

IS LABOR LAW INTERNAL OR EXTERNAL TO PRIVATE LAW? THE VIEW FROM CEDAR POINT

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This Article contrasts two views of the relationship between the fields of work law and private law. The “internal” view, propounded by Hanoch Dagan, would bring work law into the domain of private law by recentering the latter, including property law, around liberal values of reciprocal respect for autonomy. The “external” view locates the law of work in an overlapping but distinct domain that we might call “social law,” where it operates as a set of externally imposed conditions on the activity of employing others. When workers’ rights and interests come into conflict with those of owner-employers, the two views face off on the constitutional terrain of takings. In principle, the internal view might afford a better defense against takings challenges to laws that constrain property owners’ entitlements in the interest of those who work there, for it would redefine the former to reflect the latter. The external view relies more on takings law than property law to accommodate others’ interests when they conflict with traditional property rights. Unfortunately, the U.S. Supreme Court’s recent decision in Cedar Point Nurseries v. Hassid deals a heavy blow to both views. Its neo-Blackstonian conception of property rights rejects the notion that property law itself recognizes workers’ interests and entrenches that conception of property rights within the constitutional law of takings, sharpening the takings sword against social law’s regulation of property rights in the interest of others, including workers. Cedar Point thus underscores and magnifies the challenges that modern U.S. takings law, with its constitutional definition of property rights, poses to the advancement of workers’ rights, whether those are understood as internal or external to property law.

INTRODUCTION

Private law does not feel like home for most U.S. scholars of the law of work. That is partly due to historical antagonisms. For many decades before the New Deal, private law in the form of strong private property rights and the liberty of contract reigned supreme against legislative and collective assertions of workers’ rights. But then, labor law gained its independence from private law. Labor was not a commodity, and employment was no ordinary contract. Distinct principles and institutions were necessarily devised to govern this *sui generis* domain.¹

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But there is a case to be made for rejoining the private law team. If the legal universe must be divvied up into private law and public law, the law of work seems to belong largely to private law. Most of the law of work (in the private sector) governs not the structure of the polity or relations between citizens and the government but relations between nongovernmental actors. And as the once-dominant public paradigm of collective bargaining has retreated into an ever-smaller niche of the U.S. labor market, workplace governance and employment relationships are increasingly shaped by the conventional stuff of private law—property rights, individual contract, and the managerial power that emanates from both. In the wake of those trends, perhaps those of us in the field of work law should take up the tools, and engage with the intellectual currents, of private law theory.

That prospect is more inviting in light of the liberal autonomy-based conception of property developed by Hanoch Dagan, separately and with Avihai Dorfman,² and the similarly inspired choice theory of contract that Dagan has developed with Michael Heller.³ Dagan's recent book, in particular, elaborates "liberal property's underlying commitment to reciprocal respect for self-determination,"⁴ and explains how property law does—and should better—reflect that commitment. (Without meaning to neglect others in this camp,⁵ including Dagan's collaborators, I will call this the Daganian view.) These scholars contend that many of the values that animate the law of work—including principles of relational justice—are immanent within property and contract law, properly understood. "Come on in," they say; "the water's fine!"

Perhaps we work law scholars, in keeping private law at arms-length, are responding not to something essential in that domain but to conventional paradigms of contract and property—a conception of property that is centered on the rights of owners and a conception of contract-as-consent that is largely blind to the power disparities characteristic of relations between firms and workers. Those conceptions animated the common law, equitable, and constitutional doctrines against which workers and their organizations fought for decades before the New Deal. Labor and employment law has seemed to me more a creature of the public and mostly legislative interventions

Hanoch Dagan for the ongoing exchange that spawned this piece. I am also grateful for valuable research assistance from Jacob Metz-Lerman and Dane Thomas.

1 This history is reviewed in Cynthia Estlund, *The Fall and Rise of the Private Law of Work*, in RESEARCH HANDBOOK ON PRIVATE LAW THEORY 412 (Hanoch Dagan & Benjamin Zipursky eds., 2020).

2 See HANOCH DAGAN, A LIBERAL THEORY OF PROPERTY (2021); Hanoch Dagan, *Autonomy and Property*, in RESEARCH HANDBOOK, *supra* note 1, at 185; Hanoch Dagan & Avihay Dorfman, *The Human Right to Private Property*, 18 THEORETICAL INQUIRIES L. 391 (2017).

3 HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS (2017). For a concise overview, see Hanoch Dagan and Michael Heller, *Choice Theory: A Restatement*, in RESEARCH HANDBOOK, *supra* note 1, at 112.

4 DAGAN, *supra* note 2, at xii.

5 See, e.g., GREGORY S. ALEXANDER, PROPERTY AND HUMAN FLOURISHING (2018); GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY (2012); Joseph William Singer, *Democratic Property: Things We Should Not Have to Bargain For*, in RESEARCH HANDBOOK, *supra* note 1, at 220.

that followed than of the underlying paradigms of property and contract—more external than internal to private law. But maybe that is a false dichotomy.

Should scholars of the law of work throw in their lot with Dagan and other private law theorists who are seeking to reconstruct those private law paradigms along more humane and egalitarian lines? Or is there indeed a basic cleavage between the law of work and private law? And if the law of work is not private law, what is it? Lurking behind those questions is another: What is at stake in locating work law inside or outside the domain of private law? I will approach these questions mainly through the lens of the U.S. law of work and its relation to private law, especially property law, though some of the analysis will resonate with experience in other countries.

I will begin by identifying some institutional and normative features of the law of work that fit awkwardly at best into the private law domain, and others that seem to place it outside public law as well. I suggest an alternative location for the law of work, along with some other bodies of regulatory law, within the largely forgotten category of “social law.” Work-law-as-social-law might best be conceived as a set of externally imposed, mostly statutory conditions on the activity of employing others. I compare work-law-as-social-law to the Daganian proposal for liberalizing private law—specifically the law of property—so as to incorporate workers’ rights into private law itself. These two views—which we may call the external and internal views of the relationship between work law and private law—potentially face off in the U.S. on the constitutional terrain of “takings,” where conflicts between property rights and public regulation, including laws regulating work, are adjudicated. In principle the Daganian internal view—while it would require some major reconstruction of property law—might afford a better defense against takings challenges to laws that constrain property owners’ entitlements in the interest of those employed there, for it would redefine the former to reflect the latter. The external view relies less on a reconstruction of property law than on takings law itself—specifically, a regulatory takings doctrine that is highly deferential to social regulation—to accommodate workers’ interests when they conflict with property rights. Until recently, takings law largely fit that prescription.

The takings terrain was shaken up recently in *Cedar Point Nursery v. Hassid*,⁶ in which the U.S. Supreme Court held that a 40-year-old California regulation—which allows union organizers to meet with agricultural workers at the workplace—was a “taking” of private property. *Cedar Point* dealt a harsh blow to both the internal and external views of the law of work relative to property law. Its neo-Blackstonian conception of property betrays no recognition of the rights and interests of workers and other non-property owners; indeed, it effaces such recognition when granted by the positive state law of property. By entrenching its neo-Blackstonian conception of property rights within the federal constitutional law of takings, *Cedar Point* sharpens the takings sword against social regulation of property rights in the interest of others, including workers. *Cedar Point* thus underscores and magnifies the challenge that

6 *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021).

modern U.S. takings law poses to the advancement of workers' rights, whether those are understood as internal or external to property law.

I. THE LAW OF WORK: PRIVATE LAW, PUBLIC LAW, OR SOCIAL LAW?

The law of work deals mainly with relations between nongovernmental actors, usually between private corporations and individuals; hence the kinship with private law.⁷ Undoubtedly, the employment relationship is contractual at some level: Workers and employers choose whether to enter the relationship at all; and many of its terms are established through what passes for individual bargaining within labor markets—outside the union sector, that is, and above the publicly established floor of employment law. In that residual domain of private ordering, the terms of employment are governed by contract law—not some generic law of contract but that of a distinct “sphere” of contract, as Dagan and Heller put it.⁸ There is much more to say about how contracting does and should work within the sphere of work.⁹ But my focus here will be on the large body of work law that does not fit that description—the minimum standards and mandatory rights and benefits of employment law and all of collective labor law, which establishes the ground rules for union organizing and collective bargaining. Together that is most of labor and employment law as it is taught and practiced. Even though that body of law governs relationships between individuals and nongovernmental entities, several of its features trouble its classification as private law.

A. *Work Law as Private Law: A Square Peg in a Round Hole*

Some parts of the law of work seem plainly to fall outside private law. First, the mostly statutory and constitutional law of public employment, which governs relations between government agencies and the workers who perform government functions, seems to fall on the public law side of the divide. Yet it has more in common with the law of private employment than with anything else in public law. Second, much of collective labor law—such as the labyrinthine law defining the structure and subjects of collective bargaining and regulating union organizing and strikes—is hard to fit within or alongside the traditional private law boxes of contract, property, and tort.

7 In many civil law countries, laws governing work appear among the private law provisions of the civil code, and labor law professors are members of the private law faculty. See, e.g., Walter Ahrens & Mark S. Dichter, *Germany*, in 1 INTERNATIONAL LABOR AND EMPLOYMENT LAWS 5 (William L. Keller & Timothy J. Darby eds., 4th ed. 2015). By contrast, France's Labor Code is separate from its Civil Code. Code du Travail, [C. trav.] [Labor Code] (Fr.).

8 See DAGAN & HELLER, *supra* note 3, at 5.

9 The question is taken up in other contributions to this volume. See, for example, Hugh Collins, *Relational and Associational Justice in Work*, 24 THEORETICAL INQUIRIES L. 26 (2023); Hanoch Dagan & Michael Heller, *Can Contract Emancipate? Contract Theory and the Law of Work*, 24 THEORETICAL INQUIRIES L. 49 (2023); Sabine Tsuruda, *Good Faith as a Contractual Foundation for Workers' Rights*, 24 THEORETICAL INQUIRIES L. 206 (2023).

The apparent lack of fit between much of the law of work and the rest of private law corresponds to more systematic cleavages between the two. Historically, the birth of modern work law in the United States—after decades of struggle by workers and their unions against the judicially enforced primacy of private property rights and contract-as-consent—represented a pivotal moment in U.S. constitutional law.¹⁰ The dramatic New Deal recalibration of the judicial role in reviewing the constitutionality of federal and state legislation was embodied in a pair of 1937 Supreme Court decisions upholding legislative power over labor relations and terms of employment.¹¹ That origin story alone engenders skepticism, at least in the United States, toward the idea of labor-law-as-private-law. Still, the issue deserves a more conceptual (and less provincial) treatment.

The historic clashes that gave birth to the modern U.S. law of work also highlight its intense politicization. Labor law has almost always and everywhere been a matter of sharp political contestation—far more than is typical in the core private law fields. The dynamics that generate minimum labor standards or collective bargaining frameworks, for example, look nothing like the disinterested ratiocination of common law adjudication (or the comparatively nonpolitical expert-driven processes by which private law is developed in civil law countries). The endemic politicization of the law of work is also related to some institutional features that tilt toward public law versus private law. Whereas U.S. private law is quintessentially judge-made common law, the law of work is largely statutory. Of course, legislation figures in other contractual fields—like franchising, insurance, residential leases, and consumer sales—and constitutes private law in code-based jurisdictions. But much labor and employment legislation is also administered partly or wholly by regulatory agencies, with or without a role for private enforcement.¹²

The roles of politics, legislation, and public administration in turn reflect a distinctive normative dimension of the law of work: Most of it weighs in squarely on the side of workers, overrides contrary contractual terms, and confines the scope of employer prerogatives and property rights based on a societal interest in employment and labor markets. Moreover, it asserts a public stake in wages that are too low, in workplace deaths and injuries, in suppression of union organizing, and in employment discrimination and segregation.¹³ History is again instructive: Major pillars of modern U.S. labor and employment law—especially the NLRA, the Fair

10 For my own brief account of the historic antagonism between organized labor and private law, see Estlund, *supra* note 1, at 412.

11 *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

12 The NLRA, in particular, is administered by the NLRB, with private complainants having little role in adjudication and enforcement.

13 Dagan and Heller explain minimum terms of employment as reflecting standards of “interpersonal decency” and “relational justice” that are internal to their conception of contract. DAGAN & HELLER, *supra* note 3, at 128-29. But those laws also take aim at “substantial systemic external effects on third parties,” like other public-policy constraints on contract that they describe as “external to contract.” *Id.* at 127.

Labor Standards Act, and Title VII of the Civil Rights Act of 1964—were enacted amidst civil strife that underscored the public stakes in private sector work relations.

The public interest in private employment is not only in maintaining public order, of course, but in ensuring the vitality of democratic governance. Autocratic employer power—what Elizabeth Anderson calls “private government”—threatens workers’ autonomy as citizens,¹⁴ and the extreme economic inequality with which it is associated undercuts the political equality that lies at the heart of republican self-government.¹⁵ Concerns about the distribution of power at work are part of what Joseph Fishkin and William Forbath call “constitutional political economy.”¹⁶ Moreover, some labor rights qualify as “fundamental” within the language and jurisprudence of public international law.¹⁷ As Nikolas Bowie has highlighted recently, much of the law of work represents incremental advances of democracy over private property and monied interests—not only democratic political processes but democratic control over economic life.¹⁸ Hence the pull toward public law for many labor law scholars.

So we have many reasons for doubting that the law of work occupies the same region of the legal cosmos as property, contract, and tort law; and many of them seem to point toward public law as a proper home. Yet public lawyers generally define their bailiwick to include the constitutional *structures* and legislative and regulatory *processes* that produce the law of work, but not the *content* of the law that is produced. That is left to us labor lawyers, and we are not them. As for constitutional *rights*, U.S. private sector workers essentially have none vis-à-vis their employers; that is ordained by “state action” doctrine, which confines the reach of constitutional rights to relations between the state and the citizens.¹⁹ Parts of labor and employment law are, to be sure, occupied with constructing some semblance of rights and citizenship for workers, and with meeting the demands of international human rights law, through common law, legislation, and collective bargaining. But the salience of those public values seems insufficient to place work law in the category of public law. So where does the law of work fit in the legal cosmos?

B. *The Law of Work as Social Law?*

One prominent theme in the law of work that arguably sets it apart from both private law and public law is its concern with the *collective* interests of its worker-subjects.

14 ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT) (2017); Cynthia Estlund, *Book Review—Rethinking Autocracy at Work*, 131 HARV. L. REV. 795 (2018).

15 See JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION (2022); Joseph Fishkin & William Forbath, *The Anti-Oligarchy Constitution*, 94 BOS. UNIV. L. REV. 671 (2014).

16 *Id.*

17 See Virginia Mantouvalou, *Are Labour Rights Human Rights?*, 3 EURO. LAB. L.J. 151 (2012).

18 Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160 (2021).

19 For a deep dive into the historical evolution and implications of state action doctrine in the employment setting, see SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT (2014).

Those collective interests are more partial than “the public interest,” but are not just the aggregation of workers’ individual interests. The whole history of the labor movement, and its central animating principle of *solidarity*, recognizes that workers’ interests are tied up with each other, not only within but across workplaces. The problem can be expressed though not wholly captured in economic terms: labor market and product market dynamics, left alone, tend to depress wages and working conditions, at least for workers without scarce skills, below socially tolerable levels. Many aspects of the law of work—from minimum labor standards to mandatory rights and collective bargaining structures—respond to those dynamics by putting boundaries on individual choice, labor market competition, the commodification of labor, and the degradation of work and wages, essential as those are to the well-being of workers and their families. Indeed, the law of work operates largely to defeat private decision-making on the terms and conditions of work; it pointedly denies that they are a matter of individual autonomy and fairness as between the parties.

The law of work arose out of struggles over industrialization, and it challenged and scrambled conventional legal categories across the industrialized world.²⁰ It calls for a category that overlaps with public and private law but has its own distinct character. For now, let us call it “social law.” As Duncan Kennedy recounts in an illuminating essay, French and German legal theorists began in the late 19th century to elucidate a concept of “social law” that straddled, and perhaps muddled, the traditional boundaries of public law and private law.²¹ Theorists including Otto von Gierke,²² Eugen Ehrlich,²³ and Georges Gurvitch²⁴ were part of a transatlantic conversation with U.S. adherents of “sociological jurisprudence” and Legal Realism about how law should evolve and was evolving in response to the momentous changes of the past century. One recurring preoccupation was the inequality, dependency, and subordination that rendered contract-as-consent a problematic legal platform for some market relationships. Said von Gierke in 1889, “[u]nrestricted freedom of contract destroys itself. A fearsome weapon in the fist of the strong, a blunted tool in the clutch of the weak, it becomes the means of oppression of one by another, the merciless exploitation of intellectual and economic power.”²⁵ Plainly the law of labor and industrial relations, then in the making, was at the heart of these discussions.

Although a great deal of law enacted in the twentieth century on both sides of the Atlantic fits the bill, “social law” never quite made it into the canon alongside private and public law. In part that is because what Kennedy called “the social” was

20 For an illuminating survey of the rise of a distinct field of labor law in the early 20th century, see Matthew W. Finkin, *Comparative Labour Law*, in OXFORD HANDBOOK OF COMPARATIVE LAW 1110 (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2019).

21 Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT 19, 25-71 (David M. Trubek & Alvaro Santos eds., 2006).

22 OTTO VON GIERKE, THE SOCIAL ROLE OF PRIVATE LAW (Ewan McGaughey trans., 19 GERMAN L.J. 1017 (2018)) (1889).

23 Brian Z. Tamanaha, *A Vision of Social-Legal Change: Rescuing Ehrlich from ‘Living Law’*, 36 LAW & SOC. INQ. 297 (2011).

24 Georges Gurvitch, *The Problem of Social Law*, 52 ETHICS 17 (1941).

25 VON GIERKE, *supra* note 22, at 1080.

less a distinct legal category than a mode of legal consciousness and discourse—one that envisioned law “as a regulatory mechanism that could and should facilitate the evolution of social life in accordance with ever greater perceived social interdependence at every level.”²⁶ That included much “private law.” Indeed, much of what we might call social law in Germany is formally part of private law and the Civil Code. In the United States, the intellectual and political struggle to create space for social law alongside public and private law coincided with and contributed to a surge of skepticism, led by the Legal Realists, about the utility and coherence of such categorical distinctions.²⁷ That skepticism survives among scholars of the law of work, and percolates through this Article’s provisional placement of the law of work within social law.

Still, the concept of social law, better than either private law or public law, captures the societal and collective stakes in voluntary relationships between individuals and the propertied non-state actors, such as employers and landlords, that exercise power over those individuals through their control of crucial resources. To paraphrase Karl Polanyi, the commodification of labor and land (and housing)—that is, their incorporation into markets where they are bought and sold in exchange for money—provoked a countermovement to socialize markets and protect the weaker parties in these transactions, mainly through regulation.²⁸ The sum of those public regulatory interventions into the private law of property and contract might be better understood as its own thing—as social law—than as elaborations of private law. We can think of social law as including the law by which the society, mainly through the legislature, imposes socially acceptable conditions on the use of one’s property to employ (or house) others, given the outsized impact on those others’ lives and livelihoods. It might include more than that, but that loose definition will suffice for present purposes.

To be sure, we probably could divvy up the law of work into public law and private law components, and subdivide much of the latter into law that governs individual or collective labor contracts, or defines tort-like injuries, or redefines property rights. But we would miss the wholeness of the law of work—the institutional commonalities and the interrelationships between its components—if we separated out those various elements. And we would obscure its basic character if we effaced the crucial roles of public policy, public administration, constitutional law, and quasi-constitutional principles that shape even private sector work relations.

The point is certainly not to exclude the law of work from private law fields and courses. As noted above, some of the law of work clearly is part of private law (as with the law of workplace torts or of the individual employment contract). As an

26 Kennedy, *supra* note 21, at 22. Similarly, Ewan McGaughey views “social law” not as a separate category but as a better depiction of all law, one that “sees that every legal subject concerns *associations* among people: from exchanges, to partnerships, to polities.” EWAN MCGAUGHEY, A CASEBOOK ON LABOUR LAW 7-8 (2021).

27 See Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PENN. L. REV. 1423, 1426-27 (1982).

28 KARL POLANYI, *THE GREAT TRANSFORMATION* (1944).

intellectual matter, the fields can illuminate each other; and as a normative matter, there is much to be gained on both sides of the ledger from serious engagement of private law scholars and teachers with the private law of work. Yet the whole of the law of work can usefully be classified as “social law,” much of which impinges on property and contract from without.

C. Is the Law of Work a Better Fit with a Daganian Conception of Private Law?

The idea of social law emerged, and seems most urgently needed, in a legal world in which private law fails to reckon seriously with the interests of those on the weaker side of lopsided market transactions and relationships. But private law itself can evolve and has evolved to take greater account of those interests, especially in a more industrial and urbanized society. And it might be pushed further in that direction. So let us return to the idea of work-law-as-private-law through the lens of the liberal Daganian view of property and contract, on which those private law paradigms themselves are, or ought to be, animated by “reciprocal respect for self-determination” and the demands of relational justice. The institution of private property, in particular, is only *justified*, on Dagan’s view, if it meets those demands. On that view, much of the law of work is not a politically contingent external imposition on private employment relationships; it is internal to those paradigms, properly understood, insofar as it expresses normative aspirations that ought to infuse the law of property and contract itself.

Thus far, this is all quite abstract. One might wonder what is at stake in treating workers’ rights as either internal or external to private law. More than labels might be at stake. The Daganian view of property law shows its teeth, so to speak, where the legislature *fails* to legislate in favor of workers’ rights versus property owners’ rights. (And from here on, I will focus mainly on property law’s relation to the law of work, as opposed to private law and social law more broadly.) On Dagan’s view, we need not await legislative action to vindicate crucial interests of workers vis-à-vis employer-property owners; the values at stake are immanent in property, as best understood, and judges can get there on their own through common law adjudication. For those who would expand workers’ rights vis-à-vis employer property rights, that is one virtue of Dagan’s liberal theory of property. Another virtue might appear when the legislature *does* advance the interest of workers vis-à-vis employer-owners: if courts recognize workers’ rights and interests as internal to the meaning of property itself, that might avert some conflicts between property rights and workers’ rights that, in the U.S., can otherwise tee up a regulatory takings challenge.

Consider, for example, *State v. Shack*, in which the New Jersey Supreme Court held that an agricultural employer had no right under the state’s trespass law to bar the entry of individuals who were offering legal and medical aid to migrant farm workers who lived on the employer’s land.²⁹ *State v. Shack* might be Dagan’s *pièce de résistance* within U.S. property law. No positive legislation or constitutional doctrine

29 *State v. Shack*, 277 A.2d 369 (1971).

was at hand, but none was required, to support the claimed right of entry, for New Jersey law simply did not recognize the entry as a trespass. “Property rights serve human values. They are recognized to that end and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises.”³⁰ If that is the shape of property law itself, then no new law would be needed to ensure access for those seeking to aid migrant farm workers or inform them of their rights; and as to any legislation affirming or codifying that access right, a takings challenge to that law would not get off the ground. That suggests some of what might be gained for workers’ rights in a world of Daganian property rights.

Thus far, however, we have politely ignored a sizable gap between the “is” and the “ought” of the Daganian view.³¹ I find *State v. Shack* and its humanistic vision of property inspiring. But is that what property law is really about? The question does not answer itself. Many property doctrines do require owners to accommodate others—but mainly others with their own recognized property interests, like tenants, co-owners, or neighboring landowners. Most of the law that requires owners to accommodate non-owners has come by way of legislation—civil rights, environmental, and employment laws, for example—that is conventionally seen not as part of property law but as trumping it from without. That view is bolstered in the U.S. by the fact that much of the trumping legislation has come from Congress, which the Supreme Court has said is not “possessed of residual authority that enables it to define ‘property’ in the first instance.”³² But Congress is empowered to trump state property rights and has often done so.

I do not mean to overstate the obduracy of property law itself to the rights of others.³³ Support for Dagan’s thesis can be found not only in *State v. Shack* but, for example, in Blackstone’s description of the common law duties of innkeepers to serve all comers on nondiscriminatory terms.³⁴ Those duties receded in the post-Civil War era, but were restored and expanded—mainly through state and federal civil rights legislation—in the 1960s and beyond.³⁵ In *Uston v. Resorts International*, the New Jersey Supreme Court took these trends a step further in holding that, as a matter of state common law, owners of places of public accommodation could not exclude members of the public without a legitimate reason.³⁶ A casino thus could not exclude a skilled card counter who was following the state-prescribed rules of the game. No constitutional or statutory right to count cards was in sight, but none

30 *Id.* at 372.

31 Katharina Pistor, *Liberal Property Law vs. Capitalism*, LAW & POL. ECON. PROJECT (Jan. 27, 2021), <https://lpeproject.org/blog/liberal-property-law-vs-capitalism/>.

32 *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

33 I’ve written elsewhere about the common law evolution of others’ rights of access to private property. Cynthia Estlund, *Labor, Property, and Sovereignty after Lechmere*, 46 STAN. L. REV. 305 (1994).

34 3 BLACKSTONE’S COMMENTARIES 16 [1765].

35 Had Congress failed to enact the Civil Rights Act of 1964, the Supreme Court might have been poised to bar discrimination in public accommodations based on the Constitution’s equal protection clause. *Bell v. Maryland*, 378 U.S. 226 (1964).

36 *Uston v. Resorts International*, 445 A.2d 370 (1982).

was needed. As in *State v. Shack*, New Jersey property law itself contained all the resources needed to vindicate rights of access to such places.

Still, cases like *Shack* and *Uston* are unusual. Rights of access to private property of another have more often come through positive legislation (or occasionally a constitutional trump card) rather than through principles immanent in property law itself. A landmark case in that vein was *Marsh v. Alabama*, a 1946 Supreme Court decision recognizing a constitutional right to distribute literature in privately owned “company towns”: “The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”³⁷ The principle reaches beyond property open to the public, as underscored by the *Marsh* Court’s reliance on a then-recent labor case upholding the statutory rights of workers to speak and associate with each other in ordinary workplaces.³⁸ The rights of others in both cases plainly overrode any contrary principles of state property law, but they were not depicted as internal to property law but as “statutory and constitutional rights” that “circumscribe” property rights.

I agree with Dagan that the positive law of property law *should* more broadly accommodate the legitimate interests of others, and I would welcome the reconstruction of property law around principles of relational justice and reciprocal respect for self-determination. But there is lots of history, doctrine, and theory on the side of those who would resist it, whether on normative or ideological grounds or based on the internal logic and coherence of property law—on what Tom Merrill calls its “architecture.”³⁹ Once we recognize that the project is one of reconstruction, we might wonder whether the project is more likely to find traction than a normative demand for more encompassing social law protections through legislation. It is true that the latter generally has to work through democratic political channels. But maybe that is at least in part a virtue, not a vice, of the social law framing of the project. It is in any case a feature of the law of work as we know it.

The law of work is largely a product of political conflict, contestation, and compromise, as we have seen. There is little of that to be found within Dagan’s theories of private law.⁴⁰ He sees more tension than harmony between liberal principles of property and democratic politics, in which aggregate preferences may prevail over the demands of justice. That is a fair concern. There are bedrock values at stake in the law of work, including basic values of autonomy and justice, which may afford a basis for criticizing legislation (or the lack of it). But those values should also leave room for democratic contestation and choice.

Much of the law of work—from minimum wages to the boundaries on collective action—reflects political clashes among contending forces. Workers’ campaigns for more protection, more benefits, and more power are grounded in collective *interests*

37 *Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

38 *Id.*, citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

39 See, e.g., Thomas W. Merrill & Henry E. Smith, *The Architecture of Property*, in RESEARCH HANDBOOK, *supra* note 1, at 134; Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

40 See, e.g., DAGAN, *supra* note 2, at 76. The word “legislation” first appears on page 118.

as well as rights and values. And some of the values at stake—like the value of active citizenship in a democratic polity—are of a different genus than the liberal values that animate Dagan’s conception of property law. Workers’ political campaigns in turn clash with counter-campaigns based on employer self-interest, economics, and contrasting prescriptions for a well-functioning polity. Rather little of this reflects reasoning from within the complex and evolving bodies of property and contract law; and that would be so even if those bodies of law were internally animated by principles of autonomy and relational justice, as in Dagan’s account.

To be clear: Locating most of the law of work outside of private law—as I am provisionally inclined to do—is not meant to undercut the powerfully appealing project of recentring the latter around reciprocal respect for autonomy and relational justice.⁴¹ But that project does not fully encompass the aspirations that animate the law of work or the dynamics that drive it. Moreover, that project faces strong headwinds from within private law. At least as the law currently stands, I think the law of work is better understood as a set of external social limits or conditions on the activity of employing others. What does that mean when those bodies of law conflict?

II. THE RUBBER HITS THE ROAD: *CEDAR POINT* AS A WINDOW ON CONFLICTS BETWEEN WORKERS’ RIGHTS AND PROPERTY RIGHTS

If the social law of work is distinct from and external to property law, then workers’ rights can conflict with property rights, at least in their conventional shape; and property rights can become a constitutional cudgel against social law. That brings us to the question of what counts in U.S. law as a “taking” of private property, and to *Cedar Point Nursery v. Hassid*, in which the Supreme Court took a seriously wrong turn.⁴² I will use the case to illuminate the two contrasting views of the relationship between the law of work and property law sketched above.

A. *The Case and the Context*

In *Cedar Point*, agricultural employers challenged a 40-year-old California regulation, adopted under the state’s Agricultural Labor Relations Act (ALRA), that entitles

41 I recognize that the implications of work-law-as-private-law run in both directions. Dagan argues persuasively that bringing work law inside the field of private law would contribute to recentring the latter around the rights and interests of economically weaker parties. Here I flag some concerns about the fit between work law and private law, but otherwise focus on the implications of work-law-as-private-law for work law. My chief aim here is to ensure that, in case of conflict, property law *accommodates* the competing interests of workers, even if their legal protection emanates from outside property law itself.

42 For my extended analysis of *Cedar Point*, see Cynthia Estlund, *Showdown at Cedar Point: “Sole and Despotism” Gains Ground*, 2021 SUP. CT. REV. 125 (2022). For Dagan’s take on *Cedar Point* in advance of the decision, see Hanoah Dagan, *Liberal Property for Skeptics, Part 2, LAW AND POLITICAL ECONOMY PROJECT* (Feb. 4, 2021), <https://lpeproject.org/blog/liberal-property-for-skeptics-part-2/>.

union organizers to meet with workers on their employers' property for up to three hours per day—before and after employees' shifts and during their lunchbreaks—for up to four 30-day periods each year.⁴³ The regulation applied whether or not workers lived on the employer's property; they did not in the case at issue. The employers claimed that the regulation constituted an unconstitutional "taking" of their private property.

Before *Cedar Point*, this regulatory takings claim, like nearly all such claims, would have been governed by the so-called *Penn Central* balancing test.⁴⁴ The physically invasive character of the government action would have weighed in favor of a taking.⁴⁵ But the balancing test hinges on substantial interference with the use and value of the relevant parcel and with owners' reasonable investment-backed expectations, and there was no evidence of such interference in *Cedar Point*. Yet the Court held (6-3) that the California regulation effected a *per se* taking, regardless of its economic impact, because it "appropriate[d] a right to invade the growers' property."⁴⁶

The *per se* rule for physical takings originated in *Loretto v. Teleprompter*,⁴⁷ which held that a New York law requiring landlords to permit installation of a cable and cable box was a *per se* taking because it imposed a "permanent physical occupation"; it actually dispossessed the owner from a portion of its property. *Loretto* took pains to emphasize that most government-authorized physical invasions would still be subject to *Penn Central* balancing.⁴⁸ But the line drawn in *Loretto* did not hold. In *Nollan v. California Coastal Commission*,⁴⁹ the Court held that the state's imposition of a public easement along a privately owned stretch of Pacific beach would amount to a permanent physical occupation and a *per se* taking. Although it allowed only transitory passage by a shifting procession of individuals, the easement would permit public passage at any time. *Nollan's* hazier line did not hold either. After *Cedar Point*, nearly all recurring physical invasions imposed by the government—at least as to property not open to the public—are *per se* takings, however minimal the impact on the use and value of the property.⁵⁰

43 Agricultural workers are among the groups excluded from the federal National Labor Relations Act, 29 U.S.C. § 152(3); their collective rights are thus governed by state law.

44 *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

45 *Id.*

46 *Cedar Point*, 141 S.Ct. at 2072. That raises questions about what "just compensation" will require (probably not much), and what process that demand will trigger (depending on state law, a potentially burdensome process indeed). See Estlund, *supra* note 42, at 20-21.

47 *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

48 In particular, the *Loretto* Court reaffirmed both *Kaiser-Aetna v. United States*, 444 U.S. 164 (1979), which found no *per se* taking (though a taking on balancing grounds) in the imposition of a public "easement of passage" in a pond that had been made navigable by the owner's investments, and *PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980), which found no taking in a California state constitutional right to engage in non-disruptive political expression in a private shopping mall. See *Loretto*, 458 U.S. at 433.

49 *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

50 *Cedar Point*, slip op. at 7-10. In distinguishing *PruneYard*, *supra* note 32, the Court said: "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." *Cedar Point*, slip op. at 14-15.

Cedar Point marks the first time since the *Lochner* era that the Court has overturned any labor and employment statute or regulation on takings grounds. But it is not the first time labor laws have come into conflict with property rights. In the 1945 *Republic Aviation* case,⁵¹ the Court upheld workers' right under the NLRA to wear union insignia, distribute union literature, and solicit union support at the workplace during non-work hours. The Court later extended *Republic Aviation* in *Eastex v. NLRB*⁵² to include other types and topics of communication among employees at work, including some "political" speech. As Justice Rehnquist pointed out (dissenting in *Eastex*), these cases sanctioned a common law trespass by nullifying the owner-employer's right to expel workers for violating conditions the owner had imposed on their entry onto the property: "A licensee who goes beyond the rights and privileges granted by the license becomes a trespasser."⁵³ (For Rehnquist that militated for a narrower construction of workers' rights, consistent with *Republic Aviation* but not *Eastex*.⁵⁴) Indeed, the very decision upholding the NLRA's constitutionality in 1937, *NLRB v. Jones & Laughlin Steel*, had effectively sanctioned a trespass by enforcing a Board order reinstating employees whom the employer had ejected for union activity.⁵⁵

Those rulings exemplify the wide swath of restrictions that social law imposes on employer property rights. The Civil Rights Act of 1964 abrogated employer property rights that many states recognized in 1964—that is, the right to exclude or expel workers from their property on discriminatory grounds. Many federal and state statutes also limit employers' right to fire workers—whistleblowers, for example—or to control their workplace conduct, and call for reinstatement of workers who are wrongfully fired.⁵⁶ We could go on, but the point is plain: Legislation protecting workers' rights often overrides or restricts employers' property rights, including the right to exclude, without triggering a takings claim worthy of mention.⁵⁷

Of course, *Cedar Point* involved access by union organizers who were neither employed nor seeking employment on the property at issue. The distinction does not bear weight under the conventional law of trespass—which equally supports the right to exclude unwanted "strangers" and the right to eject licensees who have violated owner-imposed conditions on entry. But it does resonate with two Supreme Court decisions—*NLRB v. Babcock & Wilcox*⁵⁸ and *Lechmere v. NLRB*⁵⁹—that

51 *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). The case was cited, with important implications, in *Marsh v. Alabama*, as noted *supra* 37.

52 *Eastex v. NLRB*, 437 U.S. 556 (1978).

53 *Id.* at 580 (Rehnquist, J., dissenting).

54 *Id.* at 581-82.

55 *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

56 See Bowie, *supra* note 18, at 162-63.

57 The takings objection to the public accommodations provisions of the Civil Rights Act was dismissed unanimously and summarily in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1965). Although the *Cedar Point* majority favorably cites *Heart of Atlanta*, Professor Bowie sounds an alarm over the future viability of the civil rights laws after *Cedar Point*. See Bowie, *supra* note 18, at 194-95.

58 *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

59 *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

sharply restricted organizer access to employer property under the NLRA.⁶⁰ Finding a “distinction . . . of substance” *within labor law* between the rights of employees to communicate at work and the rights of union organizers to communicate with them,⁶¹ the Court held that organizers have a statutory right to enter employer property only “if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them,” as in logging camps and remote rural resorts.⁶² I think those decisions misconstrue the NLRA, which sought to empower workers to engage in concerted action across workplaces through unions and their organizer-employees.⁶³ But in any case, *Cedar Point* casts doubt on the viability of even the “highly contingent access right . . . recognized under the NLRA.”⁶⁴ More plainly, the decision seems to doom any future effort to expand organizer access under the NLRA.

The impact of *Cedar Point* on work law is not confined to union organizing. Of greatest concern is the potential clash between Blackstonian property rights and the many laws that limit employers’ power to fire or refuse to hire employees—and thus their right to exclude them—for discriminatory or retaliatory reasons. Will the Court continue to tolerate or ignore those conflicts?⁶⁵ In addition, the Court’s characterization of occasional and limited entries onto employer property as a *per se* taking plainly imperils many state and federal regulatory regimes that require property owners to submit to periodic government inspections to ensure compliance with laws protecting workers, consumers, or the general public. The Court said in *Cedar Point* that “government health and safety inspection regimes will generally not constitute takings.”⁶⁶ Why? Because, says the Court, those inspections might be valid conditions on “the grant of a benefit such as a permit, license, or registration”—provided that they meet the “essential nexus” and “rough proportionality” tests for “exactions.”⁶⁷ But what about inspection regimes that are not linked to a “permit, license, or registration”—like most of those enforcing labor standards? Are those inspections now *per se* takings?

All these questions warrant a closer look than I can give them here.⁶⁸ Here, let us ask instead what light *Cedar Point* casts on two competing views of labor law’s

60 Both decisions relied on a construction of the NLRA, though they alluded to takings law: *Babcock*, 351 U.S. at 112 (“Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other”); accord, *Lechmere*, 502 U.S. at 534.

61 *Lechmere*, 502 U.S. at 537 (citing *Babcock*, 351 U.S. at 113).

62 *Babcock*, 351 U.S. at 113; *Lechmere*, 502 U.S. at 532.

63 See Estlund, *supra* note 32. According to *Lechmere*, “[b]y its plain terms, . . . the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers.” Yet organizers are employees of the union; and the NLRA specifies that the term “employee . . . shall not be limited to the employees of a particular employer” (29 U.S.C. § 151-166).

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

65 For a pessimistic answer, see Bowie, *supra* note 18; for my take, see Estlund, *supra* note 42.

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

67 *Id.* at 2079-80.

68 For more on this, see Estlund, *supra* note 32.

place in the legal cosmos—as internal to private law, including property law, per Dagan, or as external “social law” constraints on property rights.

B. Cedar Point and the Daganian Approach

Let us first see how the internal Daganian view of work-law-as-private-law fares after *Cedar Point*. Dagan’s innovations to property law would enter the takings equation before we get to the doctrine surrounding physical takings and *per se* versus balancing tests. The first question in any takings analysis should be whether the challenged law impinged on any property right the owner actually had. Only if something was literally taken from the owner’s baseline entitlements, or bundle of rights, do we ask the constitutional takings question: Did the challenged action “go too far” in its impingement on property rights so as to trigger the requirement of just compensation?

Plainly property ownership does not always entail a right to exclude others. For example, given *State v. Shack*, employers of migrant farm workers might have no right to exclude labor organizers seeking to communicate with workers during non-working hours. (I say “might” because *State v. Shack* involved medical and legal aid workers, not union organizers; and they were seeking access to migrant workers who lived on the property, unlike the workers in *Cedar Point*.) If so, then a New Jersey regulation like California’s would have taken no right that the farm owner otherwise had. If Dagan had his way, that built-in limitation on the right to exclude would be a universal feature of property, in accordance with fundamental principles of autonomy and relational justice that are immanent in property law. That reconstructed baseline of property rights would neatly sidestep any takings challenge to regulations like those in *Cedar Point*. Indeed, it might even alleviate the need for such regulations.

We have assumed thus far, as does current takings dogma, that an owner’s baseline property rights are defined by positive state law.⁶⁹ The Daganian camp would thus face the daunting but well-defined task of reforming positive law—state-by-state in the U.S.—along liberal lines. Yet some of the tea leaves scattered by prior conservative majorities hint at a different methodology for determining owners’ baseline property rights. On a purely positivist approach, for example, it would seem that the ALRA regulation itself—in place for decades when Cedar Point Nursery began operating—limited agricultural employers’ right under California law to exclude union organizers from their property, such that nothing was “taken” in 2015 with the organizers’ state-sanctioned entry. But the Court had already rejected that approach, and held that *statutory* restrictions on property rights do not necessarily redefine owner’s baseline property entitlements for takings purposes upon enactment.⁷⁰ Rather, the restrictions on land that “inhere in the title itself” and define the owner’s baseline entitlements are the “common, shared understandings

69 See *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 163 (1998); *Lucas v. South California Coastal Council*, 505 U.S. 1003, 1015 (1992); *PruneYard*, 447 U.S. at 81; cf. *Kaiser-Aetna*, 444 U.S. at 179.

70 See *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

of permissible limitations derived from a State's legal tradition."⁷¹ Precedent thus instructed us to ask how the California access regulation measured up against a baseline defined by older or more basic "common shared understandings" and "legal traditions." That could still entail an inquiry into actual positive state law, just not the particular law under challenge.

The Court in *Cedar Point* nodded toward positivist dogma on how to find the "common shared understandings" that define baseline property rights: "[N]o one disputes that, without the access regulation, the growers would have had the right under California law to exclude union organizers from their property."⁷² In support the Court cited a single 1993 California decision affirming a private medical center's right to eject anti-abortion protesters. As it happens, however, the point was indeed disputed, albeit not in the parties' own arguments to the Court. As one amicus brief explained, California law has often required employers to allow peaceful and otherwise lawful union activity on their property.⁷³

According to the California Supreme Court, looking back in 1981 at three decades' worth of criminal trespass law, "the general trespass statutes do not prohibit [otherwise] lawful union activity at [a] jobsite."⁷⁴ That court later summed up the relevant civil law of trespass, in light of state constitutional and statutory access rights: "Since at least 1964, . . . California law has protected the right to engage in labor speech—including picketing, distributing handbills, and other speech activities—on private land in front of a business that is the subject of a labor dispute."⁷⁵ The ALRA regulation thus sits quite comfortably among the restrictions on California property owners' right to exclude union speakers. Admittedly, a close reading of California law suggests that those rulings allowed access to common areas of large shopping malls and the outdoor entrances to retail businesses; California property owners usually *did* have the right to exclude union speakers from property that is closed to the public (except for farms covered by the ALRA regulation itself).⁷⁶ But the *Cedar Point* majority engaged in no such close reading; it simply ignored the more nuanced state law surrounding access to employer property for union speakers.

Reading tea leaves, and especially silences, is a speculative business. But more seems to be afoot in *Cedar Point* than a lazy imprecision about the actual state of California law. Strikingly, in support of the breadth and fundamentality of the right to exclude, the Court quoted Blackstone's famous—and famously overstated—proclamation that "the very idea of property entails 'that sole and despotic dominion which one man claims and exercises over the external things of the world, in total

71 *Palazzolo*, 447 U.S. at 630 (citing *Lucas v. South California Coastal Council*, 505 U.S. 1003, 1029-30 (1992)).

72 *Cedar Point*, 141 S.Ct. at 2076 (citing *Allred v. Harris*, 14 Cal. App. 4th 1386, 1390, 18 Cal. Rptr. 2d 530, 533 (1993)).

73 See Brief of Amici Curiae United Food and Commercial Workers Western States Council and Teamsters Joint Council 7 in Support of Respondents Hassid et al., *Cedar Point*, 141 S. Ct. 2063 (No. 20-107).

74 *In re Catalano*, 29 Cal.3d 1, 10-13 (1981). See also *In re Zerbe*, 60 Cal.2d 666, 669 (1964).

75 *Ralphs Grocery Co. v. United Food & Comm'l Workers U. Local 8*, 290 P.3d 1116, 1123-25 (2012) (citations omitted).

76 *Id.* at 1120-21.

exclusion of the right of any other individual in the universe.”⁷⁷ That might look like a mere rhetorical flourish. But consider the Court’s account of the access rights that *do* count among the “pre-existing limitation[s] upon [a] land owner’s title” that are factored into the baseline and thus foreclose a takings claim.⁷⁸ The Court mentioned only privileges of access with a very old common law pedigree—indeed, those that the Framers themselves would have recognized: the privilege of necessity and the government’s power to effect an arrest or a reasonable search on private property.⁷⁹

All in all, *Cedar Point* sends strong signals that limitations on the right to exclude that diverge from a Blackstonian (or at least pre-New Deal) conception of property rights—even those with a rather lengthy pedigree in state law—may not count among the “common, shared understandings” that determine baseline property rights. Constraints grounded in a state constitution or labor statutes—that is, outside versus inside the canonical sources of property law—might be especially likely to get excluded from the baseline analysis. But even a longstanding, authoritative interpretation of state trespass law might not be deemed to inhere in an owner’s baseline property rights if it denies a right to exclude that the Court deems “fundamental.”

The crucial point here is that a shift in takings jurisprudence away from positivist dogma about where property rights come from and toward a neo-Blackstonian conception of property rights would pull the rug out from under the Daganian project of reshaping property rights along liberal, other-oriented lines. Legislatures that were moved to limit owners’ right to exclude in the interest of others’ autonomy and well-being would risk takings liability in a wide swath of cases under the Court’s newly-exacting standards for “physical takings.” Even common law rulings that diverge from the Blackstonian baseline—like *State v. Shack*, on the books in New Jersey for more than a half-century—might not define owners’ baseline property rights so as to insulate laws congenial to those rulings from a takings challenge. Indeed, *State v. Shack* itself could be challenged as a taking if a conservative majority finally embraces the concept of “judicial takings” long favored by some conservative members of the Court.⁸⁰

Let’s be clear: the Daganian baseline, like the Blackstonian baseline, would itself challenge the positivist conception of property rights, albeit in a very different direction. The nuance of positive California law on employers’ right to exclude union speakers suggests how a Daganian program of law reform might have reshaped conflicts like this one. But the Court’s willingness in *Cedar Point* to overlook that nuance in favor of neo-Blackstonian assumptions about the right to exclude cuts sharply in the opposite direction. And that is apart from the challenges the Daganian

77 *Cedar Point*, 141 S.Ct. at 2073.

78 *Id.* at 2079 (citing *Lucas*, 505 U.S. at 1028-29). For more on this point, see Estlund, *supra* note 42.

79 *Cedar Point*, 141 S.Ct. at 2079. *Lucas* had noted that “we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the land,” e.g., through prescription. 505 U.S. at 1028. Yet that leaves in doubt the status of easements whose legal foundations are of more modern vintage.

80 A majority demurred, neither accepting nor rejecting the concept of judicial takings, in *Stop the Beach Renourishment v. Florida Dept. of Environmental Protection*, 560 U.S. 702 (2010). Needless to say, the composition of the Court has shifted since then.

approach faces in states where positive law adheres more closely to Blackstonian assumptions. *Cedar Point* highlights what an uphill battle it will be to reconstruct U.S. property law from within around less owner-centric values. Then again, there are only uphill battles on this terrain, as we will see.

III. REFORMING TAKINGS LAW TO ACCOMMODATE THE SOCIAL LAW OF WORK

Unfortunately, *Cedar Point* is equally inauspicious for the alternative strategy for enhancing the rights of workers versus owners, which lies not in reforming property law from within but in ensuring that takings law makes more space for external social constraints on property rights. *Cedar Point* carries takings law in a radically different direction.

Let's first recall *Marsh v. Alabama*'s declaration that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." The principle extends not just to property open to the public but to ordinary workplaces, as it should: When property owners choose to admit others for their own advantage, they do so subject to social protections the legislature has imposed for the benefit of those others. Property rights, on this view, are admittedly circumscribed from without, not internally reconfigured; but that circumscription is part of the prerogative of a democratic society. What might that mean for takings law?

On a categorical version of that proposition, nothing in the social law of work could constitute a taking because, as a matter of takings law, the baseline entitlements of those who choose to use their property as a place of employment would be conditioned on state or federal laws that define the rights of workers and their organizations.⁸¹ Other constitutional constraints, including the backstop protections of substantive due process against irrational, arbitrary, or capricious laws, would still operate. But takings law would be out of the picture. After all, the oft-stated purpose of takings law is "to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."⁸² That might apply to some laws that burden particular properties in order to ensure public beach access or to preserve wetlands or historic landmarks. But as to social regulations that protect individuals whom the owner has chosen to bring onto its property for its own economic gain, it can hardly be said that any attendant burdens, "in all fairness and justice, should be borne by the public as a whole." Perhaps that is why takings doctrine has had almost no traction (before *Cedar Point*) against labor and employment laws. A categorical exemption of such laws from regulatory takings challenges would in one sense just formalize that history.

81 That would require overruling *Palazzolo*; see *supra* note 70.

82 *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

It would do more than that, of course. It would dispel whatever shadow takings law has cast over labor lawmaking and, through the doctrine of constitutional avoidance, statutory interpretation. That shadow was hazy but visible in *Babcock* and *Lechmere*, as we've seen. If the takings shadow disappeared in the case of labor regulations, the more liberal organizer access rulings of the NLRB and the California regulation in *Cedar Point* might all have survived, enhancing workers' ability to organize and bargain collectively. Beyond that, however, it's hard to know what other labor laws or rulings, past or future, might come out differently if takings were off the table. That is partly because of political constraints on the political branches.

Powerful economic and political forces almost certainly do more than takings law to restrain the enactment of burdensome laws regulating work. Indeed, those forces restrain the enactment of perfectly reasonable labor laws. The political constraints on pro-labor lawmaking stem partly from business opposition, and from a political process that enables monied interests to amplify their influence. But business opposition to labor's legislative agenda—backed as it is by “[t]he ultimate political sanction [of] non-investment or the threat of it”⁸³—also finds a receptive audience among political leaders of many stripes and among voters who are consumers as well as workers, and who need the economic activity and jobs that private investments generate. If a labor law manages to run that political gauntlet, should it still be reined in by the takings clause? Why not simply treat the law of work as a set of binding conditions on the use of property for the employment of labor, and as exempt from takings challenges?

One might imagine limiting cases, though only by venturing into political fantasyland. Imagine first a law that simply transferred ownership of firms, partially or totally, to their employees with or without compensation.⁸⁴ If Congress somehow enacted such a law despite gale-force political headwinds, it would implicate the takings clause, though not necessarily a regulatory takings analysis. As with an exercise of eminent domain, courts would be called upon to assess whether the forced redistribution of property was for a valid “public use,” and whether it provided for “just compensation.”⁸⁵ A system that did not impose those limits on the expropriation of private property would not be recognizable as our own—even a social democratic version of our own.

Or imagine a law that dictated the permanent employment and economic support of incumbent workers, regardless of their productivity, through a high minimum wage coupled with an outright prohibition on dismissals?⁸⁶ An employer might

83 CLAU OFFE, *CONTRADICTIONS OF THE WELFARE STATE* 244 (1984).

84 Perhaps the closest example in a capitalist democracy was the Meidner Plan, endorsed in 1976 by Sweden's leading trade union, which would have gradually shifted partial ownership of most Swedish firms by issuing new shares to “wage-earner funds” managed on behalf of workers. The Plan's careful design and its eventual demise highlight the legal and political constraints on ambitious pro-worker policies even in the heyday of Swedish social democracy. See Joe Guinan, *Socialising Capital: Looking Back on the Meidner Plan*, 15 INT'L J. PUB. POL'Y 38 (2019).

85 Cf. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (upholding Hawaii's land redistribution scheme, with compensation, against a takings challenge given the state's extreme concentration of land ownership).

86 Or, by analogy, a rent control law that capped rents below basic costs and blocked evictions indefinitely.

escape the burdens of this law (or any employment-related law) by ceasing to be an employer and going out of business. (And that suggests some reasons why such a law is not imaginable in a market-based economy.) But such a law, if enacted, would at least arguably cast on employers “public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁸⁷ Such a draconian employment law might exceed the constitutional limits of social lawmaking in a liberal democracy. And if takings law were off the table, courts might ratchet up the level of substantive due process review in order to strike it down—not a clear gain over preserving a narrow takings objection for such a case.

By contrast, and closer to the realm of reality, suppose a new labor law—say a high minimum wage—effectively destroyed a business. Should that trigger a takings claim? Hardly. Laws that set a uniform floor on labor standards within particular industries or a whole jurisdiction aim to and often do drive out of business those who would undercut that floor—like “sweatshops” whose competitive advantage was their exaction of long hours for low wages.⁸⁸ Establishing the rules of the road for employers—nationally or in a particular region or sector—is and ought to be a prerogative of a democratic polity, whatever the impact on firms whose business model is at odds with those rules.⁸⁹ Again, those laws are adequately restrained by the politics and economics of labor lawmaking.

Might there be limiting cases that implicate *Cedar Point’s* atavistic preoccupation with *physical invasions* of private property, especially by strangers? What about a law that authorized union organizers to enter employer property to communicate with workers at any time, including work time? Such a law is hard to imagine even in a radically transformed political climate, in part because of the obvious potential for abuse; unions might strategically choose to disrupt a particular business by occupying it. Of course, labor laws do protect collective activities, such as strikes, that aim to interrupt production; but they do not protect the commandeering of work time in work areas.⁹⁰ If they did, those laws, too, might trigger takings (or due process) restraints that are hardwired into our liberal polity.⁹¹

Imagine, by contrast, a law that authorized not just periodic government inspections but ongoing, near-permanent monitoring of compliance with regulations. As it happens, intensive inspection regimes like this already exist in some industries that pose unusual risks to workers, consumers, or the general public.⁹² But they are rare, and are bound to be rare, given endemic resource constraints on government. If the concern is with arbitrary or discriminatory application, that is a job for due

87 *Armstrong*, 364 U.S. at 49.

88 Marc Linder, *The Minimum Wage as Industrial Policy: A Forgotten Role*, 16 J. LEGIS. 151 (1990).

89 Contrast, e.g., land use restrictions, which often apply to particular properties based on their physical or geographic features.

90 See *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). A different question (and the question that was in fact at issue in *Fansteel*) is whether such activity might be not protected but *excused* if provoked by serious lawless conduct by the employer. See Ahmed White, *Its Own Dubious Battle: The Impossible Defense of an Effective Right to Strike*, 2018 WIS. L. REV. 1065 (2018).

91 For profound reflections on the point, see *id.*

92 Justice Breyer cites several in his *Cedar Point* dissent, 141 S.Ct. at 2087-88.

process.⁹³ Otherwise, government inspections are integral components of many regulatory regimes, and should be subject to the same deferential form of judicial review.⁹⁴ Takings law, with its endgame of “just compensation,” is simply out of place here (though *Cedar Point* suggests otherwise).

So the categorical carve-out that we have been testing might have its limits, even if they are unlikely to be triggered in the world we know. In this world, laws that protect or empower or protect workers often raise costs, constrain managerial prerogatives, or disrupt “business models”; but they rarely impinge seriously on the use or value of property. And that has long been the linchpin of a regulatory takings claim—except for the anomalous *per se* treatment of physical takings. But for the metastasized version of the *per se* rule adopted in *Cedar Point*, takings law would almost never impinge on the actual law of work.

In other words, takings law as it stood before *Cedar Point*—with the *Penn Central* balancing test governing nearly all cases—might reach roughly the same results in the real world as a categorical exemption of the law of work from takings challenges. To be sure, even the balancing test could turn into a loose cannon in the hands of overzealous judges.⁹⁵ But a conventional application of that test would have little traction against the law of work that we know or can imagine. That test would have permitted the modest organizer access rules struck down in *Cedar Point* and, on statutory grounds, in *Lechmere* and *Babcock*, as none of those rules had a significant economic impact on employers.⁹⁶ The balancing test as traditionally applied makes ample room, as it should, for the judgments of the political branches about what is needed to maintain decent conditions and a fair balance of economic power at work.

The presumptive primacy of laws regulating work over employer property rights reflects society’s large and legitimate stake in labor relations and labor markets and commitments to democratic governance of economic and social life. Yes, those commitments are bounded by the Constitution, including the takings clause; even large governing majorities do not get to have their way no matter what. But in the case of the takings clause, its protection of property rights is properly qualified by the role of the political branches in defining *and limiting* those property rights. That could create what some property scholars have called the “positivist trap” by enabling legislatures (or courts) to simply define away property rights rather than compensate for their destruction.⁹⁷ That trap is worth avoiding in the case of “public burdens which, in all fairness and justice, should be borne by the public as a whole,”⁹⁸ but almost never in the case of laws regulating the employment of human labor.

93 See, e.g., *Marshall v. Barlow’s, Inc.*, 436 U.S. 307 (1978).

94 Rather than the narrow safe harbor prescribed by *Cedar Point* for government inspections. See *supra* note 6.

95 Indeed, the Court could have struck down the *Cedar Point* regulation under a ratcheted-up version of the balancing test—one that weighed heavily the physically invasive character of government action.

96 That is, putting aside, as we must, any costs flowing from workers’ decision to exercise their right to form a union and contest unilateral employer control through collective bargaining. See Estlund, *supra* note 33, at 353.

97 Thomas Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 922-26 (2000).

98 *Armstrong*, 364 U.S. at 49.

CONCLUSION

Takings law provides a useful lens through which to view conflicts between labor law and property rights, and to compare two ways to defend laws that limit property rights in the interest of workers. One defense runs through property law and commitments to human autonomy and relational justice that may be immanent in property law itself. The other is grounded in a scaled-back takings doctrine that recognizes the legitimate power of a democratic polity to limit property rights in the interest of others. If property law were indeed reconstructed along Daganian lines, such that owners simply did not have the right to exclude or control others in ways that violate their autonomy, there would be fewer conflicts between property law and social law, including labor law. But that reconstruction project faces an uphill battle given the more owner-centric character of much positive law. Worse yet, *Cedar Point* threatens to turn the battleground into a minefield of takings liability under the banner of a neo-Blackstonian view of property that is antithetical to Dagan's.

As long as property law is what it is, conflicts will arise between property law and the law of work, or between private law and social law. When that happens, the social law of work should be regarded as a set of presumptively valid conditions on the right to use one's property for the employment of others. In particular, laws that regulate all employers in a jurisdiction or in a particular sector—like all actual labor laws—should almost never trigger takings scrutiny. In the foreseeable future, however, with *Cedar Point* on the books and poised for further deployment, the project of reshaping takings law to accommodate social law faces as uphill a battle as does the Daganian project of remaking property law. My strong hunch is that workers' rights will continue to be won or lost on the terrain of politics. But the more that Dagan and his like-minded theorists succeed in reshaping property law in the meantime, the more likely it is that labor's political victories will survive any takings challenges. For now, with the property fundamentalists holding the strategic high ground, a pincer movement from both sides of the hill—the property side and the takings side—might have the best chance of success over time.