## *ARTICLE:*

# KEEP OUT AND STAY OUT: THE *CEDAR POINT* DECISION AND THE LANDOWNER'S *SINE QUA NON* RIGHT TO EXCLUDE OTHERS (MAYBE SOMETIMES EVEN A GOVERNMENT OFFICIAL)

*By Karl E. Geier*[*]

The latest United States Supreme Court decision in the contested ground of Fifth Amendment takings law, *Cedar Point Nursery v. Hassid*,[1] is yet another chapter in the long-standing argument regarding the distinction between "regulation" of the use of private property by its owner, and "physical invasion" or "appropriation" of property by the government. As the summary of the *Cedar Point* decision in the Case Notes section of this issue of the *Newsalert* indicates (see page 44, below), a 6-3 majority of the Supreme Court ruled that a regulation of the California Agricultural Labor Relations Board requiring agricultural employers to permit union representatives to enter their property to meet with employees on-site was in violation of the Takings Clause. The ALRB rule required the growers to allow union organizers access for one hour before and one hour after each workday, as well as during lunch hour. The Court held that this regulatory requirement was a per se "taking," because although each such entry by itself was in some sense episodic, temporary, or transitory, by denying the owner the fundamental right to exclude others from the property, the regulation effectively deprived the owner of a protected property interest, namely, that same right to exclude others. This right to exclude, the Court said, is "one of the most essential sticks in the bundle of rights that are commonly characterized as property,"[2] which some have characterized as " '*the sine qua non* of property.' "[3]

The Court's majority opinion, by Chief Justice Roberts, and the dissenting opinion, by Justice Breyer, read almost as a "point/counterpoint" series of observations about previous Supreme Court Takings jurisprudence, all ultimately focused on an esoteric question—what distinguishes a "regulation of use" by a private property owner from an "appropriation" or "invasion" of private property? The question, if not the answer, was highlighted by this sequence of sentences in Justice Breyer's dissent:

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[*]Karl E. Geier is Shareholder Emeritus of Miller Starr Regalia and Editor-in-Chief of the firm's 12-volume treatise, Miller & Starr, California Real Estate 4th, published by Thomson Reuters.

 

> "The [ALRB union access] regulation does not *appropriate* anything. It does not take from the owners a right to invade (whatever that might mean). It does not give the union organizations the right to exclude anyone. It does not give the government the right to exclude anyone. What does it do? It gives union organizers the right temporarily to invade a portion of the property owners' land. It thereby limits the landowners' right to exclude certain others. The regulation *regulates* (but does not *appropriate*) the owners' right to exclude. . . .
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> ". . . . [T]he issue before us . . . is whether a regulation that temporarily limits an owner's right to exclude others from property automatically amounts to a Fifth Amendment taking." [Italics in original.][4]

To pose the question this way, without acknowledging that the "right to exclude" is in fact "taken" or "appropriated" when the owner is denied the right to exercise that right, even briefly, may seem to anticipate the answer without engaging the argument, but it is not that simple.

The majority's answer to the question as posed by Justice Breyer, is that any government-mandated allowance of physical entry amounts to an appropriation of the right to exclude and thus constitutes a per se taking, while the dissent's answer is that it only amounts to a regulation of the right to exclude, and is not a per se taking. The problem Justice Breyer and the other dissenters have with finding a per se *taking* of property when only one component of "property" is affected (the right to exclude), is that it renders inapplicable the sliding, multi-factor test of the seminal regulatory takings case, *Pennsylvania Coal Co. v. Mahon*,[5] which finds a taking only when regulation "goes too far," and instead turns the question into a stark either-or proposition with the scale weighted toward outright prohibition of the regulation or else compensation even for a partial taking of a partial interest in the property, even for a limited and transitory period of time.

The difference between a physical taking and a mere regulation was once described by the Court in *Loretto v. Teleprompter Manhattan CATV Corp*.[6] as follows:

> "[W]hen the 'character of the governmental action' is a permanent physical occupation of real property, there is a taking to the extent of the occupation without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[7]

The *Loretto* decision ultimately extended the rule of "physical taking" to include a government-directed physical occupation of a small portion of an owner's property (the wiring of an apartment building) by a third party's

 

telecommunications wiring, but it clearly involved a permanent physical occupation, albeit by a third party rather than the government. *Cedar Point* is similar insofar as it is a government-directed occupation of property by a third party, but it is considerably different in the nature of the entry permitted, which is episodic or transitory and results in no enduring physical occupation or change in the tangible aspects of the owner's property. The *Cedar Point* majority opinion nevertheless concludes, "The access regulation grants labor organizations a right to invade the growers' property. It therefore constitutes a per se physical taking."[8]

Justice Breyer's *Cedar Point* dissent repeatedly asks, what are the limits to this notion of "temporary per se physical takings" based on forced or compelled entry? It clearly does not mean that all such "forced" or "mandatory" allowances of entry into private property, whether by governmental officials or by other private parties, constitute a per se taking. The majority opinion in *Cedar Point* explicitly endorses the continued relevance of a number of substantial "exceptions" to the notion that all "invasions" or "appropriations" of private property through governmental actions constitute a per se taking. The dissent understandably poses the question, "So, if a regulation authorizing temporary access for purposes of organizing agricultural workers falls outside of the Court's exceptions and is a per se taking, then to what other forms of regulation does the Court's per se conclusion also apply?"[9]

That is a fair question, but Chief Justice Roberts' majority opinion clearly leaves a great many such "regulations" intact. Indeed, his list of presumed exceptions could well be a harbinger that in future cases, the exceptions will continue to swallow the rule. There are ramifications to the per se taking requirement, but they probably do not impact nearly as many regulations that include government inspections for health, safety, and compliance with law as Justice Breyer fears.

The majority opinion by the Chief Justice lists three general categories of "exceptions" to the "per se taking by appropriation of the right to exclude," as follows:

First, the Court considers that "isolated physical invasions, not undertaken pursuant to a granted right of access" are individual torts, not appropriations of a property right, although "a continuance of them in sufficient number and for a sufficient time may prove [the intent to take property]."[10] In other words, for

 

temporary entries or trespasses on private property that are either unplanned and not directed by government or simply accidental, there may be a tort remedy for a temporary trespass, or not, depending on the circumstances, but they do not rise to the level of a compensable taking of a property interest under the Fifth Amendment unless repeated or sustained so much that an intent to take property may be inferred.

Second, the Court observes that "many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights."[11] Depending on how broadly these "background restrictions" are read, this may be the largest hole in the Fifth Amendment's protection of the private property owner's right to exclude, as well as the most likely source of continued "regulatory exceptions" to the notion that every government-authorized entry is a taking. The Court itself identified four such "background restrictions on property rights":

(1) nuisance law, which permits government abatement actions without compensation because the owner "never had a right to engage in the nuisance in the first instance."[12]

(2) common law privileges to enter private property in the event of public or private necessity, such as to avert serious harm to a person, land, or chattels, or "to avert an imminent public disaster."[13]

(3) common law privileges to enter property to effect an arrest or enforce the criminal law under certain circumstances.[14]

(4) government searches that are consistent with the Fourth Amendment and state law.[15]

Third, the Court says, "the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking."[16] Here, again, noting that government health and safety inspection regimes "will generally not constitute takings," the Court identified a number of specific governmental health and safety inspections under identified federal statutory regimes "for which the nexus and governmental interest requirements" of *Nollan v. California Coastal Commission*[17] and *Dolan v. City of Tigard*[18] "should not be difficult to satisfy," including pesticide inspections, hydroelectric project investigations, pharmaceutical inspections, and nuclear material inspections.[19]

 

The Court contrasted these legitimate and expected governmental intrusions on private property for law enforcement searches and health and safety inspections with the ALRB regulation mandating union representative access to private property before it, for which the Court found no "traditional background principle of property law" and no connection to "any benefit provided to agricultural employers or any risk posed to the public."[20]

Justice Breyer's dissent worries that the Court's new-found notion of "temporary physical taking" as distinguished from what he considers a mere "regulation" of the right to exclude will threaten a host of other access and inspection statutes, but he focuses on the "short-term," "isolated," or "temporary" nature of the union organizers' intrusions authorized by the ALRB regulation in question, rather than the relationship of these intrusions to governmental action.[21] Thus, the dissenting opinion sets forth a catalogue of state laws that provide for government-authorized "temporary entry onto (or an 'invasion of') a property owner's land," which Justice Breyer implies are threatened by the majority's decision deeming "temporary" intrusions a "per se physical taking."[22] But Justice Breyer downplays the majority's inclusion of "reasonable searches" and "special benefit" as "background principles" giving rise to exceptions to the landowner's right to exclude others. All of the threatened inspection rights Justice Breyer enumerates in his opinion involve governmental inspections and investigations in the context of police power regulations for health, safety, and environmental protection, and all of them most likely would survive scrutiny under the majority's test for "reasonable health and safety inspections" if preceded by appropriate administrative determinations of need or necessity.

As to the third "exception," Justice Breyer also questions the notion of a "benefit" that may be conditioned on the property owner's grant of permission to enter private property. He refers to the Court's own decision in *Horne v. Department of Agriculture,*[23] holding that a forced contribution to a government-mandated marketing program constituted a per se taking, and observes that the Court there had expressly found the sale of agricultural products in interstate commerce could not be characterized as a "special governmental benefit."[24] Justice Breyer suggests that "labor peace" as well as community health, education, and higher standards of living are all "benefits" of the ALRB rule disapproved by the Court, while "myriad regulatory schemes" based upon "benefits" such as electricity, sewage collection, and internet accessibility might or might not meet the Court's test for a "special benefit" justifying temporary and brief

 

access. By focusing, however, on the "benefit" to the public generally, Justice Breyer seems to sidestep the question of "special benefit" to the landowner as a "quid pro quo" for giving up the right to exclude, which is embodied in the Chief Justice's notion of "entry and inspection in exchange for a special benefit." And he downplays the significance of previous recitals that such regulatory entries and inspections may continue, which are mentioned later in this article.

Justice Breyer's dissent throughout seems to disregard the difference between governmental entries and inspections of private property and nongovernmental parties authorized to enter and inspect other nongovernmental owners' private property. Again, he asks, "So, if a regulation authorizing temporary access for purposes of organizing agricultural workers falls outside of the Court's exceptions and is a *per se* taking, then to what other forms of regulation does the Court's *per se* conclusion also apply?"[25] He does not acknowledge the distinction that is consistently maintained throughout the majority opinion, between governmental representatives, on the one hand, and union representatives or other third parties, on the other. It is possible that he does not believe the distinction matters, or it is possible that he worries that the court does not believe the distinction matters. But either way, he largely avoids the issue.

In fact, the one case discussed by both the majority opinion and the dissent in which third party non-governmental rights to enter and assemble on private property for brief, episodic periods of time were at issue, *PruneYard Shopping Center v. Robins*,[26] highlights the difference between Justice Breyer's analysis and that of Chief Justice Roberts. For Roberts, *PruneYard* is an example of when the government may *regulate* the owner's treatment of third party speech and assembly on property already open to the public, as distinguished from a government directive to *allow* such public entry of private property in the first place. For Breyer, *PruneYard* is just an example of when government, under a regulatory takings analysis rather than a per se physical takings analysis, allows regulation of private property for the benefit of the public generally. Thus, as Chief Justice Roberts writes

> "Unlike the growers' properties, the PruneYard was open to the public, welcoming some 25,000 patrons a day. . . . Limitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public."[27]

Justice Breyer, by contrast, considers that *PruneYard* mainly demonstrates that in the Court's previous rulings on this issue, the limited effect of a given

 

regulation on the value of the property, on the owner's intended use of the property, and the temporary character of the restrictions, all point to analysis as a "regulatory taking" rather than a "per se physical taking":

> "[In *PruneYard*] [w]e . . . considered the status of a state constitutional requirement that a privately owned shopping center permit other individuals to enter upon, and to use, the property to exercise their rights to free speech and petition. . . . We held that this requirement was not a per se taking in part because even though the individual may have 'physically invaded' the owner's property, there was nothing to suggest that preventing the owner from prohibiting this sort of activity would unreasonably impair the value or use of the property as a shopping center, and the owner could adopt time, place and manner regulations that would minimize interference with its commercial functions."[28] [Punctuation, quotation marks, and internal citations omitted.]

Immediately after this characterization of *PruneYard*, Justice Breyer observed that a later "physical takings" case, *Loretto v. Teleprompter,* had distinguished *PruneYard* based on the "temporary" character of the "invasion" in *PruneYard*,[29] after previously noting that *Loretto* was an example of a regulation allowing third party access to private property that went "too far."[30] But again, Justice Breyer downplays the significance in *PruneYard* of the pre-existing entry privileges granted to the public generally *by the owner* rather than *by the government*, which clearly was the more important distinction in the *Cedar Point* majority's view.

It is always hazardous to predict the outcome of cases that have not yet been decided based on the latest twist in Supreme Court jurisprudence, but governmental regulations of the use and operation of private property for the protection of health, safety, and welfare in the exercise of the police power, and reasonable inspections and monitoring by governmental agencies to assure compliance with such regulations, are not seriously at risk from the Court's decision in *Cedar Point Nursery v. Hassid.* The focus of the decision, and its likely progeny, is on governmental edicts and regulations that purport to give other private or non-governmental parties the right to enter upon, use, or otherwise "invade" private property, which the Court has clearly indicated will usually be analyzed as a per se physical taking, i.e., appropriation, of the owner's right to exclude others. Although it is not the only distinction that can be drawn between the union organizers' right to enter private property under the disapproved ALRB rule and the other types of entries that may survive scrutiny under the "per se physical taking" rule enunciated by the Court, the most salient distinction is the non-governmental character of the union actors.

 

Other issues may surface in the future, but the most probable outcome of finding that a physical taking of the "right to exclude" has resulted from governmental regulation is to limit governmental largesse, i.e., governmental directives authorizing non-governmental entities and private individuals to enter and occupy private property for non-governmental purposes. Thus, "regulations" that purport to give rights of occupancy to "homeless" individuals or "squatters" on the theory that otherwise vacant private property should be used to meet a "housing emergency" (such as have been proposed in Oakland, California and some other jurisdictions), will not avoid scrutiny as per se takings of private property, i.e., the right to exclude. Eviction moratoria such as those adopted during the COVID-19 pandemic, forcing private owners to allow continued occupancy without payment of rent for a prolonged period of time, also could fall to a "physical taking" analysis under *Cedar Point.* Even just cause eviction statutes and some forms of rent control regulation might face renewed scrutiny under *Cedar Point* because of how they impinge on the landowner's right to control who enters the property and for what purpose (although other existing case law suggests the threat to such laws is minimal, as discussed below).

Another category of "regulations" that may be implicated by the per se takings analysis applied to the "right to exclude" is in the area of "whistleblowers" and "private attorneys general" who in practice under state law may be allowed to trespass on private property with impunity and to report on alleged violations of environmental laws, regulations on treatment of animals, or other conduct engaged in by the owner or the owner's employees and contractors. A state policy that purports to give such trespassers carte blanche to enter private property without consent and under false pretenses, without fear of liability to the owner, may be seen as a taking of the owner's right to exclude, although that too is a significant extrapolation from the narrow holding of *Cedar Point.*

None of these other issues are mentioned in the majority or dissenting opinions in *Cedar Point*, but they might have been in the back of Justice Breyer's mind when he suggested that the Court's adoption of a new per se physical taking rule for an ephemeral and transitory limitation of the "right to exclude" could have unintended or unpredictable results—"[b]etter the devil we know . . .," i.e., better to have a multifactor sliding scale of when a regulation goes "too far" than to have a per se physical takings rule, as he put it in closing his dissent.[31]

 

Even then, the Court's opinion may well support rather than undermine regulatory inspections and compliance monitoring of the business properties of those who voluntarily put themselves into the marketplace or offer their property for entry by the public (as in *PruneYard*) or for rent to the public (as in *Loretto v. Teleprompter*), and it would be a mistake to assume that *Cedar Point* inevitably puts an end to such regulations or to the related compliance inspections and monitoring by governmental representatives. In this regard, one of the Court's comments about the effect of its decision in *Loretto* may come back to the fore. In *Loretto* the Court said:

> [W]e do not agree with appellees that application of the physical occupation rule will have dire consequences for the government's power to adjust landlord-tenant relationships. This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails. [Citations omitted.] *In none of these cases, however, did the government authorize the permanent occupation of the landlord's property by a third party. Consequently, our holding today in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building. So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity.*[32] [Emphasis added, inline citations omitted.]

Justice Breyer's focus on the "transitory, temporary" nature of entry found to be a per se taking also may divert attention from the broad category of governmental intrusions, as distinguished from third party intrusions, that remain permissible under the majority opinion. If anything, the Court's enumeration of the so-called "background restrictions on property rights" creates a potentially limitless opening for regulatory entries, depending on how future cases may develop. For example, long before *Loretto,* the Court had held in *Camara v. Municipal Court of City and County of San Francisco,*[33] that building code and safety inspections of private property are subject to the Fourth Amendment's proscription on unreasonable searches and seizures and must be pursuant to a warrant based on probable cause. But in so holding, the Court also resoundingly endorsed the notion of area-wide health and safety and code compliance inspection programs that may support individual search warrants based on probable cause:

> "This is not to suggest that a health official need show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or

 

> instrumentalities of crime. Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken. Experience may show the need for periodic inspections of certain facilities without a further showing of cause to believe that substandard conditions dangerous to the public are being maintained. The passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of warrant. The test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought."[34]

In *Cedar Point*, Chief Justice Roberts gives several examples of apparently permissible inspection programs that will remain unaffected "exceptions" to the limitations on "takings" of the right to exclude after *Cedar Point*, as mentioned above. One of these is "reasonable searches" under *Camara*. The *Cedar Point* opinion leaves the scope of these exceptions open and barely mentions any limitations on such governmental intrusions on private property, but it cites *Camara* as a "see generally" case concerning the types of health and safety inspections that remain allowable as consistent with the Fourth Amendment and that "cannot be said to take any property right from landowners."[35]

The majority opinion in *Cedar Point* thus leaves a large opening for continued regulatory inspections by government representatives, as distinguished from private parties. Since the case arose in California it is useful to consider existing California case law in this area. The California Supreme Court's opinion in *Property Reserve, Inc. v. Superior Court*[36] contains the following enumeration of such background limitations in the nature of affirmative governmental rights of entry on private property:

> "At common law, when a public official was required or authorized by statute to perform a public duty or activity, the statutory authority was generally recognized as carrying with it *a legal privilege* to enter private property for the purpose of performing or exercising such duty or authority that absolved the government of liability for what would otherwise be considered a trespass [Citations omitted]. . . .
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> "Outside the precondemnation entry and testing context, numerous statutes grant public entities and employees the authority to enter and to engage in official activities on private property for a very wide range of purposes. Common examples include entries to execute search warrants, to conduct health and safety inspections, to enforce fish and game regulations, to carry out workplace inspections, and to investigate and eliminate nuisances. [Citations omitted.] *As a general matter, in the absence of any connection with the construction or operation of a public*

 

> *improvement, conducting such entries and activities on private property, even when such activities result in damage to the property, has not been considered to constitute either the taking of a compensable property interest in property or the damaging of property so as to entitle the property owner to just compensation under the state takings clause.* . . . Instead, any potential recovery by a property owner against a public entity outside the public improvement context has been based on tort principles. [Citation omitted.]"[37] (Emphasis added.)

The California court went on to conclude that this intrusive entry was not an exercise of "classic eminent domain," again relying in part on what it characterized as a "common law rule" allowing public officials "a privilege to enter private property in order to conduct statutorily authorized activities on such property."[38]

> In advancing the argument that the environmental order amounts to the taking of a temporary easement, the landowners point to statements in a number of opinions to the effect that " 'the right to exclude [others is] "one of the most essential sticks in the bundle of rights that are commonly characterized as property." [quoting *Nollan v. California Coastal Comm'n*]' " As demonstrated by the common law rule recognizing that public officials generally enjoy a privilege to enter private property and to conduct statutorily authorized activities on such property . . ., the right to exclude others has never been viewed as an absolute or unqualified attribute of property ownership. *Entries onto private property by public officials or employees to conduct statutorily authorized activities are a long recognized limitation of a property owner's right to exclude others*.[39] (Emphasis added.)

It is a fair assumption that the California Supreme Court's broad-brush sanctioning of governmental intrusions on private property goes beyond the scope of what the *Cedar Point Nursery* majority contemplates under the Fifth Amendment Takings Clause, but how far beyond that scope remains to be seen. The numerous examples of "background restrictions" and other exceptions in the majority opinion by Chief Justice Roberts suggest that the "right to exclude" remains a highly attenuated aspect of private property rights in business premises, no matter how *sine qua non* it might seem.

**ENDNOTES:**

[1] *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

[2] *Cedar Point Nursery*, supra note 1, slip op. at 5, 141 S. Ct. at 2072, quoting *Kaiser Aetna v. U.S.*, 444 U.S. 164, 176, 179-180, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979).

[3] *Cedar Point Nursery*, supra note 1, slip op. at 5, 141 S. Ct. at 2073, quoting Merrill, Property and the Right to Exclude, 77 Neb. L.Rev. 730 (1998).

 

[4]*Cedar Point Nursery*, supra note 1, slip op. at 14, 141 S. Ct. at 2083 (diss. op.).

[5]*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

[6]*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982).

[7] Id., 458 U.S. at 434. (Internal citation omitted.)

[8]*Cedar Point Nursery*, supra note 1, slip op. at 11, 141 S. Ct. at 2080.

[9]*Cedar Point Nursery*, supra note 1, slip op. at 18, 141 S. Ct. at 2089 (diss. op.).

[10]*Cedar Point Nursery*, supra note 1, slip op. at 10, 141 S. Ct. at 2078.

[11]*Cedar Point Nursery*, supra note 1, slip op. at 10, 141 S. Ct. at 2079.

[12]Id., citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

[13]Id., citing Restatement (Second) of Torts, §§ 196, 197 (1964).

[14]Id., citing Restatement (Second) of Torts, §§ 204, 205 (1964).

[15]Id., citing *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 538, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967).

[16]Id., slip op. at 11, 141 S. Ct. at 2079.

[17]*Nollan v. California Coastal Com'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

[18]*Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

[19]*Cedar Point Nursery*, supra note 1, slip op. at 11, 141 S. Ct. at 2079, referencing 7 U.S.C.A. § 136g(a)(1)(A), 16 U.S.C.A. § 823b(a), 21 U.S.C.A. § 374(a)(1), 42 U.S.C.A. § 2201(o).

[20]Id.

[21]*Cedar Point Nursery*, *supra* note 1, slip op. at 17, 141 S. Ct. at 2087-2088 (diss. op.).

[22]Id.

[23]*Horne v. Department of Agriculture*, 576 U.S. 350, 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015).

[24]*Cedar Point Nursery*, supra note 1, slip op. at 18, 141 S. Ct. at 2089 (diss. op.), citing *Horne v. Department of Agriculture*, 576 U.S. 350, 366, 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015).

[25]Id. (Italics in original.)

[26]*PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980).

[27]*Cedar Point Nursery*, supra note 1, slip op. at 8, 141 S. Ct. at 2076-2077.

 

[28]*Cedar Point Nursery,* supra note 1, slip op. at 15, 141 S. Ct. at 2084 (diss. op.).

[29]*Cedar Point Nursery*, supra note 1, slip op. at 15, 141 S. Ct. at 2084 (diss. op.).

[30]*Cedar Point Nursery*, supra note 1, slip op. at 12, 141 S. Ct. at 2081 (diss. op.).

[31]*Cedar Point Nursery*, supra note 1, slip op. at 19, 141 S. Ct. at 2089 (diss. op.).

[32]*Loretto v. Teleprompter Manhattan CATV Corp.*, supra note 6, 458 U.S. at 440. The full citations for the cases referenced in the portion of *Loretto* quoted in the text are as follows: *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964) (discrimination in places of public accommodation); *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 66 S. Ct. 850, 90 L. Ed. 1096 (1946) (fire regulation); *Bowles v. Willingham*, 321 U.S. 503, 64 S. Ct. 641, 88 L. Ed. 892 (1944) (rent control); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413 (1934) (mortgage moratorium); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 42 S. Ct. 289, 66 L. Ed. 595 (1922) (emergency housing law); *Block v. Hirsh*, 256 U.S. 135, 41 S. Ct. 458, 65 L. Ed. 865 (1921) (rent control).

[33]*Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967).

[34]Id., 387 U.S. at 538.

[35]*Cedar Point Nursery*, supra note 1, slip op. at 10, 141 S. Ct. at 2079.

[36]*Property Reserve, Inc. v. Superior Court*, 1 Cal. 5th 151, 204 Cal. Rptr. 3d 770, 375 P.3d 887 (2016).

[37]Id., 1 Cal. 5th at 191-192.

[38]Id., 1 Cal. 5th at 196 n. 18.

[39] Id., citing and quoting *Nollan v. California Coastal Com'n*, 483 U.S. 825, 831, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

 