COMMENTS

Property Versus Antidiscrimination: Examining the Impacts of *Cedar Point Nursery v. Hassid* on the Fair Housing Act

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The Fair Housing Act is a groundbreaking federal law enacted in 1968 during the civil rights movement. Reflecting a policy judgment that the public's interest in eliminating housing discrimination outweighs a prejudicial landlord's property right to exclude, it prohibits landlords from rejecting tenants on a discriminatory basis. However, as the Act's promises remain in the process of fulfillment, the Supreme Court's 2021 decision in Cedar Point Nursery v. Hassid *has placed it into unprecedented danger: by holding that a regulation authorizing temporary occupations of private property constituted a per se taking that requires compensation under the Takings Clause,* Cedar Point *threatens the constitutionality of the Act, which grants tenants a similar temporary right to access rental properties.*

This Comment takes up the task of finding an escape valve for the Act within the current legal landscape. Looking to Cedar Point*'s Court-created exceptions, this Comment argues that the Act should fall under the "open to the public" exception because case law, common law considerations, and the normative value in preserving an important antidiscrimination law all support a finding that the Act regulates the business of offering dwelling rentals, a type of business open to the public.*

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INTRODUCTION

There is a well-established tension between an individual's rights to property and the interests of the public. A landowner is generally free to use her property, transfer it to others, dispose of it, and—most importantly—exclude unwanted strangers from entering it.[1] However, the pursuit of public welfare often compels state and federal governments to restrict a landowner's property rights.[2] And they may do so, as long as such restrictions do not amount to "tak[ings] . . . without just compensation" under the Fifth Amendment.[3]

The Fair Housing Act[4] (FHA) is one such regulation. It reflects a legislative judgment that the public's interest is best served by eliminating discrimination in the housing market.[5] Specifically, 42 U.S.C. § 3604(a) prohibits discrimination in the sale or rental of dwellings on the basis of "race, color, religion, sex,

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1 Thomas W. Merrill, *Property and the Right to Exclude II*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 1, 4–7 (2014).

2 *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 115–19 (1978) (describing New York City's restriction on a private company's right to build a tower on its railroad station in response to public concern over the protection of city landmarks).

3 U.S. CONST. amend. V, § 1; *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

4 Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601–3619).

5 *See* Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 9 WASHBURN L.J. 149, 153 (1969) (noting that arguments for the elimination of discrimination in housing included increased opportunities for employment and education and positive psychological significance for Black Americans).

familial status, or national origin."[6] In the rental context, this provision forbids a landlord harboring negative sentiments toward minority applicants from refusing to accept them as tenants. Thus far, the question of whether the FHA amounts to an unconstitutional taking has not been raised in court proceedings.

But the Supreme Court's 2021 decision in *Cedar Point Nursery v. Hassid*[7] called the FHA's constitutionality into question.[8] In *Cedar Point*, the Court was asked to decide whether a state regulation that permitted union organizers to enter agricultural employers' property for three hours a day, 120 days a year amounted to a per se taking.[9] Even though this regulation did not authorize a permanent occupation of private property by the public,[10] the Court answered in the affirmative.[11] As a consequence, any regulation that, like the FHA, enables unwanted third parties to temporarily occupy a private property without also providing mechanisms for compensating the private owner is in danger of becoming an unconstitutional per se taking.

Cedar Point demonstrated the Court's desire to afford greater protection to individual property rights. In rendering a decision favorable to the agricultural employers, the Court extended the boundary of what constitutes a per se taking in a context where such a move would protect the rights of powerful land-owning employers over the interests of their less powerful employees.[12] This action seems to conflict with the balance struck by the FHA—namely, that the interest in combatting housing discrimination, a type of discrimination that closely relates to the badges and incidents of slavery,[13] is important enough to triumph over an individual's property rights.

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6 42 U.S.C. § 3604(a).

7 141 S. Ct. 2063 (2021).

8 *See* Nikolas Bowie, *Comments: Antidemocracy*, 135 HARV. L. REV. 160, 197–98 (2021) (discussing how *Cedar Point* threatens to render workplace antidiscrimination and fair housing laws takings that require just compensation).

9 *See Cedar Point*, 141 S. Ct. at 2069.

10 The Supreme Court's *Cedar Point* decision is contrary to its prior decisions concerning the Takings Clause, including *Loretto*, which held that a regulation becomes a per se taking only if it authorizes a permanent physical occupation of private property. *See, e.g.*, *Loretto*, 458 U.S. at 434 (noting "the constitutional distinction between a permanent occupation and a temporary physical invasion" and holding that a "permanent physical occupation of property" constitutes a taking).

11 *See Cedar Point*, 141 S. Ct. at 2072–74.

12 *See infra* notes 118–121 and accompanying text.

13 *Cf.* Hugh E. Hackney, Comment, *Racial Discrimination and the Civil Rights Act of 1866*, 23 SW. L.J. 373, 374–75 (1969) (discussing how congressional debates in 1864 and

This Comment examines the expansive scope of *Cedar Point*'s definition of per se takings with a focus on its impact on the FHA. Part I explores the development of the Supreme Court's takings jurisprudence and discusses the changes made by *Cedar Point*. Notably, although the category of per se takings had always been narrowly cabined to permanent and physical occupations, *Cedar Point* effectively eliminated the permanency factor.

In light of this development, Part II explains how *Cedar Point*'s holding threatens the constitutionality of the FHA, a statute that restricts a landlord's right to exclude strangers from temporarily occupying her property as tenants when that exclusion is done on a discriminatory basis. Beyond disabling its enforcement, rendering the FHA a taking would likely slow future equal rights efforts by creating an entitlement in the right to discriminate. Accordingly, Part II ends by noting that the Court will likely hesitate to invalidate the FHA given the statute's social importance and the Court's expressed disinclination to render unconstitutional a large swath of regulations.[14]

In Part III, this Comment recommends that courts confronted with takings challenges to the FHA evaluate dwelling rentals as "business[es] open to the public." As Part III.A explains, *Cedar Point* excepted four scenarios from becoming per se takings, including when the statute at issue regulates businesses open to the public. The Court sourced its understanding of a business open to the public from two locations: public-accommodation laws and First Amendment doctrine. The First Amendment–based understanding supports this treatment of the rental business.

Part III.B expands on this argument. It argues that dwelling rentals should be considered the same type of business as hotel keeping, where owners are obligated by the common law innkeeper's rule to accept guests without discrimination. This proposal, though it requires a major deviation from the principles underlying the innkeeper's rule, would safeguard an important antidiscrimination law from the danger of becoming an unconstitutional taking. Further, increasing similarities between rental dwellings and hotels, especially with the rise of short-term rentals, point toward the appropriateness of expanding the innkeeper's rule to cover landlords offering rental dwellings.

1965 reflected the belief that certain forms of discrimination, such as the "refusal to sell real property" to Black people, were "incidents of slavery").

14 *See infra* Part II.C.

I. LEGAL BACKGROUND

The Fifth Amendment states that the government shall not take private property "for public use, without just compensation."[15] This language, commonly known as the Takings Clause, recognizes that governmental action may override an individual's ownership of, and interests in, her property.[16] Courts historically understood the Takings Clause to govern only eminent domain proceedings,[17] in which the government formally takes possession and control of specific private properties. In 1922, however, the Supreme Court held that statutory regulations could also amount to takings.[18]

In Parts I.A and I.B, this Comment briefly overviews these regulatory takings and describes the factors that affect whether courts consider a regulation to have effected a taking. It then closely examines a special category of cases where the Court departed from its standard-like regulatory-takings analysis to hold that the statutes at issue amounted to per se takings of private property. Part I.C focuses on *Cedar Point*, a recent addition to the Court's Takings Clause jurisprudence, and shows that the majority opinion has blurred the distinction between per se and regulatory takings.

A. Regulatory Taking: A Framework Applicable to Most Property Rights–Related Regulations

Federal and state governments can limit individuals' property rights via statutory regulations. While these regulations do not expropriate private property, they may nevertheless place onerous burdens on affected landowners. Recognizing that it is sometimes unfair to force individual landowners to "bear the burden of an exercise of governmental power in the public interest,"[19]

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15 U.S. CONST. amend. V, § 1. The Fifth Amendment has been extended to the states via incorporation by the Fourteenth Amendment. *See* U.S. CONST. amend. XIV; Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 233–34 (1897).

16 *See* First English Evangelical Lutheran Church v. L.A. Cnty., 482 U.S. 304, 315 (1987) (noting that the Takings Clause was not designed to "limit the governmental interference with property rights" but to ensure compensation in such events).

17 *See* Robert D. Rubin, *Taking Clause v. Technology:* Loretto v. TelePrompter Manhattan CATV*, A Victory for Tradition*, 38 U. MIAMI L. REV. 165, 168–70 (1983).

18 Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

19 Daniel R. Hansen, *Environmental Regulation and Just Compensation: The National Priorities List as A Taking*, 2 N.Y.U. ENV'T. L.J. 1, 6 (1993); Yee v. City of Escondido, 503 U.S. 519, 523 (1992) (recognizing that governmental regulations could "unfairly

the Supreme Court held in *Pennsylvania Coal Co. v. Mahon*[20] that Fifth Amendment takings occur when regulations that restrict land use "go[ ] too far."[21]

The Court clarified when a regulation would go so far as to constitute a taking by developing a fact-based balancing test in *Penn Central Transportation Co. v. New York City*.[22] At issue in *Penn Central* was the application of New York City's Landmarks Preservation Law[23] to the Grand Central Terminal.[24] Adopted in 1965, the Landmarks Law aimed to preserve the city's historical scenery by requiring private owners of such landmarks to acquire approval from the Landmarks Preservation Commission before modifying their exteriors.[25] When the Grand Central Terminal's owners planned to erect a tall building atop the Terminal and rent out its spaces to alleviate their dire financial straits, the Commission denied their plan because the building would "overwhelm" the Terminal's aesthetics.[26] The owners filed suit, alleging that the construction restrictions resulting from the Landmarks Law amounted to takings of their property.[27]

In resolving the dispute, the Court considered three factors that balance the regulation's impact on the property owners against its public benefits.[28] The factors are as follows: "The economic impact of the regulation on the [regulated party];" "the extent to which the regulation has interfered with distinct investment-backed expectations;" and "the character of the governmental action."[29] Applying these factors to the *Penn Central* case, the Court found that the Landmarks Law did not constitute a taking because (1) it continued to allow the owners to derive "reasonable returns" from operating the Terminal;[30] (2) it did not upset the owners' expectations via interfering with "the present uses of the Terminal;"[31] and (3) as for the character of the

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single[ ] out [a] property owner to bear a burden that should be borne by the public as a whole").

20 260 U.S. 393 (1922).

21 *Id.* at 415.

22 438 U.S. 104 (1978); *see id.* at 124.

23 NYC Admin. Code, Ch. 3, §§ 25-301–25-322.

24 *Id.* at 115.

25 *See id.* at 109–12.

26 *Id.* at 118.

27 *See id.* at 119.

28 *See* Hansen, *supra* note 19, at 5–6 (1993) (discussing the *Penn Central* factors).

29 *Penn Cent.*, 438 U.S. at 124.

30 *Id.* at 136.

31 *Id.*

regulation, it did not single out "selected owners," nor did it constitute physical appropriation of private property.[32]

As the *Penn Central* dissent pointed out, however, the Landmarks Law deprived the Terminal's owners of their property right to construct a building worth "several million dollars" atop the Terminal.[33] In other words, the regulation uniquely "imposed" a "multimillion dollar loss" onto the owners.[34] Consequently, as the Court recognized in *Loretto v. Teleprompter Manhattan CATV Corporation*,[35] the *Penn Central* analysis is not especially landowner-friendly in practice; it has often been used to uphold "substantial regulation of an owner's use of his own property . . . to promote the public interest."[36]

B. Per Se Takings: Regulations that Authorize Permanent and Physical Occupations

In 1982, the Supreme Court departed from its ad hoc regulatory taking analysis in favor of protecting the landowners' property rights by holding that certain property regulations are so extreme that they amount to per se takings. The most notable case that lays out this principle is *Loretto*.

At issue in *Loretto* was a New York State statute which required landlords to "permit a cable television company to install its cable facilities upon [their] property."[37] The statute further forbade the landlords from receiving compensation for the installation beyond what the New York Cable Television Commission deemed reasonable.[38] Pursuant to this statute, the Teleprompter Manhattan CATV Corporation installed cables on the roof of the petitioner's building.[39] The petitioner argued that the statute constituted a per se taking of her property without just compensation.[40]

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[32] *Id.* at 131. *Penn Central* found that "a 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government." *Id.* at 124. It was not until *Loretto* that the Court "removed permanent physical invasions from *Penn Central*'s purview." Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN. ST. L. REV. 601, 621 (2014).

[33] *Penn Cent.*, 438 U.S. at 142 (Rehnquist, J., dissenting).

[34] *Id.* at 147.

[35] 458 U.S. 419 (1982).

[36] *Id.* at 426.

[37] *Id.* at 421.

[38] *See id.* at 423.

[39] *See id.* at 421–22.

[40] *See Loretto*, 458 U.S. at 424–25 (noting that the lower courts rejected the argument "that a physical occupation authorized by government is necessarily a taking").

The statute, by authorizing the cable installation, imposed only a minor physical burden on the petitioner's property rights. The installation took up very little space on the landlord's roof and hardly restricted her property use.[41] In fact, the Commission determined that the cable's invasion was worth just one dollar.[42] Additionally, the statute intended to "serve[ ] the legitimate public purpose of 'rapid development of and maximum penetration by a means of communication which has important educational and community aspects.'"[43] Nonetheless, the Court did not subject the statute to the *Penn Central* ad hoc regulatory takings analysis and agreed with the petitioner that the statute amounted to a taking of her property.[44]

The Court held that "when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred."[45] *Loretto* emphasized that the per se taking rule narrowly applies to a special category of governmental regulations. It further clarified that a regulation amounts to a per se taking only if it authorizes an occupation of private property that is both physical and permanent.[46] The following Sections analyze what constitutes a physical occupation, and what constitutes a permanent occupation.

1. Physical occupation.

A physical occupation occurs when uninvited entities enter a landowner's property.[47] The entities could be objects or members of the public.[48] The size of the invading entity also does not affect whether its entry is a physical occupation. According to *Loretto*,

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41 *See id.* at 422.

42 *Id.* at 423–24.

43 *See id.* at 425 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 423 N.E. 2d 320, 329 (N.Y. Ct. App. 1981)).

44 *See id.* at 425–26.

45 *Loretto*, 458 U.S. at 426.

46 *See id.* at 426–27, 430.

47 *See id.* at 427–28 (distinguishing the facts of *Loretto* from those of *Northern Transportation Co. v. Chicago*, 99 U.S. 635 (1879), where the construction of a dam prevented landowners from accessing their properties but did not cause anything to enter the properties).

48 *See, e.g.*, *id.* at 426 (holding that a cable physically occupied a landlord's property); Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979) (holding that an imposition of a navigable servitude on a privately developed marina, requiring the marina's owners to allow free public access to its waters, amounted to a per se taking); Nollan v. Calif. Coastal Comm'n, 483 U.S. 825, 83 (1987) (finding that a regulation that requires landowners to make an easement across their land "available to the public on a permanent basis" amounted to a per se taking).

entities physically occupy property "even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land."[49]

2. Permanent occupation.

Also crucial to *Loretto*'s decision in favor of the landowner was the permanent nature of the cable installation. To highlight the importance of the permanent-versus-temporary distinction in the per se takings analysis, the Court distinguished "between a permanent physical occupation, a physical invasion short of an occupation" and a regulation that does not cause invasions.[50] While the latter two are subject to the regulatory takings analysis discussed previously in Part I.A, the former is a per se taking[51] because a landowner "suffers a special kind of injury when a stranger directly invades and occupies" her property.[52]

The evaluation of whether an occupation is permanent, according to the Court, relies on three principles. First, courts consider the question of permanency in light of the property's current use.[53] To illustrate, the statute in *Loretto* affected only landlords. If the petitioner were to cease renting her building to tenants, she would no longer have to keep the cables on her roof. By determining that the cable permanently occupied the petitioner's property, the Court clarified that an occupation is permanent as long as the landowner cannot remove it given her current property use.[54]

Second, courts ask whether an occupation is both continuous[55] and indefinite—in other words, whether it exists for (1) twenty-four hours a day, (2) day after day, and (3) indefinitely into the future.[56] The cable installation in *Loretto* exemplifies an

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49 *Loretto*, 458 U.S. at 430.

50 *Id.*

51 *See id.* at 430–32; *see also* Michael L. Gold, Loretto v. Teleprompter Manhattan CATV Corp.*: The Propriety of a Per Se Rule in Takings Claims*, 16 J. MARSHALL L. REV. 419, 424 (1983).

52 *Loretto*, 458 U.S. at 436 (emphasis omitted).

53 *Cf. id.* at 438–39 (noting that, even though the statute applies only to buildings for rent and the petitioner is free to alter her property use, these facts do not render the cable's invasion temporary).

54 *See id.* at 439 ("So long as the property remains residential and a CATV company wishes to retain the installation, the landlord must permit it.").

55 *See Nollan*, 483 U.S. at 832 (discussing the public's ability to continuously pass through a public easement over a private property).

56 For example, the lower courts in *Cedar Point* found that a permanent physical invasion occurred when a regulation allowed the public "to unpredictably traverse [the growers'] property 24 hours a day, 365 days a year." *See Cedar Point*, 141 S. Ct. at 2070

occupation that possesses all three features. By being stationary and unmovable, the cable continuously occupied the petitioner's roof. And, because the petitioner could not remove it after a predetermined period—for example, after a year—its stay on her roof was indefinite.[57]

Third, in conducting the permanency analysis, courts ask whether a property owner has lost her right to exclude rather than whether intruding entities were actually present on her premises.[58] In *Nollan v. California Coastal Commission*,[59] the Court considered whether a hypothetical regulation that granted the public an easement over a private property would constitute a per se taking.[60] In this hypothetical, strangers could travel across the easement at any time. However, travelers, unlike cables, are unlikely to stay on private property for more than a few minutes. It is also imaginable, for instance, that no stranger would use the easement at night.

The *Nollan* Court concluded that such an easement would constitute a per se taking. It stated that what truly matters is that the easement gives strangers "a permanent and continuous *right* to pass to and fro" across the property.[61] By shifting the analytical focus away from the conduct of the invasive entity, this principle acknowledges that human beings have a higher level of mobility than objects. It further emphasizes that regulations that authorize physical invasion are problematic because they interfere with one of the most fundamental sticks of a person's bundle of property rights—the right to exclude.[62]

C. *Cedar Point*: A New Understanding of Per Se Takings

The Supreme Court reexamined its takings jurisprudence in *Cedar Point*. At issue was a California regulation that required agricultural employers to allow union organizers onto their premises for up to "three hours per day, 120 days per year" to solicit

(citing Cedar Point Nursery v. Shiroma, 923 F.3d 524, 532 (2019), *rev'd*, 141 S. Ct. 2063 (2021)).

57 *Loretto*, 458 U.S. at 438–40.

58 *Cf.* Nollan, 483 U.S. at 832 (noting that the important issue is whether other individuals have a "permanent and continuous right to pass to and fro" rather than whether there's a particular individual there at any given moment).

59 483 U.S. 825 (1987).

60 *See id.*

61 *Id.* at 832 (emphasis added). The *Nollan* Court considered this scenario in dicta. However, the opinion expressed certainty that such an easement would be a per se taking.

62 *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).

their employees' support.[63] The union organizers could "take access" to an employer's property by serving written notice on the employer.[64] Further, the temporal scope of the entry was limited. Union organizers could enter the property for "one hour before work, one hour during the lunch break, and one hour after work."[65] An employer interfering with an organizer's right of access—for example, by blocking the organizer's entry[66]—could be punished for "unfair labor practice[s]."[67]

Cedar Point Nursery and Fowler Packing Company, two fruit-growing corporations, challenged this regulation, arguing that it amounted to a per se taking.[68] The district court rejected their contention because the California regulation did not grant the "public" a "permanent and continuous" access onto their property "for whatever reason."[69] The Ninth Circuit affirmed that the regulation did not authorize a permanent physical invasion on the grounds that "it did not 'allow random members of the public to unpredictably traverse the growers' property 24 hours a day, 365 days a year.'"[70]

The Supreme Court reversed, ruling that a government-authorized invasion of private property is a per se taking "regardless of [its] length."[71] In addition to rendering the California regulation an unconstitutional taking, this holding expanded the scope of what may constitute per se takings; previously, only regulations that authorized a physical and permanent occupation would fall into this category.

The Court altered the definition of per se takings in two ways. First, it clarified that a regulation authorizes a physical occupation even when it does not grant a right of access to the entire public. Prior to *Cedar Point*, *Loretto* had implied that a statute would constitute a physical occupation if it authorized specific

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63 *Cedar Point*, 141 S. Ct. at 2072.

64 *Id.* at 2069.

65 *Id.* (citing Cal. Code Regs., tit. 8 §§ 20900(e)(3)(A)–(B), (4)(A)).

66 *See id.* at 2070.

67 *Id.*

68 *See Cedar Point*, 141 S. Ct. at 2069–70.

69 *Id.* at 2070 (quoting Cedar Point Nursery v. Gould, No. 1:16-cv-00185, 2016 WL 1559271, at *5 (E.D. Cal., Apr. 18, 2016), *rev'd*, 141 S. Ct. 2063 (2021)).

70 *Id.* (alteration in original) (quotation marks omitted) (citing *Cedar Point v. Shiroma*, 923 F.3d at 532).

71 Bethany R. Berger, *Eliding Original Understanding in* Cedar Point Nursery v. Hassid, 33 YALE J.L. & HUMAN. 307, 312 (2022) (citing *Cedar Point*, 141 S. Ct. at 2074).

objects to enter private property.[72] Where intrusions by human beings were concerned, a statute was considered to cause a physical occupation only when it granted a right of access to anyone from the public.[73] *Cedar Point* departed from this traditional approach, finding that a regulation that grants a right of access to a subsection of the public, such as union organizers, can be a per se taking.

Second and more notably, the Court blurred the distinction between permanent and temporary occupations.[74] Before *Cedar Point*, a permanent occupation had to be both continuous and indefinite to rise to the level of a taking. However, the California regulation satisfied only the indefiniteness factor by virtue of its lacking a "contemplated end-date."[75] The regulation did not authorize a continuous occupation because the employers were required to allow the union organizers onto their premises for only three hours per day, 120 days per year. They remained free to exclude the union organizers, and everyone else from the public, twenty-one hours per day, 245 days per year.

The blurring of the permanent-versus-temporary distinction operates in two ways. At the outset, the Court's holding that a regulation authorizing a noncontinuous occupation of private property constituted a per se taking indicates that "continuity" would no longer factor in the permanency analysis. Further, as shown below, language in *Cedar Point* suggests that the Court has entirely eliminated the permanency requirement from the definition of per se takings.

The Court justified eliminating the continuity factor by cabining it to the facts presented in two precedents: *Nollan* and *United States v. Causby*.[76] Both cases involved the government

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72 *See, e.g.*, *Loretto*, 458 U.S. at 421 (finding that the installation of cables on an apartment constituted a taking); United States v. Causby, 328 U.S. 256, 261–62 (1946) (evaluating whether the low flight of airplanes above private property constituted a taking).

73 *See Nollan*, 483 U.S. at 828 (evaluating a statutory easement to the entire public); *Kaiser Aetna*, 444 U.S. at 169 (same). The lower courts in *Cedar Point* further supported this understanding. *See Cedar Point*, 141 S. Ct. at 2070 (noting that "[t]he [appellate] court agreed with the District Court that the access regulation did not [impose a permanent physical occupation] . . . because it did not 'allow random members of the public to unpredictably traverse'" the growers' property (quoting *Cedar Point*, 923 F.3d at 532)).

74 *See* Berger, *supra* note 71, at 313–14.

75 *Cedar Point*, 923 F.3d at 532. This fact did not weigh significantly in the Court's holding. *Cf. Cedar Point*, 141 S. Ct. at 2078–79 (drawing a distinction between trespass and takings).

76 328 U.S. 256 (1946).

taking an easement across private property. According to the Court in *Cedar Point*, the hypothetical easement determined to be a per se taking in *Nollan* is "legally continuous" but "hardly continuous as a practical matter"[77] due to its nonconstant usage. Similarly, the government-created easement for flying military planes over a private barn's airspace, which was deemed as a taking in *Causby*, was used for merely "4% of takeoffs and 7% of landings."[78] Although unimportant in their respective decisions, these facts were crucial to *Cedar Point*. Focusing on the intruding entities' sporadic actual presence on private property—and not the landowners' continued inability to exercise their exclusionary right—the *Cedar Point* Court made a surprising departure from its precedents,[79] in which continuity had not factored into the permanent-occupation analysis.[80]

Cedar Point's expansion of what constitutes a per se taking did not stop at altering the permanency analysis. Specifically, the California regulation authorized an indefinite entry onto employers' property because it lacked a contemplated end date. The Court could have redrawn the line between permanent and temporary occupations at whether the challenged occupation is indefinite. It did not do so, however. Stating that "[u]nlike a mere trespass, the regulation grants a formal entitlement to physically invade the growers' land," the Court shifted the focus of the per se takings analysis from *Loretto*'s focus on the permanent versus temporary distinction to the easy question of whether there was a physical occupation.[81] This change suggests that *Cedar Point* could validly be read as recharacterizing per se takings as physical—rather than physical and permanent—occupations.

The significance of *Cedar Point*'s changes to the Court's takings jurisprudence has been highlighted by several recent

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77 *Cedar Point*, 141 S. Ct. at 2075.

78 *Id.* (citing *Causby*, 328 U.S. at 259); *see also Causby*, 328 U.S. at 258, 264–67.

79 *Cedar Point*'s conclusion was inconsistent with the legal rationales of the Court's prior takings precedents. It departed from *Loretto*'s careful exception of regulations that authorize physical and *permanent* occupations from the *Penn Central* framework. Moreover, it disregarded the principle elucidated by *Nollan*—namely, that courts should conduct the permanency analysis from the landowner's perspective by asking whether a regulation caused her to lose a stick of her property rights, rather than asking whether the intruding entities actually stayed on her property.

80 *See id.* at 2075 ("[P]hysical invasions constitute takings even if they are intermittent as opposed to continuous."); *id.* (contending that the *Nollan* Court would have concluded that the easement constituted a per se taking even if the easement "had lasted for only 364 days per year").

81 *Id.* at 2080.

commentators. For example, Professor Bethany Berger finds that *Cedar Point* starkly departed from not only existing precedents but also early American law concerning the right to enter private property.[82] Placing the case in a broader sociopolitical context, Professor Christina Rodriguez recognizes *Cedar Point* as an example of the Roberts Court's utilization of "constitutional backstops" to constrain the states' police power to enact laws that benefit the public welfare.[83] The California regulation, after all, was a state regulation that intended to protect workers by giving them more access to unionization.

On the other hand, it is worth noting that the *Cedar Point* majority would likely not characterize the case as revolutionary. As Professor Josh Blackman points out, Chief Justice John Roberts, the author of the majority opinion, "professes to decide cases in narrow ways, and hesitates to actually overrule precedents."[84] The opinion itself also demonstrates the majority's desire to fit *Cedar Point* into the sea of existing case law. For example, despite altering the principles embedded in precedents such as *Causby* and *Nollan*, *Cedar Point* did so quietly and refused to admit that its legal conclusions have departed from the past. Implicit in *Cedar Point*, then, is the Roberts Court's reluctance to take an openly drastic step towards altering its takings jurisprudence. Hence, while *Cedar Point* has become the new law of the land, prior case law—those whose logic it did not repudiate—likely remains relevant in understanding, and perhaps constraining the reach of, its holding.

II. THE FAIR HOUSING ACT

Cedar Point's expansion of what constitutes a per se taking raises the concern that many "ordinary forms of regulations" have become unconstitutional takings.[85] These regulations, as

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[82] *See* Berger, *supra* note 71, at 314, 331–32; *see also* Bowie, *supra* note 8, at 196 (noting that the cases contradict the proposition that the government must pay employers every time it interferes with their right to exclude).

[83] Cristina M. Rodríguez, *The Supreme Court 2020 Term: Foreword: Regime Change*, 135 HARV. L. REV. 1, 126 (2021); *see also* Sam Spiegelman & Gregory C. Cisk, Cedar Point*: Lockean Property and the Search for a Lost Liberalism*, *in* CATO S. CT. R.: 2020–21, at 165, 188–89 (Trevor Burrus ed. 2021) (framing *Cedar Point* as a case that limits the exercise of state police power to confer benefits on individuals).

[84] Josh Blackman, Cedar Point Nursery v. Hassid *Quietly Rewrote Four Decades of Takings Clause Doctrine*, REASON (June 25, 2021), https://perma.cc/ZLU5-2W4V.

[85] *Cedar Point*, 141 S. Ct. at 2081 (Breyer, J., dissenting); *see also* Bowie, *supra* note 8, at 197–98.

Professor Nikolas Bowie suggests, include "fair housing laws [that] prohibit landowners from excluding potential renters on the basis of their race,"[86] such as the FHA. The sections below provide an overview of the FHA provision relevant to the takings inquiry and explain why that provision will likely be considered a per se taking post–*Cedar Point*—a move that would impact both the FHA's enforcement and the modern antidiscrimination movement's continuing progress.

A. The Statute

The FHA, a landmark piece of federal legislation, was passed as Title VIII of the Civil Rights Act of 1968[87] amidst fierce congressional debate and explosive public sentiment.[88] It was passed in response to a national climate of "significant racial tension," and it aimed to eliminate racial segregation and its associated harms, including "poverty, lack of education, underemployment, and discrimination in housing."[89]

Section 3604 of the FHA prohibits discrimination against potential buyers and tenants of dwellings, defined in § 3602(b) as places "occupied as, or designed or intended for occupancy as, a residence."[90] Section 3604(a) specifically makes unlawful a person's refusal to sell or rent "after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person" because of race, color, religion, national origin, sex, familial status, and disability.[91] This provision regulates all sales and rentals of dwellings except for what is known as the "Mrs. Murphy" situation—when a landlord lives in a building with four or fewer units and rents out the other units.[92]

The FHA represented a groundbreaking shift in national housing policy from permitting individual landowners to discriminate as an exercise of their property rights to promoting equality

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86 Bowie, *supra* note 8, at 197.

87 42 U.S.C. §§ 3601–3619.

88 *See* Dubofsky, *supra* note 5, at 149–63.

89 Cassia Pangas, Note, *Making the Home More Like a Castle: Why Landlords Should Be Held Liable for Co-tenant Harassment*, 42 U. TOL. L. REV. 561, 574 (2011) (quoting Aric Short, *Post-Acquisition and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203, 222 (2006)).

90 42 U.S.C. § 3602(b).

91 42 U.S.C. § 3604(a).

92 *See* Scott M. Badami, *What is the "Mrs. Murphy" Exception to the Fair Housing Act?*, FOX ROTHSCHILD LLP (July 13, 2017), https://perma.cc/82HE-UGZC.

and protecting civil rights. The movement toward housing equality began during the Civil War era and continued with the passage of the Thirteenth Amendment,[93] which abolished slavery and involuntary servitude.[94] As the 1850s congressional debates suggested—and the Supreme Court later affirmed[95]—the Thirteenth Amendment was also intended to abolish badges and incidents of slavery that "impaired and destroyed the rights of [Black Americans]," including housing discrimination.[96] This view was later affirmed by the Supreme Court.[97]

However, early efforts toward fair housing did not protect against discrimination by private landowners. The Civil Rights Act of 1866,[98] which sought to safeguard Black Americans' civil rights, declared that "all citizens should have the same rights 'to inherit, purchase, lease, sell, hold, and convey real and personal property.'"[99] Nonetheless, members of the enacting legislature emphasized that the Act was intended to protect against only "state-sanctioned discrimination and not [ ] purely private discrimination."[100] Accordingly, the FHA was the first instance where members of Congress decided to prohibit private-housing discrimination.

During the five decades since its passage, the FHA has enabled public and private actors to steadily eliminate housing discrimination.[101] It started by proscribing the most blatant type of

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93 Hackney, *supra* note 13, at 378–79.

94 U.S. CONST. amend. XIII, § 1.

95 *Cf.* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441, 439–41 (1968) (concluding that the Thirteenth Amendment empowered Congress to pass legislations to abolish such badges and incidents of slavery as restraints upon "the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." (quoting *Civil Rights Cases*, 109 U.S. 3, 22 (1883))).

96 Hackney, *supra* note 13, at 374.

97 *See Jones*, 392 U.S. at 427.

98 14 Stat. 27 (1866) (codified as amended in scattered sections of 42 U.S.C).

99 Richard V. Damms, *Fair Housing Act*, *in* THE CIVIL RIGHTS MOVEMENT 254, 255 (Salem Press ed. 2000) (quoting 42 U.S.C. § 1982); Michael Haas, *Fair Housing Act*, *in* THE CIVIL RIGHTS MOVEMENT 254, 255 (Salem Press ed. 2000). Notably, the Civil Rights Act of 1866 is narrower than the FHA because it only prohibits housing discrimination on the basis of race.

100 Hackney, *supra* note 13, at 377. In 1968, the *Jones* Court, contrary to the enacting legislature's intent, interpreted the Civil Rights Act of 1866 to also apply to private acts of discrimination. *See* 392 U.S. at 436 ("[I]t is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein.")

101 *See* Katherine M. O'Regan, *The Fair Housing Act Today: Current Context and Challenges at 50*, 29 HOUS. POL'Y DEBATE 704, 705 (2019) ("Although there is considerable work still to be done . . . discrimination in housing markets has declined.").

discrimination, where a landlord makes clear her intention to select tenants on the basis of race and other protected classes.[102] It further addressed enforcement deficiencies by empowering the Department of Housing and Urban Development and the Department of Justice, in addition to private parties, to initiate litigation and administrative proceedings against discriminating landlords.[103] This has shifted the burden of enforcement away from the victims of discrimination, resulting in the filing of "hundreds of thousands of lawsuits" under the FHA—compared to only "a handful" under the Civil Rights Act of 1866.[104] Finally, the FHA has been expanded to make unlawful housing policies that disparately affect members of the protected classes.[105]

Despite the FHA's successes, however, many commentators recognize that "minorities still face discrimination when trying to rent an apartment or buy a home."[106] For instance, the development of new technology has enabled discrimination to become "more subtle . . . [and] more difficult to detect."[107] One lawsuit alleged that Facebook, for example, had "permitt[ed] advertisers to steer housing advertisements away from members of protected classes."[108] In light of these new obstacles to eradicating housing discrimination, the need for the FHA has not diminished. In fact, on the Act's fiftieth birthday commentators including U.S.

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[102] *See* 42 U.S.C. § 3604(c) (making it unlawful to "make, print, or publish . . . any notice, statement, or advertisement . . . that indicates any . . . discrimination based on" a protected class); *see also* Paul A. Jargowsky, Lei Ding & Natasha Fletcher, *The Fair Housing Act at 50: Successes, Failures, and Future Directions*, 29 HOUS. POL'Y DEBATE 694, 701 (2019) (finding the FHA "somewhat successful" in preventing "overt racial discrimination at the point of sale" and rental given that "[o]ne does not see *whites only* listed in advertisements" (emphasis in original)).

[103] *See* Rachel M. Cohen, *Taking Back the Suburbs: The Fair Housing Act at Fifty*, DISSENT, 2018, at 44. In contrast, the Civil Rights Act of 1866 was much less effective because it placed the burden solely on the victims "to enforce their own rights" via private lawsuits. *Id.*

[104] *Id.*

[105] *See* John N. Robinson, *Fair Housing After "Big Government": How Tax Credits Are Reshaping the Legal Fight Against Racial Segregation*, 29 HOUS. POL'Y DEBATE 752, 759–60 (2019).

[106] Julián Castro, *The Fair Housing Act After Fifty Years: Opening Remarks*, 40 CARDOZO L. REV. 1091, 1095 (2019); *see also, e.g.*, *Fair Housing Testing in Chicago Finds Discrimination Based on Race and Source of Income*, NAT'L LOW INCOME HOUS. COAL. (Jan. 28, 2019), https://perma.cc/QT5H-ND2B (reporting that a fair-housing test in Chicago revealed racial and source-of-income discrimination in dwelling rentals, including "refusal to rent, differential terms and conditions applied, and residential steering").

[107] *See* O'Regan, *supra* note 101, at 706, 707 ("[A]s markets and mechanisms change, new forms of discrimination may arise.").

[108] *Id.* at 707.

Secretary of Housing and Urban Development Julián Castro have called for "expand[ing] and not contract[ing]" its reach.[109] Clearly, protecting the FHA's legal integrity remains vitally important to combatting the deeply entrenched presence of housing discrimination.

B. *Cedar Point* Jeopardizes the Constitutionality of the FHA's Antidiscrimination Provision Governing Dwelling Rentals

Despite its continuing significance, the FHA is now facing an unprecedented danger. Specifically, *Cedar Point*'s holding calls into question the constitutionality of its rental provision.[110] To illustrate, this Comment will first provide an example of the rental provision (contained in § 3604(a) of the FHA) in action.

In this hypothetical, an individual becomes a landlord by putting units within her apartment complex out for rent.[111] In doing so, she becomes subject to § 3604(a) and loses the right to discriminatorily select her tenants.[112] After seeing an ad, a prospective tenant applies to live in one of this landlord's apartments for a predetermined period of time. The prospective tenant is everything the landlord could hope for, but the landlord dislikes her because of her race. If the landlord turns the prospective tenant away—or excludes her from being able to occupy the apartment as a tenant—the landlord has violated § 3604(a).

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[109] Castro, *supra* note 106, at 1096; *see also* Elizabeth Julian, *The Fair Housing Act at Fifty: Time for a Change*, 40 CARDOZO L. REV. 1133, 1143–47 (2019) (noting that civil rights advocates worry of a "lack of national commitment, or perhaps outright hostility, to the principles that underlie the FHA" and recognizing a continued need to address the shortcomings concerning the FHA's enforcement by the Department of Housing and Urban Development).

[110] *See* Bowie, *supra* note 8, at 197 (focusing on rent-control policies when discussing fair housing laws that may become unconstitutional takings after *Cedar Point*). The sales provision is not at risk because the FHA does not grant a right to access the seller's home. The FHA prohibits sellers from refusing to sell their properties discriminatorily. *See* 42 U.S.C. § 3604. However, a sale transfers a property's title and ownership. When a buyer purchases and moves into a new home, she does not occupy the seller's property; rather, she occupies her own property. Although homebuyers are encouraged to attend open houses and schedule home visits prior to making a purchase, the FHA does not require sellers to provide these services to anybody.

[111] *See Landlord*, MERRIAM WEBSTER DICTIONARY, https://perma.cc/NYJ6-72BX (defining landlord as "the owner of property (such as land, houses, or apartments) that is *leased or rented to another*" (emphasis added)); *see also Landlord*, THE BRITANNICA DICTIONARY, https://perma.cc/95J2-T63A ("[A] person who owns a house, apartment, etc., and rents it to other people.").

[112] *See* 42 U.S.C. § 3604(a). This hypothetical assumes that the landlord does not escape the FHA's regulation via the Mrs. Murphy exemption (when a landlord lives in a building with four or fewer units and rents out the other units).

This hypothetical scenario illustrates the FHA's similarities to the California regulation in *Cedar Point*. First, both the hypothetical landlord and the agricultural employers seek to exclude a segment of the public—racial minorities and union organizers—from entering their property. Second, so long as the landlord continues to use her properties for their current purpose (renting to tenants),[113] § 3604(a) limits her right to exclude.[114] In other words, just as the California statute made unlawful the employer's exercise of its right to exclude union organizers, § 3604(a) takes away the landlord's right to prevent racial minorities from occupying her rental apartments as tenants.

Third, like the California regulation, the FHA authorizes a noncontinuous but indefinite occupation of private property. Here, the landlord's rental apartment is subject to noncontinuous occupation by minority tenants because each tenant's stay is generally of a limited duration. A time gap likely exists between when one minority tenant departs and when another such tenant enters. This is similar to how the *Cedar Point* employer's property was subject to union organizers' presence for only three hours per day. Meanwhile, like the employer's property, the rental apartment is subject to indefinite occupation because under the FHA, a landlord is legally unable to reject minority tenants for as long as she holds that apartment out for rent.

Further, more abstractly, *Cedar Point*'s special veneration of the right to exclude implies an ideology that contradicts the one underlying the FHA's enactment. The Court's Takings Clause decisions generally state the importance of an individual's property right to exclude. Earlier cases, including *Loretto*, did so in concise terms: "The power to exclude has traditionally been considered one of the most treasured strands" of property rights.[115] By contrast, *Cedar Point* bolstered the importance of the right to exclude by citing historical commentaries that hailed its necessity

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[113] The fact that the limitation on a person's right to exclude depends on him or her continuing to be a landlord does not prevent a court from finding a per se taking. *See supra* Part I.B.2 (discussing *Loretto*). *Cedar Point* likely did not disturb this conclusion because it expanded rather than contracted the definition of a per se taking.

[114] *See* Rent Stabilization Ass'n of N.Y.C. v. Higgins, 630 N.E.2d 626, 633 (N.Y. 1993) ("[T]he antidiscrimination laws eliminate an owner's unfettered discretion in rejecting tenants."). Because a landlord cannot exclude, the FHA has effectively created a right of access in the minority tenants.

[115] *Loretto*, 458 U.S. at 435 (citing Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979)).

immediately after reciting the text of the Takings Clause.[116] By going beyond making a concise statement, *Cedar Point* further accentuated the significance of this exclusionary right.

Indeed, an individual's right to exclude seemed so crucial that the *Cedar Point* Court felt compelled to stretch its takings jurisprudence[117] to protect the right over safeguarding the democratic interests of the disenfranchised Black and Brown farmworkers[118]—interests, for example, in seeking union organizers' help to protest against exploitative employers and "low wages, dirty bathrooms, and harassment from supervisors."[119] Similar to how the California statute aimed to empower the farmworkers, the FHA was enacted to counteract antidemocratic forces and "dominating social hierarchies"[120] by protecting the often-disenfranchised minorities' interests in housing.[121] Given the Court's willingness to undermine the farmworkers' interests for the sake of individuals' property rights, the Court's similar potential to undermine minority tenants' interests becomes a serious concern.

The FHA's similarity to the California regulation at issue in *Cedar Point* creates a serious possibility that courts might recognize it as a per se taking that requires just compensation. Such a move has substantial consequences for both the Act and the antidiscrimination principles it embodies. Specifically, requiring the government to compensate a landlord for interfering with her right to exclude a potential tenant would impede the FHA's enforceability—if the government must pay, it cannot effectively enforce the law.[122] Moreover, a finding that the FHA constitutes a taking would likely establish a societal entitlement in the "right to discriminate" (for there would be a monetary value attached to this "right"). It suggests that, rather than an important public

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116 *See Cedar Point*, 141 S. Ct. at 2071; Berger, *supra* note 71, at 314.

117 *See supra* Part I.C.

118 Professor Bowie defined "democracy" as "political equality" and described the United States' most democratic moment as Election Day, when all eligible voters "are treated as political equals . . . in their electoral district[s]." Bowie, *supra* note 8, at 172. Meanwhile, "antidemocracy protect[s] dominating social hierarchies, particularly those based on property." *Id.* at 175.

119 *Id.* at 196 (quoting David Bacon, *The Real Target in the Supreme Court's 'Cedar Point' Decision*, THE NATION (July 2, 2021), https://perma.cc/XAS5-C9QS).

120 *Id.* at 175.

121 Both the Court and Congress have recognized that racial discrimination is related to the badges and incidents of slavery, and the first fair housing law was passed with this in mind. *See supra* Part I.A.

122 *Cf.* Bowie, *supra* note 8, at 196.

policy to be pursued, antidiscrimination must instead be purchased, which could slow future efforts toward achieving equality.

Of course, the Court may nonetheless be reluctant to rule that the FHA constitutes a per se taking. The absence of discussion pertaining to race in *Cedar Point* indicates this hesitation. In the facts section, the majority opinion described the agricultural employees only as "seasonal workers" and "full-time workers" who did not live on their employer's property.[123] But as Professors Bowie and Veena Dubal have noted, these race-neutral characterizations hardly present the whole picture. The California regulation specifically aimed to protect minority workers from exploitation in the workplace, and the employees were mainly Black or Brown.[124] The opinion also failed to acknowledge the nuances of the *Cedar Point* employers' legal stance, which (as Bowie characterized it) "resurrected a segregationist argument that employers have a right to discriminate."[125]

In light of this racial backdrop, the majority's race-neutral opinion is informative of its stance on antidiscrimination laws with respect to the Takings Clause. As noted previously, these laws' roots and histories are intertwined with those of the constitutional amendments that abolished slavery—whose passage had marked a significant turning point in the United States history. In addition, antidiscrimination continues to receive significant public and scholarly discourse.[126] Given the majority's asserted disinclination against proclaiming a large swarth of statutes to be per se takings, its silence regarding race is unlikely to represent a desire to secretly and silently do so for antidiscrimination laws—which hold significant social, political, and historical weight.

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[123] *Cedar Point*, 141 S. Ct. at 2069.

[124] *See* The LPE Project, *Property Rights Against Democracy: Implications of* Cedar Point Nursery, (Oct. 22, 2021), https://perma.cc/6F5P-G82E.

[125] *See* Bowie, *supra* note 8, at 192 (discussing the employers' brief). According to Professor Bowie, the employers in effect argued that "the Fifth Amendment's protection of 'private property' includes the right of a property owner to exclude whomever it wants from its property." *Id.* (citing Petitioners' Brief on the Merits at 29–32, *Cedar Point*, 141 S. Ct. 2063 (2021) (No. 20-107)). Specifically, the employers argued that "this right to discriminate was protected" by the Fourteenth Amendment and the Ku Klux Klan Act, 42 U.S.C. § 1983, a federal statute that "extended the Fourteenth Amendment's protection to Black farmworkers in the South," despite the argument "ha[ving] twice been rejected by the Supreme Court" prior to *Cedar Point*. *Id.* at 191–92.

[126] *See supra* Part II.A (describing various commentaries on the shortcomings of the FHA).

The remaining question, therefore, is how to read the FHA's dwelling rental provision to avoid a holding that it amounts to a per se taking under *Cedar Point*. In addressing this issue, this Comment notes that in the hypothetical scenario described in Part II.A, the analogy between the rental and union-organizer situations is not perfect. A notable difference is that, at the outset, the agricultural employer welcomed only employees onsite.[127] Meanwhile, the hypothetical landlord extended her invitation to everyone but racial minorities. In other words, the agricultural employer's premises were generally closed to members of the public. By contrast, the landlord's rental properties were generally open.

In the following Part, this Comment will discuss the paths that courts could take to avoid a holding that the FHA amounts to a per se taking. It reasons, building on the aforementioned difference between landlords and employers, that the FHA falls under one of *Cedar Point*'s four enumerated exceptions to its holding—specifically, the business-open-to-the-public exception.

III. PREVENTING THE FHA FROM BECOMING A PER SE TAKING

Cedar Point's expansion of the definition of per se takings concerned the dissenting justices and various scholars.[128] In response to Justice Stephen Breyer's worry that *Cedar Point* would endanger many governmental regulations,[129] the Court carved out four scenarios where its holding[130] would not apply: trespass, background property principles, receipt of governmental benefit, and when a statute regulates a business open to the public.[131] This Comment argues that the *Cedar Point* exceptions provide an escape valve for the FHA from becoming a per se taking. Part III.A describes the four *Cedar Point* exceptions in greater detail. Part III.B argues that the FHA fits within the business-open-to-the-public exception. Part III.B.3 finds additional support for this argument by drawing parallels between modern dwellings for

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[127] *See* Bowie, *supra* note 8, at 197.

[128] *See, e.g.*, *Cedar Point*, 141 S. Ct. at 2081 (Breyer, J., dissenting); Bowie, *supra* note 8, at 197–98; Blackman, *supra* note 84.

[129] *See Cedar Point*, 141 S. Ct. at 2087–88 (Breyer, J., dissenting) (arguing that the majority opinion endangers health and safety regulations that allow government officials to come onto private property to conduct examinations).

[130] *See id.* at 2079 (majority opinion) ("Under this framework, government health and safety inspection regimes will generally not constitute takings.").

[131] *See id.* at 2076–79 (asserting that the dissent's fears are "unfounded" immediately before describing the exceptions to the holding).

rent and hotels, which, under the common law innkeeper's rule, are required to accept guests without discrimination. Finally, Part III.C explores other methods for protecting the FHA and the merits of doing so through the business-open-to-the-public exception.

A. The Four *Cedar Point* Exceptions

Of the four *Cedar Point* exceptions, three do not provide viable pathways to save the FHA's rental provision from becoming a per se taking. This Section starts by describing these three exceptions and their inapplicability and concludes by laying out the fourth, business-open-to-the-public exception.

The first exception to *Cedar Point*'s holding is trespass, which is not analyzed under the takings doctrine.[132] Trespasses, according to the Court, are "[i]solated physical invasions, not undertaken pursuant to a granted right of access."[133] An illustrative example is a "truckdriver parking on someone's vacant land to eat lunch," a one-time activity not conducted with any governmental authorizations.[134] The FHA does not fall under this exception because the scenario it regulates—a landlord renting their property to tenants—does not involve trespasses. Rather, dwelling rentals involve prolonged physical occupations, and, as Part II argued, the FHA provides a statutorily granted right of access for minority tenants.

The second exception encompasses physical invasions "consistent with longstanding background restrictions on property rights," which are not takings.[135] These background principles "encompass traditional common law privileges to access private property" and include strangers' power to enter another's property due to "public or private necessity," the need to "avert serious harm to a person, land, or chattels," and the enforcement of criminal laws.[136] The FHA also likely does not fit under this exception because the right of access created by the FHA bears no relationship to already-established background property principles. The

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[132] *Id.* at 2078.

[133] *Id.* The Court also stated that a "continuance of [trespasses] in sufficient number and for a sufficient time could prove [the intent to take property]" and consequently be analyzed under the takings doctrine. *Id.* (alteration in original) (quoting Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 329 (1922)).

[134] *See Cedar Point*, 141 S. Ct at 2078 (quoting Hendler v. United States, 952 F.2d 1364, 1377 (Fed. Cir. 1991)).

[135] *Id.* at 2079.

[136] *Id.*

common law did not bar landlords from selecting their tenants on a discriminatory basis,[137] and private housing discrimination remained lawful until 1968.[138] Moreover, while longstanding statutes may become background property principles,[139] the *Cedar Point* Court found that the California regulation, a fifty-year-old law, was not "longstanding."[140] Because the FHA is about as old as the *Cedar Point* regulation, it could plausibly receive similar treatment.

Third, "the government may require property owners to cede a right of access as a condition of receiving certain benefits."[141] This exception addresses governmental exactions, where the government "conditions the grant of a benefit such as a permit . . . on allowing access [to the landowner's property] for reasonable health and safety inspections."[142] This exception likewise does not apply to the FHA because its provisions do not implicate such exactions.

Finally, *Cedar Point*'s holding does not apply to governmental appropriation of property rights belonging to "a business generally open to the public."[143] The Court created this exception by distinguishing *Cedar Point* from *PruneYard Shopping Center v. Robins*,[144] which held that a state constitution's protection of the right to distribute leaflets in a private shopping center—a business open to the public—did not constitute a taking.[145] Under this exception, a regulation granting equal opportunity to access a business open to the public does not constitute a per se taking.

Unlike the other three exceptions, the business-open-to-the-public exception plausibly covers the dwelling-rental scenario regulated by the FHA. From a logical standpoint, one could frame the rental situation as landowners welcoming members of the public to shop for places to live, the same way a mall invites the public to purchase goods. The next Section will explore this

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137 The innkeeper's rule, which prohibits innkeepers from discriminating in accepting guests, is a special case at common law. *See supra* Part II.B.3.

138 *See supra* Part I.A.

139 *See* Michael C. Blumm & Rachel G. Wolfard, *Revisiting Background Principles in Takings Litigation*, 71 FLA. L. REV. 1165, 1193–1202 (2019).

140 Bowie, *supra* note 8, at 195–96; *Cedar Point*, 141 S. Ct. at 2080.

141 *Cedar Point*, 141 S. Ct. at 2079.

142 *Id.*

143 *See id.* at 2077.

144 447 U.S. 74 (1980).

145 *Cf. id.* at 77, 84.

exception in further detail and argue that it extends to the FHA from a legal standpoint.

B. The FHA Establishes a Right to Access Businesses Open to the Public

Under the business-open-to-the-public exception, regulations that grant strangers a right to access businesses open to the public are not per se takings. Instead, such regulations are evaluated under the government-friendly *Penn Central* regulatory-takings framework. This Section argues that the FHA's rental provision is one such regulation: it established a right to access rental dwellings, which this Comment argues are businesses open to the public.

Part III.B.1 explores two definitions of business open to the public found in *Cedar Point*: (1) properties covered by public-accommodation statutes and (2) properties that fall within the Court's own understanding of this terminology. Parts III.B.2 and III.B.3 will then illustrate that the rental properties regulated by the FHA are open to the public under the second definition.

Finding that dwelling rentals are businesses open to the public means breaking down the differences between rental homes, perhaps the most private places, and shopping malls. But at the same time, this approach is consistent with a few different lines of precedent. First, placing the FHA within the business-open-to-the-public exception is consistent with *Cedar Point*'s unwillingness to disturb a large swath of important antidiscrimination regulations. Further, as explained below, Congress and the courts have implicitly acknowledged the less-than-private nature of some dwelling-rental scenarios; this solution would not disturb landlords' and tenants' expectations of privacy in practice. For those reasons—as well as the normative value of preserving an important antidiscrimination law from constitutional challenge—courts should consider the FHA to be within *Cedar Point*'s business-open-to-the-public exception.

1. Cedar Point suggests there are two definitions of a business open to the public.

An examination of *Cedar Point*'s analysis of *PruneYard* and choice of case citations reveals that the Court drew the meaning of a business open to the public from two sources: (1) public-accommodation statutes and (2) its own interpretation as shown in *Cedar Point* and in its First Amendment jurisprudence. The

subsequent sections shall discuss the definition drawn from each source in turn.

a) Businesses open to the public include those defined by public-accommodation statutes. *Cedar Point* implied that statutorily defined public accommodations are businesses open to the public in the Takings Clause context. This implication is evinced by the Court's reference to *Heart of Atlanta Motel v. United States*[146] while discussing the business-open-to-the-public exception.

Cedar Point created this exception by distinguishing the California statute, which governed agricultural employers, from the state constitution at issue in *PruneYard*, which restricted a shopping center's right to exclude leaflet distributors from its premises.[147] *Cedar Point* explained that the state constitution did not effect a taking because the place it regulated—the shopping mall—was "open to the public."[148] Considering the Court's focus on *PruneYard*, its insertion of a citation to *Heart of Atlanta* was surprising. *Heart of Atlanta*, after all, did not concern shopping malls. Instead, it pertained to the constitutionality of Title II of the Civil Rights Act of 1964[149] as applied to motels.[150]

The Court further did not portray *Heart of Atlanta* as relevant to its discussion of *PruneYard*. Rather, it characterized *Heart of Atlanta* as a case "rejecting [the] claim that provisions of the Civil Rights Act of 1964 prohibiting racial discrimination in public accommodations effected a taking."[151] And finally, Bowie and other scholars contend that the Court "would have silently overruled . . . its 1964 decision upholding the Civil Rights Act," namely, *Heart of Atlanta*, without the open-to-the-public exception.[152] The Court's citation, then, was a deliberate action that forcefully suggests that public accommodations, like shopping centers, are businesses open to the public, thereby folding public-

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146 379 U.S. 241 (1964).

147 *See Cedar Point*, 141 S. Ct. at 2076.

148 *Id.*

149 Pub. L. No. 88-352, 78 Stat 241 (codified as amended in scattered sections of 42 U.S.C).

150 *See Heart of Atlanta*, 379 U.S. at 243–45.

151 *Cedar Point*, 141 S. Ct. at 2076 (citing *Heart of Atlanta*, 379 U.S. at 261).

152 Bowie, *supra* note 8, at 194.

accommodation statutes like Title II under this exception.[153]

This definition does not help the FHA, however, because the dwelling rentals it regulates are likely not places of public accommodation. For example, the American with Disabilities Act of 1990,[154] a statute regulating public accommodations, makes it clear that places of public accommodation do not include "strictly residential private apartments and homes"—in other words, rental dwellings.[155] The Court is also unlikely to interpret Title II, the public-accommodation statute whose constitutionality was explicitly saved by *Cedar Point*, to cover rental dwellings. After all, the FHA, or Title VIII, is a separate part of the Civil Rights Act, and such a broad reading of Title II would render the FHA superfluous. Given the unhelpfulness of the "public accommodations" definition, this Comment now turns to the Court's definition of a business open to the public.

b) The Court defined a business open to the public in PruneYard and similar First Amendment cases. The second, distinct source from which the Court drew its definition of a business open to the public is *PruneYard*. In addition to rendering a decision on Fifth Amendment regulatory takings,[156] *PruneYard* also concerned a question in a different context. Specifically, it belonged to a line of First Amendment cases that considered whether shopping mall owners could prohibit strangers from coming onsite to protest, distribute pamphlets, or otherwise exercise their freedom of speech.[157] The meaning of a business open to the public has been especially crucial to these cases because,

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153 *Cedar Point* cited *Heart of Atlanta* in support of the statement that "[a]pplying the *Penn Central* factors, we held that no compensable taking had occurred" with respect to the shopping center. *Cedar Point*, 141 S. Ct. at 2076.

154 Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213). The ADA's definition of "public accommodations" is relevant because the Court's characterization of *Heart of Atlanta* suggests a broad exemption from its holding of statutes regulating public accommodations. The ADA is therefore likely to be within the business-open-to-the-public exception.

155 *See* ADA National Network, *Does the ADA Cover Private Apartments and Private Homes?*, ADA NAT'L NETWORK (Oct. 2021), https://perma.cc/9FVV-H8E6. Similarly, Title II defines "places of public accommodation" as "[e]stablishments affecting interstate commerce or supported in their activities by State action . . . [such as] lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; [and] places of exhibition or entertainment." 42 U.S.C. § 2000a(b).

156 *See supra* notes 144–145 and accompanying text.

157 *See, e.g.*, *PruneYard*, 447 U.S. 74 (evaluating the passing of pamphlets); Food Employees Local 590 v. Logan Valley, 391 U.S. 308 (1968) (evaluating picketing).

according to the Court in *Marsh v. Alabama*,[158] the more an owner "opens up" her property for public use, the more her rights "become circumscribed by the . . . constitutional rights of those who use it."[159] As such, it was during these First Amendment inquiries that the Court closely examined what constitutes such a business.[160]

Importantly, the Court did not use public-accommodation statutes as an aid to establish the meaning of a business open to the public.[161] Rather, it determined whether the malls were open to the public through fact-based reasoning.[162] As discussed in further detail below, the Court's definition in the First Amendment context can be summarized as follows: a business open to the public welcomes anyone in the general population onsite.

A business open to the public is generally accessible, meaning it does not limit access to particular individuals. The Court's focus on this factor started with *Marsh*, the progenitor of the First Amendment cases concerning shopping centers. In *Marsh*, a state punished an individual for distributing religious literature on the sidewalks of a company-owned town in violation of the town's regulations.[163] Although the town was private, the Court held that the punishment was unconstitutional in light of the First Amendment because the business block was open to the public.[164] In reaching this conclusion, the Court highlighted that the business block "serve[d] as the community shopping center and is freely accessible and open to the people in the area and those passing through."[165] In other words, the company town had no prohibition regarding whom could go onsite.

Likewise, in *Food Employees Local 590 v. Logan Valley Plaza, Inc.*,[166] the Court held that peaceful picketing in a shopping mall's

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158 326 U.S. 501 (1946).

159 *Marsh v. Alabama,* 326 U.S. at 506.

160 *See infra* notes 173–174 and accompanying text. In the Takings Clause context, *Cedar Point* was the case that made "business open to the public" a formal category.

161 *See generally* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (determining, without examining public-accommodation statutes, that malls were private in the First Amendment free speech context); Hudgens v. NLRB, 424 U.S. 507 (1976) (same). *Cedar Point* itself defined this term by distinguishing the characteristics of Cedar Point Nursery from those of PruneYard Shopping Center. *See Cedar Point*, 141 S. Ct. at 2076. Like the earlier cases involving shopping malls, *Cedar Point* did not look to public-accommodation statutes as an aid for defining the phrase "business open to the public."

162 *See, e.g.*, *Marsh*, 326 U.S. at 508.

163 *See id.* at 502–04.

164 *See id.* at 506, 509.

165 *Id.* at 508.

166 391 U.S. 308 (1968).

parcel pickup area by individuals not associated with the mall is speech protected by the First Amendment.[167] It reasoned that the mall is a "location open generally to the public,"[168] and any member of the public has "unrestricted access to the mall property" given the ample roads and sidewalks that lead onto the premises.[169] Analogizing to *Marsh*, the Court further characterized the mall as a business district contained in one building.[170] This suggests that whether a property is open to the public is not reliant on its size or physical structure; what truly matters is whether it invites all members of the public.

The First Amendment case law took a sharp turn, however, with *Lloyd Corp. v. Tanner*.[171] At issue was whether "under the Federal Constitution a privately owned shopping center may prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations."[172] Citing *Logan Valley*, the handbill distributors argued that the shopping center may not prohibit their handbilling because it "[wa]s open to the public."[173] Rejecting the distributors' argument, the *Lloyd* Court held that a private mall that invites the public "to use it for designated purposes," such as shopping, does not lose "its private character."[174]

In deciding a similar issue, *PruneYard* affirmatively cited *Lloyd*'s conclusion that the First Amendment does not require the mall owner to allow on-premises pamphlet distribution.[175] At the same time, *PruneYard* characterized the mall as open to the public—meaning generally accessible—as a factual matter.[176] *PruneYard* therefore made clear that a mall may be open to the

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167 *See id.* at 316–19.

168 *Id.* at 313.

169 *Id.* at 318.

170 *See id.* at 319.

171 407 U.S. 551 (1972).

172 *PruneYard*, 447 U.S. at 80 (citing *Lloyd*, 407 U.S. at 552).

173 *Id.* (citing *Lloyd*, 407 U.S. at 564).

174 *Lloyd*, 407 U.S. at 569 ("Few would argue that a free-standing store, with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop there.").

175 *See PruneYard*, 447 U.S. at 80–81. *PruneYard* nonetheless reached a different result than *Lloyd* because, in *PruneYard*, the state constitution required the mall owner to allow such handbilling. *See id.* at 81. As *PruneYard* stated, "Our reasoning in *Lloyd* [ ] does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right" to confer more rights on individuals via its own constitution than "those conferred by the Federal Constitution." *Id.*

176 *See PruneYard*, 447 U.S. at 74 ("PruneYard is open to the public for the purpose of encouraging the patronizing of its commercial establishments.").

public because it does not restrict who can enter (as in *Marsh* and *Logan Valley*), but that fact alone is not enough to overcome its private nature and circumscribe its owner's rights with the First Amendment rights of the public. Put differently, the mall was not sufficiently public for free speech obligations under the First Amendment to attach to its owner.

By crafting an exception to its holding based on *PruneYard*, *Cedar Point* effectively imported the business-open-to-the-public exception into the Fifth Amendment Takings Clause context. It did not incorporate the nuances added by *Lloyd*, however. By excepting a provision (state constitution) that applied to the PruneYard mall from being a per se taking because the mall was "a business generally open to the public,"[177] the Court made clear that the range of activities permitted by a landowner does not matter in the Takings Clause context (unlike in the First Amendment context). Instead, status as a business open to the public depends only on the range of people invited onto the premises.

It is worth noting that *Cedar Point* did not explicitly base its distinction between public and private businesses on the facts considered by the First Amendment cases. It characterized the PruneYard mall, which "welcom[es] some 25,000 patrons a day," as open to the public while implying that Cedar Point Nursery, supposedly closed to everyone but its employees, was private.[178] While the Court's language could be read to suggest that only businesses with large visitor flows are open to the public, the size of an establishment's visitor flow is likely not dispositive. Consider this scenario: a duplicate of the PruneYard mall is built in a rural town and welcomes only one-hundred patrons a day. Making visitor flow dispositive of a business's public-versus-private nature would cause this exact copy of the PruneYard to be designated as private. The Court's language, therefore, is best read as being consistent with how First Amendment cases have defined "open to the public" in terms of general accessibility, rather than imposing an additional size-of-visitor-flow factor.

In summary, the business-open-to-the-public category originated from a series of First Amendment cases and formally became a part of the Takings Clause jurisprudence after *Cedar Point*. Although *Cedar Point* implied a highly factual definition for this term based on the size of a business's visitor flow, the logic

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177 *Cedar Point*, 141 S. Ct. at 2077.

178 *Id.* at 2076.

underlying this rationale is unstable. In light of this ambiguity, how the First Amendment cases understood this term remains highly relevant. That understanding, infused with *Cedar Point*'s own input, suggests that a business open to the public in the Takings Clause context is one that invites the general population onsite.

2. The rental situation regulated by the FHA likely falls under the Supreme Court's definition of a business open to the public.

This Section contends that dwelling rentals regulated by the FHA meet the definition of businesses open to the public. It begins by arguing that such rentals could be viewed as businesses that invite the public onsite for limited purposes. It then argues that viewing such rentals as ones that invite the general population is consistent with existing case law and aligns with the FHA's legislative history. It concludes by exploring a caveat to the view that dwelling rentals are generally accessible: if the FHA did not prohibit discrimination, dwelling rentals might not in fact be generally accessible.

To start off, the rental of dwellings covered by the FHA should be viewed as a business. Specifically, the landlord's activities are distinguishable from those of ordinary homeowners because, like mall owners, the landlord is making money by engaging in commercial transactions.[179] Further, the commercial nature of renting an apartment complex bears some similarities to running a shopping center, which also involves leasing spaces to individual stores and establishments. Finally, a landlord extends invitations to potential renters for a limited purpose: to occupy her rental dwellings as tenants. The fact that this is a limited purpose (for instance, the public cannot venture into a rental property to distribute pamphlets) does not matter in the open-to-public analysis.

Next, this Section turns to the most critical inquiry in determining whether dwelling rentals are businesses open to the public: whether they are generally accessible. The Court suggested

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[179] Whether something is a "business" was not the Court's concern in either the First Amendment cases concerning shopping centers or in *Cedar Point*. There is likely little dispute that a shopping center is a business. *Cedar Point* was silent on whether an agricultural employer who hires employees and presumably earns revenue runs a business. *See Cedar Point*, 141 S. Ct. at 2076 ("Unlike the growers' properties, the PruneYard was open to the public.").

an answer in the affirmative in *Yee v. City of Escondido*.[180] *Yee* concerned the rental of mobile-home park spaces. The case addressed whether a local rent-control ordinance, when viewed together with a California Mobilehome Residency Law,[181] constituted a *Loretto*-type per se physical taking of mobile home–park owners' property.[182] Mobile homes are "largely immobile" residences and are "generally placed permanently" in mobile-home parks.[183] A mobile-home owner "typically rents a plot of land, called a 'pad,'" from a park owner to use as the location of her home,[184] much like how tenants rent apartments from landlords.[185]

The rent-control laws at issue in *Yee* limited a property owner's right to exclude in similar ways as the FHA. The laws required the park owners to keep their rents below the fair market value and protect tenants from eviction,[186] effectively allowing tenants to occupy their pads at below-market rates indefinitely.[187] As the park owners in *Yee* argued, the laws required them to submit to the physical occupation of their property by the owners of mobile homes.[188]

The Court found that the rent-control laws did not amount to a per se taking. It determined that the laws did not force a landlord to suffer a physical occupation because the landlord had "voluntarily decided to rent" her property.[189] The laws additionally did not grant tenants the right "to invade property *closed to the public*."[190] Rather, the Court stated that the tenants were invited by

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180 503 U.S. 519 (1992).

181 Cal. Civ. Code Ann. § 798 (West 1982 and Supp. 1991).

182 *See id.* at 523.

183 *Id.*

184 *Id.*

185 *Cf., e.g.*, Rent Stabilization Ass'n of N.Y.C. v. Higgins, 630 N.E.2d 626, 632–33 (N.Y. 1993) (treating *Yee v. City of Escondido*, 503 U.S. 519 (1992), a case about renting pads in a mobile home park, as binding precedent in a case about renting apartments); Ballinger v. City of Oakland, 24 F.4th 1287, 1292–94 (9th Cir. 2022), *cert. denied*, 142 S. Ct. 2777 (2022) (relying heavily on *Yee* in its analysis of a municipal ordinance requiring landlords pay tenants a relocation fee before the owner could move back into her home).

186 *See* Dwight C. Hirsh IV, Yee v. City of Escondido—*A Rejection of the Ninth Circuit's Unique Physical Takings Theory Opens the Gates for Mobile Home Park Owners' Regulatory Takings Claims*, 24 PAC. L.J. 1681, 1699–1700 (1993) (describing the regulations at issue in *Yee*).

187 *See Yee*, 503 U.S. at 526–27. The park owners retain the power to evict in some circumstances, such as when they wish to change their use of land, if they provide notice to the homeowners ahead of time. *See id.* at 528.

188 *See id.* at 527.

189 *See* Hirsh, *supra* note 186, at 1707.

190 *Cedar Point*, 141 S. Ct. at 2077 (emphasis added).

the landlords at the first instance, and "it is the invitation, not the rent," that distinguished *Yee* from per se taking cases like *Loretto*.[191]

The Court's statements in *Yee* suggest that, given that the park owners had broadly invited tenants to rent, their parks were open to the public. This understanding likely extends to the dwelling-rental situation even though mobile-home parks have different physical characteristics than apartment complexes for rent. For example, *Yee* affirmatively referred to both the park owners and the owners of rental dwellings as "landlords."[192] Additionally, although *Yee* rejected the park owners' attempt to analogize their situation to the per se taking experienced by the landlord in *Loretto*, it did not distinguish *Loretto* based on the physical differences between the properties run by a park owner and the building units run by a more traditional landlord.[193] These facts reveal that the Court likely considered mobile park rentals and dwelling rentals as the same type of business. Consequently, rental dwellings should not be considered closed to the public.

A finding that rental dwellings regulated by the FHA are open to the public is consistent with the Act's legislative history. During debates on the Mrs. Murphy exemption, legislators acknowledged that rental situations possess varying degrees of privacy. Situations where small landlords share the same building space with their tenants are the most private.[194] By contrast, situations involving landlords who own hundreds of rental units are less private and personal.[195] In choosing to exempt the former from the FHA, the drafters intentionally drew a line between landlords whose businesses are clearly private and those whose businesses are more public and more deserving of regulation.

However, there remains one caveat to this public-accessibility analysis concerning dwelling rentals. In *Rent Stabilization Ass'n v. Higgins*,[196] another case about whether a rent-

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191 *See Yee*, 503 U.S. at 532 (quoting FCC v. Fla. Power Corp., 480 U.S. 245, 252–53 (1987)). The *Yee* Court unanimously rejected the idea that a per se taking was at issue. *See generally id.*

192 *See id.* at 528–29.

193 *See Yee*, 503 U.S. at 530–32.

194 *See* James D. Walsh, Note, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605, 609–10 (1999).

195 *Cf. id.* at 607 (noting that a co-sponsor of the FHA declared that the "sole intent of [the Mrs. Murphy exemption] is to exempt those who, by the direct personal nature of their activities, have a close personal relationship with their tenants" (alteration in original) (quoting 114 CONG. REC. 2495 (1968) (statement of Sen. Mondale))).

196 630 N.E.2d 626 (N.Y. 1993).

control law amounts to a per se taking,[197] the New York Court of Appeals cited *Yee* for the proposition that "once a property owner decides to rent to tenants, the *antidiscrimination laws* eliminate an owner's unfettered discretion in rejecting tenants."[198] *Higgins*'s proposition suggests that the FHA is what made dwelling rentals generally accessible—that is, open to the public. After all, even if a landlord wished to limit her invitation to rent to a racial subgroup, § 3604(a) of the FHA, which makes such discrimination unlawful, would act as an addendum that extends her invitation to the entire public.

Higgins's proposition breaks down when the FHA's constitutionality is called into question. If § 3604(a) is a per se taking, the government would be required to pay a landlord "every time it interferes with [his] 'right to exclude'" a potential tenant "from [her] property."[199] As Bowie's article implies, requiring such payments would make the FHA unenforceable, which in effect returns to landlords the power to limit their invitations by race and other protected characteristics.[200] In practice, even with limited invitations, a landlord's invitation to rent might still be extended to a sizeable portion of the population (such as every individual belonging to a particular race). However, that invitation is not as broad as an invitation to shop and could start to look like the extremely narrow employee-only invitations made by the agricultural employers in *Cedar Point*.

In sum, *Higgins* implies that dwelling rentals could be considered open to the public only because of antidiscrimination statutes like the FHA. Thus, analyzing whether the FHA constitutes a per se taking requires dealing with a counterfactual scenario where the FHA is absent. In the next Section, this Comment argues—analogizing the rental of dwellings to innkeeping—that the common law innkeeper's rule should be extended to the former business; doing so supports the notion that, even without the FHA, dwelling rentals should be considered open to the public.

3. The rental of dwellings regulated by the FHA should be

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197 *See id.* at 632.

198 *Id.* at 633 (emphasis added).

199 Bowie, *supra* note 8, at 196.

200 *Cf. id.* at 196–97 (suggesting that *Cedar Point*'s threat to antiretaliation laws means that employers regain the power to retaliate against whistleblowing employees).

analogized to common law innkeeping.

This Section aims to find an alternative ground in the common law innkeeper's rule showing that rental dwellings should be considered generally accessible and therefore open to the public. It first strives to link the rental of dwellings to innkeeping via potential threads found within case law. It subsequently analogizes these businesses and argues that, given their growing similarities, the common law supports viewing both as similarly open to the public.

Earlier discussions have shown that the rental of dwellings and innkeeping (or, in modern terms, hotelkeeping) are treated as distinct types of business under the law.[201] However, some court cases, including one in the Supreme Court, suggest that this distinction may be smaller than it seems. For example, the Court wrote the following statement in *Yee*: "When a landowner decides to rent his land to tenants, the government may . . . require the landowner to accept tenants he does not like without automatically having to pay compensation."[202]

Notice that *Yee* cited *Heart of Atlanta* and *PruneYard* for this proposition.[203] As an initial matter, these citations lend support to the general idea that, when *Yee* was decided, antidiscrimination laws were analyzed under the *Penn Central* regulatory takings framework, rather than the per se takings framework.[204] Indeed, *Heart of Atlanta* and *PruneYard* had performed a regulatory takings analysis of Title II (a public-accommodations statute) and of a state constitution restricting a mall owner's right to prohibit on-premises leafletting, respectively.

Importantly, though, *Yee* did not cite both cases at once; it cited *Heart of Atlanta* in the middle of the sentence and

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[201] For example, the FHA was crafted as a separate Act from Title II, which covers hotels and motels.

[202] *Yee*, 503 U.S. at 529 (citations omitted) (first citing *Heart of Atlanta*, 379 U.S. at 261; and then citing *PruneYard*, 447 U.S. at 82–84); *cf. Loretto*, 458 U.S. at 440 (citing *Heart of Atlanta* as a case affirming the government's power to regulate the landlord-tenant relationship).

[203] As *Cedar Point*'s citation to *Heart of Atlanta* in its *PruneYard* discussion illustrates, the Court's citation choices may convey important substantive messages. Like *Cedar Point*'s legal reasoning in support of its holding demonstrates, it is possible for the Court to breathe new life into previously unimportant language in its precedents to achieve its desired outcome. *See supra* Part I.C and Part II.B.

[204] *See Yee*, 503 U.S. at 529 (holding that "[s]uch [regulations of the landlord-tenant relationship] are analyzed by engaging in" the regulatory takings analysis). This Comment argues that *Cedar Point* likely requires analyzing antidiscrimination laws first under the per se framework.

PruneYard in a "*see also*" citation at the end of the sentence. This creates the possibility of reading the *Heart of Atlanta* citation solely to support the statement preceding it—namely, *Yee*'s proposition that the government could constitutionally limit a landlord's right to exclude. Considering that *Heart of Atlanta* upheld the constitutionality of Title II as applied to motels, *Yee*'s citation could induce the following inference: the government's constitutional authority to limit a motel owner's right to exclude was used to support the government having a similar constitutional power to restrict the same right with respect to landlords. This reasoning hints at some similarities between motel operations and dwelling rentals. While not binding on the Court, *Higgins* seemed to support this understanding.[205] Because Title II, according to *Heart of Atlanta*, codified "the common-law innkeeper rule,"[206] *Yee*'s citation, read in the aforementioned way, could support extending this common law rule's applicability to the rental scenario.

The common law innkeepers rule imposed a duty on innkeepers to accept all guests because the innkeeper's business was a "common calling."[207] The concept of a common calling arose out of the innkeeper's special place in the medieval English society,[208] where travelers were often forced to traverse roads and forests "infested with robbers."[209] Inns, which offered protection, food, and entertainment, became a critical part of travelers' livelihoods.[210] Unlike medieval tenants, who had more power to bargain with landlords,[211] travelers were often "at the mercy of the innkeeper" because inns were few and far between.[212] These conditions created a need to forbid innkeepers from rejecting guests on a discriminatory basis.[213]

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[205] *See Higgins*, 630 N.E.2d at 633 ("Indeed, once a property owner decides to rent to tenants, the antidiscrimination laws eliminate an owner's unfettered discretion in rejecting tenants.").

[206] *Heart of Atlanta*, 379 U.S. at 261.

[207] Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156, 159 (1904).

[208] *See id.*

[209] JOHN H. SHERRY, THE LAWS OF INNKEEPERS 3 (1972).

[210] *See id.* at 3–4.

[211] *See id.* at 12–13.

[212] Wyman, *supra* note 207, at 159.

[213] *Cf. id.* at 160–61, 164, 166.

Modern-day landlords exercise a similar public calling.[214] While not as crucial as medieval inns, dwelling rentals are highly important to the modern public. Statistics show that roughly 30–35% percent of U.S. households rented their homes between 1998 and 2021.[215] Additionally, the Court has noted that housing conditions and landlord-tenant relationships deserve special regulation.[216] Moreover, minority tenants have persistently faced greater difficulties and more limited housing options in the rental market, which raises questions as to their capacity to bargain with landlords. For example, a 2012 study found that "[w]hite renters experience more favorable treatment than equally well-qualified [Black renters] in 28.4 percent of housing inquiries," Hispanic renters in 28.9% of inquiries, and Asian renters in 32.0% of inquiries.[217] By comparison, Black, Hispanic, and Asian renters receive more favorable treatment in only 19.6%, 18.9%, and 22.6% of interactions respectively.[218] In addition, Black, Hispanic, and Asian renters on average learn of about 10% fewer available units from rental agents than white renters.[219] Further, white renters are more likely to be "informed about rent incentives" than Black and Hispanic renters, which "possibly giv[es] them more bargaining power in lease negotiations."[220]

Modern circumstances have reduced the distinction that once existed between inns and dwelling rentals, specifically in connection with their respective occupants. Under the common law, inns

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[214] Case law indicates that a business's surrounding circumstances determine whether it is a public or private calling; as such, businesses once considered private can be recharacterized as public callings. *See id.* at 160–61. It is possible, of course, that hotel owners exercise less of a public calling in modern times. Today, there are more hotels for travelers to select from, internet services that let travelers choose their hotels and amenities, and hotel competitors like Airbnb. However, the usage of hotels has not fallen into disfavor, suggesting that hotels continue to occupy an important place in modern society. Further, antidiscrimination considerations regarding the hospitality industry, especially in light of discrimination concerns regarding Airbnb, provide normative support for continuing to view the hotel business as a public calling.

[215] *Quarterly Residential Vacancies and Home Ownership, Fourth Quarter 2021*, U.S. CENSUS BUREAU (Feb. 2, 2022), https://perma.cc/4JA5-92DU.

[216] *See Loretto*, 458 U.S. at 440 ("This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular.").

[217] MARGERY AUSTIN TURNER, ROB SANTOS, DIANE K. LEVY, DOUG WISSOKER, CLAUDIA ARANDA, ROB PITINGOLO & THE URB. INST., HOUS. DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012, 40 (2013).

[218] *See id.*

[219] U.S. Dep't of Hous. & Urb. Dev., *Subtle Forms of Discrimination Still Exist for Minority Homeseekers*, THE EDGE, https://perma.cc/39FH-P8JC.

[220] TURNER ET AL., *supra* note 217, at 42, 45.

were defined by their primary service of guests, who were in turn defined by the transient nature of their stays.[221] Transiency did not necessarily hinge on the occupant's length of stay or distance of travel; instead, it depended on factors including whether the occupant was a stranger to the innkeeper and whether he had entered the premises in accordance with the inn's general invitation of the public. Notably, in holding that an occupant who had stayed at a hotel for two or three weeks and paid weekly fees was a guest, a court considered the occupant's lack of prearrangements with the hotel critical.[222]

These common law factors for transiency no longer serve as accurate proxies for distinguishing guests from tenants. First, dwelling renters regulated by the FHA most likely solicit tenants via public advertisement.[223] A tenant, like a guest, would enter the premises of a landlord previously unknown to him in accordance with a general invitation. Second, certain types of tenancy arrangements do not prearrange a tenant's duration of stay. An example is tenancy at will, which enables either the landlord or the tenant to terminate the rental agreement with little notice.[224] This tenancy arrangement affords the tenant greater flexibility in moving on from her rental property. Notably, beneficiaries of this arrangement include tenants who move frequently and therefore may bear significant similarities to travelers (the typical guests under common law) who stay at a particular location for short periods of time.[225]

Just as dwelling rentals have acquired some of the characteristics of inns and hotels, inns and hotels have grown similar to dwelling rentals. A stay at a hotel increasingly involves prearrangement, which may push the guest outside the traditional definition of a "guest" under the common law. This trend has resulted from the growing use of online hotel-reservation systems, which enable guests to arrange the duration of their stay prior to

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221 See SHERRY, *supra* note 209, at 143 (citing Hancock v. Rand, 94 N.Y. 1 (1883)).

222 *See id.* at 143–44 (first citing Holstein v. Phillips, 146 N.C. 366 (1907); and then citing Pettit v. Thomas, 103 Ark. 593, 600 (1912)).

223 *Cf.* 42 U.S.C.§ 3604(c) (prohibiting statements of discrimination in advertisements for sale and rental of dwellings).

224 *See* The Investopedia Team, *Tenancy-at-Will*, INVESTOPEDIA (Mar. 22, 2021), https://perma.cc/8F8U-QBLX.

225 *See id.* (noting that at-will tenancy is beneficial to tenants, "who may wish to have the flexibility to change rental situations easily").

their arrival on the hotel premises.[226] Further, recent reports have shown that individuals across the country often resort to living in hotels that "rent on a daily, weekly or monthly basis" after being evicted from their rental properties.[227] To these individuals, a hotel room functions as their rental apartment. In some cities, as many as 40% of a hotel's guests may consist of such long-term residents.[228] Hotels' increased service of tenants and guests who have acquired some tenant characteristics[229] (and vice versa for dwelling rentals) suggest a growing similarity between hotelkeeping and the rental of dwellings. Consequently, the innkeeper's duty to accept all guests without discrimination should no longer be limited to the hotelkeeping situation.

The growth of short-term rentals also supports extending the innkeeper's rule to apply to dwelling rentals. Since the last decade, sharing platforms like Airbnb have enabled homeowners to rent their properties to short-term occupants.[230] The short-term rentals spurred by this sharing service not only provide a more affordable alternative to hotels but also "displace[ ] long-term housing in thousands of apartments."[231] This suggests that short-term rentals share the characteristics of both types of business.

In light of the similarities between inns and short-term rentals, it makes sense to bring them under the coverage of the innkeeper rule. Meanwhile, the similarities between short-term rentals and traditional dwelling rentals, as implied by occupants' abilities to use them interchangeably, suggests that the innkeeper's rule should not be limited to one situation but not the other. In addition, the same rationale supports extending the

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[226] *See* Eva Lacalle, *How Does an Online Hotel Reservation System Work?*, MEWS (Apr. 2, 2021), https://perma.cc/BS2N-HLD8.

[227] *See* Britt Kennerly & Isadora Rangel, *Invisible Homelessness: How Families End Up Living at Hotels on the Space Coast*, FLA. TODAY (Apr. 23, 2020), https://perma.cc/ZV9J-N9UM; *see also* Mariah Woelfel, *Homeless Can Keep Staying at a Downtown Chicago Hotel Through the Winter*, WBEZCHICAGO (Nov. 17, 2021), https://perma.cc/P4KE-YD38 (describing the city of Chicago's rental of hotel rooms to tackle the problem of homelessness).

[228] *Cf.* Kennerly & Rangel, *supra* note 227 (describing the proportion of long-term occupants of the River Palm Hotel along the Space Coast).

[229] *See generally* Amy M. Campbell, Note, *When a Hotel Is Your Home, Is There Protection?* — Baker v. Rushing, 15 CAMPBELL L. REV. 295 (1993) (discussing *Baker v. Rushing*, 409 S.E.2d 108 (1991), a case where a state court found that hotel occupants who had stayed for six years and had no residences elsewhere were tenants rather than guests even though they lived in a hotel).

[230] Allyson E. Gold, *Community Consequences of Airbnb*, 94 WASH. L. REV. 1577, 1584 (2019).

[231] *Id.* at 1581 (quoting N.Y. STATE OFF. OF THE ATT'Y GEN., AIRBNB IN THE CITY 3 (2014)).

innkeeper's rule to apply to both short- and long-term rentals. Both situations present significant problems concerning the landlord's ability to discriminate during occupant selection.[232] Therefore, extending the innkeeper's rule to both rental scenarios provides a sensible strategy moving forward.

Extending the common law duty to accept all comers to the rental of dwellings does not upset a landlord's right to exclude or a tenant's expectation of privacy. Under the common law, innkeepers may exclude guests for reasons other than discrimination, including the availability of space, ability to pay, and safety of existing occupants.[233] For example, innkeepers may exclude when their inns are full[234]—in other words, "when all the bed chambers are occupied" and a potential guest has no right to demand to share a room with an existing occupant.[235] Moreover, innkeepers do not have to accept potential guests who are incapable of "paying a compensation suitable to the accommodation provided"[236] and can set prices to proactively limit their service to individuals of a particular wealth status.[237] Scholarship examining old common law cases also found that innkeepers had broad discretion to exclude individuals of "objectionable character," including brawlers, gangsters, mobsters, ex-convicts, or people "habitually picked up by the police for questioning," whose presence might disincentivize potential occupants from entering their establishments.[238] Just as innkeepers retained powers to exclude under common law, a landlord subject to the innkeeper's rule would retain discretion to reject potential renters for good reason; this would allow landlords to keep members of the public from intruding into properties that were already occupied by their tenants.

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[232] *See id.* at 1597–1600; Justin Tanaka & David Lau, Essay, *Airbnb in Paradise: Updating Hawai'i's Legal Approach Towards Racial Discrimination in the Sharing Economy*, 39 U. HAW. L. REV. 435, 458–59 (2017).

[233] The common law innkeeper's ability to exclude potential guests in certain cases despite the duty to serve all comers results from "consideration for the safety and comfort of the patrons already in the hotel" and "the proprietor's expectancy of compensation, and the space limitations of the inn." Comment, *Innkeeper's Right to Exclude or Eject Guests*, 7 FORDHAM L. REV. 417, 419 (1938).

[234] *See* SHERRY, *supra* note 209, at 78.

[235] *Innkeeper's Right*, *supra* note 233, at 421.

[236] SHERRY, *supra* note 209, at 81 (quoting Thompson v. Lacy (1820), 106 Eng. Rep. 667 (K.B.)).

[237] *Innkeeper's Right*, *supra* note 233, at 424 ("[A] proprietor may fix the grade of his inn so high as to exclude all but the wealthy.").

[238] SHERRY, *supra* note 209, at 79, 80 (first citing Markham v. Brown, 8 N.H. 523 (1837); and then citing Goodenow v. Travis, 3 Johns. 427 (N.Y. Sup. Ct. 1808)).

Analogizing between inns and rental dwellings would establish a new basis for understanding dwelling rentals as businesses open to the public. Namely, they are as open to the public as hotelkeeping businesses. This analogy would completely transform the common law understanding that only innkeeping, as a special category of business, must serve all comers. This solution creates a less significant impact on society than allowing landlords to racially discriminate against potential tenants. Extending the duty to accept guests without discrimination to landlords does not alter the protections that hotel guests receive under the innkeeper's rule.

C. Normative Rationales for Extending the Business-Open-to-the-Public Exception to Cover the FHA

In the previous sections, this Comment explored one method of preventing the FHA from being disabled post–*Cedar Point*. Recent scholarship has suggested other ways for the Court to achieve the same outcome.

One pathway would allow the FHA to remain operative even if it were found to be a per se taking. Specifically, because "*Cedar Point* turned entirely on the discretion of the justices,"[239] Bowie envisions that the Court could simply choose to act moderately by declaring that affected property owners only deserve nominal compensation, like "one dollar per taking."[240] The problem with this method, however, is that courts exercise full discretion over whether to utilize it. As Bowie points out, a pro–property rights Court could justify granting property owners large compensation via selective citation of economic research, which would render the FHA unenforceable.[241]

Further, constraining *Cedar Point*'s effects at the compensation stage would not resolve the problems that arise from a court categorizing a statute as a taking. Holding that the FHA effects a taking would set back current antidiscrimination movements. The requirement that the government compensate landlords for losing the right to discriminatorily select tenants is likely to normalize discrimination and segregation in society. By extension, antidiscrimination efforts would become deviations from the

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[239] Bowie, *supra* note 8, at 198; *see also* Part I.C (discussing how *Cedar Point* loosely interpreted precedents, even going as far as contradicting their legal reasonings, to find support for its holding).

[240] Bowie, *supra* note 8, at 198.

[241] *See id.* at 199.

norm. This, in turn, would generate a legal and psychological entitlement to discriminate, slowing efforts to achieve equality in the housing market and in society more broadly.

The other pathway, which this Comment has followed, is to prevent the FHA from effecting a per se taking in the first place. In light of *Cedar Point*—where the Court created a broad holding that threatens to swallow up numerous statutes and then carved out several exceptions—the two clearest methods for exempting the FHA are to argue (as this Comment did) that it is covered by an enumerated exception, or to engineer a new exception specifically for the FHA and similar antidiscrimination laws. Between these choices, folding the FHA into an existing exception is more in line with the Court's current view on individual property rights.

In particular, the *Cedar Point* majority's broad protection of the individual's property rights cuts against the possibility that a new exception would be created. *Cedar Point* suggests that the Roberts Court would likely consider a landowner's property interests to outweigh other interests that are implicated by right-to-access regulations. The FHA implicates three types of interests. First, the government desires to address racial tension across the country and protect individuals from discrimination. Second, some landowners wish to exclude unwanted strangers on the basis of a protected category. Third, the FHA's beneficiaries have an interest in being able to freely select and negotiate for their future residences. *Loretto* found that governmental interests, which define the purpose of a regulation, do not factor into the per se taking analysis. Likewise, *Cedar Point* implies that any third-party beneficiaries' interests in the right-to-access laws matter very little compared to the landowners' interests in their property rights. In rendering its decision, the Court prioritized the powerful employers' property interests over the disenfranchised agricultural employees' interests in combatting exploitation.[242] This means that the Court would likely feel disinclined to affirmatively erode its protection of property rights to create another *Cedar Point* exception.

Finding shelter for the FHA within the business-open-to-the-public exception avoids the ideological issue generated by the Court's pro–property rights philosophy. Instead of asking courts to erode individuals' property rights via a new exception, this

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[242] *Cf.* The LPE Project, *supra* note 124.

method maintains that *Cedar Point* does not protect landlords' rights to rent to tenants on discriminatory bases. This position is the most reconcilable with both the majority opinion's language and its embedded ideologies.

CONCLUSION

Cedar Point was a victory for individual property rights. Departing from its prior jurisprudence, the Supreme Court protected agricultural employers' right to exclude over union organizers' and employees' interests in unionization and collective bargaining. Specifically, the Court found a per se taking in a regulation that granted a miniscule segment of the public a right to temporarily enter private premises.

The Court's alteration of the definition of per se takings was substantial. No longer is this designation reserved for regulations that limit a landowner's right to exclude by authorizing a permanent and physical occupation of private property. Instead, the distinction between permanent and temporary occupation has all but disappeared, leaving regulations that establish temporary rights of access at risk of becoming per se takings.

Cedar Point's holding poses a serious threat to our nation's antidiscrimination laws. A prime example is the FHA, which takes away a landlord's right to lawfully exclude minority members of the public from temporarily occupying the landlord's property as tenants. Under *Cedar Point*'s definition, the FHA likely amounts to a per se taking. Such a finding would be detrimental to the FHA's enforceability and capacity to promote equality in the housing market.

This Comment presents one way to counteract *Cedar Point*'s endangerment of the FHA. It takes a close look at *Cedar Point*'s enumerated exceptions and recommends finding that the rental situations regulated by the FHA fall under the business-open-to-the-public exception. This solution is compatible with the Court's and legislature's views on rental situations, does not upset the expectations of landlords and tenants, and accords with the takings framework and ideological stances of *Cedar Point*.