For the last century, the Supreme Court has tried to operationalize the idea that a government regulation can be so burdensome that it amounts to a seizure of property. In the process, it has created a house of mirrors, a maze in which nothing is as it seems. Rules that appear crisp and clear turn out to be mushy and murky. Judicial rulings that seem to expand the rights of property owners turn out to undermine those rights. The Court's decision last week in *Cedar Point Nursery v. Hassid* illustrates both points.

Cedar Point Nursery involved a California law giving labor organizers the right to go into a farm to talk with farmworkers, thereby interfering with the owner's ability to exploit its workers. (No, that's not quite the language the Court used.) The Supreme Court held that, because the government was authorizing an intrusion onto farmland, this was a taking of property that the government would have to pay for. Rick Frank wrote a great overview of the ruling's implications last week, but I want to dive deeper into a couple of points.

The Court's ruling seems simple enough: Physical invasions of property are *per se* takings. Only things turn out not to be quite so simple after all. First of all, what counts as a physical invasion of property? Isolated invasions of property may be trespasses rather than takings. In a previous case, the Court had said temporary invasions "are subject to a more complex balancing process to determine whether they are a taking." Not a sharp, bright-line distinction.

Moreover, the Court now says, "limitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public." Thus, in a previous case, the Court had upheld a California law allowing protest activities at a shopping mall. That ruling is apparently still intact.

The Court will undoubtedly have to do more fine tuning of its definition of physical invasions. You could argue that laws banning discrimination in employment are takings under *Cedar Point Nursery*. They say that you have to hire people you don't want to hire because of their race or gender. Then you have to let those people work in your offices or factory — a physical invasion of property! Libertarians have actually made that argument but I'm sure that the Court will say this isn't the kind of "physical invasion" they were talking about. For the same reason, I don't think the Court will strike down state laws that forbid businesses to deny access to people carrying guns.

And what about other kinds of "invasions" like flying drones above property, or "invading" a computer with unrequested emails? What about pollution or ground

water contamination from a government facility?
There are many, many circumstances where the government enters people's lands or authorizes others to do so. The Court realized that applying the physical invasion rule for all it's worth would create havoc. So the Court added a series of exceptions which may very nearly threaten the "physical invasion" rule. The most important is that "many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights." Those restrictions are often called background norms.

What's a background norm?, you might wonder. One, as the Court recognized in a prior case, is the common law of public and private nuisances — two legal doctrines notorious for their vagueness. Another is "public or private necessity." That includes, according to a source cited by the Court, "entry to avert an imminent public disaster" or "to avert serious harm to a person, land, or chattels." Then there's the right to enter property to carry out lawful arrests and searches. In addition, there are laws that "condition the grant of a benefit such as a permit, license, or registration on allowing access for reasonable health and safety inspections." The Court later phrases these as access requirements "germane to any benefit provided to agricultural employers or any risk posed to the public." The scope of these various exceptions isn't exactly self-explanatory. Nor is it clear whether there may be other background norms.

As you can see, while appearing to create clarity, the Court's opinion may create about as many new questions as it answers.

Moreover, the Court has also expanded the category of background norms of property, but has provided no indication of the limits of those norms. A previous case recognized public and private nuisances, but now the Court has added another broad category (preventing serious harm to the public, individuals, land, or property). Lower courts have identified a wide array of other background norms such as public access to beaches, the public trust applying to water bodies, and wildlife protection.

The Supreme Court actually got the idea of background norms rolling in the earlier *Lucas* case, where it tried to simplify takings law and establish a bright line rule as it did in *Cedar Lake Nursery.* The bright line rule in *Lucas* was that a regulation becomes a taking if it eliminates 100% of the economic value of property. The Court then recognized an exception to this "total taking" rule for background norms. Apparently, some of the Justices insisted on the exception in order to prevent

application of the categorical rule to laws such as bans on land uses that create disaster risks.

State courts have expanded the category of background norms to the point of nearly eviscerating the "total taking" rule. It also turned out to be very hard to determine exactly what property interests are covered by the 100% rule, just as I expect it will be hard to determine when trespasses turn into "invasions." In the end, the *Lucas* rule turned out to be something of a hollow shell.

When the Court establishes categorical rules like "physical invasions are takings" or "eliminating all property value is a taking", the long-term effect is to add complexity to the law, as more and more epicycles are added to the legal doctrine in order to come to sensible results. We will end up with a complicated definition of what constitutes a "physical invasion," a multi-factor test to determine whether one or more trespasses are or are not "invasions," and an ever-burgeoning set of background norms. Then there will be a series of exceptions.

Property owners may end up losing more than they gain from *Cedar Point Nursery*. Cases covered by categorical rules (physical invasions and total takings) are much less common than cases involving more moderate restrictions on property. Those cases are governed by what's called the *Penn Central* test that tests the reasonableness of the restriction on property. But where a background rule applies, a court doesn't even need to consider the issue of reasonableness. The Court has given landowners in the narrow area of physical takings some added protection. But in the course of doing so, it has also strengthened the government's ability to fend off the claims of many more landowners in garden-variety land use and environmental cases, by waving the banner of "background norms."

The number of landowners who lose out will very likely exceed the number who win from the ruling in the relatively few cases dealing with physical intrusions. Thus, from the point of view of most landowners, the Supreme Court's ruling may turn out to be a loss in practical terms.

In short, in the upside-down, inside-out world of regulatory takings doctrine, nothing is as it seems.