

**“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)**

There are few areas of law that fuel as much passion and debate as government takings. To understand the importance Americans place on property rights, one need only look at the outrage generated in the wake of *Kelo v. City of New London*<sup>1</sup> and the resulting political reaction at both the state and federal levels.<sup>2</sup> If property rights are indeed “the most basic of human rights,”<sup>3</sup> it is the charge of the courts to defend them vigilantly. In *Horne v. U.S. Department of Agriculture*,<sup>4</sup> the Ninth Circuit failed to fulfill this duty when it determined that a New Deal-era program requiring raisin farmers to hand over significant portions of their crops—sometimes over half—with little or no compensation<sup>5</sup> did not violate the Takings Clause.<sup>6</sup>

First, the court inappropriately applied a regulatory takings analysis<sup>7</sup> to what was best understood as a simple physical taking. Second, in finding that the Secretary of Agriculture was

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1. 545 U.S. 469 (2005).

2. In the wake of the Court’s 5–4 ruling in *Kelo*, legislators worked to restrict the ability of state and local governments to seize land through eminent domain. To date, forty-three state legislatures and eight state supreme courts have taken action. *Kelo v. New London: Lawsuit Challenging Eminent Domain Abuse in New London, Connecticut*, INSTITUTE FOR JUSTICE (Aug. 4, 2014), <http://www.ij.org/kelo-v-new-london> [http://perma.cc/C4VP-666T]. Additionally, on the one-year anniversary of the *Kelo* decision, President Bush issued Executive Order 13,406, forbidding the federal government from exercising eminent domain for purely economic reasons. Exec. Order No. 13,406, 71 C.F.R. 36973–74 (2006).

3. MILTON FRIEDMAN & ROSE D. FRIEDMAN, *TWO LUCKY PEOPLE: MEMOIRS* 605 (1998); see generally RICHARD PIPES, *PROPERTY & FREEDOM* (2007) (arguing that property rights are essential for the development of a free society).

4. 750 F.3d 1128 (9th Cir. 2014).

5. *Id.* at 1132–33.

6. U.S. CONST. amend. V. The Ninth Circuit was not alone in its evaluation of the Marketing Order. In a similar case the Federal Circuit affirmed a determination that the reserve tonnage requirement did not constitute a taking. See *Evans v. United States*, 74 Fed. Cl. 554 (2006), *aff’d*, 250 F. App’x 321 (Fed. Cir. 2007).

7. See *Horne*, 750 F.3d at 1138.

free to demand from farmers the (dried) fruits of their labor, the court made the troubling pronouncement that “the Takings Clause affords less protection to personal than to real property.”<sup>8</sup> Third, the court unconvincingly argued that because the Hornes were free to choose a new profession other than raisin farming, thereby avoiding the regulatory program entirely, the Department of Agriculture’s demand for raisins did not place an unconstitutional condition on the Hornes’ right to possess their property.<sup>9</sup> Thus, in refusing to recognize that the Department of Agriculture’s Marketing Order results in a *de facto* seizure—a physical taking—of private property, and instead applying the more lenient regulatory takings approach, the Ninth Circuit weakened property rights by creating a precedent that, if uncorrected, stands as the most troubling development in Takings Clause jurisprudence in years.

## I. THE FACTS

During the 1930s, the price of raisins, along with other crops, fell dramatically as supply outpaced demand.<sup>10</sup> In the spirit of the New Deal, Congress took action, passing the Agricultural Marketing Agreement Act of 1937.<sup>11</sup> The Act granted the Secretary of Agriculture the authority “to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce.”<sup>12</sup> The Secretary was to accomplish this through the Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California.<sup>13</sup> Responsibility for implementing the order lies with the Raisin Admin-

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8. *Id.* at 1139.

9. *See id.* at 1143.

10. *See Parker v. Brown*, 317 U.S. 341, 364 (1943) (“[S]ince 1934 the industry, with a large increase in acreage and the attendant fall in price, has been unable to market its product and has been compelled to sell at less than parity prices and in some years at prices regarded by students of the industry as less than the cost of production.”).

11. Pub. L. No. 75-137, 50 Stat. 246 (1937) (codified as amended at 7 U.S.C. §§ 601, 602, 608a–608d, 610, 612, 614, 624, 627, 671–674 (2012)).

12. 7 U.S.C. § 602(1) (2012).

13. 7 C.F.R. § 989 (2014).

istrative Committee (RAC),<sup>14</sup> which sets an annual “reserve tonnage requirement,”<sup>15</sup> a percentage of a farmer’s crop that can reach up to 62.5%.<sup>16</sup> Title to the reserve tonnage raisins transfers to the RAC, which sells the raisins in secondary, non-competitive markets,<sup>17</sup> often to be used in animal feed, school lunch programs, and distilleries.<sup>18</sup> Though producers are entitled “to an equitable distribution of the net proceeds from the RAC’s disposition of the ‘reserve tonnage’ raisins,”<sup>19</sup> some years the “equitable distribution” is zero.<sup>20</sup>

The Marketing Order was designed to benefit producers and consumers by “smoothing the raisin supply curve and thus bringing predictability to the market.”<sup>21</sup> In practice, the program disproportionately benefits big players in the industry while harming small farmers who cannot afford to forfeit half their yields.<sup>22</sup> Raisin farmers Marvin and Laura Horne, tired of losing large percentages of their harvests to the RAC with little or no compensation, ceased contributing.<sup>23</sup> After the Department of Agriculture assessed the couple a fine of \$695,226.92 for their failure to submit to the Marketing Order, the Hornes challenged the reserve requirement, arguing that it constituted

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14. The RAC is composed of individuals nominated by members of the raisin industry and appointed by the Secretary of Agriculture. See 7 C.F.R. §§ 989.26, 989.29, and 989.30.

15. See 7 C.F.R. §§ 989.65–.66.

16. *Horne v. U.S. Dep’t of Agric.*, CV-F-08-1549LJOSMS, 2009 WL 4895362, \*25 n.9 (E.D. Cal. Dec. 11, 2009).

17. See 7 C.F.R. §§ 989.65, 989.66(a), (b)(1), (b)(4), 989.67.

18. *Lion Raisins, Inc. v. United States (Lion I)*, 58 Fed. Cl. 391, 394 (2003).

19. *Evans v. United States*, 74 Fed. Cl. 554, 557 (2006).

20. *Horne v. U.S. Dep’t of Agric.*, 750 F.3d 1128, 1132 (9th Cir. 2014).

21. *Id.*

22. Much of the proceeds from the sale of reserve tonnage raisins is spent on national and international raisin promotion—the famous singing “California Raisins” were a product of reserve tonnage revenue. David A. Fahrenthold, *One Grower’s Grapes of Wrath*, WASH. POST (July 7, 2013), [http://www.washingtonpost.com/lifestyle/style/one-growers-grapes-of-wrath/2013/07/07/ebebcfd8-e380-11e2-80eb-3145e2994a55\\_story.html](http://www.washingtonpost.com/lifestyle/style/one-growers-grapes-of-wrath/2013/07/07/ebebcfd8-e380-11e2-80eb-3145e2994a55_story.html) [<http://perma.cc/6EUU-LXMA>]. While the Hornes and other farmers have opposed the Market Order, raisin giant Sun-Maid filed an amicus brief in support of the Department of Agriculture when the case was before the Supreme Court to determine whether or not the Ninth Circuit had jurisdiction. See Brief of Sun-Maid Growers of California as *Amicus Curiae* in Support of Respondent, *Horne v. Dep’t of Agric.*, 133 S. Ct. 2053 (2013) (No. 12-123).

23. *Horne*, 750 F.3d at 1132.

a violation of the Fifth Amendment and that the program deprived them of personal property without just compensation.<sup>24</sup> Following a lengthy journey through administrative proceedings and the federal court system, the Hornes finally found themselves before a Ninth Circuit panel with the opportunity to argue their claim on the merits.<sup>25</sup>

## II. THE OPINION

The Ninth Circuit affirmed the district court's ruling that the raisin Marketing Order did not constitute a taking in violation of the Fifth Amendment.<sup>26</sup> Writing for the court, Senior Circuit Judge Michael Daly Hawkins explained that the penalty assessed against the Hornes for their noncompliance with the Marketing Order gave the Hornes standing to challenge the reserve tonnage requirement as a taking.<sup>27</sup> However, the court refused to characterize the Marketing Order as a physical per se taking, applying instead a regulatory takings analysis.<sup>28</sup> Arguing that *Loretto*<sup>29</sup> and *Lucas*<sup>30</sup> were applicable to real property only,<sup>31</sup> the court settled on the *Nollan-Dolan*<sup>32</sup> regulatory takings analysis and determined that no taking occurred because the Hornes voluntarily submitted to the Marketing Order when they chose to participate in the interstate raisin industry.<sup>33</sup>

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24. *Id.*

25. In district court the Hornes argued that they were not "handlers" and therefore the regulation did not apply, that the assessed fine violated the Eighth Amendment, and that the reserve requirement violated the Takings Clause. *Id.* at 1135. The Ninth Circuit affirmed the district court's ruling in favor of the Secretary of Agriculture on the textual and Eighth Amendment claims and found that under the Tucker Act, 7 U.S.C. § 608c(15) (2012), the Court of Federal Claims had exclusive jurisdiction to hear the Fifth Amendment claim. *Horne*, 750 F.3d at 1135. The Supreme Court unanimously reversed the jurisdictional ruling, finding that the Hornes could bring their takings claim before the Ninth Circuit. *See Horne v. Dep't of Agric.*, 133 S. Ct. 2053, 2064 (2013).

26. *Horne*, 750 F.3d at 1144.

27. *Id.* at 1136.

28. *Id.* at 1138.

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

30. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

31. *See Horne*, 750 F.3d at 1139–40.

32. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

33. *See Horne*, 750 F.3d at 1138, 1142–43.

A. *The Hornes Had Standing to Challenge the Marketing Order as a Taking*

The court rejected the Secretary of Agriculture's contention that the Hornes could challenge only the portion of the fine that corresponded to the raisins they actually owned and could not challenge the portion of the fine that corresponded to raisins they processed for other farmers.<sup>34</sup> Reiterating the Supreme Court's findings,<sup>35</sup> the court explained that the injury suffered by the Hornes was not the loss of raisins (indeed, the Hornes never surrendered their raisins) but rather the fine imposed by the Department of Agriculture.<sup>36</sup> Because the requirement to pay a penalty was traceable to the penalty's imposition, and because a favorable determination by the court on the takings claim would have redressed the Hornes' injury, the *Hornes* had standing to sue.<sup>37</sup>

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34. *Id.* at 1136. The Marketing Order distinguishes between raisin "producers" and raisin "handlers" (those who pack and process raisins). See 7 C.F.R. §§ 989.65–66. The Hornes initially attempted to evade the reserve tonnage requirement by becoming their own handlers—a strategy the Ninth Circuit rejected the first time it heard the case. See *Horne*, 750 F.3d at 1135. After restructuring their business to include handling, the Hornes also began processing raisins of other producers, believing that these raisins would not be subject to the order if the Hornes never assumed title—an argument the Ninth Circuit also rejected. See *id.* It was these latter raisins over which the government argued that the Hornes had no standing.

35. See *Horne v. Dep't of Agric.*, 133 S. Ct. 2053, 2061 n.4 (2013).

36. *Horne*, 750 F.3d at 1136.

37. *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The Ninth Circuit rests much of its finding that no physical taking occurred on the fact that the injury incurred was a fine rather than a seizure of raisins. *Horne*, 750 F.3d at 1138 ("Because the government neither seized any raisins from the Hornes' land nor removed any money from the Hornes' bank account, the Hornes cannot—and do not—argue they suffered this sort of 'paradigmatic taking.'"). As discussed, *infra* Part III.A, the logic is flawed. The government's demand for title to the raisins is backed by the threat of a fine (the dollar value of the raisins plus interest and penalties). Noncompliance results in financial ruin for most and is therefore effectively not an option. Though the government does not send agents to confiscate raisins, the result is a physical taking. That the Hornes decided to take their chances in court in this instance should not convert the takings analysis from a physical to a regulatory one—the program remains the same. The great irony is that, absent another victory in the Supreme Court, the government will indeed remove "money from the Hornes' bank account" to make up for the raisins withheld. *Id.*

B. *A Regulatory Rather than Physical Takings  
Analysis Was Appropriate*

The court next determined that because no “paradigmatic taking”<sup>38</sup> occurred—meaning that the government never physically appropriated the Hornes’ raisins—the court could not evaluate the fine assessed by the Secretary of Agriculture as a physical per se taking.<sup>39</sup> Instead, the court reasoned, it was forced to enter the “doctrinal thicket” of regulatory takings jurisprudence.<sup>40</sup> Relying on *Lingle v. Chevron U.S.A., Inc.*,<sup>41</sup> the court explained that per se regulatory takings fall into three categories: *Loretto*,<sup>42</sup> where the government causes a total, permanent physical invasion of real property; *Lucas*,<sup>43</sup> where a government regulation deprives a property owner of all economically beneficial use of his real property; and *Nollan-Dolan*,<sup>44</sup> where the government grants a benefit in exchange for an exaction. Regulatory takings that do not fall under any of these categories instead require application of the *Penn Central* balancing test,<sup>45</sup> an alternative argument the Hornes declined to advance.<sup>46</sup>

The court found both *Loretto* and *Lucas* inapplicable for two reasons. First, unlike *Loretto*, which involved the physical occupation of an apartment building,<sup>47</sup> or *Lucas*, which involved a statute forbidding all development on a beachfront parcel of land,<sup>48</sup> the Marketing Order regulates personal rather than real property.<sup>49</sup> The Takings Clause, the court explained, “affords less protection to personal than to real property,” especially

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38. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005).

39. *Horne*, 750 F.3d at 1138.

40. *Id.*

41. 544 U.S. 528 (2005).

42. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 427–38 (1982).

43. *Lucas v. S.C. Coastal Council*, 505 U.S. at 1015 (1992).

44. *Dolan v. City of Tigard*, 512 U.S. 374, 374 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 825 (1987).

45. See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

46. *Horne v. U.S. Dep’t of Agric.*, 750 F.3d 1128, 1138 (9th Cir. 2014).

47. See *Loretto*, 458 U.S. at 421–23.

48. See *Lucas*, 505 U.S. at 1008–09.

49. See *Horne*, 750 F.3d at 1139–40 (“*Loretto* applies only to a total, permanent physical invasion of real property . . . . [I]t is clear the holding of *Lucas* is limited to cases involving land.”).

when the government program in question “is motivated by economic, or ‘commercial,’ concerns.”<sup>50</sup>

The second reason the court found *Loretto* and *Lucas* inapplicable was that the Hornes were not completely divested of their property rights with respect to the reserve raisins.<sup>51</sup> The Hornes were not deprived of *all* economic benefit even in years when the Hornes received no monetary return because the equitable stake in the reserve raisins was not valueless: “[T]he reserved raisins continue to work to the Hornes’ benefit” in that they fund the RAC, which in turn represents raisin producers (such as the Hornes) and helps to stabilize raisin prices.<sup>52</sup>

C. *The Marketing Order Did Not Constitute a Taking Under Nollan-Dolan*

Agreeing with the Secretary of Agriculture, the court determined that the “nexus and rough proportionality” analysis of *Nollan-Dolan* was the most appropriate legal framework because the reserve requirement was a use restriction, analogous to those imposed in the land-use permitting context.<sup>53</sup> Applying the *Nollan-Dolan* analysis, the court determined that the reserve tonnage requirement did not constitute a Fifth Amendment taking. The reserve program “further[ed] the end advanced as [its] justification”<sup>54</sup> by aiming to establish “orderly marketing conditions” and stabilizing prices, thus satisfying the *Nollan* “nexus” requirement.<sup>55</sup> Additionally, the Marketing Order satisfied *Dolan*’s “rough proportionality” requirement.<sup>56</sup> Indeed, the court claimed that the reserve requirement might have been in “actual proportion to the end of stabilizing the domestic raisin market.”<sup>57</sup> By annually modifying the percentage, the court rea-

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50. *Id.*

51. *Id.*

52. *Id.* at 1140–41 (“*Loretto* . . . applies only when each ‘strand’ from the ‘bundle’ of property rights is chop[ped] through . . . taking a slice of every strand.”) (citation omitted) (internal quotation marks omitted); *id.* at 1141 n.17 (“*Lucas* plainly applies only when the owner is deprived of *all* economic benefit of the property.”) (citation omitted).

53. *Id.* at 1141.

54. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987).

55. *Horne*, 750 F.3d at 1143.

56. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

57. *Horne*, 750 F.3d at 1143 (emphasis in original).

soned, the RAC did not overly burden producers. *Dolan's* requirement that the conditions being imposed be "individualized"<sup>58</sup> was less relevant in the Hornes' context because raisins, unlike parcels of land, are fungible. Although individualized consideration is necessary when the government imposes conditions on a unique parcel of land, it is not required when the property at issue is a commodity and the burden is "imposed evenly across the industry."<sup>59</sup>

Finally, as in *Nollan* and *Dolan* where the government conditioned the bestowal of a benefit on the forfeiture of a property interest, the reserve tonnage requirement was best thought of as a "conditional exaction": Instead of granting an easement (as in *Nollan*), or transferring title to real property (as in *Dolan*), the Hornes were asked to assume "the loss of possessory and dispositional control" of their raisins in exchange for the "government benefit" of participating in interstate commerce.<sup>60</sup> In this way, the court reasoned, the reserve tonnage requirement was not a "forced seizure"<sup>61</sup> of property because the Hornes were left with a meaningful choice in the matter: By "planting different crops . . . or selling their grapes without drying them into raisins" the Hornes could avoid the Marketing Order.<sup>62</sup> To put it another way, the Hornes voluntarily subjected themselves to the Marketing Order when they chose to become raisin farmers. They could avoid the reserve tonnage requirement simply by choosing a new profession.

### III. THE NINTH CIRCUIT'S *HORNE* DECISION UNDERMINES PROPERTY RIGHTS BY MISCONSTRUING TAKINGS CLAUSE JURISPRUDENCE

Though the RAC did not physically seize the Hornes' raisins, the Secretary's assessment of a fine is best analyzed as a physical, not a regulatory, taking. By declaring that personal property deserves less protection than real property, the Ninth Circuit not only misapplied Supreme Court precedent but also significantly

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58. *Dolan*, 512 U.S. at 391.

59. *Horne*, 750 F.3d at 1144.

60. *Id.* at 1143.

61. *Id.* at 1142.

62. *See id.* at 1143.

undermined Takings Clause protections. Finally, the court erroneously found that the Marketing Order presented the Hornes with a meaningful choice, one that satisfied the *Dolan* “rough proportionality” standard.<sup>63</sup>

A. *The Hornes Suffered a Physical, Not a Regulatory, Taking*

The Marketing Order, which allows the government to demand title to raisins, results in a straightforward physical taking of property without just compensation—precisely what the Takings Clause was designed to prevent. Takings Clause jurisprudence calls for the application of a physical or “paradigmatic” analysis where there “is a direct government appropriation or physical invasion of private property.”<sup>64</sup> A regulatory takings analysis, on the other hand, applies when “government regulation of private property may be so onerous that its effect is tantamount” to a straightforward physical taking.<sup>65</sup>

In the case of the Hornes, the court acknowledged that the couple had standing to litigate a takings claim despite the fact that no raisins were actually confiscated.<sup>66</sup> As the penalty that constituted the injury was directly tied to the Hornes’ refusal to comply with the Marketing Order, the Hornes had only two options.<sup>67</sup> The Hornes had to hand over their raisins or submit to the penalty—or as Justice Scalia quipped during oral argument, “your raisins or your life.”<sup>68</sup> Indeed, most of the Secretary’s fine was a proxy for the raisins the Hornes withheld.<sup>69</sup>

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63. *See id.* at 1143–44.

64. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005).

65. *Id.*

66. *See Horne*, 750 F.3d at 1136.

67. The Ninth Circuit contended that the Hornes had a third option. *See infra* Part III.C.

68. Transcript of Oral Argument at 31, *Horne v. Dep’t. of Agric.*, 133 S. Ct. 2053 (2013). Given that the fine stood at \$695,226.92, *Horne*, 750 F.3d at 1135, Justice Scalia’s observation was only mild hyperbole—collection of the fine would likely spell the end of the Hornes’ raisin farm.

69. The breakdown of the fine was as follows: (1) \$8,783.39 in overdue assessments for the 2002–03 and 2003–04 crop years, (2) \$483,843.53 as the dollar equivalent for the raisins not held in reserve, and (3) \$202,600 as a civil penalty for failure to comply with the Marketing Order. *Horne*, 750 F.3d at 1135 n.6.

What the Secretary demanded was title to the Hornes' raisins<sup>70</sup> or its dollar equivalent, with penalties and interest.<sup>71</sup>

Such a demand for property is best understood as a *physical* taking because the government, if ultimately successful, will gain possession of the Hornes' property by obtaining the cash equivalent of the raisins that the Hornes withheld. This was not, in the words of Justice Holmes, merely a regulation that "goes too far."<sup>72</sup> It was (and is) a demand for physical property ("the loss of possessory and dispositional control," as the court euphemistically described it).<sup>73</sup> Yet the court insisted that because no "paradigmatic taking" occurred—because the Government did not march onto the Hornes' property and carry off baskets of raisins—a physical takings analysis was inapplicable.<sup>74</sup> Instead the court committed to an ill-fitting and ultimately incoherent analysis when it attempted to characterize the Secretary's demand as a regulatory taking.

Plunging into the "doctrinal thicket"<sup>75</sup> of regulatory takings, the court continued to obscure what is readily apparent to raisin farmers: The Marketing Order allows the government to seize private property. According to the court, even after title to raisins is transferred to the RAC, farmers like the Hornes do not suffer a total deprivation of rights to the property that they relinquish.<sup>76</sup> In crop year 2002–2003 farmers were forced to for-

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70. See 7 C.F.R. §§ 989.65, 989.66(a), (b) (1), (4).

71. Joseph R. Palmore, Assistant to the Solicitor General, summarized the situation best during oral argument for *Horne I* before the Supreme Court: "The . . . demand letter [from the Department of Agriculture to the Hornes] said: We showed up—literally it says: We showed up with our truck, you didn't provide the raisins, so now you have got to provide the cash equivalent." Transcript of Oral Argument at 32, *Horne v. Dep't. of Agric.*, 133 S. Ct. 2053 (2013).

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

73. *Horne*, 750 F.3d at 1143.

74. See *id.* at 1138 ("A 'paradigmatic taking' occurs when the government appropriates or occupies private property . . . Because the government neither seized any raisins from the Hornes' land nor removed any money from the Hornes' bank account, the Hornes cannot—and do not—argue they suffered this sort of 'paradigmatic taking.'" (citing *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005))).

75. *Id.*

76. See *id.* at 1141 ("the reserved raisins are not permanently occupied; rather, their disposition, while tightly controlled, inures to the Hornes' benefit."). Note that the court here was not arguing that farmers have a retained interest *in their*

feit forty-seven percent of their crops, converting it to “reserve tonnage.”<sup>77</sup> Though the RAC managed to sell the yield for \$970 per ton in 2004, none of the revenue generated was returned to raisin producers.<sup>78</sup> *Loretto* and *Lucas* teach that the deprivation of all economically valuable use constitutes a per se taking.<sup>79</sup> Even though the farmers received no compensation for their reserve raisin contributions, the court refused to find a total deprivation, arguing that RAC representation and more stable raisin prices demonstrated a retained property interest in the forfeited raisins that was greater than zero.<sup>80</sup> If the supposed benefits of government control over the nation’s raisin supply can be considered a retained property interest, then almost any seizure of property could be justified. The government will almost always be able to claim that an expropriation of property in some way benefits the (former) property owner.<sup>81</sup>

To admit the obvious—that the Marketing Order allows the Secretary of Agriculture to effectively *seize* raisins—would have been to admit that the program results in a *physical* taking of property. Instead, the court contended that “forced seizure” was authorized because the Secretary merely “imposed a condition on the Hornes’ *use* of their crops by regulating their

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*entire yield* because only a portion is surrendered to the RAC, rather the court claimed that farmers have a retained property interest in their *forfeited* raisins.

77. *Id.* at 1133.

78. *Horne v. U.S. Dep’t of Agric.*, CV-F-08-1549LJOSMS, 2009 WL 4895362, at \*25 (E.D. Cal. Dec. 11, 2009), *aff’d*, 673 F.3d 1071 (9th Cir. 2012), *rev’d sub nom.* *Horne v. Dep’t of Agric.*, 133 S. Ct. 2053 (2013), and *aff’d*, 750 F.3d 1128 (9th Cir. 2014). Referring to a more recent year, RAC president and general manager Gary Schulz observed, “We generated \$65,483,211. And we pretty well spent it all.” *Fahrenthold*, *supra* note 22.

79. *See Horne*, 750 F.3d at 1140–41, 1141 n.17 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019, 1019 n.8 (1992)).

80. *See id.* at 1141. The contention that a taking cannot have occurred when a property owner is left with even a few scraps from his previous bundle of rights is reminiscent of Justice Blackmun’s assertion in his dissent in *Lucas* that a state’s ban on the erection of any permanent structures on the beachfront property in question did not constitute a taking: “Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer.” *Lucas*, 505 U.S. at 1044 (Blackmun, J., dissenting).

81. For instance, in *Lucas*, the owner of the beachfront property in theory benefited from a statute “properly and validly designed to preserve . . . South Carolina’s beaches.” 505 U.S. at 1010 (citation omitted).

sale.”<sup>82</sup> This argument, in contrast to the court’s “retained interest” justification discussed above, attempted to refocus the takings inquiry on the raisins not demanded by the RAC: For the court, transferring title is just the cost of doing business, a mere “use restriction” imposed on the raisins retained by farmers.<sup>83</sup> Regardless of how the Marketing Order is characterized, the government ends up with either cash or raisins; property is physically taken, often without any compensation.<sup>84</sup>

B. *The Court’s Real Property-Personal Property Distinction Was Flawed*

The court’s decision to apply a regulatory rather than a physical takings analysis enabled it to create a flawed distinction between the protection the Takings Clause affords to real property and personal property. Though the court erred in not applying a straightforward physical takings analysis, regulatory takings jurisprudence nevertheless should have prevented the government from laying claim to the Hornes’ property without providing just compensation.<sup>85</sup> Indeed, the Supreme Court made clear in *Loretto* and *Lucas* that the government cannot take control of private property through a permanent occupation or totally deprive it of value without providing compensation to the property owner; such government action constitutes a categorical taking.<sup>86</sup> The Ninth Circuit, however, quickly rejected the possibility that the principles undergirding *Loretto* and *Lucas* were applicable, in part because those cases dealt with real rather than personal property.<sup>87</sup> According to the

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82. *Horne*, 750 F.3d at 1142 (emphasis in original). Such an extortionate demand impermissibly conditions a property owner’s right to possess property on compliance with a government program and is thus no real choice at all. See *infra* Part III.C.

83. See *Horne*, 750 F.3d at 1142.

84. See *id.* at 1138 (conceding that a removal of “money from the Hornes’ bank account” would constitute a paradigmatic taking).

85. It bears repeating that the proper approach would have been to consider the enforcement of the Marketing Order a paradigmatic (physical) rather than a regulatory taking; thus the fallacious assertions the court made in the course of its regulatory takings analysis were themselves built upon a flawed foundation.

86. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982); *Lucas*, 505 U.S. at 1019.

87. See *Horne*, 750 F.3d at 1139–40.

court, “the Takings Clause affords more protection to real than to personal property.”<sup>88</sup> The court cited *Lucas*:

[I]n the case of personal property, by reason of the State’s traditionally high degree of control over commercial dealings, [a property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property’s only economically productive use is sale or manufacture for sale).<sup>89</sup>

Yet this *Lucas* language, upon which the court based its extraordinary assertion that personal property enjoys reduced constitutional protection, referred merely to the idea that commercial regulation frequently changes the value of personal property sold or used to manufacture goods. *Lucas* was not discussing the *seizure* of personal property,<sup>90</sup> but the *loss of value* of personal property.<sup>91</sup> The court similarly misappropriated language in *Loretto*.<sup>92</sup> The *Loretto* court’s observation that a government’s physical occupation of “land or real property is an obvious fact that will rarely be subject to dispute,”<sup>93</sup> in addition to the *Loretto* court’s citation of “virtually only cases pertaining to real property,”<sup>94</sup> was somehow clear proof to the Ninth Cir-

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88. *Id.* at 1140.

89. *Lucas*, 505 U.S. at 1027–28 (citing *Andrus v. Allard*, 444 U.S. 51, 66–67 (1979)). The *Lucas* Court was envisioning a scenario in which the government banned the sale of a particular product, *see, e.g., Andrus*, 444 U.S. at 66–67 (prohibition on sale of eagle feathers), thus rendering it valueless. *Lucas* was *not* implying that the Takings Clause allowed the government to claim title to personal property, or physically seize it, without providing just compensation. For instance, if the government determined that raisins were a health hazard if consumed, it could prohibit the Hornes from selling them, rendering the crop valueless. This is quite different from the current scenario where the government actually demands title to the raisins.

90. *See supra* Part III.A. Even though in the present case the government never acquired title to the Hornes’ raisins, because the government demanded raisins—and will receive their cash equivalent if the Ninth Circuit’s decision is not reversed—the ultimate effect of the Marketing Order is a physical seizure.

91. *See Horne*, 750 F.3d at 1139–40 (quoting *Lucas*, 505 U.S. at 1027–28).

92. *See id.* at 1140.

93. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437 (1982). Contrary to the court’s pronouncement, what exactly constitutes a physical occupation of real property subject to Takings Clause analysis is still an issue of intense legal dispute. *See, e.g., Ark. Game & Fish Com’n v. United States*, 133 S. Ct. 511 (2012) (holding that temporary government-induced flooding is not automatically exempt from Takings Clause protections).

94. *Horne*, 750 F.3d at 1140.

cuit that personal property deserved a lesser degree of protection.<sup>95</sup>

Government attempts to seize, physically invade, or severely restrict the use of land are indeed met with high levels of judicial scrutiny. This is true for myriad reasons. A particular parcel is often unique and therefore not fungible. Landowners rarely have the same degree of liquidity as owners of other investments. Landowners cannot easily shift assets to avoid the objectionable actions of others. Land is interconnected with the community. And, perhaps most importantly, landowners often hold deep personal attachments to their land.<sup>96</sup> Contrary to the Ninth Circuit's categorization, however, these attributes are not exclusive to real property: In any given situation real property may lack them and personal property may possess them. While the owner of a childhood home may have a special attachment to it, a real estate tycoon would likely view his land holdings as mere investments. A wedding ring in the hand of a jewelry store owner is fungible, but a wedding ring on the hand of a bride has a deeply personal significance.<sup>97</sup> The court's blanket assertion regarding real property misses these nuances. In declaring that the Takings Clause affords personal property less protection, the court transforms passing observations in *Lucas* and *Loretto* into a troubling new standard of awesome breadth.

*Lucas* and *Loretto* aside, precedent and history make clear that property need not be real property to enjoy the full protection of the Fifth Amendment.<sup>98</sup> Such protections extend back to Magna

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95. Though the Ninth Circuit insisted that the principles of *Loretto* and *Lucas* were inapplicable because they dealt with real rather than personal property, the court saw no problem in applying *Nollan* and *Dolan*—cases that also dealt with real property—to deny the Hornes' takings claim. *See id.* at 1143. *But see* Daniel L. Siegel, *Exactions After Lingle: How Basing Nollan and Dolan on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 STAN. ENVTL. L.J. 577, 589 (2009) (arguing that the unconstitutional conditions doctrine confines *Nollan* and *Dolan* to adjudicatively-imposed real property exactions).

96. *See* Michael Allan Wolf, *Taking Regulatory Takings Personally: The Perils of (Mis)reasoning by Analogy*, 51 ALA. L. REV. 1355, 1361 n.42 (2000).

97. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 987–88 (1982).

98. *See, e.g.,* *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164–65 (1980) (declaring state retention of interest accruing on an interpleader fund deposited in the registry of the county court a taking); *Kimball Laundry v. United States*, 338 U.S. 1, 16 (1949) (finding that the temporary government seizure of a

Carta, which declared that “No constable or other of Our bailiffs shall take corn or other chattels of any man without immediate payment.”<sup>99</sup> Personal property is indeed property under the Takings Clause, worthy of full constitutional protection from uncompensated government seizure.

C. *The Government’s Extortionate Demand for Raisins Represents an Unconstitutional Condition Placed on the Hornes’ Right to Sell Raisins*

In its continuing effort to avoid applying a physical takings analysis,<sup>100</sup> the court argued that the government did not force farmers like the Hornes to hand over their raisins (or dollar equivalent). Instead, “the loss of possessory and dispositional control” of raisins was consented to in exchange for a “government benefit”—that is, the privilege of selling one’s raisins across state lines into a regulated raisin market.<sup>101</sup> The Hornes could have avoided the Marketing Order by “planting different crops, including other types of raisins, not subject to this Marketing Order or selling their grapes without drying them into raisins.”<sup>102</sup> Yet such a choice—one that would have required the Hornes to abandon their business—was no choice at all. The Ninth Circuit’s logic was expressly rejected in *Loretto* where the Supreme Court repudiated an argument that a physical occupation of rental property did not constitute a taking because property owners could avoid the imposition by getting out of the rental business.<sup>103</sup> More recently, the Court rejected the same flawed logic when it determined that a state agency could not coerce a property owner to expend funds on a sepa-

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laundry company constituted a taking of the proprietor’s laundry trade routes requiring just compensation).

99. MAGNA CARTA cl. 28, translated in A.E. DICK HOWARD, *MAGNA CARTA: TEXT & COMMENTARY* 43 (1964).

100. The court’s tortured application of *Dolan* is once again indicative of the original error undercutting the court’s entire analysis: the Marketing Order results in a physical, not a regulatory taking. Thus any of the court’s observations regarding conditional exactions, as applied to the case at hand, rely on a false premise.

101. See *Horne v. U.S. Dep’t of Agric.*, 750 F.3d 1128, 1143 (9th Cir. 2014).

102. *Id.*

103. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982) (“a landlord’s ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation.”).

rate water mitigation project by conditioning the issuance of a permit on his willingness to comply: “Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.”<sup>104</sup> The government cannot deny a benefit to an individual because he chooses to exercise a constitutional right.<sup>105</sup> Here the Hornes faced just such a demand, one more befitting of Vito Corleone than the Secretary of Agriculture: Give us a cut of your product or lose your business.

Some government requests for property in exchange for benefits, of course, are permissible. *Nollan* and *Dolan* both represent a “special application” of the unconstitutional conditions doctrine.<sup>106</sup> A property owner can be forced to relinquish property without compensation in order to qualify for a government benefit only if the exaction demanded is both proportional and closely connected to the “benefit” sought.<sup>107</sup> In evaluating whether a government demand for property is permissible, courts must make *individualized* assessments as to whether the demand is related in nature and extent to the government’s purpose.<sup>108</sup>

Assuming that the reserve tonnage requirement was best understood to be a regulatory rather than a physical taking, as the court argued, the Marketing Order did not satisfy the “rough proportionality” requirement of *Dolan*.<sup>109</sup> The court re-

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104. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2596 (2013) (“As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.”).

105. *Id.* at 2594 (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983); *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59–60 (2006); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 78 (1990)).

106. *Id.* (quoting *Lingle*, 544 U.S. at 547).

107. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 547 (2005); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987). It is telling that the Ninth Circuit considered the ability to participate in interstate commerce a “government benefit” rather than a presumed right. See *Horne*, 750 F.3d at 1143 (arguing that the Marketing Order, like permitting regimes in *Nollan* and *Dolan*, “conditionally grant[ed] a government benefit in exchange for an exaction.”).

108. See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

109. *Id.*

fused to allow the *Dolan* requirement that conditions imposed on property owners be “individualized” to frustrate the government’s designs; instead, the court declared that a demand for a percentage of property, if uniformly applied to all, satisfies *Dolan* individualization.<sup>110</sup> Such reasoning belies the very purpose of the “rough proportionality” requirement. The test was derived from the standard then followed by a majority of states that an exaction must have a “reasonable relationship” to the end sought.<sup>111</sup> While the confiscation of half of a major raisin producer’s product may have a *reasonable* relationship to price stabilization, the confiscation of half of a small family farm’s crop does not: The impact on the Hornes would be catastrophic, and the effect on market-wide price stabilization would be negligible. And not only did the reserve requirement lay a heavy burden on small farmers, the Hornes and others argued that the benefits (such as national and international advertising) were disproportionately reaped by bigger players in the industry.<sup>112</sup> The *Dolan* Court created the “individualized determination” requirement, which the Ninth Circuit so quickly dismissed, precisely to avoid such disparities.

Finally, undergirding the court’s conditional exaction analysis is a troubling assumption: The ability to sell raisins is a “government benefit,”<sup>113</sup> meaning the Hornes do not have the

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110. See *Horne*, 750 F.3d at 1144.

111. *Dolan*, 512 U.S. at 391. The term “reasonable relationship” was rejected mainly to avoid confusion given its similarity to the term “rational basis” used in the Equal Protection Clause context. *Id.*

112. See *Horne*, 750 F.3d at 1144 (“the Hornes’ impatience with a regulatory program they view to be outdated and perhaps disadvantageous to smaller agricultural firms is understandable . . .”).

113. *Id.* at 1143 (“there are important parallels between *Nollan* and *Dolan* on one hand and the raisin diversion program on the other . . . . All conditionally grant a government benefit in exchange for an exaction.”). Though government has enjoyed wide latitude to regulate business since the death of *Lochner v. New York*, 198 U.S. 45 (1905), it is quite a philosophical leap to describe the ability to engage in otherwise lawful business as a “government benefit.” Aside from noting that there do remain some constitutional limits to economic regulation, see, for example, *St. Joseph Abbey v. Castille*, 712 F.3d 215, 217 (5th Cir. 2013) (2013) (holding that the Due Process Clause forbade the Louisiana Board of Funeral Directors from prohibiting Benedictine monks from selling caskets), a thorough discussion of what protections the Fourteenth Amendment provides to those wishing to engage in business is beyond the scope of this comment. The point here instead is a

presumptive right to earn a living as raisin farmers. Such an assumption is of course necessary if the court is to draw any real comparison between the reserve requirement and *Nollan-Dolan*, where landowners were asked to forfeit property rights in exchange for permits.<sup>114</sup> Unlike construction permits, however, the ability simply to participate in legal economic activity, even in a market with artificially inflated prices, should never be considered a “government benefit” to be distributed or withheld by federal bureaucrats.

#### IV. CONCLUSION

Government could not properly function if “values incident to property could not be diminished without paying for every such change in the general law.”<sup>115</sup> When the law asks too much of property owners—where property value is significantly diminished or eliminated but no outright seizure has occurred—modern regulatory takings jurisprudence is supposed to ensure that property owners are justly compensated. The sort of demand leveled at the Hornes, however, by which the government claims a right to take actual possession of property—to *seize* it—without leaving the property owner a meaningful choice in the matter, must be evaluated with an even higher level of scrutiny, regardless of whether the property in question is real or personal. By viewing the reserve requirement as a regulatory taking instead of a straightforward physical seizure of private property, the Ninth Circuit managed to meander its way to the determination that the government is free to confiscate personal property as long as it does so uniformly and with the purpose of achieving a stated goal minimally furthered by the confiscation.

Fortunately the Ninth Circuit will not have the last word. The Supreme Court already unanimously rejected the Ninth Circuit’s logic in this very case.<sup>116</sup> As the Court takes a second

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philosophical one: the right to engage in lawful business should not be described as a “government benefit.”

114. See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 828 (1987); *Dolan*, 512 U.S. at 380.

115. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

116. See *Horne v. Dep’t of Agric.*, 133 S. Ct. 2053, 2064 (2013).

look in *Horne II*,<sup>117</sup> it will not only have the opportunity to rein in the revolutionary and flawed pronouncement that the Takings Clause is somehow less applicable to personal property—in reversing the Ninth Circuit the Court would strike a blow to the expansive administrative state, an increasingly onerous bureaucratic government that the Roberts Court seems to view with suspicion.<sup>118</sup> The Hornes, having literally bet the farm on their claim, may yet be vindicated.

*William K. Lane III*

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117. *Horne v. Dep't of Agric.*, 83 U.S.L.W. 3127 (U.S. Jan. 16, 2015) (No. 14-275) (granting certiorari).

118. See *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (holding that dual for-cause removal limitations for the Public Company Accounting Oversight Board violate the separation of powers). One could speculate that the Court might be especially skeptical of the Marketing Order given that the Secretary of Agriculture delegates his authority to determine the reserve tonnage requirement to the RAC; see also *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring) (“When citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences.”). Even members of the Court who tend to be more accepting of federal regulatory regimes have expressed concern over the raisin program. During oral argument, Justice Kagan suggested that the Marketing Order could be the “world’s most outdated law,” while Justice Breyer expressed his shock at the absurdity of the program: “I can’t believe that Congress wanted the taxpayers to pay for a program that’s going to mean they have to pay higher prices as consumers.” Transcript of Oral Argument at 43, 49, *Horne v. Dep't. of Agric.*, 133 S. Ct. 2053 (2013).