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Raisin' Contentions: A Farmer's Grapes of Wrath and the Ninth Circuit's Questionable Takings Analysis in Horne v. U.S. Dept. of Agriculture

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RAISIN' CONTENTIONS: A FARMER'S GRAPES OF WRATH AND THE NINTH CIRCUIT'S QUESTIONABLE TAKINGS ANALYSIS IN *HORNE V. U.S. DEPT. OF AGRICULTURE*

I. Introduction

The Fifth Amendment's Takings Clause serves as a shield protecting individuals from bearing public burdens that society should shoulder as a whole.[1] The Supreme Court has recognized the essential need for such protection, extending the Fifth Amendment's guarantees to interests in specific parcels of real property and personal property alike.[2] While the Court has found "no distinction" between the protections afforded to personal and real property interests, it has applied varying tests to determine whether a taking has occurred and whether compensation is due.[3]

In the arena of real property and land use, for example, the Supreme Court has established significant authority, particularly through *Nollan v. California Coastal Comm'n*[4] and *Dolan v. City of Tigard*.[5] From these cases, the *Nollan-Dolan* test emerged, which stipulates that any conditional factors considered when issuing land use permits must exhibit an "essential nexus" and be "roughly proportional" to the impact of the proposed development on the

1. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) (defining purpose of Takings Clause).

2. *See, e.g.*, Webb's Fabulous Pharms., Inc. v. Beckwith, 449 U.S. 155, 164 (1980) (holding money confiscation unassociated with specific parcel of property can constitute taking); Brown v. Legal Found. of Wash., 538 U.S. 216, 217 (2003) (holding that interest accrued on monetary funds qualifies as property); United States v. General Motors Corp., 323 U.S. 373, 383-84 (1945) (holding owner's interest in personal property protected to same extent as interest in real property).

3. *See* United States v. Burnison, 339 U.S. 87, 93 (1950) (noting lack of distinction due to broad state power). *Compare* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427-38 (1982) (holding that permanent physical invasion of property effects per se taking), *with* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), *and* Dolan v. City of Tigard, 512 U.S. 374 (1994) (together holding conditions on land use permits require "essential nexus" and "rough proportionality" to impact construction proposed).

4. 483 U.S. 825 (1987).

5. 512 U.S. 374 (1994). *See* Catherine Contino, *Monetary Exactions: Not Just Compensation? The Expansion of Nollan and Dolan in Koontz v. St. Johns River Water Management*, 25 Vill. Envtl. L.J. 465, 473 (2014) (citation omitted) (discussing significance of *Nolan* and *Dolan* in takings jurisprudence).

land.[6] In addition to the *Nollan-Dolan* test, the Court has recognized a number of categorical exceptions that constitute an unconstitutional, per se taking of personal and real property.[7] With such an inclusive ambit, the history of takings jurisprudence is rife with complex application, continuous litigation, and often, confusing precedent.[8]

It was against this expansive and convoluted backdrop that the United States Court of Appeals for the Ninth Circuit, in a curious ruling, applied the *Nollan-Dolan* test in *Horne v. United States Dep't of Agric.*,[9] extending the test not to conditions on land use permits—or real property at all—but to raisins.[10] In *Horne*, the Ninth Circuit determined whether a government regulation requiring certain farmers to allocate a portion of their annual raisin crop to the government, without any guaranteed compensation, constituted an unconstitutional taking.[11] In its analysis, the court first distinguished the raisins as distinctly personal property and, as a result, determined the heightened scrutiny of certain categorical per se takings rules did not apply.[12] Instead, the court ruled that the *Nollan-Dolan* land use test was appropriate to analyze this alleged taking of uniquely personal property, likening the allocation requirement of the government regulation to a condition on private land use.[13] Executing the test, the Ninth Circuit held that the allocation requirement exhibited an "essential nexus" and "rough proportionality" to its stated purpose of stabilizing market conditions.[14]

The Ninth Circuit's dismissal of a categorical takings approach regarding personal property and extension of the *Nollan-Dolan* test to personal property appears inconsistent and contrary to both

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6. *See id.* at 374-75 (holding permit conditions "roughly proportional" to development impact are not takings); *see also Nollan*, 483 U.S. at 842-43 (noting condition must exhibit "essential nexus" to pass constitutional muster).

7. *See, e.g.*, *Loretto*, 458 U.S. at 426 (holding government's permanent physical invasion of private property works per se taking); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1031 (1992) (holding regulations depriving owner of all economically viable use of property works per se taking); United States v. General Motors Corp., 323 U.S. 373, 381-83 (1945) (holding owner's interest in personal property protected to same extent as real property interest).

8. For a discussion of the relevant background to Takings Clause jurisprudence, see *infra*, notes 41-173 and accompanying text.

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

10. *See id.* at 1141-42 (holding to extend *Nollan-Dolan* test).

11. *See id.* at 1133-34 (describing government regulation at issue in case).

12. *See id.* at 1140-41 (dismissing categorical approach of analysis).

13. *See id.* at 1142-43 (explaining necessity of *Nollan-Dolan* test here).

14. Horne v. United States Dep't of Agric., 750 F.3d 1128, 1144 (9th Cir. 2014) (stating holding of case).

Ninth Circuit and Supreme Court precedent.[15] With this sweeping expansion of *Nollan-Dolan* review, lower courts may struggle to determine when, and under which circumstances, the test applies to personal and real property matters.[16] Further, this decision may open the door to future challenges to similar environmental regulations, threatening the government's ability to safeguard the environment.[17]

This Note examines the Ninth Circuit's opinion in *Horne* holding that the federal regulation requiring allocation of private raisin crops to the government did not constitute a taking, and further analyzes the court's decision-making process.[18] Part II provides a factual summary of *Horne*.[19] Part III reviews the origin and impact of the applicable government regulation, and further analyzes the evolution of relevant Takings Clause jurisprudence.[20] Part IV reviews the Ninth Circuit's analysis in *Horne*.[21] Part V presents a critical analysis of the court's reasoning and holding, specifically examining its distinction between personal and real property, and the court's choice to implement the *Nollan-Dolan* test over other methods of analysis for takings challenges.[22] Finally, Part VI examines the decision's potential impact on Takings Clause jurisprudence and possible future conflicts of similar posture.[23]

15. For a further critical analysis of the Ninth Circuit's application of the test, see *infra* notes 220-62 and accompanying text.

16. For a further discussion of the ruling's potential impact, see *infra* notes 263-82 and accompanying text.

17. For a further discussion of the ruling's potential impact, see *infra* notes 263-82 and accompanying text.

18. For a narrative analysis of *Horne*, see *infra* notes 173-219 and accompanying text. For a critical analysis of *Horne*, see *infra* notes 220-62 and accompanying text.

19. For a discussion of the relevant facts of *Horne*, see *infra* notes 24-40 and accompanying text.

20. For a discussion of all relevant background information, see *infra* notes 41-172 and accompanying text.

21. For a narrative analysis of *Horne*, see *infra* notes 173-219 and accompanying text.

22. For a critical analysis of *Horne*, see *infra* notes 220-62 and accompanying text.

23. For a discussion of the potential impact of *Horne*, see *infra* notes 263-82 and accompanying text.

II. FACTS

The Appellants in *Horne*, Marvin and Laura Horne (the Hornes), have been California raisin farmers since 1969.[24] In 2004, the United States Department of Agriculture (USDA) initiated an enforcement action against the Hornes, seeking nearly $700,000 in fines for their alleged violation of a federal policy that required farmers of certain crops to allocate a portion of their annual crop yield to the federal government.[25]

The Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California (the Marketing Order) was the regulation at the center of the dispute.[26] The Marketing Order is a complex regulatory program that requires raisin "handlers" to divert a percentage of the annual crop yield they receive from raisin "producers" to a national reserve.[27] The government then diverts this reserved portion from the open market and sometimes sells it in foreign or noncompetitive domestic markets.[28] The diversion allows the government to control the amount of raisins that enter the market, and thus facilitates the government's ability to assure a constant supply and price, eliminating the threat of oversaturation of the raisin supply in the market.[29] Any farmer who fails to comply

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24. Evan J. Seeman, I HEARD IT THROUGH THE GRAPEVINE: The Impact of Horne v. United States Department of Agriculture, 65 PLAN. & ENVTL. LAW No. 9, 7 (Sept. 2013) (describing parties to action).

25. Horne v. United States Dep't of Agric., 730 F.3d 1128, 1134 (9th Cir. 2014) (describing relief sought). The USDA sought relief for violations totaling $695,226.92. *Id.* at 1135. Specifically, the fines included $8,783.39 in overdo assessments for the 2002-2003 and 2003-2004 crop years, $483,843.53 for the dollar equivalent of the raisins not sent to reserve, and $202,600.00 as a civil penalty for failure to comply with the marketing order. *Id.* at n. 6.

26. 7 C.F.R. pt. 989 (current through April 5, 2015) (exhibiting title of regulation).

27. *Horne*, 750 F.3d at 1132 (describing provisions of Marketing Order). The Marketing Order delineates the duties of "producers," those who grow and cultivate the raisins, and "handlers," those who prepare and sell the free tonnage of raisins. *Id.* at 1133. It directs handlers to comply with its regulations and divert a portion of the crop to the government. *Id.* For further discussion of purpose of Marketing Order, see *infra* notes 49-61 and accompanying text.

28. *Horne*, 750 F.3d at 1133 (describing use of reserve tonnage). Noncompetitive domestic markets include school lunch programs and other related programs. *See* Seeman, *supra* note 24. For further discussion of use of diverted raisins, see *infra* notes 49-61 and accompanying text.

29. *See Horne*, 750 F.3d at 1133 (describing purpose of Marketing Order). For further discussion of purpose and history of Marketing Order, see *infra* notes 49-61 and accompanying text.

with the regulation is subject to fines at the discretion of the Secretary of Agriculture (Secretary).[30]

Beginning in the early 2000s, the Hornes began to view the Marketing Order as antiquated and sought to avoid falling subject to its authority.[31] Accordingly, the Hornes elected to restructure their raisin cultivation by not only growing their own raisins, but also stemming, sorting, and packaging the raisins for sale themselves, thereby eliminating the need to send their crop to handlers altogether.[32] The Hornes believed that, despite assuming all of the duties that a handler would traditionally undertake, they would not qualify as "handlers" as understood by the Marketing Order for raisins they produced.[33] Thus, because the Hornes believed their operations to be outside of the Marketing Order's purview, they declined to supply the government with the proportion of their raisin crops between 2002 and 2004.[34] The Secretary, however, disagreed, and brought an enforcement action against the Hornes for failing to comply with the Marketing Order from 2002 through 2004.[35] After an administrative hearing, the USDA imposed a fine of $695,226.92.[36]

The Hornes sought review of the USDA's decision and relief on the grounds that the Marketing Order constituted an illegal taking prohibited by the Fifth Amendment to the United States Consti-

30. *Horne*, 750 F.3d at 1133 (describing consequences for noncompliance). For further discussion of consequences of the Marketing Order, see *infra* notes 49-61 and accompanying text.

31. *Horne*, 750 F.3d at 1134 (noting Hornes' perspective on Marketing Order). The Marketing Order was a direct statutory descendent of New Deal and World War II era legislation. *Id.* For further discussion of the history of the Marketing Order, see *infra* notes 49-61 and accompanying text.

32. *Horne*, 750 F.3d at 1134 (describing Hornes' attempt to contravene Marketing Order). Stemming, sorting, and packaging the crop were all traditional duties of "handlers." *Id.* The Hornes performed these same tasks on behalf of other raisin producers on a per-pound fee basis, so as to allow those producers similar avoidance of the Marketing Order. *Id.*

33. *Id.* (noting Hornes' belief). Similarly, the Hornes also believed that they would not qualify as "handlers" for third party raisins as, instead of acquiring actual title to the raisins like normal handlers do, the Hornes charged a per-pound fee. *Id.*

34. *See id.* at 1134 (describing Hornes' failure to reserve exaction for federal government). The annual percentage requirements totaled forty-seven and thirty percent of raisin crops during the 2002-2003 and 2003-2004 crop years respectively. *Id.*

35. *Id.* at 1135 (describing charges against Hornes). As the USDA applied these penalties, it took into account in the third parties' crop that the Hornes handled, and applied it to the total accordingly. *Id.*

36. *Id.* at 1134 (discussing penalties imposed). This total reflected penalties plus the dollar equivalent for the raisins not reserved for the government. *Id.* For further discussion of specific total amounts, see *supra* note 25.

tution.[37] Upon review, the Ninth Circuit analyzed the Marketing Order under the *Nollan-Dolan* test.[38] The court held that the Marketing Order did not qualify as an unconstitutional taking, as it exhibited an essential nexus between the means and ends that the Order sought, and established, a rough proportionality between the structure of the Marketing Order and its stated goal of market stabilization.[39] Accordingly, the Ninth Circuit upheld the fine.[40]

III. BACKGROUND

In *Horne*, the Ninth Circuit applied already-complex takings jurisprudence to an exceedingly intricate federal regulation.[41] In a narrow holding, the court determined that monetary exactions associated with the Marketing Order did not violate the Takings Clause.[42] This section will present and review all relevant background information needed to comprehend the court's reason-

37. *Horne*, 750 F.3d at 1135 (discussing Hornes' claims). Similarly, the Hornes sought relief on the basis that the penalties violated the Eighth Amendment by virtue of their excessive nature, as well as the claim that they did not qualify as "handlers" as understood under the Marketing Order. *Id.*

38. *See id.* at 1143 (discussing decision to implement *Nollan-Dolan* test). The Hornes' claim proceeded through an extensive procedural posture prior to its appearance before the Ninth Circuit in this instance, which was actually the second time the Ninth Circuit reviewed this case. *Id.* at 1134. Initially, the District Court granted summary judgment in favor of the government on all counts. *Id.* at 1135. The Hornes then appealed to the Ninth Circuit, which affirmed the District Court's findings with respect to the Hornes' statutory claims, their qualification as "handlers," as well as their Eighth Amendment claim. *Id.* (citation omitted). The Ninth Circuit, however, held that it lacked jurisdiction over the Fifth Amendment takings claim. *Id.* Specifically, in accordance with the Tucker Act, which requires takings claims totaling over $10,000 be reviewed by the Federal Claims Court, the Ninth Circuit held that the authority for the claim lay in the hands of the Federal Claims Court. *Id.* Upon review, the Supreme Court reversed the Ninth Circuit and held that the Hornes, as handlers, may assert a constitutional defense to the USDA's action in district court. *Id.* The Court held that the AMAA withdrew Tucker Act jurisdiction over the claim and asserted that it would "make little sense to require the party to pay the fine in one proceeding and . . . sue for recovery of that same money in another proceeding." Horne v. Dep't of Agric., 133 S.Ct. 2053, 2063 (2013). The Court then remanded the case back to the Ninth Circuit to determine the merits of the Hornes' takings claim. *Horne*, 750 F.3d at 1135.

39. *Horne*, 750 F.3d at 1144 (discussing holding of case). The court heavily relied on the distinction that the raisins, as personal property, were subject to far less protection from governmental intrusion than real property, and that such regulation is "foreseeable." *Id.* This fact, in addition to the finding that the regulations strive to preserve as much ownership rights to the raisins as possible guided the court to find that the regulations did not constitute a taking. *Id.* For further discussion of the court's reasoning, see *infra* notes 173-219 and accompanying text.

40. *Horne*, 750 F.3d at 1144 (discussing holding of case).

41. *See id.* at 1142 (discussing complex factors of both takings law and regulation at issue).

42. *See id.* (noting narrow holding of case).

ing.[43] Section A will review the statute that promulgates the Marketing Order, as well as the Marketing Order's stipulations.[44] Section B will review the development and application of takings jurisprudence through the analysis of Supreme Court precedent, specifically examining regulatory and categorical takings analyses.[45] Section C will examine takings jurisprudence addressing the taking of personal property.[46] Section D will consider the Supreme Court's analysis of takings regarding monetary exactions.[47] Finally, Section E will review the Ninth Circuit's application of takings jurisprudence through case law.[48]

A. The Marketing Order: Origins and Stipulations

The USDA originally promulgated the Marketing Order to avoid the severe economic distress that pervaded both the agricultural and economic markets in years leading up to and through the Great Depression.[49] The Marketing Order's statutory foundation is grounded in the Agricultural Marketing Agreement Act of 1937 (AMAA), New Deal legislation intended to "establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish . . . parity prices."[50] Pursuant

43. For a discussion of Ninth Circuit's analysis, see *infra* notes 173-219 and accompanying text.

44. For a discussion of origins and stipulations of Marketing Order and related statutory guidelines, see *infra* notes 49-61 and accompanying text.

45. For a discussion of takings jurisprudence regarding regulatory and categorical analyses, see *infra* notes 62-98 and accompanying text.

46. For a discussion of takings cases regarding personal property, see *infra* notes 99-112 and accompanying text.

47. For a discussion of the Supreme Court's review of monetary exactions and its intersection with takings law, see *infra* notes, 113-51 and accompanying text.

48. For a discussion of the Ninth Circuit's implementation of Supreme Court takings jurisprudence, see *infra* notes 152-72 and accompanying text.

49. *See* Horne v. United States Dep't of Agric., 750 F.3d 1128, 1133 (9th Cir. 2014) (citing Parker v. Brown, 317 U.S. 341, 364 (1943); Zuber v. Allen, 396 U.S. 168, 174-76 (1969)) (discussing extreme market fluctuations). The cited cases exhibit the extreme fluctuations, sometimes garnering such a high supply and low demand that producers were compelled to sell for less than what could cover production costs. *Id.*

50. 7 U.S.C. §§ 602(a) *et. seq* (2012) (amended 2014). Specifically, the AMAA was a direct statutory descendant of the Agricultural Adjustment Act (AAA), a key piece of legislation comprising President Roosevelt's New Deal. *See generally*, Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 SAN JOAQUIN AGRIC. L. REV. 3, 3-4 (1995) (discussing AAA history). The AAA sought to unequivocally stabilize the spiraling agro-economic market by issuing licenses for handling agricultural commodities, thereby facilitating the a controlled output of crop yields in the supply and subsequently creating a constant and stable market for those goods. *Id.* at 3. While these licenses evolved into marketing orders through the passage of the AMAA in 1937, their purpose of promot-

to the authority granted to it through the AMAA, the USDA possesses the ability to develop and implement marketing orders.[51] Marketing orders are regulations controlling quantities of certain crops present in the market at any one time via their distribution and sale.[52] Generally, marketing orders are designed to create market conditions that assure demand for the product through promotional programs, and encourage quality control.[53]

In 1949, the Secretary created the Marketing Order at issue in *Horne* in response to growing concerns that the raisin market was unstable.[54] The Secretary delegated authority of the Marketing Order to the Raisin Administrative Committee (RAC) to execute the policies of the order.[55] The Marketing Order required the RAC to annually review crop yields and inventory listings of raisin producers for the purpose of recommending what portion of that total should be allocated to the government to control the total quantity of raisins entering the commercial market.[56]

The Marketing Order specifically distinguishes "producers," those who grow and cultivate the crop, from "handlers," those who stem, prepare, and package the crop for sale.[57] Producers ordinarily convey their marketable crop yield to the handlers, who then are solely responsible for complying with the RAC's stipulations for

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ing and protecting a stable market remained unwavering. *Id.* at 4. For further discussion of the history and evolution of both the AAA and the AMAA, *see generally*, *id.* at 3-5 (discussing history of both pieces of legislation).

51. *See* Bensing, *supra* note 50, at 5 (discussing USDA authority).

52. 7 U.S.C. § 602(2) (2012) (amended 2014).

53. *See* Bensing, *supra* note 50, at 5 (discussing purpose of marketing orders generally).

54. *See Horne* 750 F.3d at 1133 (citing 7 C.F.R. pt. 989) (describing creation of Marketing Order). For further discussion of policies of Marketing Order, see *supra* notes 49-53 and *infra* notes 55-61 and accompanying text.

55. *See Horne*, 750 F.3d at 1133 (describing delegation of authority in Marketing Order); *see also*, 7 C.F.R. § 989.26. The RAC was comprised of "industry representatives" that included both producers and handlers. *Horne*, 750 F.3d at 1141. In fact, Mr. Horne was at one time an alternate member of the RAC, although he never held a voting position. *Id.* at n. 15. Accordingly, the court determined that the Hornes' interests as producers were adequately represented in the structure and makeup of the RAC. *Id.* at 1141.

56. *See* Seeman, *supra* note 24 (discussing responsibilities of RAC). While the Marketing Order requires that handlers actually give the raisins to the government, the producers in fact shoulder the financial burden. *Id.* The handlers agree to a preset price to prepare the raisins whereas the producers are not guaranteed reimbursement for the portion of their crop allocated to the government. *See Horne*, 750 F.3d. at 1134. For further discussion of the producer/handler distinction, see *supra* note 27 and accompanying text.

57. *See Horne* 750 F.3d at 1133 (discussing distinction between producers and handlers).

raisin allocations.[58] The government receives these reserved raisins and prepares them to enter noncompetitive domestic markets or sells them overseas for value.[59] The RAC is the first to receive any profits derived from overseas sales, and appropriates those funds to cover its own administrative costs.[60] Once those costs are reimbursed, producers are eligible to receive the remainder of the profits, if any, on a pro rata basis.[61]

B. The Fifth Amendment: Development and Application of Regulatory and Categorical Takings Law

Takings Clause jurisprudence has tread a long and winding path, stipulating intricacies and complexities that lower courts struggle to interpret.[62] The Fifth Amendment of the Constitution provides the basis for these challenges, guaranteeing that "private property [shall not] be taken for public use, without just compensation."[63] Through an extensive history of adjudication, the Supreme Court has recognized a number of different types of takings.[64] A paradigmatic, categorical taking occurs where the government physically appropriates or occupies private property.[65] The clarity of physical seizure or occupation, however, is contrasted by the vast and ambiguous nature of regulatory takings jurisprudence.[66]

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58. *See id.* at 1134 (citation omitted) (discussing channels raisins flow through before allocation).

59. *See id.* (discussing destination for exacted raisins). Noncompetitive markets include areas such as government-subsidized school lunch programs. Seeman, *supra* note 24.

60. *See Horne*, 750 F.3d at 1134 (discussing costs). The RAC is not federally funded and operates solely from the disposition of the annual raisin allocations. *See id.*

61. *Id.* (discussing profits returned to producers). The producers bear the entire cost of the Marketing Order, not the handlers. The handlers, rather, operate under a pre-negotiated price for the portion of the raisins that are not subject to this regulation. As such, only the producers are able to receive any profits from the sale of the reserved raisins. *Id.* at 1133.

62. *See id.* at 1138 (citation omitted) (stating "[W]e must enter the doctrinal thicket of the Supreme Court's regulatory takings jurisprudence"). For a discussion of Takings Clause jurisprudence, see *infra* notes 62-111 and accompanying text.

63. U.S. CONST. amend. V (quoting the Fifth Amendment).

64. For a discussion of the various types of takings, see *infra* notes 62-111 and accompanying text.

65. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537 (2005) (discussing quintessential takings). In *Lingle*, the United States government seized a private coalmine for government use. *Id.* Despite asserted war-time powers and subsequent necessity, the Supreme Court held that such occupation constituted an unconstitutional taking requiring just compensation. *Id.*

66. *See* Horne v. United States Dep't of Agric., 750 F.3d 1128, 1138 (9th Cir. 2014) (describing difficult nature of regulatory takings jurisprudence analysis).

Private property has long been a central focus of much dispute regarding apparent takings.[67] Government regulation of private property has long been recognized as having the possibility of rising to a level "so onerous that its effect is tantamount to a direct appropriation or ouster."[68] The Supreme Court has since promulgated three categories of regulations that work a categorical, or per se taking, each represented by an exemplary case.[69]

First, any governmental "permanent physical invasion" of real property works a per se taking.[70] In *Loretto v. Teleprompter Manhattan CATV Corp.*,[71] an apartment owner challenged a New York state law that required all owners of multi-family buildings to allow cable companies to install cable equipment on their property.[72] The owners could not demand payment from the company in excess of the amount determined reasonable by a State Commission.[73] The Supreme Court declared the regulation required a "permanent physical occupation of property" and "such an appropriation is perhaps the most serious form of invasion of an owner's property interests."[74] While some regulations may permissibly take a single "strand" from the "bundle" of property rights owners normally enjoy, the New York regulation "chop[ped] through the bundle, taking a slice of every strand."[75] Accordingly, the Supreme Court held any permanent physical invasion of private real property constitutes a per se taking.[76]

Second, a regulation depriving an owner of all economically valuable use of his or her real property also constitutes a per se taking.[77] In *Lucas v. South Carolina Coastal Council*,[78] an individual purchased two vacant beachfront properties, intending to develop single-family homes.[79] After his purchase, however, the South Car-

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67. For further discussion of key private property takings cases, see *infra* notes 68-98.

68. *See id.* (citing *Lingle*, 544 U.S. at 538) (holding government regulations can rise to level of unconstitutional taking).

69. *Id.* (discussing Supreme Court takings jurisprudence).

70. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 438 (1982) (noting holding of case).

71. 458 U.S. 419 (1982).

72. *See id.* at 420-21 (discussing facts of case).

73. *See id.* at 421 (discussing facts of case).

74. *Id.* at 435-36 (noting seriousness of invasion).

75. *Id.* (noting impermissibly expansive reach of regulation).

76. *See Loretto*, 458 U.S. at 441 (declaring holding of case).

77. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992) (discussing holding of case).

78. 505 U.S. 1003 (1992).

79. *See id.* at 1008-09 (explaining facts of case).

olina legislature adopted legislation that sought to prevent erosion on certain beachfront parcels, including the petitioner's, consequentially rendering any development of his parcel impossible.[80] As a result, the petitioner was left with two vacant lots without any possibility of development.[81] Upon review, the Supreme Court declared that a taking occurs whenever a regulation deprives an owner of "all economically viable use of the land."[82] This holding was unquestionably narrow, limited only to "the extraordinary circumstances where no productive or economically beneficial use of the land is permitted."[83]

Finally, two related Supreme Court cases, *Nollan v. California Coastal Comm'n* and *Dolan v. City of Tigard*, represent a third type of categorical taking.[84] Together, these cases illustrate a nuanced rule for takings analysis, referred to as the *Nollan-Dolan* test.[85] This test stipulates that a land use regulation requiring forfeiture of a property right constitutes a taking unless the regulation (1) exhibits an "essential nexus" and (2) is "roughly proportional" to the specific interests that the government seeks to protect.[86]

In *Nollan*, the Supreme Court addressed whether a state-imposed condition on a permit requiring a landowner to dedicate part of his property to a public easement violated the Takings Clause.[87] The state claimed that it placed the condition on the permit to mitigate the diminished "visual access" to the ocean.[88] The Supreme Court held that there was "no nexus" between the condition-based exaction and the asserted state interest behind that exaction.[89] Absent such an "essential nexus," the condition constituted a taking.[90]

The Supreme Court expanded upon *Nollan*'s holding in its subsequent decision in *Dolan*.[91] In *Dolan*, the petitioner applied for

80. *Id.* (discussing impact of legislation).

81. *See id.* at 1009 (describing issue petitioner faced).

82. *Id.* at 1004 (discussing holding of case).

83. *Lucas*, 505 U.S. at 1017-19 (discussing limits of holding).

84. For a discussion of both cases and their rules, see *infra* notes 87-98.

85. For further discussion of the cases and their rules, see *infra* notes 87-98.

86. *See* Horne v. United States Dep't of Agric., 750 F.3d 1128, 1139 (9th Cir. 2014) (discussing *Nollan-Dolan* test).

87. *See* Nollan v. California Coastal Comm'n, at 828-29 (discussing facts of case).

88. *See id.* at 829 (explaining reasoning behind easement).

89. *See id.* at 837 (describing analysis of Court).

90. *See id.* at 841-42 (discussing holding of Court).

91. For a discussion of the Supreme Court's decision in *Dolan*, see *infra* notes 92-98.

a city permit to expand and redevelop her property.[92] The city granted the permit on the condition that the individual dedicate a portion of her land to the city for improvements to storm drainage systems, as well as the construction of a pedestrian pathway.[93] The Supreme Court reviewed the petitioner's claim through the provisions articulated in *Nollan*.[94] The Court expanded upon *Nollan*, asserting that, if in fact an "'essential nexus' exist[ed] between the 'legitimate state interest,' [and the regulation at issue]" the Court must then determine whether the government exhibited a "rough proportionality" between the regulation and the overall impact of the proposed development.[95] The Court asserted that although a "precise mathematical calculation" was not necessary, the state must make an "individualized determination" of the connection between the condition and the governmental interest.[96] Accordingly, the Court concluded the City had not put forth satisfactory findings regarding the impact the proposed development would cause.[97] Despite its application to situations concerning real property, the Supreme Court's formulation of the *Nollan-Dolan* test served as a basis for the Ninth Circuit's analysis in *Horne*, a case concerning the taking of personal property.[98]

C. Personal Property and Takings Law

While the Supreme Court has delivered extensive guidance on per se takings analysis regarding real property, it has not left analysis of per se takings regarding personal property to the imagination.[99] In *United States v. General Motors Corp.*,[100] the Supreme Court addressed whether the Government's act of destroying or reducing the value of personal property requires the Government to compensate injured parties for the loss or reduction.[101] There, the gov-

92. *See Dolan v. City of Tigard*, 512 U.S. 374, 378-80 (1994) (discussing facts of case).

93. *Id.* (describing conditions state placed on construction permit).

94. For a discussion of the Supreme Courts findings and ruling in *Dolan*, see *supra* notes 92-93 and *infra* notes 95-96 and accompanying text.

95. *See Dolan*, 512 U.S. at 385 (discussing Court's analysis of claim).

96. *Id.* at 391 (stipulating requirements of "rough proportionality").

97. *Id.* at 396 (discussing holding of case).

98. For further discussion of Ninth Circuit's analysis, see *infra* notes 173-219 and accompanying text.

99. For a discussion of the Supreme Court's Takings Clause analysis regarding personal property, see *supra* notes 99-112 and accompanying text.

100. 323 U.S. 373, 382-83 (1945).

101. *See id.* at 381 (discussing third issue to address). The petitioner in this case owned a building and rented a portion of it two the United States. *Id.* at 375. Later, the Secretary of War issued a condemnation order on the building in order

ernment implemented condemnation proceedings of a warehouse General Motors occupied, justifying the act as necessary for military purposes.[102] General Motors used the warehouse for storage and distribution of automobile parts; therefore, many items of personal property were dismantled or demolished pursuant to the condemnation proceedings.[103] Upon determination of whether compensation was due specifically for the destruction of this personal property, the Court declared that "[a]n owner's rights in [personal property] are no less property within the meaning of the Fifth Amendment than his rights in land and the structures thereon erected."[104] Accordingly, the Court held that the government effected a per se taking of the owner's personal property that required compensation.[105]

Similarly, in *United States v. Burnison*[106] the Supreme Court reaffirmed its position that personal property can be categorically taken.[107] *Burnison* involved a contested bequest of personal property to the United States.[108] The petitioner claimed the disposition of the property to the government was unlawful.[109] The Court held, however, that the receipt of gifts was within the power of the government.[110] In dicta, though, the Court noted that while the gift did not violate the Takings Clause, personal property could be taken in the same manner as real property.[111] In finding "no distinction between realty and personalty," the Court noted that "[a]n authorized declaration of taking . . . will put *realty or personalty* at the disposal of the United States for 'just compensation.'"[112]

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to obtain the building for military purposes. *Id.* The Supreme Court addressed issues regarding the compensation needed for such a taking. *Id.*

102. *See id.* at 374 (describing government action).

103. *See id.* (discussing General Motors' use of the space).

104. *Id.* at 383-84 (asserting that rights in personal property are equal to those in real property and any taking requires just compensation).

105. *See General Motors Corp.*, 323 U.S. at 384 (discussing holding of case).

106. 339 U.S. 87 (1950).

107. *See id.* at 90 (1950) (holding level of protection afforded to personal property the same as that afforded to real property).

108. *See id.* at 89-90 (discussing facts of case).

109. *See id.* (noting petitioner's claims).

110. *See id.* at 90 (discussing holding of case and government's ability to lawfully receive gifts).

111. *See Burnison*, 339 U.S. at 92-93 (noting that personal property is no different than real property under Takings Clause analysis).

112. *See id.* at 93 n. 14 (emphasis added) (discussing Takings Clause application to both real and personal property alike).

D. Monetary Exactions and Takings Law

The protection against a seizure of personal property does not merely apply to physical fixtures, but also to fungible items such as money.[113] To qualify for protection under the Takings Clause, however, the money must be linked to some property interest, a notion that has been developed over a number of Supreme Court decisions.[114] An examination of the Supreme Court's analysis of the relationship between monetary exactions and unconstitutional takings must begin with its decision in *Eastern Enters. v. Apfel*.[115] In *Eastern Enters.*, the Court considered the Coal Act, legislation that required the petitioner coal mining company to pay retroactively additional medical benefits to its employees.[116] While the Supreme Court declared the Act unconstitutional, the Justices could not agree on a rationale.[117] A plurality of four Justices found that the Act violated the Takings Clause of the Fifth Amendment, determining that the legislation "permanently deprived [the company] of those assets necessary to satisfy its statutory obligation."[118]

While concurring in part and dissenting in part, Justice Kennedy offered a perspective on this issue that has been heralded as creating a "second majority" to the case.[119] Justice Kennedy stipulated that takings jurisprudence and the regulatory takings analysis should be reserved for instances where "specific and identified"

113. *See, e.g.*, Webb's Fabulous Pharms., Inc. v. Beckwith, 449 U.S. 155 (1980) (holding that government exaction of money related to *any* property interest constituted taking) (emphasis added); Brown v. Legal Found. of Wash., 538 U.S. 216 (2003) (holding interest accrued on monetary funds qualifies as property); Phillips v. Washington Legal Found., 524 U.S. 156, 156-57 (1998) (holding confiscation of income interest payment constitutes taking).

114. *See, e.g.*, Eastern Enters. v. Apfel, 524 U.S. 498, 541 (1998) (plurality opinion) (Kennedy, J., concurring in the judgment and dissenting in part) (noting specific and identifiable property interest is condition for regulatory taking); Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2601 (2013) (noting direct link between monetary exaction and regulation can constitute taking). For further discussion of monetary takings, see *infra* notes 113-51 and accompanying text.

115. *See* Eastern Enters. v. Apfel, 524 U.S. 498, 541 (1998) (plurality opinion) (holding retroactive requirement of medical payments constituted taking). The plurality, Justices O'Connor Rehnquist, Scalia, and Thomas, held that Congress violated the petitioner's constitutional rights by making it pay medical benefits for its former coal mine workers retroactively. *Id.* Justice Thomas concurred in the judgment, while Justices Souter, Ginsburg, and Breyer comprised a dissent. *Id.* Justice Kennedy filed an opinion concurring in part and dissenting in part. *Id.*

116. *See id.* at 499 (discussing retroactive requirement).

117. *See id.* at 498 (noting fractured nature of holding).

118. *See id.* at 538 (explaining holding of case).

119. *See* Lauren Reznick, Note, *The Death of Nollan and Dolan? Challenging the Constitutionality of Monetary Exactions in the Wake of Lingle v. Chevron*, 87 B.U. L. REV. 725, 729 (June, 2007) (discussing Justice Kennedy's second majority).

property interests are at stake.[120] While many cases reflect Justice Kennedy's asserted need for an identifiable property interest, other holdings diverge and apply takings analysis in a different manner.[121]

In *Webb's Fabulous Pharms., Inc. v. Beckwith*,[122] the Supreme Court held that a government exaction of money related, not to a specifically identifiable property interest, but to *any* property interest, could constitute an illegal taking.[123] In *Webb's*, the Court addressed whether a state statute allowing the county court to retain the interest earned on an interpleader fund deposited with the court's clerk was unconstitutional.[124] The Court determined that because the funds qualified as private, personal property, the interest earned on those funds was also private property, therefore qualifying the seizure of the interest as a taking.[125] The fact that the Court held the funds for a period of time did not "recharacteriz[e] the principal as 'public money.'"[126] The Court held that "a State . . . may not transform private property into public property without compensation . . . This is the very kind of thing the Takings Clause of the Fifth Amendment was meant to prevent."[127]

The need for an identifiable property interest prompted the Court to find a link between land use conditions and the property itself.[128] In *City of Monterey v. Del Monte Dunes*,[129] the petitioner claimed that the city's repeated rejection of a landowner's applica-

120. *See* Eastern Enters. v. Apfel, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (noting asserted factors required to execute takings analysis).

121. *Compare* Armstrong v. United States, 364 U.S. 40 (1960) (holding government mandated reduction of liens infringed on identifiable property interest), *with* Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935) (holding act requiring banks to allow mortgagors to keep property at lower-appraised rate was deprivation of identifiable property interest), *and* Webb's Fabulous Pharms., Inc. v. Beckwith, 449 U.S. 155 (1980) (holding government exaction of money related to *any* property interest constituted taking) (emphasis added).

122. 449 U.S. 155 (1980).

123. *See id.* at 164-65 (emphasis added) (explaining holding of unconstitutionality).

124. *See id.* at 161 (discussing issue of case). The total interest on the account in question exceeded $100,000. *Id.*

125. *See id.* at 164 (declaring interest as private property subject to protection from seizure).

126. *Id.* at 164 (noting court's possession of money did not change its status as private).

127. *See Webb's*, 449 U.S. at 164 (declaring holding of case).

128. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 687-88 (1999) (discussing link between exactions and land allowing for analysis under *Nollan-Dolan* test).

129. 526 U.S. 687 (1999).

tions for land development constituted a taking.[130] Upon review, the Supreme Court addressed whether the *Dolan* test was the proper analysis to execute under the circumstances of this takings claim.[131] Ultimately, the Court refused to extend the *Dolan* test to this set of facts, as it had "not extended the rough-proportionally test of *Dolan* beyond the special context of exactions – land use decisions conditioning approval of development on the dedication of property to public use."[132] Accordingly, *Del Monte Dunes* exhibits a limitation to the test's applicability.[133]

The Supreme Court has held that monetary exactions required as a condition to approval of a land use permit do not necessarily violate the Takings Clause.[134] In *Koontz v. St. Johns River Water Mgmt. Dist.*,[135] a landowner applied for permits to develop parcels of land.[136] The permitting agency conditioned approval of the permits on the landowner's completion of one of two options: the landowner could (1) deed a portion of his land to the locality as a conservation easement, or (2) agree to fund environmental improvements on parcels of land the locality owned, while leaving his entire development untouched.[137] The Supreme Court reviewed these conditions to determine whether they constituted a taking.[138]

Koontz provides guidance for analyzing a takings claim when a monetary exaction, rather than a specific piece of property, is the subject of the claim.[139] In its analysis, the Court first responded to the assertion that a link be required between the monetary demand and an identifiable property interest.[140] In distinguishing Justice

130. *See id.* (noting petitioner's claim). The petitioner claimed that this denial should be analyzed under the *Nollan-Dolan* test despite its contrast with the facts of those cases. *Id.* Here, the alleged taking was claimed through the repeated denials whereas in *Nollan-Dolan*, the focus was considered excessive exactions. *Id.*

131. *See id.* at 702-03 (discussing issue to be determined).

132. *Id.* at 702 (declining to extend *Dolan*).

133. *See City of Monterey*, 526 U.S. at 702 (limiting extent of *Dolan* test).

134. *See* Koontz v. St. John's River Water Mgmt. Dist., 133 S. Ct. 2586, 2601 (2013) (citation omitted) (discussing precedent leading to conclusion that penalties do not necessarily constitute taking).

135. 133 S. Ct. 2586 (2013).

136. *See id.* at 2589 (discussing facts of case).

137. *See id.* at 2592 (discussing locality's conditions to approval). The improvements that that locality sought to implement included "replac[ing] culverts on one parcel or fill[ing] in ditches on another." *Id.* These projects would have improved roughly fifty acres of land. *Id.*

138. *See id.* at 2599 (discussing review of takings claim).

139. *See* Contino, *supra* note 5, at 490 (discussing significance of *Koontz* in takings jurisprudence).

140. *See* Koontz v. St. John's River Water Mgmt. Dist., 133 S. Ct. 2586, 2599-2600 (2013) (identifying property interest at stake).

Kennedy's assertion in *Eastern Enters.*, the Court noted that the monetary demand in *Koontz* burdened the petitioner's ownership of a specific piece of land.[141] Accordingly, the Court declared "[t]he fulcrum this case turns on is the *direct link* between the government's demand and a specific parcel of real property."[142] This direct link, the Court opined, implicated the need for the application of the *Nollan-Dolan* test.[143] While the Court remanded the case for a decision consistent with its holding, *Koontz* broadens the understanding of a taking and asserts that a taking can occur even absent any physical seizure of land or money.[144]

In a dissenting opinion, Justice Kagan rejected the application of the *Nollan-Dolan* test.[145] Justice Kagan disagreed with the majority's extension of the *Nollan-Dolan* test to include conditions demanding money rather than physical property.[146] This test, Justice Kagan argued, aims to "provide an independent layer of protection in the 'special context of land-use exactions.'"[147] In that situation, the "government demands that a landowner . . . surrender a piece of real property" in order to obtain a permit.[148]

Koontz stands as a beacon for lower courts in determining takings claims directed at monetary exactions.[149] In fact, the court in *Horne* heavily relied upon *Koontz*'s reasoning to reach its own conclusion.[150] Ninth Circuit decisions leading up to *Horne*, however,

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141. *See id.* at 2600 (distinguishing *Eastern Enters.*).

142. *Id.* at 2600 (emphasis in original) (discussing key linkage between monetary demand and specific property).

143. *See id.* (pointing out need to implement *Nollan-Dolan* test).

144. *See id.* at 2603 (discussing order). On remand, the Florida Appellate court found that, upon application of the *Nollan-Dolan* test, the conditions imposed constituted a taking. *See St. Johns River Water Mgmt. Dist. v. Koontz*, 2014 WL 1703942 (Fla. April 30, 2014). *See also* Contino, *supra* note 5 at 483, 494-500 (discussing extent and impact of Court's decision in *Koontz*).

145. Koontz v. St. John's River Water Mgmt. Dist., 133 S. Ct. 2586, 2607 (2013) (Kagan, J. dissenting) (rejecting reasoning behind Court's opinion).

146. *Id.* (Kagan, J. dissenting) (asserting main contention with Court's opinion).

147. *Id.* at 2604 (Kagan, J. dissenting) (discussing narrow applicability of test).

148. *Id.* (Kagan, J. dissenting) (discussing context for application of *Nollan-Dolan* test).

149. *See* Horne v. United States Dep't of Agric., 750 F.3d 1128, 1137 (9th Cir. 2014) (noting instructive nature of *Koontz*). The Court stated that it founds *Koontz* "instructive" in determining whether monetary exaction in question constitutes a taking. *Id.*

150. For further discussion of the Ninth Circuit's reasoning in *Horne*, see *infra* notes 173-219 and accompanying text.

have looked to related precedents to interpret similar issues, and have come to different conclusions.[151]

E. Ninth Circuit Application of Takings Jurisprudence

The Ninth Circuit has sought to determine under what circumstances the *Nollan-Dolan* test should apply.[152] In *West Linn Corporate Park, LLC v. City of West Linn*,[153] the court refused to extend the *Nollan-Dolan* test to the funding of off-site public improvements.[154] In *West Linn*, a landowner claimed that the various conditions the city placed on its approval of his proposed development constituted a taking.[155] Specifically, the city required the developer to fund several off-site public improvements with his personal money and property.[156] There was no condition requiring any dedication of real property.[157] The developer contended that the conditions ran amiss to *Dolan*'s "rough proportionality" test.[158] The Ninth Circuit, however, distinguished *Dolan*, as there was no required dedication of real property in this case.[159] Accordingly, as "[t]he Supreme Court has not extended *Nollan* and *Dolan* beyond situations in which the government requires a dedication of private real property . . . [w]e decline to do so here."[160]

The Ninth Circuit reviewed the extent to which the *Nollan* test must apply in *Commercial Builders of N. Cal. v. Sacramento*.[161] In *Commercial Builders*, a city ordinance conditioned certain building permits on payments aimed to offset the burdens placed on the city by the development and to provide lodging for low-income workers who moved there to fill jobs associated with the development.[162] The developers argued that this requirement constituted an impermissible means of advancing the city's interest that amounted to a taking of their monetary funds.[163] Specifically, they argued that the

151. For further discussion of Ninth Circuit analysis of takings cases, see *infra* notes 152-72.

152. For a discussion of Ninth Circuit's examination of takings claims, see *infra* notes 152-72 and accompanying text.

153. 428 F. App'x 700 (9th Cir. 2011).

154. *See id.* at 703 (9th Cir. 2011) (describing outcome of case).

155. *See id.* at 701-02 (discussing petitioner's claim).

156. *See id.* at 700 (articulating City's conditions on development).

157. *See id.* at 701 (describing City's conditions on development).

158. *See West Linn*, 428 F. App'x at 702 (describing petitioner's claims).

159. *See id.* (discussing differences between *Dolan* and this case).

160. *Id.* (declining to extend *Nollan-Dolan* test to facts of *West Linn*).

161. *See*, Commercial Builders of N. Cal. v. Sacramento, 941 F.2d 872, 874 (9th Cir. 1991) (discussing applicability of *Nolan* test).

162. *See id.* at 873 (describing stipulations of city ordinance).

163. *See id.* (describing crux of developers' claims).

precedent set in *Nollan* required the city to prove that the development was directly related to the impact on the city.[164] In its evaluation of the claim, the Ninth Circuit refused to extend *Nollan*, noting that no other circuits "have interpreted [*Nollan*] as changing the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land."[165]

Years later, the Ninth Circuit relied on this precedent in adjudicating *San Remo Hotel L.P. v. San Francisco City & Cnty.*[166] In *San Remo Hotel*, a hotel claimed that a city ordinance prohibiting it from converting its residential rooms into tourist use was an unlawful taking.[167] The hotel sought review of the lower court's refusal to implement the *Nollan-Dolan* test and claimed that it should be applied to the facial and as-applied challenges to the ordinance.[168] The Circuit Court, however, again declined to extend the test, and cited its own precedent as evidence.[169] It approved of the lower court's rejection of the test because it was "equivalent to the approach taken in this circuit, which also has rejected the applicability of *Nollan/Dolan* to monetary exactions. . . ."[170]

Since the Supreme Court promulgated the *Nollan-Dolan* test, federal circuit courts have split when determining the extent to which the test should apply to takings claims that do not specifically involve real property, a dedication of land, or a condition imposed on real property.[171] These inconsistencies prepared the stage on

164. *See id.* at 874 (arguing for court to apply *Nollan* to facts at hand).

165. *Id.* (citations omitted) (noting *Nollan* has only been applied to cases specifically involving real property).

166. *See* San Remo Hotel L.P. v. San Francisco City & Cnty., 364 F.3d 1088, 1097-98 (9th Cir. 2004), *aff'd* 545 U.S. 323 (2005) (citing Commercial Builders of N. Cal. v. Sacramento, 941 F.2d 872, 874 (9th Cir. 1991)) (discussing past precedent).

167. *See id.* at 1091-93 (discussing facts of case).

168. *See id.* at 1098 (discussing hotel's claim).

169. *See id.* (rejecting application of *Nollan-Dolan* test).

170. *Id.* (reaffirming Ninth Circuit's stance *Nollan-Dolan* test does not apply to monetary exactions). The Ninth Circuit defended its reliance on this precedent despite its issuance before *Dolan* had been promulgated in asserting that the "rough proportionality" requirement "simply refined the test articulated in *Nollan*" and therefore *Commercial Builders* was still reliable. *Id.*

171. *Compare* Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1578 (10th Cir. 1995) ("In our judgment, both *Nollan* and *Dolan* follow from takings jurisprudence's traditional concern that an individual cannot be forced to dedicate his or her land to a public use without just compensation. That is, *Nollan* and *Dolan* essentially view the conditioning of a permit based on the transfer of a property interest—i.e., an easement-as tantamount to a physical occupation of one's land."), *and* B.A.M. Dev., L.L.C. v. Salt Lake Cnty., 282 P.3d 41 (Utah 2012) ("A development exaction is a government mandated contribution of property imposed as a condition of approving a developer's project."), *and* Sea Cabins on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach, 548 S.E.2d 595, 603 n. 5 (S.C. 2001)

which *Horne* would be received and lent in the development of a Ninth Circuit opinion that could be interpreted as inconsistent with its own precedent.[172]

IV. NARRATIVE ANALYSIS

The Ninth Circuit Court of Appeals entered into the "doctrinal thicket" of takings jurisprudence in its analysis of the Marketing Order and attempted to navigate the underbrush through its analysis and application of Supreme Court precedent.[173] The court first sought to identify the specific property at issue.[174] It then proceeded to ascertain whether an actual taking had occurred.[175] After extensive discussion, the Ninth Circuit reasoned that the *Nollan-Dolan* test was appropriate for determining whether the Marketing Order's reserve requirements qualified as an unconstitutional taking.[176] The court then applied the test to the Marketing Order's reserve requirements and found the regulation did in fact pass the "essential nexus" and "rough proportionality" tests, and therefore was not an unconstitutional taking.[177]

A. The Initial Inquiry: What Was Taken?

At no time were raisins ever physically exacted from the Hornes.[178] Accordingly, the Ninth Circuit set out to determine

(South Carolina Supreme Court stated *Dolan* "rough proportionality" test applied only to physical exactions), *with* Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996) (California Supreme Court holds rough proportionality test applied to nonpossessory exactions, in the form of individual and discretionary monetary fees).

172. For a further discussion of the Ninth Circuit's opinion in *Horne*, and a critical analysis of that opinion, see *infra* notes 173-262 and accompanying text.

173. *See* Horne v. United States Dep't of Agric., 750 F.3d 1128, 1138 (9th Cir. 2014) (noting complex nature of takings case law).

174. *See id.* at 1136 (describing steps of analysis). The court initially addressed the threshold issue of standing in order to establish the Hornes as a viable party to this constitutional challenge. *Id.* The parties stipulated to the fact that the Hornes had standing regarding the status of their raisins. *Id.* The USDA, however, contended that the Hornes lacked standing to challenge any penalty arising from the sale of raisins produced by third parties. *Id.* The Ninth Circuit, however, disagreed with this contention. *Id.* Accordingly, it ruled that, as the injury suffered was not any obligation to turn over the raisins but rather the penalty for noncompliance, any contention to ownership of the raisins and subsequent seizure thereof is "irrelevant," and as such never occurred. *Id.*

175. *See id.* at 1137-38 (discussing court's second inquiry).

176. *See id.* at 1138-43 (discussing court's findings). For further discussion of the court's findings, see *supra* notes 174-75 and *infra* notes 177-219 and accompanying text.

177. *Id.* at 1143-44 (applying *Nollan-Dolan* test to facts).

178. *See Horne*, 750 F.3d at 1137 (noting physical property was never taken).

what, if any, property was taken.[179] The Ninth Circuit agreed with the argument that the regulation's penalty for noncompliance was directly related to a specific governmental act, the Marketing Order.[180] Because of this close relation, the court agreed that the constitutionality of the penalty was directly correlated to that of the Marketing Order itself.[181] It based its reasoning on the narrow guidance proffered by *Koontz*, which analyzed a claim centered on monetary exactions as a basis for an unconstitutional takings rather than a physical taking of property.[182] Guided by *Koontz*, the Ninth Circuit found that, although no money or property was taken from the owner, a taking could still occur.[183]

Just as in *Koontz*, the court found a "direct linkage" between the monetary exaction, the penalty, and the property at issue: the raisins.[184] If the Marketing Order constituted an unlawful taking, then the penalty for noncompliance violated the Fifth Amendment as well as the unconstitutional conditions doctrine.[185] Conversely, if the Marketing Order qualified as a lawful exercise of power, so did the penalty.[186]

B. Personal Property or Real Property: Analyzing the Hornes' Claim

1. Dismissal of a Categorical Analysis

The Ninth Circuit considered the three "relatively narrow categories" of takings analysis promulgated through *Loretto*, *Lucas*, and *Nollan-Dolan*.[187] The court disagreed with the Hornes' argument that the monetary exactions fell within the scope of *Loretto* for two reasons: (1) the Marketing Order applied to personal, not real

179. *See id.* (citing *Koontz*, 133 S.Ct. 2586, 2601 (2013)) (noting holding that fines generally do not constitute taking). The court noted that the "imposition and collection of penalties and fines [generally do] not run afoul of the Takings Clause." *Id.*

180. *See id.* at 1137 (discussing perspective of court). The Ninth Circuit agreed with the Hornes' assertion that the two were inextricably intertwined. *Id.*

181. *See id.* (citing reason for analyzing constitutionality of penalty).

182. *See id.* (discussing its reliance on *Koontz*).

183. *See Horne*, 750 F.3d at 1137 (discussing its reliance on *Koontz*). The court noted that it viewed the doctrine of *Koontz* as only clarifying the narrow "range of takings cases in which *Nollan* and *Dolan* provide the rule of decision." *Id.* at n. 11. For a further discussion on *Koontz*, see *supra* notes 134-151 and accompanying text.

184. *See id.* (applying authority of *Koontz* to present matter).

185. *See id.* (discussing implications of finding Order as taking).

186. *See id.* (describing conditions needed to achieve alternate result).

187. *See id.* at 1138. (discussing three frameworks of categorical takings). For further discussion of three cases see *supra* notes 62-98 and accompanying text.

property, and (2) the structure of the Marketing Order assured that the Hornes were not divested of all of their property rights.[188]

The distinction of the Marketing Order's operation upon personal rather than real property acted as a significant factor in the court's dismissal of *Loretto*.[189] The court asserted that, while the alleged taking interfering with personal property did not render the Takings Clause inapplicable, the protections afforded to such property are far less encompassing.[190] In drawing this conclusion, the Ninth Circuit relied on Supreme Court dicta from *Loretto* and *Lucas* to infer the tendency to allow for greater leniency regarding government regulation of personal property.[191]

First, the court interpreted *Lucas* to imply that personal property rights are less immune to a governmental taking than real property rights in stating: "the comparative language of *Lucas* [makes] clear that the Takings Clause affords more protection to real than to personal property."[192] Second, the court pointed to the "narrow reach" of *Loretto* as explicitly limited to "land or real property."[193] The court also noted that *Loretto* cited "virtually only cases pertaining to real property" and never once considered a governmental occupation of personal property.[194] This factual distinction, coupled with inferred diminution of protection for personal property asserted in *Lucas*, led the Ninth Circuit to decline to apply *Loretto* to the case at hand.[195]

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188. *See Horne*, 750 F.3d at 1139 (discussing contentions of disagreement). The Hornes advocated for the use of the authority; however, the court disagreed. *Id.*

189. *See id.* (discussing reasons for disagreement).

190. *See id.* (inferring Supreme Court precedent to afford less protection to personal property from takings).

191. *See id.* (citing authority relied on for assertion).

192. *See id.* at 1139-40 (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992)) (discussing reasoning of *Lucas*).

193. *See Horne*, 750 F.3d at 1140 (citing *Lucas*, 505 U.S. at 1015) (stipulating narrow applicability of precedent).

194. *Id.* (citing *Lucas*, 505 U.S. at 1015) (discussing reasoning).

195. *Id.* (citing *Lucas*, 505 U.S. at 1015) (discussing reasoning). The Ninth Circuit bolstered its dismissal of *Loretto* by examining another major impact of that ruling: that a deprivation of virtually all valuable use of property qualifies as a taking. *Id.* at 1140-41. The court asserted that the Hornes were not deprived of the entire value of the raisins by virtue of the structure of the Marketing Order. *Id.* at 1140. The Marketing Order itself provided for a return of the portion of the profits from the reserved raisins. *Id.* Even with the possibility that the return may total zero in some years, the "distribution is not zero every year." *Id.* at 1141. Even in those years of zero return, the profits will still be used to fund the program, which represents the Hornes and all other raisin farmers by helping to stabilize the market to provide for a constant outlet for the Hornes' business to prosper. *Id.* In other words, the value of the exacted raisins is constantly being used for the benefit of the Hornes, regardless of whether that benefit is in the form of monetary

2. Adopting the Nollan-Dolan Test

The court determined that the *Nollan-Dolan* test was the most appropriate way to assess and execute the evaluation of the Horne's takings claim.[196] To reach this conclusion, the court likened the reserve requirement of the Marketing Order to a use restriction on the Horne's personal property, and then analyzed that use restriction in the context of land use permitting.[197] The court noted, however, that this application of the *Nollan-Dolan* test applied strictly to the intricacies of this case and should not be regarded as a blanket rule.[198]

The court first explained how the regulation was akin to a use restriction in that the Hornes "voluntarily chose to send their raisins into the stream of interstate commerce."[199] As the USDA never authorized a forced seizure of the crop, the reserve requirement acted as a mere condition of the Hornes' use of their crops through regulating its sale.[200] Since the *Nollan-Dolan* test "govern[ed] this [personal property] use restriction as well as it does the land use permitting process," the court proceeded to analyze the facts under it.[201]

The court proceeded to note a number of other analogous facts to bolster its reliance on the *Nollan-Dolan* test.[202] All three cases involved a "conditional exaction," all three conditionally granted a government benefit in exchange for that exaction, and all three involved a voluntary choice by non-government actors.[203] If the Hornes wished to avoid the regulations, they needed only to "[plant] different crops" or "[sell] their grapes without drying them."[204] Using these parallels to support its rationale, the court

profits. *Id.* Accordingly, the court found that the exactions did not deprive the Hornes of the entire value of their property. *Id.*

196. *See id.* at 1141-42 (discussing reliance on *Nollan* and *Dolan*).

197. *See id.* at 1141 (discussing courts method in adopting test).

198. *See Horne*, 750 F.3d at n. 18 (noting court's limited application on test to facts of case). The court noted that given the Hornes' "significant but not total loss of [their] possessory and dispositional control over their reserved raisins," the application of the test was appropriate. *Id.*

199. *See id.* at 1142 (noting Hornes' choice to place goods in market).

200. *Id.* (describing court's perspective on facts of case).

201. *See id.* (noting belief test applied to analyzing use restrictions).

202. *See id.* at 1143 (noting related facts of each case).

203. *See Horne*, 750 F.3d at 1143 (describing similarities between cases). Here, the court asserted that there existed (1) a conditional exaction through the "loss of possessory and dispositional control," just as there was in *Dolan* through the granting of an easement, (2) a benefit given in exchange for that exaction, and (3) all involved choice. *Id.*

204. *See id.* (describing alternative methods of farming to avoid regulation).

ruled that the Hornes' claim would be evaluated under the framework of the *Nollan-Dolan* test.[205]

C. Application of the *Nollan-Dolan* Test

After resolving to apply the *Nollan-Dolan* test, the Ninth Circuit evaluated whether an "essential nexus" existed between the state interest and the imposed regulation.[206] Specifically, the reserve program must have "further[ed] the end advanced as [its] justification."[207] The court found that the policy requiring reservation of a proportion of annual raisin production had adequately stabilized the supply curve and eliminated severe price fluctuations.[208] Therefore, the program sufficiently achieved the end sought, a stable, constant market.[209] Accordingly, the court found a nexus existed.[210]

The court then proceeded to determine whether the benefit from the regulation was "roughly proportional" to the burden imposed by the regulation.[211] While the *Dolan* portion of the test does not require a "precise mathematical calculation," it does require an "individualized determination" that the condition is related to the alleged impact of the action.[212] Here, the court found the Marketing Order unquestionably complied with the test, as the reserve requirement was "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."[213]

The court noted its belief that the "individualized" requirement did not foreclose the specific application of the test to the general application of the reserve requirement.[214] While individualized review makes sense in the context of land use, it would not necessarily be as useful in cases involving readily available items such as raisins.[215] The Ninth Circuit asserted that the individual

205. *See id.* at 1143 (concluding use of *Nollan-Dolan* test is appropriate).

206. *See id.* (citing Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)) (discussing holding of case).

207. *See id.* (discussing analysis under *Nollan* and *Dolan*).

208. *See Horne*, 750 F.3d at 1143 (discussing findings of court).

209. *See id.* (stating goals of Marketing Order).

210. *See id.* (discussing conclusions of court).

211. *See id.* at 1143-44 (discussing courts initiation of *Dolan* portion of test).

212. *See id.* at 1143 (noting specifics of *Dolan* test).

213. *See Horne*, 750 F.3d at 1143 (emphasis in original) (discussing findings of court).

214. *See id* at 1143-44 (noting and disposing of concerns with terms of *Dolan* test).

215. *See id.* (discussing reasons for test's application).

evaluation element acts more as a generalized element than a specific requirement, and is aimed at assuring the regulation in question is narrowly tailored to the specific interest the government seeks to protect.[216] The Marketing Order met this goal by revising its requisite percentage for reserve annually.[217] Accordingly, the court found the Marketing Order "at least roughly proportional to its goals."[218] Since both prongs of the *Nollan-Dolan* test were satisfied, the Ninth Circuit held that the monetary exactions did not constitute a taking.[219]

V. CRITICAL ANALYSIS

Horne represents an expansion of takings jurisprudence through the Ninth Circuit's application of the *Nollan-Dolan* test, a traditional land use takings analysis, to a case that did not involve specific, real property at all, but rather, personal property.[220] The court's implementation of this test seems inconsistent with its own reasoning, as well as its discussion regarding the protection of real and personal property interests.[221] Further, the circuit court's reliance on *Koontz* and its decision to apply the test may have been misguided and incompatible with both its own case law, and Supreme Court precedent.[222]

A. The Ninth Circuit's Distinction of Personal Property and Subsequent Dismissal of Per Se Takings Analysis

The Ninth Circuit drew a distinction between property rights associated with real property and personal property, and declared that categorical per se takings doctrines do not apply to "controversies involving personal property" such as raisins.[223] This assertion is inconsistent with prior precedent, and thus, the court's ruling de-

216. *See id.* (noting courts reasoning for disposing concerns with test).

217. *See id.* (discussing Marketing Order's compliance with test).

218. *See Horne*, 750 F.3d at 1143-44 (discussing court's conclusion).

219. *See id.* at 1145 (discussing holding of case).

220. For an analysis of the Ninth Circuit's application of takings jurisprudence, see *infra* notes 238-62 and accompanying text.

221. For a further discussion of the Ninth Circuit's distinction between real and personal property, see *supra* notes 224-87 and accompanying text.

222. For a further discussion of precedent, see *supra* notes 152-72 and accompanying text. For a critical analysis of the precedent's relevance to the Ninth Circuit's holding in *Horne*, see *infra* notes 220-62 and accompanying text.

223. *See Horne*, 750 F.3d at 1140 (dismissing authority of *Loretto*).

parted from numerous Supreme Court decisions that advise otherwise.[224]

The court in *Horne* concluded that personal property is subject to greater regulation than real property, and categorical takings would generally not apply to any situation involving personal property.[225] In so deciding, however, the court strayed from a long line of Supreme Court decisions declaring the seizure of personal property a per se taking.[226] The Supreme Court, for example, has required compensation for the seizure of removable fixtures.[227] The Court has specifically declared that, "an owner's right to these [fixtures] are no less property within the meaning of the Fifth Amendment than is rights in land . . . [.]"[228] Moreover, the Supreme Court has asserted that it "finds no distinction between realty and personalty" when determining whether a per se taking has occurred.[229] Even *Koontz*, despite the Ninth Circuit's questionable application of precedent, seems to suggest against such a distinction.[230] In *Koontz*, the Supreme Court's opinion provides, where "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."[231] Thus, the acknowledgement of what the *Horne* court deems a piv-

224. For a discussion of Supreme Court cases to the contrary, see *supra* notes 99-112 and accompanying text. For a critical analysis of Supreme Court decisions to the contrary, see *infra* notes 220-37 and accompanying text.

225. *See Horne*, 750 F.3d at 1140-41 (discussing limited protection of personal property under Fifth Amendment).

226. For a critical analysis of Supreme Court decisions to the contrary, see *infra* notes 220-37 and accompanying text.

227. *See, e.g.*, United States v. General Motors Corp., 323 U.S. 373 at 383-84 (1945) (holding owner's interest in personal property protected to same extent as interest in real property).

228. *Id.* (discussing extent of personal property rights and their protection under Fifth Amendment).

229. United States v. Burnison, 339 U.S. 87, 93 (1950) (discussing Court's reasoning); *see also*, United States v. Russell, 80 U.S. 623, 628 (1871) (analyzing seizure of private steamboats for use during Civil War as per se taking); *see also*, United States v. Palmer, 128 U.S. 262, 271 (1888) (noting federal use of patent analyzed as per se taking).

230. *See* Koontz v. St. Johns River Water Mgmt. Dist., 133 S.Ct. 2586, 2600 (2013) (discussing approach to takings analysis). For a further discussion of the Ninth Circuit's application of *Koontz*, see *infra*, notes 238-62.

231. *Id.* (citing Brown v. Legal Found. of Wash., 538 U.S. 216, 235 (2003)) (discussing approach to takings analysis).

otal distinction between personal and real property seems unique to this case.[232]

The Ninth Circuit's basis for this distinction rests on its analysis of *Loretto*.[233] Specifically, the court noted language from the case directed at "real property" as the factor excluding the *Loretto*'s application to matters involving property interests other than those involving realty.[234] Since, according to the Ninth Circuit, the Supreme Court "cit[ed] virtually only cases pertaining to real property" in *Loretto*, its application must be tailored to those instances.[235] Cases leading up to and following *Loretto*, however, suggest otherwise.[236] Moreover, following its construction of this framework distinguishing real from personal property, the court effectively disregarded its distinction and subjected the Hornes' personal property to the *Nollan-Dolan* test for realty and land use.[237]

B. The Circuit's Questionable Application of the *Nollan-Dolan* Test

Immediately following a discussion refusing to apply certain categorical takings analyses based merely on the fact that the raisins were personal and not real property, the Ninth Circuit resorted to the *Nollan-Dolan* test, a framework normally reserved for evaluating conditions on realty and land use.[238] The court relied on *Koontz* to guide its analysis.[239] In doing so, the court seemingly avoided years of Supreme Court case law as well as its own precedent, which more aptly addresses the Marketing Order and whether it constituted a taking.[240]

First, the Ninth Circuit's connection of the doctrine promulgated in *Koontz* appears strained and somewhat unclear.[241] In

232. For further discussion of this distinction, see *infra* notes 220-62 and accompanying text.

233. *See* Horne v. United States Dep't of Agric., 750 F.3d 1128, 1140 (9th Cir. 2014) (analyzing *Loretto*).

234. *See id.* (discussing scope of *Loretto*'s holding).

235. *See id.* (noting limited applicability of *Loretto*).

236. For a critical analysis of takings jurisprudence advocating the opposite interpretation, see *infra* notes 220-62 and accompanying text.

237. For further analysis of court's reasoning, see *supra* notes 206-19 and accompanying text. For a critical analysis of this approach, see *infra* notes 220-62 and accompanying text.

238. *See Horne*, 750 F.3d at 1141-43 (noting *Nollan-Dolan* test as appropriate for inquiry).

239. *See id.* at 1137-38 (discussing analysis and implementation of *Koontz*).

240. For a discussion of the possible alternative routes of analysis, see *infra* notes 238-62 and accompanying text.

241. *See Horne*, 750 F.3d at 1137-38 (evaluating advantages of *Koontz*).

briefly establishing its governance, the Ninth Circuit stated that the "direct linkage" between the monetary exaction and the piece of land in *Koontz* guided the Supreme Court to apply "substantive takings jurisprudence relevant to land for the purpose of whether the related monetary exaction constituted a taking."[242] The Ninth Circuit, although noting it in a parenthetical, failed to address the fact that the "fulcrum of the case [in *Koontz* and subsequent application of the *Nollan-Dolan* test] turns on the direct link [between the monetary exaction] and a specific parcel of real property."[243] In *Horne*, the link is not between the exaction and specific real property, but rather, between the exaction and specific personal property.[244] While the circuit court noted that the "specific property" involved here was sufficient to facilitate compliance with *Koontz*, it failed clarify why it was no longer required to link specific *real* property.[245]

Even accepting the court's disregard for the important distinction between real and personal property and its strained reliance on *Koontz*, the requirement for an "individualized determination" in any application of *Dolan* seemingly renders the *Nollan-Dolan* test inapplicable in *Horne*.[246] The Ninth Circuit dismissed this because it did not appear essential in instances of personal property.[247] While this may be a reasonable interpretation, it again rests on the distinction between real and personal property, which was crucial to the court's earlier analysis, yet hardly noted upon execution of the *Nollan-Dolan* test.[248]

The court's reliance on *Koontz* appears even more misguided when considering other relevant precedent that may have been better applied to the facts of the case.[249] While the court equated the Marketing Order in *Horne* to a restriction akin to a condition on

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242. *Id.* at 1137 (citing Koontz v. St. Johns River Water Mgmt. Dist., 133 S.Ct. 2586, 2599 (2013)) (discussing link necessary for implementation).

243. *See id.* (citing Koontz v. St. Johns River Water Mgmt. Dist., 133 S.Ct. 2586, 2599 (2013)) (discussing link necessary for implementation).

244. *See id.* at 1137-38 (noting link in case concerns raisins). "Here . . . [the link is between] a monetary exaction (the penalty imposed for failure to comply with the Marketing Order) to specific property (the reserved raisins)." *Id.* at 1137.

245. *Id.* at 1137-38 (emphasis added) (noting link between monetary exaction and specific property allowed Ninth Circuit to apply *Koontz* authority).

246. *See Horne*, 750 F.3d at 1143-44 (discussing *Dolan*'s requirements for "individualized determination").

247. *See id.* (explaining why "individualized determination" was not needed in *Horne*).

248. *See id.* at 1140-41 (discussing distinction between personal and real property).

249. For further discussion of alternative options, see *infra* notes 238-62 and accompanying text.

land use, other Supreme Court and Ninth Circuit opinions address restrictions similar to the Marketing Order while either utilizing alternative modes of analysis or expressly declining to apply the *Nollan-Dolan* test altogether.[250]

The Supreme Court itself stated in *City of Monterey* that it had "not extended [the *Nollan-Dolan* test] beyond the special context of . . . land use decisions conditioning approval of development on the dedication of property to public use."[251] Further, the Ninth Circuit could have reviewed other Supreme Court takings decisions such as *Webb's*.[252] *Webb's* provided clear guidance to monetary takings that were unrelated to specific parcels of real property, and expressly prohibited a State's "transform[ation] of private property into public property without just compensation."[253] Both *Webb's* and *City of Monterey* implemented alternative analyses for determining whether a taking occurred.[254] Notwithstanding the Supreme Court's own reluctance to extend the test beyond the category of land use issues, the Ninth Circuit has similarly declined to extend the test to circumstances outside of this specific category.[255]

In *West Linn*, the Ninth Circuit explicitly stated that, as "[t]he Supreme Court has not extended *Nollan* and *Dolan* beyond situations in which the government requires a dedication of private real property . . . [w]e decline to do so here."[256] Moreover, the Ninth Circuit again declined to extend the precedent of *Nollan* in *Commercial Builders*.[257] There, it noted that, absent regulations effecting a "physical encroachment on land," the level of scrutiny in *Nollan* was unwarranted.[258] Even further, in *San Remo Hotel*, the Ninth Circuit again recognized that its approach of adjudicating takings claims

250. For further discussion of alternative options, see *infra* notes 238-62 and accompanying text.

251. City of Monterey v. Del Monte Dunes, 526 U.S. 687, 702 (1999) (explaining Court's decision to decline to extend test). For a further discussion of *City of Monterey*, see *supra* notes 128-33 and accompanying text.

252. For a further discussion of *Webb's*, see *supra* notes 122-27 and accompanying text.

253. *See* Webb's Fabulous Pharms., Inc. v. Beckwith, 449 U.S. 155, 164 (1980) (noting illegality of taking without just compensation).

254. For a discussion of *Webb's* and *City of Monterey*, see *supra* notes 122-33 and accompanying text.

255. For a discussion of related Ninth Circuit precedent, see *supra* notes 152-72 and accompanying text.

256. West Linn Corp. Park, LLC v. City of West Linn, 428 F. App'x 700, 702 (9th Cir. 2011) (declining to extend *Nollan-Dolan* test).

257. *See* Commercial Builders of N. Cal. V. Sacramento, 941 F.2d 872, 875 (9th Cir. 1991) (discussing holding of case).

258. *See id.* (declining to utilize *Nollan*).

has consistently "rejected the applicability of *Nollan/Dolan* to monetary exactions. . . ."[259]

In each of the above cases, the Ninth Circuit never considered any link between the exaction and the piece of property, regardless of whether it was real or personal, to implement land use related takings analysis.[260] Aligning the reasoning of these cases with that of the situation addressed in *Horne* highlights certain inconsistencies that may be difficult to rectify.[261] This case, therefore, may present challenges to lower courts when seeking guidance on related matters.[262]

VI. IMPACT

While *Horne* represents only one drop of an ocean of takings jurisprudence, its effects may resonate in future lower court decisions.[263] *Horne* expands the *Nollan-Dolan* test, and legitimizes its application to monetary exactions as they relate to purely personal property, a far greater expansion than any prior application.[264] Moreover, *Horne* notably opens the door for farmers to assert a takings claim as an affirmative defense to agency enforcement action, even before any real or personal property has been "taken."[265] This power could lead to future challenges to similar federal regulations governing other essential agricultural products such as milk and honey, as well as challenges to regulations specifically directed at environmental protection.[266]

A. Potential Confusion in Future Applications

The Ninth Circuit in *Horne* expanded the *Nollan-Dolan* test to apply to monetary exactions not directly linked to a specific and

259. San Remo Hotel L.P. v. San Francisco City & Cnty., 364 F.3d 1088, 1097–98 (9th Cir. 2004) (declining to extend *Nollan-Dolan* test).

260. For further discussion of the reasoning in these cases, see *supra* notes 153-70 and accompanying text.

261. See *supra* notes 221-60 and accompanying text.

262. For a discussion of the potential impact on subsequent lower court decisions, see *infra* notes 263-73 and accompanying text.

263. For further discussion of the impact, see *infra* notes 264-82 and accompanying text.

264. For a discussion of similar and dissimilar applications of the *Nollan-Dolan* test, see *supra* notes 62-172 and accompanying text.

265. *See* Seeman, *supra* note 24, at p.7 (explaining potential for future affirmative defenses based on *Horne*).

266. *See id.* (discussing farmers in other agricultural markets that could use *Horne* as claim's basis).

identifiable real property interest.[267] The court stretched a traditionally real property-focused test to encompass purely personal property, contrasting even its own traditional distinctions between the two types of property.[268] This dichotomy may spell confusion for future challenges in lower courts.[269]

Generally, courts have reserved the *Nollan-Dolan* test solely for takings affected through land use regulations.[270] In contrast, when adjudicating personal property takings claims, courts have implemented a number of other specific tests.[271] The ambiguity that arises through the Ninth Circuit's application of a land use test to personal property may cause considerable confusion and result in a lack of direction for courts facing similar regulations.[272] This application, however, will also depend on the nature and basis of the potential takings claim.[273]

B. Future Challenges and Environmental Impact

Future claims against federal regulations governing agriculture or the environment may rest on the same foundation as Hornes' challenge.[274] Federal marketing orders are not exclusively applied to raisins; rather, many other essential crops and goods are subject to federal regulations, such as milk, honey, and certain types of fruits and vegetables.[275] While the Ninth Circuit's decision in *Horne* held the Marketing Order regulating raisins did not constitute a taking, the proceedings marked a key point for related chal-

267. *See* Horne v. United States Dep't of Agric., 750 F.3d 1128, 1144-45 (9th Cir. 2014) (discussing expansion and application of *Nollan-Dolan* test).

268. *See id.* at 1143-44 (discussing application of *Nollan-Dolan* test to personal property). For a further discussion of the application of the test, see *supra* notes 206-19 and accompanying text. For a critical analysis of the expansion and application of the test, see *supra* notes 220-62 and accompanying text.

269. For further discussion of possible instances of confusion, see *infra* notes 267-68.

270. *See, e.g.*, City of Monterey v. Del Monte Dunes, 526 U.S. 687, 697-98 (1999) (discussing application of *Nollan-Dolan* test). The Supreme Court had "not extended [the *Nollan-Dolan* test] beyond the special context of exactions – land use decisions conditioning approval of development on the dedication of property to public use." *Id.*

271. *See, e.g.*, United States v. General Motors Corp., 323 U.S. 373, 383-84 (1945) (implementing per se taking analysis to personal property).

272. See *infra* notes 62-172 and accompanying text for a presentation of similar and dissimilar precedent. See *supra* notes 220-62 for a critical analysis of this precedent and its relevance to the matter at issue.

273. For further discussion on various takings claims, see *infra* notes 62-172.

274. For a description and discussion of the Hornes' claim, see *supra* notes 24-40 and accompanying text.

275. *See* 7 U.S.C. § 608c(2) (listing crops subject to regulation).

lenges.[276] *Horne* clarified that farmers may assert a takings claim as an affirmative defense to agency enforcement action, regardless of whether real or personal property has been physically "taken."[277] Allowing this affirmative defense may result in similar challenges to government regulations or enforcement actions regardless of whether they qualify as a land use restriction.[278] While these possible future claims may prove fruitless under *Horne*, the Supreme Court may once again weigh in on this decision and cultivate grounds on which such claims may have legitimacy.[279]

Despite the narrow question of standing that the Supreme Court reviewed during the Hornes' first appearance before the Court, several Justices expressed statements that encouraged speculation regarding their opinions of the Marketing Order.[280] Justice Antonin Scalia characterized the Marketing Order's penalty as giving raisin handlers the choice between "your raisins or your life," and actually affording the handlers no true option at all.[281] Further, Justice Stephen Breyer described the methods and purpose of the Marketing Order as "tak[ing] raisins that we grow, [and] in effect throw[ing] them in the river."[282] Although speculating the Court's future decisions may be imprudent, the Justices' comments offer insight into their potential reasoning. While the Hornes' challenge may be settled for now, the future may hold a greater review of the Hornes' grapes of wrath.

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276. *See* Horne v. United States Dep't of Agric., 750 F.3d 1128, 1144-45 (9th Cir. 2014) (discussing holding of case).

277. *See* Seeman *supra* note 24 (discussing use of claim as affirmative defense).

278. *See* John Echeverria, *Horne v. Department of Agriculture: An Invitation to Reexamine "Ripeness" Doctrine in Takings Litigation*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10735 (Sept. 2013) (discussing consequences of affirmative defense).

279. See *supra* notes 37-40 for a discussion of the Supreme Court's initial review and decision in *Horne*.

280. *See* Horne v. Dep't of Agric., 133 S.Ct. 2053 (2013) (discussing matter at issue and holding Hornes' had standing to challenge regulation in federal court). For a further discussion of the procedural posture of this case, see *supra* note 38.

281. *See* Transcript of Oral Argument at 31, *Horne v. Dep't of Agric.*, 133 S.Ct. 2053 (2013) (No. 12-123), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-123_l537.pdf.

282. *See id.* at 36 (noting apparent effect of regulation).

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