THE AFTERMATH OF *KOONTZ* AND CONDITIONAL DEMANDS: A PER SE TEST, PERSONAL PROPERTY, AND A CONDITIONAL DEMAND

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I. INTRODUCTION

Standards of review that scrutinize takings challenges to conditional demands by property owners have been created by the United States Supreme Court to expand Takings Clause[1] jurisprudence so that more importance and greater protection to the right to receive just compensation is achieved, which in turn gives more protection to private property rights.[2] Specifically, regulatory takings theory[3] was expanded in *Koontz v. St. Johns River Water Management District*[4] by broadening the application of the rough

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[1] U.S. CONST. amend. V. The Takings Clause of the Fifth Amendment applies to the states and its municipalities, counties, and agencies through the Due Process Clause of the Fourteenth Amendment. *See* Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226, 238-39 (1897) (quoting Scott v. City of Toledo, 36 F. 385, 395-96 (C.C.N.D. Ohio 1888)).

[2] Koontz v. St. Johns River Water Mgmt. Dist, 133 S. Ct. 2586, 2599 (2013) (applying the rough proportionality and essential nexus tests to money exactions to scrutinize the relationship between these exactions and their purpose and impact on the community); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (creating the rough proportionality test to examine the relationship between a land dedication condition and the impact of development on the community); Nollan v. Cal. Coastal Comm'n., 483 U.S. 825, 837 (1987) (creating the essential nexus test to examine the relationship between a land dedication condition and governmental purpose for this condition).

[3] *See infra* Part II.A and accompanying notes (explaining the creation of regulatory takings theory in Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

[4] 133 S. Ct. 2586 (2013).

proportionality[5] and essential nexus[6] tests to monetary exactions[7] imposed on a land use permit issued by a regional governing board.[8] Of equal importance, the Court acknowledged the existence of a categorical takings or per se test,[9] further broadening the limitation on conditions imposing a financial obligation or another demand linked to a specific, identifiable private property interest.[10] The Court chose not to apply the categorical or per se test in *Koontz*.[11] It looked as though the Court missed an immediate opportunity to greatly expand takings jurisprudence by broadening the limitation on conditions through use of physical taking theory.[12] Rather, the Court concluded that the monetary exaction—a condition—was linked to a specific, identifiable property interest and applied regulatory taking theory.[13] The rough proportionality of *Dolan v. City of Tigard*[14] and essential nexus of *Nollan v. California Coastal Commission*[15] were more appropriate standards of review for monetary exactions.[16] The Court reasoned that these standards provided heightened scrutiny of money exactions that could permit government to pursue ends not sufficiently connected to the impact of development on the community.[17] Perhaps *Koontz* was a precursor of the application of an untried physical takings theory. The Court needed only to find a government condition imposing a demand that would be a direct link

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[5] *Dolan*, 512 U.S. at 391.

[6] *Nollan*, 483 U.S. at 837.

[7] James E. Holloway & Donald C. Guy, *Extending Regulatory Takings Theory by Applying Constitutional Doctrine and Elevating Takings Precedents to Justify Higher Standards of Review in* Koontz, 22 WIDENER L. REV. 33, 65 n.273 (2016) (describing the various kinds of impact fees that include monetary exactions).

[8] *Koontz*, 133 S. Ct. at 2599. The United States Supreme Court held "that so-called 'monetary exactions' must satisfy the [essential] nexus and rough proportionality requirements of *Nollan* and *Dolan*." *Id.*

[9] *See infra* Part II.A and accompanying notes (explaining the application of physical takings theory in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).

[10] *Koontz*, 133 S. Ct. at 2600. The Court stated that Koontz's "claim rests on the more limited proposition that when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a '*per se* takings approach' is the proper mode of analysis under the Court's precedent." *Id.* at 2600 (quoting Brown v. Legal Found. of Wash., 538 U.S. 216, 235 (2003)). However, the Court asserted in a footnote that *Koontz* does not raise the issue of whether monetary exactions must be within its limited proposition to constitute a takings because St. Johns River Water Management District, the respondent, imposed its offsite mitigation fees on a specific, identifiable parcel of land owned by petitioner. *Id.* at 2600 n.2.

[11] *See id.* at 2600.

[12] *See id.* (citing *Brown*, 538 U.S. at 235); *see infra* Part II.C and accompanying notes (explaining the application of the physical takings theory to government regulation of personal property in *Brown*).

[13] *Id*.

[14] 512 U.S. 374, 391 (1994).

[15] 483 U.S. 825, 837 (1987).

[16] *Koontz*, 133 S. Ct. at 2600.

[17] *Id*.

to a specific, identifiable property interest and that would greatly exceed any government need to further public ends related to the impact of a specific, identifiable property interest on the public.[18]

This article examines the expansion of Takings Clause jurisprudence by the Roberts Court in the immediate aftermath of *Koontz* by analyzing how the Roberts Court decided that a condition of a regulatory scheme was so intrusive that a standard of review exceeding that of *Nollan* and *Dolan* would always be appropriate to determine the validity of the condition. Part I is the introduction and sets forth constitutional concerns left unsettled in *Koontz* by explaining that the Roberts Court continues the use of higher standards of review to give greater protection to the right to receive just compensation as a means to protect personal and real property rights. Part II reviews relevant takings theories and their applications to government regulation restricting the use of and permitting the occupation or invasion of real and personal property. Part III analyzes the seminal constitutional concerns that include property, takings, and just compensation in *Horne v. United States Department of Agriculture* (*Horne II*),[19] which reviewed a condition requiring the transfer of personal property to the government without the payment of just compensation. Part IV analyzes the Court's application of physical takings theory to a condition taking ownership of personal property, rejection of the application of a means-ends (heightened scrutiny) analysis, and refusal to use government benefits to offset the amount of just compensation. Part V concludes that the right to receive just compensation has been given more protection by extending physical takings theory and advancing Takings Clause jurisprudence to broaden the limitation on government conditions imposing a demand directly linked to a specific, identifiable property interest.

I. RELEVANT TAKINGS THEORIES AND THEIR APPLICATIONS

In *Koontz*, the Roberts Court advanced takings jurisprudence by expanding the application of regulatory takings theory to include heightened scrutiny of monetary exactions under *Nollan* and *Dolan*.[20] It did not stop there. The Roberts Court recognized the existence of a categorical or per se test to include even greater scrutiny of conditions imposing a demand linked to specific, identifiable property interests.[21] The Roberts Court continues the development of a line of takings jurisprudence giving more protection to the right to receive just compensation in light of the development of Takings Clause jurisprudence during the last century.

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[18] *Koontz*, 133 S. Ct. at 2600.
[19] 135 S. Ct. 2419 (2015).
[20] *Koontz*, 133 S. Ct. at 2600.
[21] *Id.*

A. Regulatory and Physical Takings Theories

Takings jurisprudence consists of takings theories that identify and examine the severity of the impact of government regulation on the exercise of private property rights. In 1922, the Court established regulatory takings theory in *Pennsylvania Coal Co. v. Mahon*.[22] In *Pennsylvania Coal Co.*, the Commonwealth of Pennsylvania required the Pennsylvania Coal Company to leave a pillar of coal under Mahon's house to prevent subsidence.[23] The Court concluded that a government regulation can go as far as to take private property for a public use,[24] though the regulation must further a legitimate government need to protect the welfare of state citizens.[25] The Court chose not to apply a general proposition and instead relied on an objective test to determine whether the burden imposed on the landowner amounts to a regulatory takings.[26] The regulatory takings theory was the genesis of protecting the right to receive just compensation by scrutinizing the effects of regulation on the exercise of property rights.

It would take a few decades for the Court to develop *Pennsylvania Coal*'s objective test so that it could examine the effects of government regulation on private property interests, their economic value, and landowner's investment expectations. In 1978, regulatory takings theory was developed much further by *Penn Central Transportation Co. v. City of New York.*[27] The Court decided whether the City of New York's historic preservation regulation imposed an unreasonable burden on the landowner by restricting the development of private property.[28] The Court established a three-prong test that includes the following factors to determine a regulatory takings: (1) character of regulation; (2) economic impact of regulation; and (3) interference with investment-backed expectations by the regulation.[29] These factors are the *Penn Central* inquiry that determines whether the historic preservation regulation that restricted the development of Penn Central Station amounted to a taking of private property for public use by the City of New York's regulation.[30] The Court applied the three-prong test and concluded that the historic preservation regulation did not amount to a taking of private property for public use.[31] The first prong of the *Penn Central*

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[22] 260 U.S. 393 (1922).

[23] *Koontz*, 133 S. Ct. at 412.

[24] *Id.* at 415. *But see* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 729-30 (2010) (finding that no judicial takings theory existed on the facts).

[25] *See Pa. Coal Co.*, 260 U.S. at 416.

[26] *Id.* at 415.

[27] 438 U.S. 104, 131 (1978) (recognizing that historic preservation and other land use regulation is subject to the reasonably related test).

[28] *Id*. at 130-31.

[29] *Id.* at 124.

[30] *Id*.

[31] *Id.* at 131.

inquiry, the character of government regulation, examines the interference of the regulation with private property rights in furtherance of public policies or government needs.[32] The Court must conclude whether some kinds of regulation impose too great a burden on private property rights and their uses and benefits to landowners.[33]

Some government regulation and decisions can take private property for public use if there is an extremely burdensome interference with the control of specific private property rights by the owner. In *Kaiser Aetna v. United States*,[34] a landowner that connected its pond to navigable waters was required to give access to the pond to the public, even though the landowner relied on the government's consent in connecting the pond to the navigable waters.[35] The Court held that the navigable servitude imposed by the government was a taking of private property for public use.[36] The government's decision that interfered with the right to exclude others was a physical invasion of property under regulatory takings theory.[37] This invasion did not effect a permanent physical occupation[38] that requires a regulation or action to permit another person or government agency to permanently occupy another's property.[39] Shortly thereafter, the Court concluded that a physical occupation existed in *Loretto v. Teleprompter Manhattan CATV Corp.*[40] In *Loretto*, the New York state legislature enacted a statute permitting cable television companies to install antennas on rooftops of private buildings and prohibiting landlords from interfering with the installations.[41] The appellants, who were owners of the buildings, challenged the statute that prohibited interference.[42] The Court held that the statute was a permanent physical occupation that effected a physical takings of private

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[32] *Penn Cent. Transp. Co*., 438 U.S. at 124 ("So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." (internal citation omitted)).

[33] *Id.*

[34] 444 U.S. 164 (1979).

[35] *Id*. at 167-69.

[36] *Id.* at 179-80.

[37] *Id*. The Court concluded that "the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking under the logic of *Pennsylvania Coal Co. v. Mahon*." *Id.* In *Dolan*, the Court would conclude that a land dedication condition along a stream bank interfered with the owner's exclusive use of her land. *See* Dolan v. City of Tigard, 512 U.S. 374, 384 (1994). The Court stated that "[s]uch public access would deprive petitioner of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Id.* (quoting *Kaiser Aetna*, 444 U.S. at 176).

[38] *See Kaiser Aetna*, 444 U.S. at 179.

[39] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

[40] *Id.*

[41] *Id.* at 423.

[42] *Id.* at 424.

property for public use.[43] The government is not permitted to allow the public, an individual or agency to occupy private property to achieve a public goal or objective.[44] *Loretto* and *Kaiser Aetna* recognize that government regulation can amount to a more burdensome regulatory takings and an unlawful categorical or per se physical takings under the Takings Clause.[45]

Loretto and *Kaiser Aetna* have not been the only movements away from the *Penn Central* inquiry that determines the validity of government regulation under the Takings Clause. Another factor of the *Penn Central* inquiry is the character of the government action, which examines the nature of the interference with the exercise of property rights by the regulation.[46] This examination coexists with a means-ends analysis that includes much deference to public policy-making to further government purposes and needs of land use and other regulation.[47] In 1987, the Rehnquist Court questioned the constitutional efficacy of a highly deferential standard of review for one particular class of regulatory takings claims in *Nollan v. California Coastal Commission.*[48] The Court responded by requiring lower federal courts to take closer scrutiny of the relationship between a government regulation and its purpose and need in some land use permitting schemes that imposed a condition demanding an interest in land on the request for a permit to develop land.[49] The Court did not eliminate the *Penn Central* inquiry but concluded that regulation imposing a condition on the request for a land use permit would be subject to heightened scrutiny to protect the right to receive just compensation as a constitutional means to protect private property rights.[50]

B. Heightened Scrutiny and the Per Se Test

The Court's takings jurisprudence consists of standards of review to weigh the relationship between means and ends, unless the takings theory forbids the weighing of public ends to determine a taking of private property for public use without the payment of just compensation. Regulatory takings theory includes three standards of review: the deferential *Penn Central*

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[43] *Loretto*, 458 U.S. at 441.

[44] Brown v. Legal Found., 538 U.S. 216, 233 (2003); *Loretto*, 458 U.S. at 434-35.

[45] *See Loretto*, 458 U.S. at 441; Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979).

[46] Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 124 (1978).

[47] *See id.* at 131 ("[A]ppellants, focusing on the character and impact of the New York City law, argue that it effects a 'taking' because its operation has significantly diminished the value of the Terminal site. Appellants concede that the decisions sustaining other land-use regulations, which, like the New York City law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking,' and that the 'taking' issue in these contexts is resolved by focusing on the uses the regulations permit." (internal citations omitted)).

[48] 483 U.S. 825, 837 (1987).

[49] *See id*.

[50] *Id.* at 841.

inquiry,[51] intermediate scrutiny under *Dolan*,[52] and the per se test set out in *Lucas v. South Carolina Coastal Council*.[53] *Pennsylvania Coal Co.* recognizes that a bright-line test or general proposition was not appropriate to determine whether a government regulation amounts to a taking of private property for public use.[54] In *Pennsylvania Coal Co.*, which was decided during the substantive due process era,[55] the Court explicitly recognized that government could not always achieve public objectives by regulation, and indicated that deference to government objectives had its limits.[56] The Court in *Penn Central Transportation Co.* did not disturb the application of a deferential standard of review to decide whether a government regulation amounts to taking of private property.[57] Several years later, the Rehnquist Court would again define the limits on deference to government objectives and ends for land use regulation.

Two seminal decisions of the Rehnquist Court define limits on the deference that could be accorded under the Takings Clause. *Lucas* and *Dolan* demonstrate forms of heightened scrutiny in determining whether government regulation amounts to a regulatory takings. *Lucas* established a per se test for a category of government regulation that denies all economically viable use of private property that had been protected under the land title at common law.[58] *Lucas* uses common-law background doctrine to firmly justify the per se test.[59] This per se test is a higher standard of review used to determine if government denies all economically viable use of private property.[60] *Dolan* did not go as far as *Lucas* but established heightened scrutiny to examine adjudicatory government actions that impose land

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[51] *Penn Cent. Transp. Co.*, 438 U.S. at 131 (recognizing the application of the reasonably related test).

[52] Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

[53] 505 U.S. 1003, 1027 (1992) (holding that "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with").

[54] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922).

[55] United States v. Carolene Prods. Co., 304 U.S. 144, 154-55 (1938) ("As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it." (citing South Carolina v. Barnwell Bros., Inc., 303 U.S. 177, 191 (1938); Standard Oil Co. v. Marysville, 279 U.S. 582, 584 (1929); Hebe Co. v. Shaw, 248 U.S. 297, 303 (1919); Price v. Illinois, 238 U.S. 446, 452 (1915))).

[56] *See Pa. Coal Co.*, 260 U.S. at 415.

[57] Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 127 (1978) (stating that "Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking'").

[58] *Lucas*, 505 U.S. at 1027.

[59] *Id*. at 1027-29.

[60] *Id.* at 1028-29.

dedication conditions on land use permits to develop or use land.[61] However, *Koontz* extends *Dolan* to cover adjudicative and perhaps legislative actions that impose a conditional demand or condition demanding off-site improvements to mitigate the impact of development.[62] Land dedication conditions demand that the landowner give an interest in land to receive a government benefit to develop on the land.[63] *Dolan* uses the unconstitutional conditions doctrine[64] to justify the rough proportionality test.[65] *Lucas*, *Dolan*, and *Koontz* rely on constitutional and common-law doctrines to justify higher standards of review for government regulation that is challenged as a taking of private property for public use.

Some government actions effect a taking that are so unlawful, courts are not permitted to consider the public objectives and needs of these actions. A physical takings applies a per se analysis or categorical rule that determines whether a government regulation physically occupied land and government must pay just compensation, notwithstanding its public objectives.[66] In *Loretto*, the Court found that a state statute permitting cable television companies to install antennas on rooftops of private buildings[67] was a physical occupation that amounted to a physical takings of private property for public use.[68] The per se analysis or physical takings gives little weight to government objectives and needs of federal, state, and local regulation.

C. Takings and Personal Property

The Takings Clause protects private property from government regulation that effects a takings without payment of just compensation. The takings of private property includes the takings of personal property without the

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[61] *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (requiring government regulation to substantially advance a legitimate state interest), *abrogated by* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

[62] *See* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2603 (2013) ("We hold that the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money.").

[63] Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (recognizing that "the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were . . . a requirement that she deed portions of the property to the city").

[64] *Id.*

[65] *Id.* at 391.

[66] Brown v. Legal Found., 538 U.S. 216, 233 (2003); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982). In *Brown*, the Court stated that "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner . . . regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." *Brown*, 538 U.S. at 233 (internal quotation marks omitted).

[67] *Loretto*, 458 U.S. at 423.

[68] *Id.* at 441.

payment of just compensation for public use.[69] In *Andrus v. Allard*,[70] the Court held that the Takings Clause was not violated when government statutes[71] and regulations[72] prohibited the sale and distribution of bird artifacts that had been acquired before enactment of federal legislation.[73] The appellees argued that the regulation of bird artifacts effected a takings by denying them the right to earn profits on the sale of their bird feathers.[74] Justice Brennan, writing for the majority, explicitly distinguished a costly restriction on the use or sale of personal property from the physical occupation or invasion of personal property.[75] In contrast, the owners were not compelled to surrender the bird artifacts and suffered no physical invasion of or restraint on the artifacts.[76] Although the regulation was a significant restriction on the right to use or sell the artifacts,[77] "the denial of one traditional property right does not always amount to a taking."[78] "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."[79] The owners of the artifacts still "retain the

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[69] *See Brown*, 538 U.S. at 233-34 (imposing a financial obligation to transfer money to government); Eastern Enter. v. Apfel, 524 U.S. 498, 538 (1998) (finding that a contract right is personal property); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003-04 (1984) (holding that "health, safety, and environmental data [are] cognizable as a trade-secret property right under Missouri law"); Andrus v. Allard, 444 U.S. 51, 67-68 (1979) (finding that bird artifacts that were acquired before the enactment of federal regulations were personal property).

[70] 444 U.S. 51 (1979).

[71] *See* Bald and Golden Eagle Protection Act, Pub. L. No. 87-884, 76 Stat. 1246 (1962) (codified as amended at 16 U.S.C. § 668 (2012)). The Act states that persons shall not "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner any bald eagle commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles . . . ." 16 U.S.C. § 668(a) (2012). However, the Act does not "prohibit possession or transportation of any bald eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to June 8, 1940," nor does it "prohibit possession or transportation of any golden eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to the addition to this subchapter of the provisions relating to preservation of the golden eagle." *Id.* In addition, the Migratory Bird Treaty Act prevents persons from hunting, capturing, selling or shipping any migratory bird, nest or egg. 16 U.S.C. § 703(a) (2012).

[72] *See* 50 C.F.R. §§ 21.2(a), 22.2(a) (2008).

[73] *Allard*, 444 U.S. at 67-68.

[74] *Id.* at 58.

[75] *Id.* at 65-66.

[76] *Id.* at 65.

[77] *Id.*

[78] *Id.*

[79] *Allard*, 444 U.S. at 66-67 (citing Penn Cent. Trans. Co. v. City of New York, 438 U.S. 104, 130-31 (1978); United States v. Va. Elec. & Power Co., 365 U.S. 624, 627 (1961); United States v. Twin City Power Co., 350 U.S. 222, 227-28 (1956); Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1230-33 (1967)). However, in *Kaiser Aetna*, the Court concluded that regulatory takings that were a physical invasion of real property could exist when the government destroys the right to exclusive use

rights to possess and transport their property, and to donate or devise the protected birds."[80] The Court noted that the regulation banning the sale was not a physical takings but a regulatory takings that restricts only the sale of lawfully acquired personal property.[81]

Standards of review of physical and regulatory takings also demonstrate the protection of the right to receive just compensation that protects personal property. In *Koontz*, the Court applied heightened scrutiny to an exercise of government power and discretion that can be used by government to burden owners of real property by advancing ends not sufficiently related to the impact of development.[82] Concurrently, the Court recognized but did not apply a per se test that would prohibit a government action tantamount to or more severe than the occupation of personal and real property where financial obligations imposed by a condition are connected to a specific, identifiable property interest.[83] Financial obligations are not new to takings jurisprudence. *Eastern Enterprise v. Apfel*,[84] a regulatory takings case, involved a statutory obligation to pay funds to a private retirement plan.[85] *Eastern Enterprise* demonstrates a government mandate on contract rights (personal property) in violation of the Takings Clause[86] as recognized by the majority in *Koontz*.[87] We are mindful that regulatory takings precedent does not apply physical takings theory, but shows that financial obligations had been before the Court in takings claims. However, the Court reviewed a physical takings claim involving a financial obligation in *Brown* v. *Legal Foundation of Washington*.[88] In *Brown*, the physical takings involved a financial obligation imposed on lawyers to transfer funds to a public service organization.[89] The personal property was money acquired by the state government through imposing a financial obligation on lawyers who were engaged in the practice of law.[90] Although *Brown* is a physical takings case,[91]

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of the real property. Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) (creating public access that amounts to a regulatory taking).

[80] *Allard*, 444 U.S. at 66.

[81] *Id.* at 65-66.

[82] *See* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2600 (2013).

[83] *Id.*

[84] 524 U.S. 498 (1998).

[85] *Id.* at 510.

[86] *Id.* at 538.

[87] *Koontz*, 133 S. Ct. at 2599. The Court rejected the argument that a financial obligations to spend money cannot amount to a taking under *Eastern Enterprises*, "hold[ing] that so-called 'monetary exactions' must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*." *Id*.

[88] 538 U.S. 216 (2003).

[89] *Id.* at 235.

[90] *Id.* ("As was made clear in *Phillips*, the interest earned in the IOLTA accounts 'is the private property of the owner of the principal.'" If this is so, the transfer of the interest to the Foundation here seems more akin to the occupation of a small amount of rooftop space in *Loretto*." (quoting Phillips v. Washington Legal Found., 524 U.S. 156, 172 (1998))).

[91] Brown v. Legal Found., 538 U.S. 216, 235-36 (2003).

the Court in *Koontz* used *Brown* and *Eastern Enterprise* to support heightened scrutiny exceeding that of *Nollan* and *Dolan*,[92] justifying the existence of a physical takings or per se test[93] that could be applied to financial obligations of conditional demands connected to a specific, identifiable real or personal property interest.[94] In *Koontz*, the Court chose not to utilize a per se test on monetary exactions imposing financial obligations, but still used heightened scrutiny on monetary exactions and fees in lieu of land dedication conditions that impose financial obligations linked to a specific, identifiable real property interest.[95] The Court recognized the existence of a categorical or per se test for a physical takings that could be applied to a particular kind of condition tantamount to effecting a physical occupation of personal and real property. *Horne II* was no more than an opportunity to apply a physical takings or per se test that avoids the means-ends analysis of *Dolan*, and instead relies on the per se analysis of *Loretto*.

II. PERSONAL PROPERTY AND THE RIGHT TO RECEIVE JUST COMPENSATION

Horne II went far beyond *Koontz* by not only recognizing but demonstrating the existence of a categorical or per se test that applied to a government condition imposed on a personal property interest. In *Horne II*, the Court was requested to decide the appropriate takings claim and standard of review to address an overly burdensome condition requiring the transfer of ownership but permitting the owner to retain a contingent interest in future income.[96] Foremost, the Court draws a direct connection to *Koontz* by

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[92] *Koontz*, 133 S. Ct. at 2599.

[93] *Id.* at 2600 ("Instead, petitioner's claim rests on the more limited proposition that when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a '*per se* takings approach' is the proper mode of analysis under the Court's precedent." (citing *Brown*, 538 U.S. at 235)).

[94] *Id.* at 2598-99 ("[W]e began our analysis in both *Nollan* and *Dolan* by observing that if the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking.").

[95] *Id.* at 2595 ("The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so. We have often concluded that denials of governmental benefits were impermissible under the unconstitutional conditions doctrine." (citing Mem'l Hosp. v. Maricopa Cty., 415 U.S. 250, 269-70 (1974) (finding unconstitutional conditions where government denied healthcare benefits); Perry v. Sindermann, 408 U.S. 593, 597 (1972) (explaining that the government "*may not deny* a benefit to a person on a basis that infringes his constitutionally protected interests") (emphasis added))).

[96] *See* Horne v. United States Dep't of Agric., 750 F.3d 1128, 1138 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015) [hereinafter *Horne II*] ("We return to the task of determining whether the imposition of the penalty for failure to comply with the reserve requirement constitutes a taking."). Authors and commentators have analyzed *Horne II* and provide favorable and unfavorable conclusions on the Court's holding and rationale. *See, e.g.*, John D. Echeverria

continuing a line of constitutional analysis—notwithstanding the takings theory—assessing the need to give greater protection to the right to receive just compensation to protect private property rights.[97] The Court did so by deciding "[w]hether the government's 'categorical duty' under the Fifth Amendment to pay just compensation when it 'physically takes possession of an interest in property' applies only to real property and not to personal property."[98] Here, the Court exceeds *Koontz* to decide how much discretionary control government can exercise over private property before this control exceeds a regulatory takings and effects a physical takings under a burdensome regulatory scheme. The Court decided "[w]hether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion."[99] Finally, the Court emphatically went far beyond *Koontz* to measure the nature and sufficiency of the connection between a condition and a particular property interest to determine the application of a per se test. The Court decided "[w]hether a governmental mandate to relinquish specific, identifiable property as a 'condition' on permission to engage in commerce effects a per se taking."[100] These issues allowed the Court to decide the level and kind of scrutiny to be given to a government condition of a federal regulatory scheme that takes physical ownership of personal property, though government leaves the owner a contingent interest and permits operation of a business in interstate commerce.

& Michael C. Blumm, Horne v. Department of Agriculture*: Expanding Per Se Takings While Endorsing State Sovereign Ownership of Wildlife*, 75 MD. L. REV. 657, 658 (2016) (concluding that the Court failed to recognize the lack of a property interest by the Hornes, abide by different treatment of real and personal property under the Takings Clause, determine just compensation when owners receive benefits, and determine the appropriate standard of review to apply); Michael W. McConnell, *The Raisin Case*, 2015 CATO SUP. CT. REV. 313, 331 (2015) (concluding that *Horne II* affirmed the protection of personal property, reaffirmed the application of unconstitutional conditions doctrine, and sharpened the distinction between physical and regulatory takings).

[97] *Koontz*, 133 S. Ct. at 2599 (imposing heightened scrutiny for a regulatory takings that was effected by a monetary exaction imposed on a request for a land use permit); Brown v. Legal Found., 538 U.S. 216, 235 (2003) (imposing a per se test for a physical takings that was effected by a physical occupation of private property permitted by a state statute); Dolan v. City of Tigard, 512 U.S. 374, 389-92 (1994) (imposing intermediate scrutiny for a regulatory takings that was effected by a land dedication condition imposed on a request for a land use permit); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030-31 (1992) (imposing a per se test for a regulatory takings effected by the denial of all economically viable use of real property); Nollan v. Cal. Coastal Comm'n., 483 U.S. 825, 837 (1987) (imposing intermediate scrutiny for a regulatory takings that was effected by a land dedication condition imposed on a request for a land use permit).

[98] *Horne II*, 135 S. Ct. at 2425 (quoting Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 518 (2012)).

[99] *Id.* at 2428.

[100] *Id.* at 2430.

A. Takings Clause, Private Property, and Conditional Demands

The Court addressed the physical takings of personal property in *Horne II* that had been preceded by *Horne I*, which raised the Takings Clause as a defense to government enforcement actions.[101] As established in *Horne I*, the Court decided that raisin handlers who refused to establish a reserve pool of raisins on order of the United States Department of Agriculture (USDA) could use the Takings Clause as a defense against civil penalties and fines imposed by the Secretary of Agriculture (Secretary).[102] The Agricultural Marketing Agreement Act of 1937 (AMAA) authorizes the Secretary to promulgate regulations that frequently required raisin growers to turn over a percentage of their crop to the federal government.[103] The Secretary promulgated a marketing order for California raisins under the AMAA to "regulate the sale and delivery of agricultural goods."[104] The objective of the AMAA and marketing order was to stabilize the price of raisins.[105]

A federal authority was created and delegated power to manage owners of raisins participating in the federal agricultural marketing program.[106] The federally-appointed Raisin Administrative Committee (RAC) was authorized to set up reserve pools of raisins that could not be sold on the open market.[107] RAC received annual raisin production reports, inventories, and shipments, and made recommendations to the Secretary on the reserve pools of raisins.[108] Raisins that were placed in the reserve pool could be sold on the open market.[109] The Secretary must approve the recommendations.[110] Raisin producers were not paid reserve tonnage but were paid for free-tonnage raisins.[111] The reserve tonnage was held by handlers in segregated bins "for the account" of RAC.[112] RAC could sell the reserve-tonnage to handlers for resale in foreign markets.[113] The proceeds of the sale of raisins by RAC were

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[101] *Horne II*, 135 S. Ct. at 2425 (citing Horne v. United States Dep't of Agric., 133 S. Ct. 2053 (2013) [hereinafter *Horne I*]).

[102] *Id.* at 2424-25 (citing *Horne I*, 133 S. Ct. at 2053).

[103] *Horne I*, 133 S. Ct. at 2056-57.

[104] *Id.* at 2057. "The Secretary may delegate to industry committees the authority to administer marketing orders." *Id.* (citing 7 U.S.C. § 608(c)(7)(C) (2012)). The AMAA does not apply to producers who grow agricultural commodities. 7 U.S.C. § 608(c)(13)(b) (2012). The AMAA regulates handlers that include processors, associations of producers, and others engaged in the handling of covered agricultural commodities. *Id.* § 608(c)(1) (2012). Handlers who violate the marketing orders may be subject to criminal and civil penalties. *Id*.

[105] *Horne II*, 135 S. Ct at 2424.

[106] *Horne I*, 133 S. Ct. at 2057.

[107] *Id.* at 2057 (citations omitted).

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.* at 2057-58.

[112] *Horne I*, 133 S. Ct. at 2058.

[113] *Id.*.

used to finance RAC, and if any funds remained, they were distributed to the producers.[114] RAC has administrative costs under the marketing order, and handlers were subject to penalties for a violation of these duties.[115] When the government sent a truck to pick up the Hornes' raisins, they refused to surrender them.[116]

In 2004, the Secretary initiated enforcement proceedings against the Hornes and other petitioners, alleging that petitioners were handlers during the 2002-2003 and 2003-2004 crop years who violated the AMAA and marketing order.[117] The Secretary imposed fines and civil penalties in the amount of $650,000.[118] Petitioners sought judicial review, but the lower courts decided against petitioner's taking claims.[119] The Court granted a writ of certiorari to the United States Court of Appeal for the Ninth Circuit.[120] In *Horne I*, the Court concluded that petitioners' takings claims was both ripe for review, an affirmative defense, and properly before the Ninth Circuit.[121] On remand, the Ninth Circuit concluded that the raisin reserve program was not a regulatory taking as a conditional demand on Horne's reserved raisin pool under *Dolan*, though the petitioner argued that the raisin reserve program was a physical taking under *Loretto*.[122] The Ninth Circuit applied the essential nexus and rough proportionality tests and held that the marketing order that established the reserve pool was justified by the need to stabilize the raisin market.[123] The petitioners requested the Supreme Court to grant a writ of certiorari again to the Ninth Circuit to decide in *Horne II* three issues that dealt generally with the question of whether the marketing order was a physical takings, even though petitioners were allowed to retain a contingent interest in uncertain future income.[124]

B. Distinction Between Kinds of Private Property and Takings Claims

The Court had to decide if a distinction existed between real and personal property regarding the right to receive just compensation for a taking of ownership by a government regulation of personal property to further a government objective. The Court agreed to decide "[w]hether the government's 'categorical duty' under the Fifth Amendment to pay just compensation when it 'physically takes possession of an interest in property'

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[114] *Horne I*, 133 S. Ct. at 2058.
[115] *Id.*
[116] *Horne II*, 135 S. Ct. at 2424.
[117] *Horne I*, 133 S. Ct. at 2058-59.
[118] *Id.* at 2056.
[119] *Id.*
[120] *Id.*
[121] *Horne II*, 135 S. Ct. at 2425 (citation omitted).
[122] *Id.*
[123] *Id.* at 2425.
[124] *Id.* at 2425-30.

applies only to real property and not to personal property."[125] The Court responded in the negative[126] and concluded that the USDA has a categorical duty to pay just compensation for a physical taking of personal property.[127] Relying on *Loretto*, the Court concluded that an appropriation of real property in the same manner as the raisin reserve program would be a physical taking requiring the payment of just compensation.[128] Simply, "[g]overnment has a categorical duty to pay just compensation when it takes your car, just as when it takes your home."[129] The Takings Clause does not show a distinction between real and personal property and is consistent with the treatment of private property under Magna Carta, which forbade the taking of crops and other provisions and was brought to America by the colonists.[130] Moreover, the Court noted that the Takings Clause was more likely a response to the taking of personal property in the form of military supplies during the Revolutionary War.[131] Thus, the Court concluded that "[n]othing in this history suggests that personal property was any less protected against physical appropriation than real property."[132]

The Court rejected a distinction between real and personal property that had been set forth by the Ninth Circuit to avoid a physical taking. The Ninth Circuit based its distinction between real and personal property on *Luca*s, which "involve[d] extensive limitations on the use of shorefront property."[133] Chief Justice Roberts stated that "*Lucas* recognized that while an owner of personal property 'ought to be aware of the possibility that new regulation might even render his property economically worthless,' such an

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[125] *Horne II*, 135 S. Ct. at 2425 (quoting Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 518 (2012)).

[126] *Id.*

[127] *Id.* at 2426 ("Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property.").

[128] *Id.* at 2428 ("The Government's 'actual taking of possession and control' of the reserve raisins gives rise to a taking as clearly 'as if the Government held full title and ownership,' as it essentially does." (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982))).

[129] *Id.* at 2426.

[130] *Id.* (citing WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 329 (2d ed. 1914); MASSACHUSETTS BODY OF LIBERTIES ¶ 8 (1641), *cited in* RICHARD L. PERRY, SOURCE OF OUR LIBERTIES 149 (1978)).

[131] *Horne II*, 135 S. Ct. at 2426 (citing BLACKSTONE'S COMMENTARIES, Editor's App. 305-06 (S. Tucker ed. 1803)).

[132] *See id.* at 2427. The Court also noted that "[a] patent confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser." *Id.* (quoting James v. Campbell, 104 U.S. 356, 358 (1881)).

[133] *Id.* (citing Horne v. United States Dep't of Agric., 750 F.3d 1128, 1139-41 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015)).

'implied limitation' was not reasonable in the case of land."[134] Chief Justice Roberts pointed out that "*Lucas*, however, was about regulatory takings, not direct appropriations."[135] Moreover, he stated that people do not expect their property, either real or personal, to be taken without just compensation.[136] Finally, Chief Justice Roberts also noted that the Court has dealt with the distinction between regulatory and physical takings,[137] stating that "*Lucas* did not alter the established rule of treating direct appropriations of real and personal property alike."[138] The Court reiterated that "[i]t is 'inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa.'"[139] Thus, the Court was not willing to allow a burdensome regulatory scheme that was tantamount to a physical occupation to amount to a regulatory takings that could be justified by its purpose and objective.

The taking of personal property can be a regulatory or physical takings under the Takings Clause, but the regulatory takings analysis weighs the circumstances and public policy of the takings. A regulatory takings can exist for the taking of personal and real property under *Pennsylvania Coal Co*., which "expanded the protection of the Takings Clause, [by] holding that compensation was also required for a 'regulatory taking'—a restriction on the use of property that went 'too far.'"[140] Later, the objective approach of *Pennsylvania Coal Co.* was set forth in *Penn Central Transportation Co.* as an "ad hoc" factual inquiry.[141] The Court clarified that the factual inquiry included an examination of "the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action."[142] Chief Justice Roberts, writing for the majority, explicitly noted that after *Penn Central Transportation Co.*, "the Court reaffirmed the rule that a physical *appropriation* of property gave rise to a *per se* taking, without regard to other factors."[143] He also stated that "requiring an owner of an apartment building to allow installation of a cable

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[134] *Horne II*, 135 S. Ct. at 2427 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027-28 (1992)).

[135] *Id*.

[136] *Id.* One could argue that Chief Justice Roberts agrees with Justice Scalia's approach to establish a per se test in *Lucas* by relying on a historical perspective, such as the common-law background principle, to justify the need for a per se test to protect personal property rights that contained specific expectations at common law. *See id.* ("Nothing in this history suggests that personal property was any less protected against physical appropriation than real property.").

[137] *Id.* at 2427-28 (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 323 (2002)).

[138] *Id*. (citing *Tahoe-Sierra Pres. Council*, 535 U.S. at 323).

[139] *Id.* at 2428 (citing *Tahoe-Sierra Pres. Council*, 535 U.S. at 323).

[140] *Horne II*, 135 S. Ct. at 2427 (citing Pa. Coal Co v. Mahon., 260 U.S 393, 415 (1922)).

[141] *Id*.

[142] *Id.*

[143] *Id*.

box on her rooftop was a physical taking of real property, for which compensation was required."[144] The Court further mentioned that a physical taking would exist regardless of the public objectives that government set forth to justify the physical appropriation or occupation.[145] Finally, the Court noted that "'[s]uch an appropriation is perhaps the most serious form of invasion of an owner's property interests,' depriving the owner of . . . 'the rights to possess, use and dispose of' the property."[146]

C. Taking Property and Leaving the Owner an Uncertain Contingent Interest

The Takings Clause grants the right to receive just compensation and requires the Federal Judiciary to review government actions furthering legitimate state purposes and policies of state legislative and adjudicative means, which could take ownership and avoid the obligation to pay just compensation. The Court addressed the need to protect the right to receive just compensation by deciding "[w]hether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion."[147] The Court answered this question in negative.[148]

The dissent and respondent put forth arguments that an interest in any future value avoids a physical takings under *Allard* and *Lucas*, which are judicial decisions applying regulatory takings theory but with different standards of review.[149] In responding to the argument favoring *Lucas*, the Court noted that when it finds physical taking, it does not ask "whether it deprives the owner of all economically valuable use of the item taken."[150] The Court also rejected the opportunity to consider a per se test for a regulatory takings. Arguably, the marketing order could be more burdensome than any monetary exaction or land dedication condition by

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[144] *Horne II*, 135 S. Ct. at 2427.

[145] *Id.* (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982)). One essayist believes that *Horne II* raises a concern regarding the means-ends analysis applied in takings claims. *See* Christopher E. Mills, *Raisin Cane?: Takings Jurisprudence After* Horne v. Department Of Agriculture, 23 GEO. MASON L. REV. 1, 1-2 (2015) (concluding that *Horne II* does little to distinguish between the application of the means-ends analysis in reviewing government regulation under the Takings Clause).

[146] *Horne II*, 135 S. Ct. at 2427 (quoting *Loretto*, 458 U.S. at 435).

[147] *Id.* at 2428.

[148] *Id.*

[149] *Id.* at 2437-38 (Sotomayor, J., dissenting).

[150] *Id.* at 2429 (citing Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 323 (2002) ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.")).

taking a property interest and leaving a contingent interest in violation of the unconstitutional conditions doctrine. Rather than relying on *Lucas*' denial of all economically viable use,[151] the Court turned to *Loretto*, which did not deny all economically viable use in that the owner could still sell the property and receive an economic benefit, though the government had permitted the installation of a cable box on the roof of the building.[152] The economic value retained by the owner carries less weight in physical takings, and perhaps even lesser weight when a contingent interest in the value of the personal property is at the discretion of government and subject to market uncertainty.[153] Furthermore, the Court was not persuaded by the impact of the regulation in *Allard* on personal property.[154] It distinguished *Allard* by noting that "the owners in that case retained the rights to possess, donate, and devise their property . . . . Government did not 'compel the surrender of the artifacts . . . [or impose a] physical invasion or restraint upon them.'"[155] The Court noted that the regulatory takings does not take all property rights or value but leaves the owner without the right to use the property.[156] The Court simply was not willing to entertain a *Penn Central* ad hoc, factual inquiry to determine whether the marketing order effected a takings. The Court found

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[151] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992) (concluding that a coastal management regulation denied the owner all economically viable use of his land by applying a per se test).

[152] *Horne II*, 135 S. Ct. at 2429 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S., 419, 430 (1982)).

[153] *Id*.

[154] *Id.* (citing Andrus v. Allard, 444 U.S. 51, 65 (1979) (noting that the Court found no taking in that case, even though the owners' artifacts could not be sold)). The Court rejected the respondent and dissent's arguments that the value of the right to a contingent interest in the raisins would not affect takings. *Id.* The government and dissent argued that raisins are fungible goods that can generate sales revenues and that the marketing order leaves a revenue interest with the raisin growers. *Id.* at 2439-40 (Sotomayor, J., dissenting). "After selling reserve raisins and deducting expenses and subsidies for exporters, the Raisin Committee returns any net proceeds to the growers." *Id.* at 2429 (citing 7 C.F.R. §§ 989.67(d), 989.82, 989.53(a), 989.66(h) (2015)). The government did not believe that the marketing order effected a takings "because growers are entitled to these net proceeds, they retain the most important property interest in the reserve raisins, so there is no taking in the first place." *Id.* The Court did not agree. *Id*.

[155] *Horne II*, 135 S. Ct. at 2429 (citing *Allard*, 444 U.S. at 65-66).

[156] *Id.* The Court explained to the government and dissent the different impact of a regulatory and physical taking analysis on the value of property rights. *Id.* The Court stated that "[a] regulatory restriction on use that does not entirely deprive an owner of property rights may not be a taking under *Penn Central*." *Id*. The Court referred to PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980), to demonstrate that a regulation may restrict use but not effect a regulatory taking of private property. *See id*. In *PruneYard Shopping Center*, the Court held that "a law limiting a property owner's right to exclude certain speakers from an already publicly accessible shopping center did not take the owner's property. The owner retained the value of the use of the property as a shopping center largely unimpaired, so the regulation did not go 'too far.'" *PruneYard Shopping Ctr.*, 447 U.S. at 83 (quoting Pa. Coal Co v. Mahon, 260 U.S 393, 415 (1922)).

that "the raisin program requires physical surrender of the raisins and transfer of title, and the growers lose any right to control their disposition."[157] The Court distinguished between a physical takings and regulatory takings by refusing to accept the argument supporting regulatory takings theory under two different standards of review and setting forth facts showing a physical takings effected by requiring the owner to relinquish an ownership interest.

The government must pay just compensation whenever it requires the owner of personal property to relinquish the ownership interest, though it leaves the owner a contingent interest to uncertain future income in the sale of the personal property in interstate commerce. When government commits a physical taking, "any payment from the Government in connection with that action goes, at most, to the question of just compensation."[158] "The Hornes did not receive any net proceeds from [RAC] . . . sales for the years at issue, because they had not set aside any reserve raisins in those years (and, in any event, there were no net proceeds in one of them)."[159] A physical takings does not allow the government to use program benefits and services to offset government's taking ownership or occupation of personal property.

III. APPLYING TAKINGS THEORIES AND JUST COMPENSATION PRINCIPLES

Dolan and *Koontz* established heightened scrutiny for a class of regulation—namely, impact exactions—and gave more protection to the right to receive just compensation under the unconstitutional conditions doctrine when government takes private property by a regulation imposing conditional demands.[160] *Horne II* considered whether heightened scrutiny was sufficient for a regulatory scheme that took ownership but left a contingent interest in the receipt of future income.[161] The Court responded by returning to *Koontz* and choosing an untested per se test for a physical takings, applying this test in *Horne II* to the agricultural marketing regulatory scheme imposing a condition that demanded owners of a specific, identifiable agricultural crops to transfer a portion of their crops to the government for receipt of public benefits.[162] This per se test gives even more protection to the right to receive just compensation, but the dissent and government would have preferred heightened scrutiny—namely, a rough proportionality—that would have given less protection to the right to receive just compensation under the facts of *Horne II*.[163]

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[157] *Horne II*, 135 S. Ct. at 2429.

[158] *Id.* (citing Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 747-48 (1997) (Scalia, J., concurring in part and concurring in judgment)).

[159] *Id.* at 2429-30.

[160] *See supra* Part III.C.

[161] *Horne II*, 135 S. Ct. at 2429.

[162] *Id.* at 2429-30.

[163] *Id.* at 2429.

A. Regulatory Takings of Personal Property Subject to a Condition

Justice Sotomayor's dissent and the Ninth Circuit decided, respectively, that regulatory takings theory would protect the right to receive just compensation that would, in turn, protect the exercise of personal property rights. In her dissenting opinion, Justice Sotomayor stated that "[b]ecause a straightforward application of our precedents reveals that the Hornes have not suffered a *per se* taking, I would affirm the judgment of the Ninth Circuit."[164] The justice also concluded that "[t]he Court reach[ed] a contrary conclusion only by expanding our *per se* takings doctrine in a manner that is as unwarranted as it is vague."[165] Justice Sotomayor shared the conclusion reached by the Ninth Circuit, which relied on regulatory taking theory used in *Koontz* to review a burdensome condition imposing a financial obligation and requesting an interest in land.[166] Consequently, the Ninth Circuit applied the essential nexus and rough proportionality of *Nollan* and *Dolan*, respectively, in *Horne II*.[167]

The Ninth Circuit found "that the reserve requirement constitute[d] a use restriction on the Hornes' personal property," which was analogized "to the land use permitting context."[168] The Ninth Circuit concluded that the reserve requirements were use restrictions and that petitioners "voluntarily chose to send their raisins into the stream of interstate commerce."[169] "The Secretary did not authorize a forced seizure of the Hornes' crops, but rather imposed a condition on the Hornes' *use* of their crops by regulating their sale."[170] Thus the reserve requirement was not a mandatory requirement but merely a

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[164] *Horne II*, 135 S. Ct. at 2443 (Sotomayor, J., dissenting). Several commentators have analyzed the Ninth Circuit application of *Dolan* and *Nollan* to the reserve requirement of the marketing order. *See, e.g.*, Yelena Bosovik, Note, *The Raisin Act: Regulation or Confiscation?*, 22 J. ENVTL. & SUSTAINABILITY L. 211, 212 (2016) (arguing that the Ninth Circuit failed to make the proper takings decision by ignoring the policy concerns of the reserve pool requirements); William K. Lane III, Note, *"Your Raisins or Your Life": The Harrowing of the Takings Clause in* Horne v. U.S. Department of Agriculture, 750 F.3d 1128 (9th Cir. 2014), 38 HARV. J.L. & PUB. POL'Y 761, 761-62 (2015) (concluding that the Ninth Circuit failed to give property rights appropriate protection); Drew S. McGehrin, Note, *Raisin' Contentions: A Farmer's Grapes of Wrath and the Ninth Circuit's Questionable Takings Analysis in* Horne v. U.S. Dept. of Agriculture, 26 VILL. ENVTL. L.J. 385, 387 (2015) (concluding that the Ninth Circuit failed to make the correct takings decision).

[165] *Horne II*, 135 S. Ct. at 2443 (Sotomayor, J., dissenting).

[166] *See* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2600 (2013) (concluding that *Nollan* and *Dolan* dealt with the concerns that had been raised by the use of impact exaction by local governments, which impose financial obligations and land dedication conditions).

[167] Horne v. U.S. Dep't of Agric., 750 F.3d 1128, 1141-42 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015).

[168] *Id.* at 1141.

[169] *Id.* at 1142.

[170] *Id.*

conditional demand.[171] The Ninth Circuit applied *Nollan*'s essential nexus to decide whether "'the reserve program further[s] the end advanced as [its] justification.'"[172] The purpose of the AMAA is "to 'establish and maintain . . . orderly marketing conditions for agricultural commodities,'[173] as well as to keep consumer prices stable . . . ."[174] Thus, the marketing order program established an essential nexus by creating more than a loose connection to the objective of the AMAA to maintain market stability.[175]

Although the marketing order created an essential nexus, a rough proportionality must exist between the marketing order and the impact of retaining and selling reserved raisins by the petitioners on the open market. The Ninth Circuit applied *Dolan*'s rough proportionality test to determine whether the marketing order's conditional demand (reserve requirement) was '"related both in nature and extent to the impact' of the permittee's activity" (controlling the market for raisins).[176] The Ninth Circuit had to determine whether the petitioner's need to market its raisin crop justified the reserve requirement, which required petitioners to surrender their raisins.[177] The Ninth Circuit was careful to point out the RAC's effort to justify the need for the reserve requirements. The marketing order was "revised annually to conform to current market conditions."[178] "[T]he RAC's imposition of the reserve requirement is not just in 'rough' proportion to the goal of the program, but in more or less *actual* proportion to the end of stabilizing the domestic raisin market."[179] The RAC modified the reserve program to reflect the current market condition "to ensure[] its program does not overly burden the producer's ability to compete while reducing to the producer's benefit the potential instability of this particular market."[180] The Ninth Circuit held that "the Secretary's imposition of the penalty satisfies any requirement *Koontz* may impose that we independently analyze the monetary exaction under

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[171] *Horne*, 750 F.3d at 1142-43 (citing Wallace v. Hudson-Duncan & Co., 98 F.2d 985, 989 (9th Cir. 1938) (rejecting a takings challenge to a reserve requirement under the walnut marketing order)). *See also* Yee v. City of Escondido, 503 U.S. 519, 527-28 (1992) (holding that a municipal regulation of a mobile home park owners' ability to rent did not amount to a taking, because the park owners voluntarily rented their land and thus acquiesced in the regulation); *cf.* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1007 (1984) ("[A] voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.").

[172] *Horne*, 750 F.3d at 1143 (quoting Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987)).

[173] *Id.* (citing 7 U.S.C. § 602(1) (2012)).

[174] *Id.* (citing 7 U.S.C. § 602(2) (2012)).

[175] *Id*.

[176] *Id.* (quoting Dolan v. City of Tigard, 512 U.S. 374, 391 (1994)).

[177] *Id*.

[178] *Horne*, 750 F.3d at 1143.

[179] *Id*.

[180] *Id.*

Nollan and *Dolan*."[181] The Court was not looking for a means-ends analysis under *Nollan* and *Dolan*, but wanted the Ninth Circuit to explain why the condition that required a transfer of ownership with an uncertain contingent interest would amount to a physical takings under *Brown*.[182] Perhaps the Ninth Circuit should have argued doctrine rather than apply a standard of review that relies on doctrine. At some point, the unconstitutional conditions doctrine may not justify a per se takings test, which creates an unlawful class of government actions to give more protection to the right to receive just compensation, until the Court explicitly declares this right to be a fundamental one.[183] Thus, the Ninth Circuit application of heightened scrutiny was not shared by the Court that chose to impose the physical takings requirement mentioned in *Koontz*, which leads one to conclude that eventually some regulatory schemes imposing conditions may be subject to a per se test of a physical takings.

B. Physical Takings of Personal Property Subject to a Condition

In returning to regulatory takings that was the subject in *Koontz*, the Court looked only to the existence of the per se test that had not been appropriate for an ends analysis when the takings included a transfer of ownership. In *Horne II*, the Court set forth indices of relinquishing ownership to the government under a regulatory scheme that caused the reserve requirement to effect a clear physical taking.[184] It found that "[a]ctual raisins are transferred from the growers to the Government [and] [t]itle to the raisins passes to the [RAC]."[185] Moreover, "[RAC's] . . . raisins must be physically

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[181] *Horne*, 750 F.3d at 1144 n.20.

[182] *See* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2600 (2013) (recognizing the existence of per se takings that relies on physical takings precedent when government mandates the relinquishment of a specific, identifiable property interest). In *Koontz*, the Court emphatically stated that "petitioner's claim rests on the more limited proposition that when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a 'per se [takings] approach' is the proper mode of analysis under the Court's precedent." *Id.* (citing Brown v. Legal Found., 538 U.S. 216, 235 (2003)). But *Koontz* did not involve a request to relinquish a specific, identifiable real property but involved the use of a condition to pursue government ends that could be disproportionate to the effects of specific property development on the community and that are not justified by the property's diminution in value. *See id.* at 2600-03. Thus, the Court applied *Nollan* and *Dolan* to conduct a means-end analysis of a condition that may cause a diminution of value. *See id*.

[183] *Horne I*, 133 S. Ct. at 2057 (stating that the Secretary promulgated "marketing orders" for California raisins under the AMAA to "regulate the sale and delivery of agricultural goods"); *see also* 7 U.S.C. § 608(c)(1) (2012). Agricultural marketing orders have been part of federal agricultural policy since the Great Depression and have served an important purpose in stabilizing agricultural product markets. *See* Bosovik, *supra* note 164, at 218-21; Mills, *supra* note 145, at 12-18.

[184] *Horne II*, 135 S. Ct. at 2428.

[185] *Id.*

segregated from free-tonnage raisins,"[186] though "[r]eserve raisins are sometimes left on the premises of handlers . . . [and] held 'for the account' of the Government."[187] The Court also noted that RAC exercised control over its raisins by managing these raisins to further the objectives of the marketing order.[188] Furthermore, "[t]he Government's 'actual taking of possession and control' of the reserve raisins gives rise to a taking as clearly 'as if the Government held full title and ownership,'[189] as it essentially does."[190] The government's exercise of ownership and management of the raisins in the reserve pool was tantamount to a physical occupation, which may be as worse as state legislation that grants cable companies the power to attach antennas to the roofs of buildings.[191] Thus, a government regulation that imposes a demand requiring the transfer of ownership is a physical takings of personal property for personal use.

The marketing order placed the Court in a position that seems undeniably launched from somewhere in *Koontz* to consider whether it should apply a per se test to a government demand that actually forced owners to relinquish ownership and management of a specific, identifiable property interest. Subsequently, the Court decided "[w]hether a governmental mandate to relinquish specific, identifiable property as a 'condition' on permission to engage in commerce effects a per se taking,"[192] and responded in the affirmative.[193] The Court did not agree with the government that the reserve program was voluntary and noted that "the Government insisted that the Hornes turn over 47 percent of their raisin crop, in exchange for the 'benefit' of being allowed to sell the remaining 53 percent. The next year, the toll was 30 percent."[194] The Court "rejected the idea that *Monsanto*[195] may be extended by regarding basic and familiar uses of property as a 'Government benefit' on the same order as a permit to sell hazardous chemicals."[196] In fact, the Court stated that "[s]elling produce in interstate commerce, although certainly subject to reasonable government regulation, is similarly not a special governmental benefit that the Government may hold hostage, to be

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[186] *Horne II*, 135 S. Ct. at 2428 (citing 7 C.F.R. § 989.66(b)(2) (2015)).
[187] *Id.* at 2428 (citing, 7 C.F.R. § 989.66(a) (2015)).
[188] *Id*.
[189] *Id.* (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 431 (1982)).
[190] *Id*.
[191] *See id.* at 2429 (citing *Loretto*, 458 U.S. at 432).
[192] *Horne II*, 135 S. Ct. at 2430.
[193] *Id.*
[194] *Id*.
[195] Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003-04 (1984) (holding "health, safety, and environmental data cognizable as a trade-secret property right under Missouri law").
[196] *Horne II*, 135 S. Ct. at 2430 (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 n.2 (1987) (distinguishing *Monsanto* on the ground that "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit'")).

ransomed by the waiver of constitutional protection."[197] In contrasting the personal property at issue in *Horne II* and *Monsanto*, the Court pointed out that "[r]aisins are not dangerous pesticides; they are a healthy snack. A case about conditioning the sale of hazardous substances on disclosure of health, safety, and environmental information related to those hazards is hardly on point."[198] Finally, the Court stated that "[a]ny physical taking of them for public use must be accompanied by just compensation."[199]

C. Just Compensation When Government Gives Benefits

The Court was not willing to allow the respondent, the United States, to deny that a takings of private property had not occurred and avoid paying just compensation. The respondent contended that no takings occurs unless the petitioners are denied just compensation and can pursue an action under the Tucker Act in the Court of Federal Claims.[200] Yet, the Court had rejected the argument that the takings claims arose under the Tucker Act in *Horne I*, and permitted the petitioners to pursue "a takings-based defense to the fine levied against them."[201] The Court identified property taken by government from the Hornes, who were growers and handlers, by stating that "[t]hey own the raisins they grew and are handling for themselves, and they own the raisins they handle for other growers, having paid those growers for all their raisins . . . ."[202] Therefore, the Hornes owned the raisins they had refused to deliver to the government and did not need to pay the fine and penalty, and thus were not required to resort to the Court of Federal Claims to pursue a regulatory takings claim under the Tucker Act to recover payment of the fines.

The respondent sought to mitigate compensation that could eventually eliminate any recovery for physical takings liability and would make just compensation dependent—a constitutional condition—on non-fiscal or non-monetary benefits and services provided by the government to program participants. The government claimed that just compensation should be offset by "the value of the reserve raisins . . . without the price support program, as well as other benefits . . . from the regulatory program, such as higher consumer demand for raisins spurred by enforcement of quality

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[197] *Horne II*, 135 S. Ct. at 2430-31.

[198] *Id.* at 2431.

[199] *Id*.

[200] *Id.*; *see also* 28 U.S.C. §1491(a)(1) (2012) (granting the Court of Federal Claims jurisdiction over any claims against the United States); *Ruckelshaus*, 467 U.S. at 1020.

[201] *Horne II*, 135 S. Ct. at 2431; *see also Horne I*, 133 S. Ct. at 2063 ("We . . . conclude that the [Agricultural Marketing Agreement Act] withdraws Tucker Act jurisdiction over [the Hornes'] takings claim. [The Hornes] (as handlers) have no alternative remedy, and their takings claim was not 'premature' when presented to the Ninth Circuit.").

[202] *Horne II*, 135 S. Ct. at 2431.

standards and promotional activities."[203] The government believed that the "Hornes would likely have a net gain under this theory."[204] The Court found that "the Government cite[d] no support for its hypothetical-based approach, or its notion that general regulatory activity such as enforcement of quality standards can constitute just compensation for a specific physical taking."[205] The Court was not willing to include the value of benefits in the determination of just compensation.

The Court relied on the traditional rule that has been applied to determine just compensation for a takings of private property for public use. The Court stated that the "clear and administrable rule for just compensation . . . [is] that just compensation normally is to be measured by 'the market value of the property at the time of the taking.'"[206] The Court acknowledged that Justice Breyer would permit the "condemning authority . . . [to] deduct special benefits—such as new access to a waterway or highway, or filling in of swampland—from the amount of compensation it seeks to pay a landowner suffering a partial taking."[207] The judicial decisions relied on by Justice Breyer do not support argument or create applicable exceptions, according to the Court.[208] Furthermore, the Court concluded that "[t]he Government has already calculated the amount of just compensation in this case, when it fined the Hornes the fair market value of the raisins: $483,843.53."[209] The Court stated that "[t]he Government cannot now disavow that valuation,[210] and does not suggest that the marketing order affords the Hornes compensation in that amount."[211] In short, the petitioners were simply "relieved of the obligation to pay the fine and associated civil

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[203] *Horne II*, 135 S. Ct. at 2432 (internal quotation marks omitted). Two commentators have analyzed the Court's determination of just compensation in *Horne II* and disagreed with the Court's conclusion. *See* Joshua Ulan Galperin, *Raisins and Resilience: Elaborating* Horne*'s Compensation Analysis with an Eye to Coastal Climate Change Adaptation*, 35 STAN. ENVTL. L.J. 3, 53-54 (2016) (concluding that the Court failed to properly calculate just compensation for physical takings when government provides benefits); Michael P. Collins, Jr., Note, Horne v. Department of Agriculture*: Just Compensation Left to Wither on the Vine*, 75 MD. L. REV. 838, 839 (2016) (concluding that the Court should have included government benefits in the determination of just compensation and that other claimants may eventually receive too much compensation); *see also* Echeverria & Blumm, *supra* note 96, at 680 (concluding that "the Court erred by refusing to permit the Department to try to show that the economic benefits conferred on the Hornes by the raisin marketing rules equaled or exceeded the burdens imposed on them by the rules").

[204] *Horne II*, 135 S. Ct. at 2432 (internal quotation marks omitted).

[205] *Id.*

[206] *Id.* (citing United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984) (quoting Olson v. United States, 292 U.S. 246, 255 (1934))).

[207] *Id*.

[208] *Id*.

[209] *Id.* at 2433 (citing Horne v. U.S. Dep't of Agric., 750 F.3d 1128, 1135 n.6 (9th Cir. 2014)).

[210] *Horne II*, 135 S. Ct. at 2433.

[211] *Id.* (citation omitted).

penalty they were assessed when they resisted the Government's effort to take their raisins."[212] Thus, the Court did not permit government to offset just compensation for a physical takings and chose not to decide when government could totally mitigate takings liability by the unobligated granting of valuable program benefits to owners suffering a physical takings.

Another concern is that by allowing government to use program benefits to offset the amount of just compensation, government could indirectly eliminate or mitigate takings liability by creating in the enactment of a regulatory scheme these benefits as just compensation. Strangely, a violation of the unconstitutional conditions doctrine by government as seen in *Horne II* could be used to defeat the Fifth Amendment's constitutional condition—namely, just compensation—by allowing the government to use benefits such as income and market stability to offset just compensation for a physical takings of private property effected by a condition demanding a specific, identifiable interest in personal property. Thus, the government should not be allowed to effect a takings and then choose just compensation from the program funds, benefits or income it provides to or caused to be generated by a property owner.

IV. CONCLUSION

Horne II extends physical takings theory and advances Takings Clause jurisprudence to give more protection to the right to receive just compensation. The Court concluded that an agriculture marketing regulatory scheme that imposed a condition requesting owners to relinquish ownership of specific, identifiable reserve of raisins but permitting the owners to retain a contingent interest to receive uncertain future income from the sale of these raisins effects a physical takings.[213] The Court also concluded that government must pay the fair market value of reserve raisins as just compensation for a physical takings and cannot use marketing program benefits to offset the amount of just compensation.[214] *Horne II* extends physical takings theory to include a condition imposed by an agricultural marketing regulatory scheme enacted to stabilize the agricultural market for raisins by acquiring an ownership interest in the raisins.

Horne II continues the development of Taking Clause jurisprudence by broadening even further the limitation on conditions and reaffirming the validity of the traditional rule for determining just compensation. This development purposely gives greater protection to private property rights under the Takings Clause. Foremost, takings jurisprudence includes more parity between real and personal property by confirming that government

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[212] *Horne II*, 135 S. Ct. at 2433.
[213] *See supra* Part III.C.
[214] *Id.*

cannot seize personal property to further and justify a government objective. Next, takings jurisprudence includes a firmer distinction between a physical and regulatory takings by applying a per se test to a condition demanding an ownership interest in personal property. Finally, takings jurisprudence includes a limitation on the use of program benefits of a government regulatory scheme that would provide benefits to offset the amount of just compensation, which in turn could permit government to partially or totally mitigate takings liability.