehicle for disseminating this view has been their coauthored casebook, THOMAS W. MERRILL, HENRY E. SMITH & MAUREEN E. BRADY, PROPERTY: PRINCIPLES AND POLICIES (4th ed. 2022). *See* Roderick M. Hills, Jr. & David Schleicher, *What Is Property Law in an Age of Statutes and Regulations? A Review of* Property: Principles and Policies *by Thomas Merrill, Henry Smith, and Maureen Brady*, 79 N.Y.U. ANN. SURV. AM. L. 89, 90 (2023).

32. *See* Smith, *supra* note 25, at 95; *see also* Arthur Ripstein, *Possession and Use*, *in* PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 156, 156 (James Penner & Henry Smith eds., 2013) (offering "a conceptual argument for the priority of exclusion . . . over use" in property law); *cf.* Katz, *supra* note 7, at 277–78 (distinguishing an "exclusivity-based approach to ownership" from an exclusion-based approach and arguing that "[w]hat it means for ownership to be exclusive is just that owners are in a special position to set the agenda for a resource"). *But see* Hanoch Dagan & Michael Heller, *Conflicts in Property*, 6 THEORETICAL INQUIRIES LAW 37, 38 (2005) (arguing that centering exclusion in property theory neglects the role of property law in coordinating social cooperation over the use of resources).

33. *See* Smith, *supra* note 25, at 95. While Merrill understands the right to exclude as the essential core of property, Smith understands the right to exclude as something that is typically valuable for protecting the essential nature of property rather than constituting its essence per se. *Id.* at 96 ("I will argue that the right to exclude is important in property—even if it is not quite a *sine qua non*—precisely because of its association with the definition of the legal things over which property rights are delineated."); *see also* Smith, *supra* note 30, at 1693 ("The purposes of property relate to our interest in using things. . . . There is no interest in exclusion per se. Instead, exclusion strategies, including the right to exclude, serve the interest in use; by enjoying the right to exclude through torts like trespass, an owner can

to exclude is the right of a property owner to prevent others from using the property. Merrill claims that the right to exclude is the necessary and sufficient condition for a property right.[34] While property rights typically fuse a number of entitlements, Merrill suggests that all of these derive from the right to exclude.[35] Smith advances the more modest claim that the right to exclude typically advances the interest in control over things that property centrally concerns and so has an elective affinity with the essence of property.[36] By centering the right to exclude, property essentialists emphasize the authority of an owner to exercise control over their property.[37] The interference with authority, rather than the interference with enjoyment or profit, is of particular concern to property essentialists. After all, if a property right is the right to control a thing, that is something more than the right to derive the profits of the thing.[38]

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pursue her interest in a wide range of uses that usually need not be legally specified."). The difference between Merrill's view and Smith's view is ultimately not so great. According to Merrill, the essence of a property right is the right of an owner of a thing to exclude others from the use of the thing. According to Smith, the essence of a property right is the right of an owner of a thing to control the thing, and the owner's right to exclude others from the use of the thing is of great instrumental value in securing the owner's control over the thing. And Merrill has also clarified that "[t]he right to exclude is critical not for its own sake, but because it yields" the two attributes of "residual managerial authority and residual accessionary rights over the thing," two features that together enable decentralized management of resources. Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061, 2068 (2012).

34. Merrill, *supra* note 3, at 731.

35. *Id.* at 740. *But see* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 623 (1998) (theorizing and identifying situations in which agents have the right to exclude others from the use of, without themselves having the right to make use of, property); Smith, *supra* note 25, at 97 ("[Merrill] attempts to derive other important rights, like the right to transfer, from the right to exclude. These derivations do not work on their terms . . . ."); *id.* at 107 ("The danger is that the right to exclude, as it covers more territory, will become thin to the vanishing point. It is but a short step from there to the bundle of rights . . . ."). These and other critics have already observed that the right to exclude does not in itself imply all (or any) of the other potential rights in property, such as the right to use the property, the right to profit from its use, or the right to sell it. As Heller observes, someone can have the right to exclude others from property without having the right to make productive use of the property (in the examples he studies, because others also have the right to exclude). Similarly, if one owned property subject to certain conservation regulations, one might have the right to exclude others without having the right to profit from the use of the property. And if one owned property subject to certain safety regulations, one might have the right to exclude others without having the right to include (or the right to invite others onto the property). It is simply not possible to derive the panoply of rights in property from the right to exclude.

36. *See* Smith, *supra* note 25, at 100. Importantly, Smith acknowledges that there can be "property without exclusion," observing that "[t]he balance between exclusion and governance can be struck differently in different systems." *Id.* at 103. But he insists that property rights are more essentially "property-like" when they provide for control rather than use alone. *Id.* at 104.

37. *See* Wyman, *supra* note 7, at 199.

38. Of course, it could also be something less: the law could confer the right to exclude without the right to profit from the use of the property.

The law can protect entitlements in various ways. Guido Calabresi and Douglas Melamed famously distinguished between property rules and liability rules. A liability rule protects an asset to the extent of a publicly chosen price: if another person wishes to acquire the asset, they can do so provided they pay the price.[39] A property rule protects an owner's entitlement not only to have a thing but also to choose the price for which they are willing to part with it.[40] Calabresi and Melamed described property-rule protection as preventing others' ability to interfere with an owner's dominion over a thing. This characterization suggests that property-rule protection requires injunctive relief, but the same effect could be achieved through super-compensatory—which is to say punitive—damages. Punitive damages deter invasions of another's entitlement by ensuring that the cost of invasion exceeds the benefit to the prospective invader.[41] The important thing is that a property rule involves deterrence of interference rather than compensation for interference.[42]

There is a close connection between the essentialist theory of property and the legal status of property-rule protection—and not a merely linguistic one. Property essentialism counsels property-rule protection, because liability-rule protection does not protect an owner's right to exclude (the instrument for effectuating the owner's dominion over the thing).[43] As Henry Smith puts it, liability rules establish a use-centered governance regime rather than an exclusion-centered regime.[44] Under a liability rule, others can use the property provided they are willing to pay for this privilege.[45] Yet the essentialist theory of property regards the right to exclude (or the interest in authority that it secures) as the essence of a property

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39. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) ("Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule.").

40. *See id.* ("An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.").

41. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 870 (1998).

42. *See* IAN AYRES, OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS 5 (2005) ("Property rules protect entitlements by deterring nonconsensual takings, while liability rules protect entitlements by compensating the entitlement holder if such takings do occur."). Ayres's distinction between rules that aim at compensating for interference with property and rules that aim at deterring interference with property is expressed slightly differently from the original distinction offered by Calabresi and Melamed, but it is similar in import. I am grateful to Guido Calabresi for an interesting discussion of this subject. Whether a property rule is most appropriately implemented via injunctive relief or via super-compensatory damages (such as disgorgement of the profits of the interference), either remedy seeks to deter the interference. A court cannot prevent a completed trespass from having occurred, so granting some such form of retrospective relief is the closest thing it can do to protecting the owner's right to avoid a trespass. Whether injunctive relief or disgorgement is a better method of protecting an owner's property right is an interesting and complicated question that is beyond the scope of this Article.

43. *See* Smith, *supra* note 24, at 1751; *see also id.* at 1732 ("The traditional justifications for property point to property rule protection.").

44. *Id.* at 1728.

45. *See* Calabresi & Melamed, *supra* note 39, at 1092.

right.[46] Hence, according to the essentialist theory, liability-rule protection is fundamentally inadequate to vindicate a property right. The right to exclude by definition cannot be vindicated by compensating a property owner for another's use of the property, because then the invader has been permitted to trample on the owner's right to exclude. The right to exclude is something over and above (or at least distinct from) the right to profit from use of the property. Put another way, the very point of the essentialist theory of property is that the entitlement protected by a liability rule is less than a property right.

This presentation of the essentialist theory clarifies the distinctive kind of injury that property essentialists take trespass—as opposed to nuisance—to be. Indeed, the distinction between trespass and nuisance underscores the relationship between property essentialism and property-rule protection. Property essentialists view punitive damages as distinctively appropriate in cases of trespass because trespass interferes with the owner's possessory interest in the property, whereas nuisance interferes with the owner's enjoyment of the property.[47] According to the essentialist theory, nuisance is an interference with a lesser interest than the property right itself. Indeed, very plausibly the reason that the Merrill, Smith, and Brady casebook[48] begins with the *Jacque*[49] case is to prime the intuition that property protection is about more than the value obtained from the use of the property. *Jacque* stands for what is supposed to be distinctive about the injury of trespass as opposed to nuisance.[50] And that is precisely why, they presumably want us to think, punitive damages were appropriate. Property-rule protection is necessary to protect the possessory interest injured by trespass but not the interest in enjoyment injured by nuisance.

The Takings Clause poses a deep and underappreciated challenge to the essentialist theory. The difficulty for attempts to incorporate property essentialism into the Takings Clause—and consequently for the essentialist theory to make sense of U.S. property law—is that the Takings Clause is inherently opposed to property-rule protection. Not only does the Takings Clause license the government to acquire private property upon the payment of a fee, it also describes the amount due as "compensation."[51] If the point of the payment is to be compensatory, then the property owner's entitlement is protected by a liability rule, not a property rule.[52] Rather than seeking to protect an owner's dominion by deterring interference, the Takings Clause licenses government interference provided the government pays compensation to the owner. The Takings Clause is therefore in fundamental tension

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46. *See supra* notes 31–38 and accompanying text.

47. *See* Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 994–96 (2004).

48. MERRILL, SMITH & BRADY, *supra* note 31; *see also* Hills & Schleicher, *supra* note 31, at 90 (characterizing the Merrill, Smith, and Brady casebook as a "thorough-going" presentation of the authors' distinctive "worldview").

49. Jacque v. SteenBerg Homes, Inc., 563 N.W.2d 154 (Wis. 1997).

50. *Id.* at 160 (holding that a trespass can give rise to punitive damages in the absence of an economic injury, because "[t]he action for intentional trespass to land is directed at vindication of the legal right").

51. U.S. CONST. amend. V.

52. *See* AYRES, *supra* note 42, at 5.

with the essentialist theory of property. Indeed, the very purpose of the Takings Clause is to convert property-rule protection into liability-rule protection when the government is the acquirer.

The conventional remedy in Takings cases—damages equal to the fair market value of the property taken by the government—effectuates this liability rule.[53] The fair-market-value formula does not consider the private valuation of the taker, as an equitable remedy (such as disgorgement) might, but rather the objective market value of the property.[54] The purpose of a remedy like disgorgement is to deter interference with an owner's entitlement, because it ensures that the interferer will gain no advantage from the interference.[55] The purpose of the fair-market-value formula, by contrast, is to compensate the property owner for lost value, not to deter the government from exercising its option under the Takings Clause. If the fair-market-value formula fundamentally fails to vindicate the right to exclude, it follows that the endgame of property essentialism must be to revise the fair-market-value formula.

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53. United States v. Miller, 317 U.S. 369, 373–74 (1943) ("The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken. It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose. In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value. The owner has been said to be entitled to the 'value', the 'market value', and the 'fair market value' of what is taken. The term 'fair' hardly adds anything to the phrase 'market value', which denotes what 'it fairly may be believed that a purchaser in fair market conditions would have given', or, more concisely, 'market value fairly determined'." (footnotes omitted)); *see also* Miss. & Rum River Boom Co. v. Patterson, 98 U.S. 403, 407–08 (1878) ("In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.").

54. *Miller*, 317 U.S. at 375 ("Since the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker."); *see also* United States v. Causby, 328 U.S. 256, 261 (1946) ("It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken.").

55. *See* AYRES, *supra* note 42, at 13 ("[T]he compensatory impetus behind liability rules causes such remedies to focus on the takee's welfare, while the deterrence impetus behind property rules causes such remedies to focus on the potential taker's welfare. Thus, disgorgement and prison terms are traditional property-rule remedies, while expectation and other compensatory damages fall squarely in the liability-rule camp.").

II. TRADITIONAL RATIONALES FOR THE TAKINGS CLAUSE

The Takings Clause conventionally sought not to obstruct government action but rather to prevent certain distributive consequences—arguably in the interest of efficiency. The Takings Clause has in part an equitable purpose.[56] Its aim is to prevent the government from imposing the costs of public schemes onto particular private parties. The famous *Armstrong* principle is that the Takings Clause "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[57] As Abraham Bell and Gideon Parchomovsky put it, the Takings Clause prevents the government from making someone "poorer relative to the rest of the world."[58]

The consequence of this restriction is to push redistributive government action into the fisc. Thus, in addition to a fairness rationale—preventing particular burdening of particular individuals—there might also be a government accountability rationale,[59] perhaps related to the notion of a "regulatory budget."[60] By requiring the government to incorporate its activities into the budget, the Takings Clause perhaps discourages it from engaging in inadvisable activities. Justice Scalia, in a 1988 concurrence joined only by Justice O'Connor, opined that part of the purpose of the Takings Clause is to discourage "regulation," meaning the burdening of property rights by means other than taxation. According to Scalia, "regulation . . . permits wealth transfers to be achieved . . . 'off budget,' with relative invisibility, and thus relative immunity from normal democratic processes."[61] The Takings Clause, in his view, therefore disfavors regulation and

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56. *See* Guido Calabresi, *The Proper Role of Equality in Constitutional Adjudication: The Cathedral's Missing Buttress*, 134 YALE L.J. 2848, 2865 (2025) (suggesting that the Takings Clause has an "egalitarian" purpose insofar as it seeks "to ensure that the burden for the taking is shared").

57. Armstrong v. United States, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

58. Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 552 (2001).

59. *See* Abraham Bell & Gideon Parchomovsky, *The Hidden Function of Takings Compensation*, 96 VA. L. REV. 1673, 1675 (2010).

60. *See, e.g.*, Jeffrey A. Rosen & Brian Callanan, *The Regulatory Budget Revisited*, 66 ADMIN. L. REV. 835, 840 (2014).

61. Pennell v. City of San Jose, 485 U.S. 1, 22–23 (1988) (Scalia, J., concurring in part and dissenting in part) (1988) ("The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved 'off budget,' with relative invisibility, and thus relative immunity from normal democratic processes. San Jose might, for example, have accomplished something like the result here by simply raising the real estate tax upon rental properties and using the additional revenues thus acquired to pay part of the rents of 'hardship' tenants . . . . Subsidies for [particular] groups may well be a good idea, but because of the operation of the Takings Clause our governmental system has required them to be applied, in general, through the process of taxing and spending, where both economic effects and competing priorities are more evident.").

encourages the government instead to conduct social policy through the fisc, whereby it will receive the proper public scrutiny.[62]

Scalia's view is somewhat puzzling in its preoccupation with "regulation," because the Takings Clause is centrally concerned with physical takings of property.[63] Nevertheless, the accountability rationale could be articulated in a way that makes no reference to regulation. In the absence of the Takings Clause, a government would be able to externalize the costs of its programs onto a small number of individuals. By distributing the burdens of government action more widely, the Takings Clause encourages public accountability.[64] The accountability function of the Takings Clause may make a concomitant contribution to equity. If the politically powerful are more likely to seek to externalize the costs of government programs onto politically and economically powerless residents, then preventing the externalization of costs would have progressive distributive effects.[65]

In addition to the related anti-redistributive and accountability rationales, the Takings Clause also has a pro-efficiency rationale: it incentivizes efficient

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62. Of course it is far from obvious that a constitutional requirement of compensation increases public scrutiny of the government. Takings without compensation surely invite more political backlash. The party whose property is taken is the most likely prima facie to object, and often the transfer of private property to the government with compensation is preferred by the property owner.

63. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782–83 (1995) (arguing that the Takings Clause was originally understood to apply to physical takings but not regulations because physical takings are more likely to involve a political process failure). Takings law did not impose any limitation on regulatory takings at all until 1922. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415–16 (1922). And even now, the application of the Takings Clause to regulatory takings serves mainly to prevent a loophole: the Takings Clause would impose no constraint if governments could achieve precisely the same result through regulation. *See infra* note 93 and accompanying text. Indeed, the public use requirement of the Takings Clause—the limitation of the compensation requirement to cases in which private property is "taken for public use," U.S. CONST. amend. V—provides an additional rationale for distinguishing between physical takings and regulations. *See* Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L.J. 1245, 1248 (2002) ("In using the term 'public use' in the Fifth Amendment, the drafters did not intend to impose a substantive limit on congressional expropriations. Rather, they intended to distinguish a certain type of taking which required compensation (expropriations) from those which did not (taxes and forfeitures). In essence, the drafters merely intended to ensure that compensation was given when a citizen was called upon to contribute more than his fair share to support the government. Thus, takings by expropriation required compensation, while takings by taxation would not."). The public use requirement suggests that compensation is only required when the government is the actor using the property. Takings doctrine has limited the import of the public use requirement. *See* Kelo v. City of New London, 545 U.S. 469, 484 (2005). But the government's exercise of the eminent domain power in *Kelo* was itself the public use. The significance of the public use requirement is to underscore the distinction between physical takings and regulatory burdens.

64. *See* Treanor, *supra* note 63, at 783–84.

65. On the other hand, requiring compensation for government takings of private property in itself will be insufficient to prevent regressive incidence of takings, in part because it is cheaper to take property that is lower in value. *See* Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 784–85 (1999).

takings. By requiring compensation for government takings of private property, the Takings Clause forces the government to internalize the costs it imposes upon a property owner, providing an incentive for the government to take property only when the social benefit exceeds the cost to the property owner.[66] When the social benefit of a taking of private property exceeds the cost to the property owner, the taking is efficient. The Takings Clause discourages inefficient takings without discouraging efficient takings.

The Takings Clause certainly to some degree favors private ownership. It constrains wanton government interference with private ownership. However, it also formalizes in law that private ownership is public forbearance. It in effect converts the protection of property to a liability rule (when the government is the acquirer).[67] With property-rule protection, the owner of an entitlement decides whether to part with it and for what price; with liability-rule protection, the acquirer of the entitlement decides whether to acquire it (although not the price, which is set according to some public decision).[68] Importantly, the compensation requirement guards against two alternatives. First, it prevents government takings at sub-market rates (encouraging the government to engage in efficient but not inefficient takings). Second, it prevents property owners from holding out for super-market rates (preventing private capture of social surplus).[69] The fair-market-value rule allocates all of the surplus of the action to the taking party, namely the government.[70]

The classic Takings rule may be undercompensatory, because it does not compensate property owners for their subjective valuation of property above fair market value. It is reasonable to be concerned about costs borne by property owners that are not incorporated into fair market value.[71] Indeed, it is worth noting that the

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66. *See, e.g.*, Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 999 (1999) ("If the government were free to take resources without paying for them, it would not feel incentives, created by the price system, to use those resources efficiently."); Bell & Parchomovsky, *supra* note 59, at 1682–83 (characterizing the efficiency function of requiring compensation as correcting government actors' "fiscal illusion"). *But see id.* at 1683 (observing that fair market value typically will not fully compensate property owners); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 364–67 (2000) (arguing that a just compensation requirement may not discourage inefficient takings because governments are politically accountable and there can be majority support for inefficient takings); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 969 (2005) (arguing that a just compensation requirement may not cause governments to internalize the social costs of takings due to the personal incentives of government officials).

67. *See supra* paragraph containing notes 51–52.

68. *See* Calabresi & Melamed, *supra* note 39, at 1092.

69. This is assuming that there exists the political will to exercise the eminent domain power. In fact, however, it is likely that there will be a suboptimally low number of takings for political reasons.

70. *See* Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENV'T L. REV. 110, 111 (2002) ("Similarly, any increment in value that reflects a gain to the taker, which might be recoverable between private parties in an action for restitution or unjust enrichment, is ignored.").

71. *See, e.g.*, Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967)

fair-market-value formula does not properly implement the liability rule that is its object insofar as it denies owners the full value they place on the property. An owner's subjective valuation of property is real value to the owner, and being deprived of that value constitutes a real injury. Limiting compensation to fair market value is, as Thomas Merrill observes, similar to contract law's restriction of consequential damages.[72] And restricting compensation for takings to objective value similarly owes to pragmatic concerns: offering subjective value would create a moral hazard problem by encouraging property owners to assert high and unverifiable subjective values of their property.

Indeed, more compensatory alternatives would have worrying implications. There are also rents that property owners could obtain by holding out from selling in circumstances where they would be able to obstruct the development of public infrastructure by doing so—and indeed this is almost exclusively the circumstance in which the government uses the eminent domain power.[73] The tendency of property-rule protection to confer rents on an owner at society's expense is why Eric Posner and Glen Weyl have recently called for the ubiquitous conversion of entitlements to liability-rule protection.[74] But the Takings Clause offers a more moderate abridgment of property rights, making the choice to convert an owner's entitlement to a liability rule depend on a collective political choice.

III. THE ESSENTIALIST TURN IN TAKINGS DOCTRINE

The Court seems to be shifting from an approach that was equity-neutral in the interest of efficiency to an approach that is hostile to efficiency in the interest of a particular (tendentious) view of equity. The apparent development in Takings doctrine, at least based on the limited evidence so far amassed, inverts the Takings Clause, turning it into an impediment to efficient regulation rather than to inefficient redistribution. Other scholars have drawn attention to the potentially radical

(drawing attention to the "demoralization" costs homeowners may experience when the government takes their land).

72. Merrill, *supra* note 70, at 111.

73. *See* Thomas W. Merrill, *The Economics of Public Use*, 72 CORN. L. REV. 61, 75 (1986).

74. ERIC A. POSNER & E. GLEN WEYL, RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY 55–79 (2018) (advocating a scheme in which owners must declare the taxable value of their property and be willing to sell the property for the declared value to any prospective buyer).

significance of *Cedar Point*,[75] but if anything, they have understated its tension with both Takings doctrine and the deeper economic logic of the Takings Clause.[76]

Cedar Point concerned a California regulation, promulgated by the state Agricultural Labor Relations Board under the California Agricultural Labor Relations Act, which authorized labor organizers to enter workplaces at certain times of the year in order to speak with employees.[77] Organizers were required to provide notice to the employer before entering the property, and when on the property, they were prohibited from disrupting work.[78] The regulation was challenged by a strawberry grower, whose property had been entered without prior notice and by organizers who engaged in disruptive conduct.[79] The employer argued that this conduct gave rise to a taking of property in violation of the Takings Clause.[80] While it seems quite strange prima facie to regard behavior in violation of a law as evidence of the law's unconstitutionality, this is exactly what the employer alleged. Moreover, if organizers complied with the terms of the statute, then their presence on the property would produce no economic injury whatsoever to employers. Organizers were merely authorized to speak to employees during

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75. *See, e.g.*, Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 162 (2021) (arguing that *Cedar Point* threatens legal protections for workers, including in federal antidiscrimination law, in ways that threaten to undermine American democracy); Julia D. Mahoney, Cedar Point Nursery *and the End of the New Deal Settlement*, 11 BRIGHAM-KANNER PROP. RTS. J. 43, 45 (2022) (arguing that *Cedar Point* is part of a judicial "normalization of property rights," along with cases like *Horne v. Department of Agriculture* and *Knick v. Township of Scott*, that "amounts to a retreat from the 'New Deal Settlement,' under which courts declined to subject legislative and administrative actions affecting property rights to significant oversight" (quoting Frank I. Michelman, *The Unbearable Lightness of Tea Leaves: Constitutional Political Economy in Court*, 94 TEX. L. REV. 1403, 1406 (2016))); Lee Anne Fennell, *Escape Room: Implicit Takings After* Cedar Point Nursery, 17 DUKE J. CONST. L. & PUB. POL'Y 1, 3 (2022) (arguing that *Cedar Point* is "best understood as part of an ongoing campaign by the Court to selectively apply heightened scrutiny in the land use arena in ways that broadly entrench and maintain status quo patterns of property wealth"); Bethany R. Berger, *Property and the Right to Enter*, 80 WASH. & LEE L. REV. 71, 141 (2023) ("*Cedar Point Nursery v. Hassid* represents the apotheosis of the new conservative radicalism. It undermines not only precedent but also the long American tradition of rights to enter in property law."); Aziz Z. Huq, *Property Against Legality: Takings After* Cedar Point, 109 VA. L. REV. 233, 238 (2023) (criticizing the confusion and uncertainty that *Cedar Point* created in Takings law and warning of adverse consequences for the rule of law).

76. A notable exception is Cynthia Estlund, *Showdown at Cedar Point: "Sole and Despotic Dominion" Gains Ground*, 4 SUP. CT. REV. 125, 126 (2021) ("The Court's 6-3 decision was eye-opening in its breadth, its divergence from precedent, its implications for longstanding regulatory practices, and its provocative rhetoric, including its paean to 'sole and despotic dominion.' The immediate impact of *Cedar Point* may be limited to government-authorized physical invasions, which are relatively unusual. Yet the decision may signal a new willingness on the part of the newly fortified conservative majority of the Court to constitutionalize restrictions on the regulatory state through takings law." (quoting Cedar Point Nursery v. Hassid, 594 U.S. 139, 149 (2021))).

77. *See Cedar Point*, 594 U.S. at 143–44.

78. *Id.* at 144.

79. *Id.* at 144–45.

80. *Id.* at 145.

nonwork hours in nonwork areas.[81] While the regulation to this extent abridged employers' right to exclude organizers from the business property, a mere temporary violation of the right to exclude absent economic injury has not traditionally given rise to a Takings problem.[82] Nevertheless, the Court deemed the entry at issue in *Cedar Point* a "physical appropriation of property" that constituted a per se government taking of private property under the Takings Clause.[83]

One striking departure from precedent is that *Cedar Point* endorses a constitutional protection against a partial taking. Justice Breyer's dissent observes that traditionally only a permanent physical presence constituted a per se taking.[84] The case then ought to have been analyzed under the *Penn Central*[85] test for regulatory takings. Under *Penn Central*, a government regulation of private property (aside from one that mandates a permanent physical presence) typically does not constitute a compensable taking unless it has a substantial economic impact on the value of the property and interferes with the owner's reasonable, investment-backed expectations.[86] In *Penn Central*, the Court rejected Penn Central's claim that a New York City regulation preventing a potentially profitable use of the land on which Grand Central Terminal was built constituted a compensable taking, reasoning that the regulation did not diminish the value of the owner's current use of the property or interfere with the owner's actual plans for the property.[87] The regulation did not sufficiently interfere with the owner's reasonable economic interest in the property to constitute a taking requiring compensation.[88] In *Cedar Point*, instead of invoking the *Penn Central* test, under which the California labor regulation clearly would have been upheld, the Court seems to have transformed the domain of the Takings Clause by requiring compensation for partial takings. Previously, courts would apply the "whole parcel" rule to a regulatory taking, because what would be relevant is the property's diminution in value, and the whole parcel rule supplies the denominator (that is, the figure to which the absolute diminution in value is compared in order to determine the relative diminution in value).[89] But by treating

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81. *See id.* at 166 (Breyer, J., dissenting) (citing relevant California regulations).

82. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434 (1982) (emphasizing "the constitutional distinction between a permanent occupation and a temporary physical invasion").

83. *Cedar Point*, 594 U.S. at 149.

84. *See id.* at 165 (Breyer, J., dissenting); *see also* Bethany R. Berger, *Eliding Original Understanding in* Cedar Point Nursery v. Hassid, 33 YALE J.L. & HUMAN. 307, 307 (2022) (arguing that contrary to the putative judicial philosophy of the justices in the majority, the Court's decision in *Cedar Point* has no basis in original understanding of the Takings Clause).

85. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (setting out factors to be considered in determining whether a regulation of property rises to the level of a compensable taking).

86. *See id.*

87. *See id.* at 136 (observing that "the New York City law does not interfere in any way with the present uses of the Terminal" and "the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel").

88. *See id.*

89. *Id.* at 130–31 ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been

the regulation at issue in *Cedar Point* as a physical taking, the Court circumvented the whole parcel rule. If the Court is willing to require compensation for partial takings beyond the facts of *Cedar Point*, this innovation could substantially increase the domain of regulations giving rise to compensable takings.[90]

The taking in *Cedar Point* was partial in another sense: abridging the right to exclude by requiring property owners occasionally to permit labor organizers onto their property involved only one stick in the bundle of rights that constitute property. This has not traditionally sufficed to establish a taking.[91] Indeed, the Takings Clause traditionally applied only to government uses of the eminent domain power or its functional equivalent. Merrill observes that "it is significant that the rules for determining compensation for partial physical takings apply only to owners who have suffered *some physical appropriation* of a portion of their property" and that "[c]ourts have consistently rejected the idea that the government has some general obligation to compensate owners for the adverse effects of government projects that affect the value of their property but do not physically touch the property."[92] The application of the Takings Clause to regulatory takings was simply to prevent a loophole, as Justice Scalia explained in *Lucas v. South Carolina Coastal Council*.[93] The constitutional protection against uncompensated physical takings would be of little consequence if the government could achieve exactly the same result through regulation.

In the same opinion, Justice Scalia elaborated the nuisance exception to regulatory takings.[94] The nuisance exception in regulatory takings doctrine is important because imposing costs on private parties is a necessary regulatory

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entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . .").

90. Absent remedial innovation, such claims are unlikely to produce much in the way of damages, but they will still enable litigation that may be costly and disruptive for defendants. *See infra* note 107. These costs in themselves might be understood as deterrents against a violation of the right to exclude. They are clearly not part of the compensation owed to a plaintiff.

91. *See* Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277, 286 (2001) (suggesting that multiple "sticks have to be removed before a taking occurs").

92. Thomas W. Merrill, *The Compensation Constraint and the Scope of the Takings Clause*, 96 NOTRE DAME L. REV. 1421, 1434 (2021).

93. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) ("Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, it was generally thought that the Takings Clause reached only a 'direct appropriation' of property or the functional equivalent of a 'practical ouster of [the owner's] possession.' Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits." (alteration in original) (internal citations omitted) (first quoting The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1870); and then quoting N. Transp. Co. v. City of Chicago, 99 U.S. 635, 642 (1879))).

94. *See id.* at 1027 (explaining that the use of one's property to create a nuisance burdening another's property is not within the scope of a property right, and so the regulation of the nuisance does not constitute a taking requiring compensation).

technique in contexts where they are imposing costs on society. Takings doctrine is supposed to mirror physical takings, not Pigouvian instruments;[95] the physical taking of property requires compensation under the Takings Clause, but the regulation of externalities by Pigouvian means does not. Indeed, requiring compensation for the burdens of Pigouvian regulation would straightforwardly disable Pigouvian regulation, because the whole point of a Pigouvian regulation is to impose costs that deter socially harmful conduct. And hence the nuisance exception in Takings doctrine recognized that where the purpose of a regulation is the analogue of a Pigouvian intervention, the government should not be required to pay compensation.[96] The reason that government should have to pay compensation for physical takings is to ensure that the provision of public goods is cost-justified. To require compensation for the prevention of public bads, however, would invite moral hazard. In fact, requiring compensation for regulations that prevent public bads would encourage owners to create public bads in order to be paid the compensation.

One way of understanding what is going on is that the Court is experimenting with applying a revanchist understanding of the property right in Takings cases, understanding it as centering on the right to exclude. Thomas Merrill characterizes this as an "essentialist"[97] understanding of property, in contrast with the "nominalist" view that treats property as a disaggregable "bundle of rights."[98] If the essence of property is the right to exclude, then liability-rule protection fundamentally fails to compensate for the abrogation of the entitlement. The proponents of property essentialism contend that vindicating property rights necessarily means property-rule protection.[99] The irony of the Court's new pro-exclusion approach to the Takings Clause, of course, is that the very function of the Takings Clause is to convert property-rule protection into liability-rule protection.[100]

Cedar Point is perhaps most disturbing for what it portends about the Court's approach to remedies under the Takings Clause, a consequence of the way that the analysis in *Cedar Point* moves away from the monetary value of property toward an essentialist conception of property. *Cedar Point* suggested that

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95. *See* A.C. PIGOU, THE ECONOMICS OF WELFARE 27–28 (1920) (developing the idea of using taxes as a mechanism for discouraging negative externalities, i.e., costs imposed on someone other than the beneficiary of some economic activity); *see also* William J. Baumol, *On Taxation and the Control of Externalities*, 62 AM. ECON. REV. 307, 309–12, 318–20 (1972) (showing that imposing a tax on the creation of a negative externality is an efficient mechanism for discouraging the externality but proposing a satisficing-oriented alternative to Pigouvian taxation that requires less information to implement).

96. Note that a Pigouvian intervention is "off-budget" in precisely the sense that scholars worry about vis-à-vis uncompensated physical takings, but there is nothing troubling about that in this context. Moreover, with a Pigouvian intervention the government gains something, revenue, that it does not when it achieves the same allocative result through regulation. As a purely distributive matter, *ceteris paribus*, the regulatory approach advantages regulated parties.

97. Merrill, *supra* note 3, at 734.

98. *Id.* at 737.

99. *See, e.g.*, *id.* at 739; Smith, *supra* note 47, at 971.

100. *See supra* text accompanying notes 51–52.

compensation was owed in circumstances where harm was difficult to discern.[101] In *Loretto v. Teleprompter Manhattan CATV Corp.*,[102] perhaps the closest precedent to *Cedar Point*, the New York Court of Appeals determined on remand that one dollar was appropriate compensation for the *de minimis* physical invasion at issue.[103] The regulation at issue in *Cedar Point* was, if anything, less invasive.[104] Indeed, it is very difficult on the facts of *Cedar Point* to identify any economic injury whatsoever caused by the regulation to the property owner.[105] But the Supreme Court has recently encouraged the filing of Takings cases in federal court,[106] reducing the likelihood that the *Loretto* denouement will be available in future Takings cases. With federal courts taking more control over the disposition of Takings cases, remedial innovation becomes more plausible.[107]

Beefing up remedies beyond fair market value would be consistent with a property-rule theory. The point of a property rule is not to compensate an owner for an injury but to deter the injurer. One way to implement a property rule is to prevent the conversion of property categorically by enjoining the attempted conversion.

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101. Mark Kelman suggests that the monetary harm suffered by the employer was "the fact that the nursery owners might have had the ability to suppress what they see as profit-dampening unionization efforts absent the taking," but he also argues that this is not a judicially cognizable injury, because the employer had no entitlement to this premium. Mark Kelman, *Staying in the Takings Lane: The Compensation Issue in* Cedar Point Nursery, 2022 CARDOZO L. REV. DE NOVO 129, 150. This is not a consideration that the Court mentions—although it may have been on the minds of the justices nonetheless.

102. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (holding that a per se taking occurred when the government mandated the installation of cable television wires on a property, constituting "a permanent physical occupation authorized by [the] government").

103. Loretto v. Teleprompter Manhattan CATV Corp., 446 N.E.2d 428, 434–35 (N.Y. 1983).

104. Unlike *Loretto*, the presence at issue in *Cedar Point* was not permanent; indeed, labor organizers were permitted to enter the property for only a few hours a day, less than one-third of the days in the year. Cedar Point Nursery v. Hassid, 594 U.S. 139, 144–45 (2021). Moreover, the regulation at issue in *Cedar Point* required that the labor organizers not interfere with work at the site; they were only permitted to talk to employees during breaks from work and only in nonworking locations. *Id.* at 166 (Breyer, J., dissenting).

105. *See id.* at 166 (Breyer, J., dissenting) (noting that under the statute, "union representatives can enter the property only 'for the purpose of meeting and talking with employees and soliciting their support'; they have access only to 'areas in which employees congregate before and after working' or 'at such location or locations as the employees eat their lunch'; and they cannot engage in 'conduct disruptive of the employer's property or agricultural operations, including injury to crops or machinery or interference with the process of boarding buses'" (quoting Cal. Code Regs. tit. 8, § 20900(e), (e)(3), (e)(4)(C) (2021))).

106. *See* Knick v. Twp. of Scott, 588 U.S. 180, 191, 206 (2019) (overturning the *Williamson County* requirement that Takings plaintiffs exhaust their state court remedies before bringing a Takings claim in federal court).

107. Estlund notes that even if the Court does not abandon the fair-market-value formula, simply expanding the scope of Takings claims increases the deterrence function of Takings doctrine. *See* Estlund, *supra* note 76, at 144–45; *see also* Merrill, *supra* note 73, at 90 (characterizing the burden of engaging in litigation under the Takings Clause as a "due process tax").

Another way to implement a property rule is to provide super-compensatory damages that deter conversion by making it exceedingly costly. Property-rule protection requires either injunctive relief or super-compensatory damages, else there is no deterrent to the efficient conversion of an asset. Another way of putting this is that absent injunctive relief, property-rule protection entails punitive damages.[108]

But with punitive damages, the Takings Clause will no longer provide the right incentives. The traditional liability rule provided the correct incentive: governments should engage in takings when the social benefits (including the benefit to the property owner) exceed the social costs (including the cost to the property owner).[109] Indeed, arguably failing to engage in such takings would be a government failure. (Of course, there are still likely to be an inefficiently low level of takings in practice, due to politics and governments' fiscal constraints.) The Takings Clause conventionally protected property to the extent of its objective value, whereas the essentialist approach would advantage property owners beyond the objective value of their assets. The result would be to confer on them some of the rents of their subjective valuation. Alternatively put, it would give property owners market power that the liability rule precisely seeks to deny them.

In recent years, some scholars and activists have proposed expanding Takings remedies by permitting courts to issue injunctions rather than ordering compensation.[110] This would be another way to move Takings doctrine in the direction of property-rule protection. The Court so far has indicated that it will not pursue this avenue.[111] Other proposals, however, have invited courts to provide "equitable compensation" for partial takings, i.e., money damages in excess of fair market value.[112] And *Cedar Point* leaves this avenue open.[113]

Short of injunctive relief, the Court can try to expand either the quantum or the scope of damages, or both. There is a doctrinal obstacle to the former, as fair market value is well established as the criterion for setting damages under the

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108. *See* Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1872–73 (2007) (observing that courts regard punitive damages as appropriate when they seek to protect property rights beyond their economic value).

109. *See supra* note 66 and accompanying text.

110. *See, e.g.*, Thomas W. Merrill, *Anticipatory Remedies for Takings*, 128 HARV. L. REV. 1630, 1650 (2015); *see also* Joshua D. Hawley, *The Beginning of the End?* Horne v. Department of Agriculture *and the Future of* Williamson County, 2012–2013 CATO SUP. CT. REV. 245, 246 (arguing that "earlier American jurists" took the view that "[i]f the state severely burdened private property without paying a fair price, the takings rule declared the action *ultra vires*, beyond the power of law and void"). *But see* John D. Echeverria, *Eschewing Anticipatory Remedies for Takings: A Response to Professor Merrill*, 128 HARV. L. REV. F. 202, 202–03 (2015).

111. *See Knick*, 588 U.S. at 205 (2019) ("Governments need not fear that our holding will lead federal courts to invalidate their regulations as unconstitutional. As long as just compensation remedies are available—as they have been for nearly 150 years—injunctive relief will be foreclosed.").

112. *See, e.g.*, Brian Angelo Lee, *"Equitable Compensation" as "Just Compensation" for Takings*, 10 BRIGHAM-KANNER PROP. RTS. J. 315, 316–17 (2021).

113. Indeed, as the dissent observes, the *Cedar Point* majority omits any discussion of remedies. Cedar Point Nursery v. Hassid, 594 U.S. 139, 179 (2021) (Breyer, J., dissenting).

Takings Clause.[114] It may be easier to expand the scope of Takings damages. And *Cedar Point* has already innovated on this score by finding a taking in the absence of either physical possession or substantial economic injury to the whole parcel.[115] *Cedar Point* thus opens the door to judicial efforts to introduce property essentialism to the Takings Clause.

Nevertheless, meaningfully instantiating a commitment to property essentialism in Takings doctrine would require much more than the Court has done so far. Vindicating property essentialism requires deterrence of conversions of property. That is, it requires super-compensatory damages. Enabling claims for partial takings facilitates imposing super-compensatory damages by circumventing the whole parcel rule. But requiring payment of fair market value for partial takings alone would be insufficient. (Fair market value on the facts of *Cedar Point*, for instance, would be nominal damages.) Whether the Court will go down the road of remedial innovation remains to be seen. It would constitute a dramatic shift in Takings doctrine. But if the Court is so inclined, it has a new resource in *Cedar Point*'s essentialist logic. And on some level, it is difficult to understand the rationale of *Cedar Point* unless there is some interest in pursuing this avenue; after all, it is a case in which there was no economic injury.[116]

IV. UNINTENDED CONSEQUENCES

Whereas the Takings Clause seeks to put a moderate thumb on the scale against government interference with market ordering, the ongoing developments in Takings doctrine may push toward more aggressive interference with market ordering by impeding the correction of market failure through more abstemious means. No institutional rule operates in a vacuum; changes in the real world never occur *ceteris paribus*. And in this case in particular, with substantial economic and political stakes, institutional innovation is likely to have repercussions. The compensation requirements imposed under the mantle of the Takings Clause will influence what governance strategies governments adopt, at least to some extent. We might describe public ownership and regulation as alternative instruments of command-and-control governance—one direct, the other mediated by the involvement of a regulated party. The problem for constitutional property essentialism is that doctrines seeking to encourage social policy to operate through the fisc by discouraging regulatory burdening of private property may instead encourage more sweeping forms of command-and-control governance.

Generally speaking, government interventions in private ordering take one of three forms: command-and-control regulation of private actors (simply requiring regulated parties to do or not do things), the imposition of fiscal incentives on private actors (taxes to deter conduct or subsidies to encourage conduct), or direct public provision of goods or services (provision, that is, through the public sector rather

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114. *See* United States v. Miller, 317 U.S. 369, 373–74 (1943); *see also* Merrill, *supra* note 92, at 1422 (observing that "the approach to determining the measure of just compensation is by far the most settled of the various issues that can arise under the [Takings] Clause").

115. *See supra* text accompanying notes 84–89.

116. *See supra* notes 78–82 and accompanying text.

than through private intermediaries).[117] Typically, these three modes of intervention are functional substitutes; that is, the government can achieve the same result through any of the three modes. Suppose the government wants to reduce greenhouse gas emissions. It could impose regulatory limits on emissions; it could tax emissions or subsidize clean energy production; or it could become a market participant, producing clean energy directly. Each of these three avenues could, in principle, achieve the same level of increase in clean energy consumption and corresponding diminution in fossil fuel consumption. Which avenue the government will prefer depends on economics (that is, on the cost-effectiveness of the various approaches) and on politics (that is, on considerations like their popularity and sustainability). If constitutional law erects hurdles to regulation, whether the government will respond by relying more on fiscal interventions or on direct public provision is indeterminate in the abstract. It might well lead to more reliance on direct public provision.[118]

Inhibiting regulatory takings encourages physical takings, just as inhibiting partial takings encourages complete takings. If the government is going to pay the same price whether it proceeds via command-and-control regulation or eminent domain, then it has little incentive to abstain from exercising the eminent domain power. The more costs imposed on command-and-control regulation, the more the incentives inch closer to the tipping point. Similarly, penalizing partial takings reduces the marginal deterrence of full physical takings. If the government pays a similar amount whether it burdens the right to exclude or exercises the eminent domain power, then it has little incentive to abstain from exercising the eminent domain power. The same mechanism still exists even when the price the government pays for burdening the right to exclude is not as high as the price it pays for exercising the eminent domain power, because the government gets more when it engages in a physical taking. Any burdening of government regulation of property rights, therefore, contributes to encouraging the government to proceed via a physical taking.[119]

Consider an analogy to a similar dilemma in a different doctrinal context also involving constitutional regulation of regulatory burdens on property. In *NFIB v. Sebelius*,[120] the Court held that the Affordable Care Act's individual mandate exceeded congressional regulatory power under the Commerce Clause but was

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117. *See, e.g.*, ANTHONY B. ATKINSON & JOSEPH E. STIGLITZ, LECTURES ON PUBLIC ECONOMICS 4–5 (updated ed. 2015) (identifying "taxation" and "public spending," "state participation in production," and "direct controls" and "regulation" as alternative instruments of government intervention).

118. Note that this observation is closely related to Justice Scalia's anti-regulatory theory of the accountability function of the Takings Clause. *See supra* note 61 and accompanying text. If the Takings Clause is supposed to promote accountability by ensuring that the government takes ownership of its policy choices, then encouraging public ownership accomplishes this objective maximally: the government is more easily accountable for what it does directly than for what it does through intermediaries.

119. One consequence of this observation is that the expansion of the ambit of regulatory takings claims, even in the absence of remedial innovation, would be sufficient to make some marginal contribution toward encouraging more physical takings.

120. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012).

justified as an exercise of Congress's power to tax. This holding might be understood as an attempt to push legislative action into the fisc.[121] However, the Court's anti-regulatory program founders on a serious problem: a system of public health insurance would not prompt the same constitutional objection, because it does not impose any regulatory burdens on private parties. The same doctrine that seeks to shift from regulatory burdening to tax incentives also adds to the government's incentive to circumvent private enterprise entirely.

The unintended-consequences problem exists in part because there is a hydraulic pressure toward government interventions that correct market failures, as these interventions grow the pie and hence produce more winners than losers.[122] The government can expect to face political costs when it fails to engage in efficient policy interventions.[123] The goal of constitutionalizing property essentialism would be to raise the cost of regulatory interventions, thus diminishing their efficiency. This would likely reduce the domain of cases in which it is rational for the government to intervene, but at a certain point even this will not be sufficient to stem the tide. And in these cases, constitutional property essentialism will push the government toward more vigorous forms of intervention. Taking property essentialism seriously requires deterring interference with private property, but deterring regulation will encourage the government to achieve its objectives through other means.

The remainder of this Part considers a few examples, explaining how this mechanism would work.[124] It does not, however, offer particular political

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121. *See* Gillian E. Metzger, *To Tax, to Spend, to Regulate*, 126 HARV. L. REV. 83, 86 (2012).

122. *See* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 86 (1990) ("The process of institutional change can be described as follows. A change in relative prices leads one or both parties to an exchange, whether it is political or economic, to perceive that either or both could do better with an altered agreement or contract. . . . However, because contracts are nested in a hierarchy of rules, the renegotiation may not be possible without restructuring a higher set of rules (or violating some norm of behavior). In that case, the party that stands to improve his or her bargaining position may very well attempt to devote resources to restructuring the rules at a higher level."); *cf.* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 98 (1972) ("The common law method is to allocate responsibilities between people engaged in interacting activities in such a way as to maximize the joint value, or, what amounts to the same thing, minimize the joint cost of the activities."); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 65–66 (1977) (arguing that the process of legal interpretation has a tendency over time to produce efficient rules). *But see* NORTH, *supra*, at 86 ("This very simplified story can be complicated in many ways – by agenda power, by the free-rider problem, or by the tenacity of norms of behavior.").

123. Whether the political costs of failing to engage in an efficient policy intervention exceed the political costs of engaging in an efficient policy intervention, however, is indeterminate in the abstract, because the constituency in favor of the less efficient alternative may be more concentrated and/or powerful.

124. Unlike previous work on the subject that has focused on direct doctrinal implications of *Cedar Point*, e.g., Estlund, *supra* note 76, at 144–52 (considering implications for labor law, landlord–tenant law, and civil rights law), the focus here is on broader implications of importing property essentialism into the Takings Clause.

predictions about what is likely to occur. Other mechanisms will also be at work, and how they will interact is indeterminate in the abstract.

Housing. First consider an example at the local level: housing policy. Municipalities have historically used zoning regulations as a significant tool to provide affordable housing.[125] Municipalities use zoning regulations to limit the quantity and regulate the character of new development ("exclusionary zoning") as well as to require developers to produce a certain number of affordable units in new developments ("inclusionary zoning"). *Cedar Point*'s logic may imply constitutional limitations on governments' authority to impose burdens on property owners' use of their property in this manner: mandating the construction of additional units, for instance, could well be understood as a violation of the owner's right to exclude.[126] To the extent the courts inhibit zoning regulations, however, they will encourage governments to pursue their policy ends instead through either housing subsidies or eminent domain.

Courts have held that some zoning laws constitute takings requiring compensation, and it is possible that zoning laws will become increasingly vulnerable. Many zoning regulations could plausibly be viewed as conditional takings under *Nollan v. California Coastal Commission*,[127] *Dolan v. City of Tigard*,[128] and *Koontz v. St. Johns River Water Management District*.[129] Some scholars have argued that inclusionary zoning[130] and rent control[131] regulations, in particular, could constitute conditional takings under this line of cases. Certainly, inclusionary zoning requirements have a closer nexus to the goal of preventing adverse effects of development on housing affordability. But many particular configurations—for instance, the height bonus that developers can receive in some municipalities in exchange for constructing a certain number of affordable units—may be vulnerable.

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125. *See* Andrew G. Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23, 28 (1996).

126. Commentators have already suggested that rent regulations may constitute a violation of the Takings Clause under the logic of *Cedar Point*. *See* Abigail K. Flanigan, Note, *Rent Regulations After* Cedar Point, 123 COLUM. L. REV. 475, 477 (2023).

127. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (holding that a condition on development must have an "essential nexus" with the legitimate government interest advanced by the condition).

128. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (holding that the government must satisfy, in addition to *Nollan*'s essential nexus requirement, a proportionality requirement).

129. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 619 (2013) (holding that the rule of *Nollan* and *Dolan* applies even if the condition consists of a requirement to pay money and even if the permit is denied for failure to agree to the condition).

130. *See, e.g.*, Lawrence Berger, *Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases*, 70 NEB. L. REV. 186, 188 (1991); Michelle DaRosa, Comment, *When Are Affordable Housing Exactions an Unconstitutional Taking?*, 43 WILLAMETTE L. REV. 453, 454 (2007); Jai Keep-Barnes, *Inclusionary Zoning as a Taking: A Critical Look at Its Ability to Provide Affordable Housing*, 49 URB. LAW. 67, 69 (2017).

131. *See, e.g.*, R.S. Radford, *Why Rent Control Is a Regulatory Taking*, 6 FORDHAM ENV'T L.J. 755, 755–56 (1995).

The more that constitutional law restricts governments' ability to achieve housing affordability through regulation, the more it will push toward local reliance on public infrastructure. Indeed, in view of the problematic uses of exclusionary zoning[132] and the limits of inclusionary zoning,[133] such a move might be desirable. While there is a strong case for housing subsidies,[134] it may be more affordable for municipalities to rely on housing projects. The ultimate resolution depends on particular political and economic factors, but it is far from assured that restricting zoning regulations would result in less intervention in housing markets. Indeed, if critics of inclusionary zoning are right that inclusionary zoning policies are an inadequate tool for addressing housing needs,[135] then such a substitution might increase the public footprint in the housing domain.

Labor policy. If *Cedar Point* signals anything, it is the Court's interest in imposing more constitutional constraint on government intervention in labor relations—and in leveraging property essentialism to do so.[136] To the extent the courts inhibit governments' attempts to facilitate labor organizing, however, they will encourage governments to invest in more public schemes for the governance of the employment relation. Governments may respond in part by shifting regulatory emphasis from labor law to employment law. It is worth observing that labor law is a private law system, focused on negotiations between employers and employees, whereas employment law is a public law system, which provides substantive entitlements to employees as a matter of right.[137] Collective bargaining is a system rooted in freedom of contract.[138] Labor law does not set substantive terms of the employment relation.[139] Burdening regulatory efforts to protect workers' ability to organize collectively might push regulators toward less reliance on collective bargaining and more reliance on public law guarantees in the workplace. If governments want to protect the workers' interests but cannot easily rely on the procedural entitlements conferred by labor law to do so, then they will be pushed to rely on the substantive provision of terms of employment. For instance, governments might have more incentive to legislate minimum wages, minimum benefits, restrictions on casualization, and protections against dismissal. Other ongoing

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132. *See* David Schleicher, *Exclusionary Zoning's Confused Defenders*, 2021 WIS. L. REV. 1315, 1320–22.

133. *See* Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167, 1170 (1981).

134. *See* Noah M. Kazis, *The Failed Federalism of Affordable Housing: Why States Don't Use Housing Vouchers*, 121 MICH. L. REV. 221, 224–45 (2022).

135. *E.g.*, Ellickson, *supra* note 133, at 1170–71 (observing that inclusionary zoning meets only a small fraction of affordable housing needs).

136. *See* Cynthia Estlund, *Is Labor Law Internal or External to Private Law? The View from* Cedar Point, 24 THEORETICAL INQUIRIES LAW 124, 126–27 (2023).

137. *See* Cynthia Estlund, *The Fall and Rise of the Private Law of Work*, *in* RESEARCH HANDBOOK OF PRIVATE LAW THEORY 412, 412 (Hanoch Dagan & Benjamin C. Zipursky, eds., Edward Elgar Publ'g, 2020).

138. *See, e.g.*, NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 488–90 (1960) (observing that the parties engaged in bargaining are not obligated to reach agreement on any particular terms and asserting that the NLRB is therefore not authorized to adjust the "economic weapons" of the parties).

139. *See id.* at 490.

developments in labor law are rendering entitlements that were once public law guarantees into subjects of private contract,[140] reinforcing the incentive for governments to retreat from a focus on collective bargaining. Again, the result might be to increase the government footprint in the domain of employment regulation. The shift from labor law to employment law would be a shift from private to public ordering. Property essentialism seeks to protect private ordering, but it could have the opposite result in practice.

Environmental regulations. To the extent the courts disable regulatory constraints on, e.g., greenhouse gas emissions, they will encourage more active government involvement in economic planning. Suppose that the Court required compensation for restricting emissions. Depending on the level of compensation required and the harmfulness of emissions, at a certain point, it would be more cost-effective for a government wishing to limit emissions to engage in a physical taking. Without going to this extreme, reducing governments' ability to limit emissions on a quantity basis would encourage more regulatory obstacles to the construction of factories *ex ante*. Again, the attempt to develop constitutional doctrine to inhibit quantity regulation will push toward either direct provision or more sweeping command-and-control regulations. Alternatively, the government might opt for Pigouvian instruments. Perhaps this is what the proponents of property essentialism hope. But there would be something particularly strange about saying that the Takings Clause prefers a carbon tax to a cap-and-trade system, since the former could well be a more heavy-handed burdening of property. One illustrative example of this hydraulic movement may be the federal government's recent substantial investment in a combination of public infrastructure and private subsidies to promote the adoption of green energy[141] in a legal environment in which the Court has signaled hostility to regulatory efforts to mitigate climate change.[142]

If the prospect of muscular government involvement as a market participant—or even a market substitute—in energy production (or analogously, in the provision of housing or employment guarantees) seems fanciful, it is worth considering that this is an intuition formed in a legal context in which governments have strong incentives to proceed through regulation of private enterprise rather than through an expanded public sector. If the legal structure changes so as to change those incentives, our familiar intuitions will have to adapt. Indeed, if the availability of the regulatory strategy enables government to evade accountability for its policy choices,[143] then the increase in accountability generated by discouraging the regulatory strategy may force government to be more active in order to meet public demands. A government that can only accommodate public demands by deploying its own resources has no one else at whom to point the finger. While proponents of wielding the Takings Clause more vigorously to promote government accountability may have imagined that accountability implies a chastening of government, accountability might instead embolden government. If government is truly

140. *E.g.*, Epic Sys. Corp. v. Lewis, 584 U.S. 497, 502–03 (2018) (holding that an employment contract can require an employee to pursue claims through arbitration even when those claims concern rights guaranteed by Fair Labor Standards Act).

141. *See* Inflation Reduction Act of 2022, Pub. L. No. 117-169.

142. *See* West Virginia v. EPA, 597 U.S. 697, 735 (2022).

143. *See supra* note 61 and accompanying text.

accountable for failing to address public problems, then it has a strong incentive to act adequately.

V. THEORETICAL IMPLICATIONS FOR PROPERTY

The inhospitality of the Takings Clause toward property essentialism, for both formal and functional reasons, has broader implications for property theory. The relationship sheds valuable light on the peculiarities of the Takings Clause as a protector of private property, and it elucidates the respective merits of property essentialism and the bundle-of-sticks theory, the two leading theories of property rights on offer. In both respects, this Article's analysis underscores the importance of social and political norms, beyond legal provisions, for the protection of private property—although it recognizes that legal rules will also affect the development of these norms. Legal incentives matter, but the import of legal incentives is complex and dependent on unpredictable social and political factors.

A. The Frailty of the Takings Clause

The project of importing property essentialism into the Takings Clause faces a catch-22. If the Court is not proposing to increase compensation above fair market value, then it faces a practical problem in that the deterrence achieved by expanding the domain of compensable takings will be very limited. But if the Court proposes to increase compensation above fair market value, then it faces a doctrinal problem (not to mention technical and political problems). Apart from its inconsistency with centuries of precedent,[144] this innovation would be hard to reconcile with the text of the Takings Clause.[145] The Takings Clause makes clear that it provides for "compensation" rather than deterrence;[146] it is therefore fundamentally incompatible with the goal of property essentialism. The new *Lochner*ism is unlikely to center on the Takings Clause because of the limits of what the Takings Clause provides.

The Roberts Court's efforts to protect private property from legislative interference have certainly centered on other areas so far, of which the developing First Amendment jurisprudence on commercial speech has been perhaps the most discussed.[147] But even in the areas in which the Court has innovated, its innovations are ultimately only as strong as the Takings Clause. This is because the limit of all of these new constitutional doctrines is public property, and the Takings Clause is

144. *E.g.*, Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

145. *See id.* ("The noun 'compensation,' standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages; the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that, if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken . . . .").

146. *Id.*

147. *See, e.g.*, David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, LAW & CONTEMP. PROBS., Autumn 2014, at 16 (warning of the advent of "an era of neoliberal *Lochner*ism" under the aegis of the First Amendment).

how the Constitution regulates the conversion of private property into public property.

A violation of the Commerce Clause or the First Amendment can be cured simply by spending public money rather than requiring private parties to spend money to achieve the same objective. While the Roberts Court has held that the Commerce Clause does not empower Congress to require private parties to buy things,[148] Congress can typically achieve the same objective by levying taxes or by providing services publicly. A single-payer healthcare scheme would avoid the constitutional problem that the Court found in *NFIB* (although the Court in any case ultimately upheld the contested provision as a tax[149]). The same doctrine that seeks to shift from command-and-control regulation to tax incentives also adds to the government's incentive to circumvent private enterprise entirely.

The same is true of many First Amendment problems. In *Janus v. AFSCME*,[150] for instance, Illinois could have funded its public sector unions via a public subsidy rather than by mandating individual contributions. This would pose no First Amendment problem, since government speech does not receive First Amendment coverage.[151] Similarly, the compelled commercial speech problem found in *United Foods*[152] can be obviated quite easily by conducting the subsidized program through the government itself rather than through a private intermediary.[153]

Similarly, in the nondelegation context, there is perhaps a fundamental distinction between government imposition of burdens on the management of private property and government management of public property.[154] Whereas the nondelegation doctrine may be held to limit regulatory interference with the private

148. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012) (holding that the Affordable Care Act's individual mandate exceeded congressional authority under the Commerce Clause but upholding the provision under Congress's authority to levy taxes).

149. *Id.* at 574.

150. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 884–85 (2018).

151. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 464 (2009).

152. United States v. United Foods, Inc., 533 U.S. 405, 415–16 (2001) (striking down a federal law requiring mushroom producers to pay assessments used to fund mushroom advertisements on the grounds that the law compelled commercial speech).

153. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005) ("Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object.").

154. *See* John C. Harrison, *Executive Administration of the Government's Resources and the Delegation Problem*, *in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE 231, 245–46 (Peter J. Wallison & John Yoo eds., 2022); *see also* David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1265 (1985) ("A statute allowing the Executive broad discretion to manage public property to the extent such management does not govern private conduct is not a delegation of legislative power.").

direction of private property,[155] it imposes no limit on executive direction of public property.

The government can therefore achieve regulatory objectives that would otherwise be frustrated by the new constitutional doctrine simply by converting private property into public property. Ironically, the Roberts Court's solicitude for property rights may push toward more vigorous takings of private property. The Takings Clause thus ubiquitously provides a vital backstop to constitutional innovations to protect private property—and it is an inherently limited one that innovations along the lines of *Cedar Point* risk undermining.

The Takings Clause is an inherently weak instrument for preventing the socialization of resources because in a sense, it recognizes that resources are always already socialized. The distribution of resources is a public choice. (This was the great insight of the classical legal realists.[156]) This is not to say that there ought to be government reallocation of resources; it is simply to say that whatever allocation of resources society chooses requires justification.[157] Such a justification must centrally consider, in addition to the requirements of justice, questions of efficiency and incentives. The Takings Clause traditionally promoted market ordering in this calculus. How much it will continue to do so may depend on how far the Roberts Court wants to push its property essentialism.

B. The Resilience of the Bundle of Sticks

There is perhaps a broader implication of the foregoing for property theory. There is a way in which the bundle-of-sticks theory may be more protective of the security of property rights than the absolutist theory—although we tend to imagine the contrary. A prominent view is that the bundle-of-sticks theory short-changes property owners by giving entitlements something less than genuine property protection.[158] Katrina Wyman observes that proponents of property essentialism "maintain that the [bundle] metaphor is inherently under-protective of property rights."[159] But assessments of the extent to which the respective theories are property-protective must incorporate the functional context in which they operate. Permitting the government to pry away particular sticks from the bundle may weaken the property owner's entitlement, but the alternative is subjecting the

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155. *See* Gundy v. United States, 588 U.S. 128, 152–53 (2019) (Gorsuch, J., dissenting) (calling for more vigorous enforcement of the nondelegation doctrine to bar all coercive regulation of private conduct); *see generally* David B. Froomkin, *The Nondelegation Doctrine and the Structure of the Executive*, 41 YALE. J. ON REGUL. 60 (2024) (discussing the prospect of an expansion of the nondelegation doctrine).

156. *See* BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 78–80 (1998).

157. *See* Ian Ayres, *Discrediting the Free Market*, 66 U. CHI. L. REV. 273, 296 (1999) (reviewing BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (1998) and observing that "Hale did not undermine the possibility that free markets could often or even normally foster the social good, but he persuasively showed that simple a priori arguments that the free market was *necessarily* better than redistributive regulation could not withstand scrutiny").

158. *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 357–58 (2001).

159. Wyman, *supra* note 7, at 189.

entitlement completely to liability-rule protection. An essentialist approach to property raises the stakes of partial takings but also reduces the marginal cost of physical takings.

This unintended-consequences thesis does not rely on psychological microfoundations (only mechanical ones), although psychological considerations also lend support to the proposition that broadening the availability of takings remedies may have counterintuitive results. A famous study of daycare centers in Haifa found that parents were more inclined to pick their children up late after the introduction of a fine for so doing.[160] The authors theorize that the introduction of a penalty for excessive use of the resource induced users to treat it as a commodity that one can consume upon paying the price.[161] In the takings context, we might imagine that the insistence upon compensation licenses the government to pay it. Social norms may achieve considerably more deterrence than monetary penalties—particularly considering the level of monetary penalties supplied by the fair-market-value formula.

Merrill and Smith observe that the development of the bundle-of-sticks theory historically was associated "[n]ot coincidentally [with greatly increasing] state intervention in economic matters."[162] It does not follow, however, that this development can be reversed by constitutional fiat. Indeed, perhaps the bundle-of-sticks theory tempered rather than abetted the rise of the regulatory state, and its demise will contribute to a new growth of the state. Analogously, Brink Lindsey and Steven Teles have applauded the looming reinvention of the nondelegation doctrine on the grounds that it will encourage Congress to pass ambitious fiscal policies rather than regulatory policies implemented largely through numerous and minute technical rules.[163]

Treating property rights as a bundle of sticks—and permitting governments to disaggregate the sticks in the bundle—may be more conducive to the security of property than the burgeoning essentialist approach.[164] Property is more secure when

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160. Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1, 3 (2000); *see also* SAMUEL BOWLES, THE MORAL ECONOMY: WHY GOOD INCENTIVES ARE NO SUBSTITUTE FOR GOOD CITIZENS 200–15 (2016) (advancing a general argument that attempts to promote socially desirable behavior through incentives risk backfiring by suppressing public-spirited motives).

161. Gneezy & Rustichini, *supra* note 160, at 14.

162. Merrill & Smith, *supra* note 158, at 365 ("[T]he motivation behind the realists' fascination with the bundle-of-rights conception was mainly political. They sought to undermine the notion that property is a natural right, and thereby smooth the way for activist state intervention in regulating and redistributing property. If property has no fixed core of meaning, but is just a variable collection of interests established by social convention, then there is no good reason why the state should not freely expand or, better yet, contract the list of interests in the name of the general welfare.").

163. Brink Lindsey & Steven M. Teles, *Why the Character of Governance Matters*, CATO UNBOUND (Jan. 10, 2018), https://www.cato-unbound.org/2018/01/10/brink-lindsey-steven-m-teles/why-character-governance-matters/ [https://perma.cc/M2S2-PDVC].

164. The contrapositive is that the essentialist theory of property may yield underappreciated resources for proponents of government intervention in the distribution of property. Indeed, understanding property as a system of authority bolsters a view of property

legal doctrine creates an incentive for governments to opt for regulatory interventions than when it encourages them to engage in complete takings. As well as making it less likely that the government will regulate, an essentialist jurisprudence makes it more likely that the government will circumvent private enterprise and opt for direct public provision of goods and services. A world in which the government cannot tweak private parties' endowments is one in which there is more pressure to obviate them entirely.

C. The Liability of Property Essentialism

In addition to the normative costs of introducing property essentialism to the Takings Clause, there is a more straightforward conceptual flaw in that the Takings Clause is quite clearly committed to compensation rather than deterrence.[165] The inhospitality of the Takings Clause to property essentialism poses a broader theoretical challenge for property essentialism. Property essentialism purports to make sense of the structure of actually existing U.S. property law. Proponents of property essentialism advertise the theory as better reflecting the contours of U.S. property law than the bundle-of-sticks theory.[166] They present this empirical fit as an important aspect of the theory's appeal. But the Takings Clause is a centrally important feature of U.S. property law. Indeed, the security of all property depends on the Takings Clause,[167] and pushing more entitlements into the coverage of the Takings Clause risks undermining the integrity of private property.[168] So if the Takings Clause is incompatible with property essentialism, that undermines property essentialism's claim to descriptive accuracy.

Insofar as property essentialism is a prescriptive rather than a descriptive theory, however, it is supposed to provide a warrant for the introduction of legal rules that better vindicate property's essential structure.[169] And ironically, the Takings Clause is an important source of authority in carrying out the project of

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as an essentially public matter. Moreover, viewing the distribution of property as a distribution of (public) authority bolsters criticisms of the maldistribution of this authority. *See, e.g.*, Gali Racabi, *At Will as Taking*, 133 YALE L.J. 2257, 2291 (2024) (arguing that the Takings Clause should be understood to protect private employees against termination, because laws that permit at-will employment effectuate a taking of employees' property interest in continued employment).

165. *See supra* note 51 and accompanying text.

166. *See* Merrill & Smith, *supra* note 158, at 385–97 (canvassing areas of property law that are better reflected by the essentialist theory than by the bundle-of-sticks theory).

167. *See supra* paragraph containing note 156.

168. *See supra* Section V.B.

169. It is worth observing that there is something puzzling about the relationship between the descriptive and prescriptive facets of the essentialist theory, although this puzzle reflects a more general tension in formalist legal theories, of which property essentialism is one example. Formalist theories tend to imagine that prescriptions about law reform can be derived from a conceptual analysis of the principles underlying existing law. But to identify principles that explain or guide existing law is to say nothing about the value of those principles—and hence cannot in itself serve as a basis for any prescriptive claim about law reform. *See generally* DAVID HUME, A TREATISE OF HUMAN NATURE (1739) (identifying the is-ought fallacy, the error of believing it possible to derive a normative proposition from a descriptive proposition).

transforming federal law to better reflect what the essentialist theory recommends.[170] That is because the Takings Clause (along with the Due Process Clause, to which it is appended) is the Constitution's only statement about a federal role in general property law.[171] Perhaps more pertinently, the Takings Clause, because it is a constitutional rule, is the only rule of general property law that is beyond the reach of the positive law of the states. The Takings Clause is the only source of federal authority to contravene state common law of property.[172] A purely positivist approach to property law would simply reconstruct the common law of the relevant state. If property essentialists want to resist positivism, which would obviate prescriptive application of the essentialist theory, then they need some legal hook for doing so. Property essentialists have thus been forced to lean on the Takings Clause, *faute de mieux*, but it cannot do the work they need it to do.

There is a broader tension here between the descriptive and prescriptive purposes to which various actors have sought to put the essentialist theory: scholars have advertised property essentialism as being valuable because it reflects positive law, but now it is being used by practitioners to do violence to positive law. The introduction of property essentialism to Takings doctrine in itself would overturn more than a century of precedent and generate both widespread confusion and socially costly litigation.[173] But more than this, if the constitutionalizing of property essentialism via the Takings Clause were successful, the import would be to facilitate federal disruption of extant property entitlements at state common law. That is because the constitutionalizing of property essentialism would displace the traditional positivist approach, which afforded a central role to the reconstruction of state common law in determining whether a taking had occurred for federal constitutional purposes.[174] The purpose of constitutionalizing property essentialism would be to marginalize the importance of state common law and license federal intervention to disrupt existing state law. To the extent that property-essentialist theory serves this disruptive function, it is not serving as a faithful reflection of the actually existing positive law of property. Property essentialism thus faces difficulties both insofar as it neglects the Takings Clause and insofar as it seeks to transform the Takings Clause into a vehicle for broader transformations in the law of property.

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170. It is not an accident that the Takings Clause has been the vehicle for the nascent creation of a federal common law of property. *See supra* note 16.

171. The Constitution does, however, empower Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2.

172. Since the Supreme Court's *Erie* decision, federal courts deciding common law property cases are supposed to apply state property law rather than create a federal common law of property. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

173. *See* text accompanying *supra* note 144; *see also* Huq, *supra* note 75, at 264, 274 (observing that *Cedar Point* "destabilizes a previously secure and predictable doctrinal structure" and disregards "[t]he ordinary tools of constitutional interpretation—ordinary meaning original understanding, and a careful reading of precedent").

174. *See* Brady, *supra* note 16, at 1031.

CONCLUSION

The constitutional law of property makes an underappreciated contribution to the mode of governance that government is encouraged to select—not just to the frequency of government intervention. The Roberts Court seems inclined to neglect these effects on the character of governance, potentially resulting in unintended consequences. The Takings Clause has traditionally reinforced market ordering by providing an appropriately tailored check on government. By directing the great bulk of its concern toward deterring physical takings, the law encouraged governments to adopt more modest regulatory strategies for governing property, protecting a central role for private ordering in the governance of society's resources. Constitutionalizing property essentialism, by contrast, would provide the wrong incentives, deterring efficient interventions in some cases and encouraging less efficient interventions in others. It might also undermine property at a deeper philosophical level. The public can only be committed to protecting private property when the institution of private property serves the public interest. But enshrining property essentialism in law risks painting property as a source of rent-seeking at the public expense. That is something else that the Takings Clause traditionally has guarded against. Those who care about the security of private property should be careful of reforming Takings jurisprudence to pit property against efficiency, because property could lose.

Not only does the essentialist theory of property face these normative difficulties, its theoretical structure also comes up short in making sense of the contours of actually existing law. The literature variously defending and scrutinizing the essentialist theory has attended too little to the Takings Clause, in view of both its central role in structuring U.S. property law and the difficulties it poses for the essentialist theory. Yet the Takings Clause is essentially incompatible with the essentialist theory, and the importance of the Takings Clause for U.S. property law—ironically something on which proponents of a prescriptive role for the essentialist theory have relied—reveals the essentialist theory's inadequacies as a descriptive account of U.S. property law. While *Cedar Point* rightly raised alarm bells, it also demonstrated the futility of constitutionalizing property essentialism.