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*Fifth Amendment — Takings Clause — Regulatory  
Takings — Horne v. Department of Agriculture*

In its regulatory takings jurisprudence, the Supreme Court has attempted to balance its conscious avoidance of “set formulas” with its belief that certain regulatory actions will categorically constitute a taking.<sup>1</sup> Last Term, in *Horne v. Department of Agriculture*,<sup>2</sup> the Court revisited this debate, this time in the context of personal property. In the process of holding that the Takings Clause categorically applies to certain personal property cases, the Court reflexively applied its “per se” approach to a regulatory scheme governing the national raisin market. In so doing, the Court dismissed as irrelevant valuable precedent discouraging the use of categorical rules in takings cases involving personal property. While directed at a program Chief Justice Roberts understood to be a “historical quirk,”<sup>3</sup> his opinion in *Horne* nevertheless threatens to radically expand the Court’s per se takings doctrine at the expense of the government’s ability to operate effectively.

The Supreme Court’s ruling in *Horne* marked the end of over a decade of litigation. The decision’s seeds were initially planted in 2002 when Marvin and Laura Horne, a couple who grew and sold raisins, refused to comply with the Marketing Order for raisins promulgated under the Agricultural Marketing Agreement Act of 1937<sup>4</sup> (AMAA).<sup>5</sup> A “measure[] [designed] to prevent the demoralization of the industry by stabilizing the marketing of the raisin crop,”<sup>6</sup> the Order required that all “handlers” of raisins — typically those who prepare and sell raisins<sup>7</sup> — set aside a percentage of raisins during years of excess production.<sup>8</sup> In such years, control of this reserve was transferred to the Raisin Administrative Committee (RAC), which diverted the reserve raisins from the open market to noncompetitive markets.<sup>9</sup> Proceeds from these sales were primarily used to compensate handlers for their sorting services, but the growers did retain an equity interest in any remaining profits.<sup>10</sup>

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<sup>1</sup> See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (acknowledging that the Court has “generally eschewed” formulas for regulatory takings but has nonetheless carved out “two discrete categories . . . as compensable without case-specific inquiry”).

<sup>2</sup> 135 S. Ct. 2419 (2015).

<sup>3</sup> Transcript of Oral Argument at 34, *Horne*, 135 S. Ct. 2419 (No. 14-275).

<sup>4</sup> 7 U.S.C. §§ 601–674 (2012).

<sup>5</sup> See *Horne v. U.S. Dep’t of Agric.*, No. 08-1549, 2009 WL 4895362, at \*1–3 (E.D. Cal. Dec. 11, 2009).

<sup>6</sup> *Parker v. Brown*, 317 U.S. 341, 367 (1943).

<sup>7</sup> See 7 C.F.R. § 989.15 (2015) (defining “handler” for purposes of the AMAA).

<sup>8</sup> See *id.* § 989.66.

<sup>9</sup> See *id.* § 989.67(b). The RAC is a government entity composed of forty-seven members representing different segments of the raisin industry. *Id.* § 989.26.

<sup>10</sup> *Id.* § 989.66(h). The Marketing Order notably demanded that the reserve raisins be sold in a manner that “maxim[izes] producer returns.” *Id.* § 989.67(d)(1).

The Hornes' failure to set aside reserve raisins triggered a lengthy administrative proceeding that culminated in the imposition of a \$695,226.92 fine for 83 regulatory violations.<sup>11</sup> When the Hornes appealed the administrative decision in federal district court as a violation of the Takings Clause,<sup>12</sup> the Eastern District of California found that, because the government did not physically invade the plaintiffs' land or take physical possession of the raisins,<sup>13</sup> and because the plaintiffs retained an equity interest in the reserve raisins, "there [was] no physical taking."<sup>14</sup> On appeal, the Ninth Circuit ruled that the Hornes had brought their suit as producers, which meant that their claim could proceed only before the Court of Federal Claims.<sup>15</sup> The Supreme Court disagreed unanimously. Reasoning that the Hornes had brought their suit as handlers, the Court concluded that the lower courts had jurisdiction to hear the takings defense.<sup>16</sup> Accordingly, the Court remanded the case for a determination of whether the government's actions violated the Fifth Amendment.<sup>17</sup>

In an opinion by Judge Hawkins,<sup>18</sup> the Ninth Circuit held that the raisin diversion program did not amount to an unconstitutional taking.<sup>19</sup> The court first clarified that, even though there had not been a physical taking of the Hornes' property, the fine for not complying with the Marketing Order's reserve requirement could violate the Fifth Amendment under the unconstitutional conditions doctrine.<sup>20</sup> Turning its attention to the reserve requirement, the court established that the Hornes had not suffered from a paradigmatic physical taking and thus

<sup>11</sup> *Horne v. U.S. Dep't of Agric.*, No. CV-F-08-1549, 2009 WL 4895362, at \*6 (E.D. Cal. Dec. 11, 2009).

<sup>12</sup> The Takings Clause, U.S. CONST. amend. V, provides that private property may not be taken for public use without just compensation. The clause is thus violated when there is both a "taking" and a lack of just compensation. See *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.").

<sup>13</sup> The court based its determination that the government did not take physical possession of the raisins on its understanding that the growers transferred the reserve raisins to the handler (and, by extension, the government) as an admission fee for marketing the raisins. See *Horne*, 2009 WL 4895362, at \*26.

<sup>14</sup> *Id.* at \*27. The district court also rejected the Hornes' claims that they were not "handlers" within the meaning of the regulation. *Id.* at \*10-17.

<sup>15</sup> *Horne v. U.S. Dep't of Agric.*, 673 F.3d 1071, 1080 (9th Cir. 2011). The Ninth Circuit also upheld the district court's determination that the Hornes were "handlers," *id.* at 1078, and that the regulatory fines were constitutional, *id.* at 1080-81.

<sup>16</sup> *Horne v. Dep't of Agric.*, 133 S. Ct. 2053, 2063 (2013) (citing 7 U.S.C. § 608c(15)(A)-(B) (2012) (providing the district courts with jurisdiction in equity to review rulings made against handlers by the Secretary of Agriculture)).

<sup>17</sup> *Id.* at 2064. The Court granted certiorari only on the jurisdictional issue and thus did not entertain the Hornes' other arguments. See *id.* at 2060.

<sup>18</sup> Judge Hawkins was joined by Judges Reinhardt and Gould.

<sup>19</sup> *Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1132 (9th Cir. 2014).

<sup>20</sup> *Id.* at 1138.

could prevail only if the reserve requirement worked a regulatory taking.<sup>21</sup> Yet because the Hornes had not presented a claim under the traditional *Penn Central* balancing test,<sup>22</sup> the success of their suit hinged on whether the Marketing Order fit one of three narrow categories of per se takings.<sup>23</sup> Finding that the reserve requirement could be distinguished from all three, Judge Hawkins concluded that the program “[d]id not constitute a taking under the Fifth Amendment.”<sup>24</sup>

The Supreme Court reversed. Writing for the majority, Chief Justice Roberts<sup>25</sup> began by asserting that the Fifth Amendment may impose a “categorical duty” on the government to pay just compensation when it “physically takes possession of an interest in [personal] property.”<sup>26</sup> The Chief Justice argued that, just as the direct appropriation of real property is a “*per se* taking that requires just compensation,” so too does the appropriation of personal property trigger the demands of the Fifth Amendment.<sup>27</sup> The opinion then provided a brief overview of colonial understandings of takings, emphasizing that this history lent no support to a distinction between personal and real property.<sup>28</sup> And while the Chief Justice conceded that the Court had distinguished between personal and real property in *Lucas v. South Carolina Coastal Council*,<sup>29</sup> he maintained that *Lucas* was concerned exclusively with regulatory takings and was thus irrelevant to “classic takings” featuring direct appropriations.<sup>30</sup>

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<sup>21</sup> *Id.* A regulatory taking is a restriction on the use of property that proves “so onerous that its effect is tantamount to a direct appropriation.” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). The court distinguished this from “paradigmatic taking[s],” where the government directly “appropriates or occupies private property.” *Horne*, 750 F.3d at 1138.

<sup>22</sup> This regulatory taking test weighs the “economic impact of the regulation,” the regulation’s interference with “investment-backed expectations,” and the “character of the government action.” See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

<sup>23</sup> *Horne*, 750 F.3d at 1138–39. Judge Hawkins defined the three categories as “permanent physical invasions of real property,” “regulations depriving owners of all economically beneficial use of their real property,” and certain conditions on grants of land-use permits that require the forfeiture of a property right. *Id.* at 1139.

<sup>24</sup> *Id.* at 1144.

<sup>25</sup> The Chief Justice was joined by Justices Scalia, Kennedy, Thomas, and Alito. Justices Ginsburg, Breyer, and Kagan joined the parts of the opinion unrelated to the calculation of just compensation.

<sup>26</sup> *Horne*, 135 S. Ct. at 2425 (quoting *Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511, 518 (2012)).

<sup>27</sup> *Id.* at 2426.

<sup>28</sup> *Id.* at 2426–27.

<sup>29</sup> *Id.* at 2427. The Court in *Lucas* ruled that the owner of real property suffers a taking when he is “called upon to sacrifice *all* economically beneficial uses” of the land. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

<sup>30</sup> *Horne*, 135 S. Ct. at 2425, 2427–28. The Court based its understanding on language from *Tahoe-Sierra Presidential Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), that stated it is “inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a ‘regulatory taking,’ and vice versa.” *Id.* at 323.

The Chief Justice found that the reserve requirement was a “clear physical taking” under *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>31</sup> This conclusion flowed from the fact that, apart from a “speculative hope” in receiving returns from the RAC’s residual proceeds, raisin growers subject to the reserve requirement “lose the entire ‘bundle’ of property rights in the appropriated raisins.”<sup>32</sup> And while the government could prohibit raisin sales through a regulatory limit without violating the Constitution, the Chief Justice underscored that “[t]he Constitution . . . is concerned with means as well as ends.”<sup>33</sup>

Neither the growers’ contingent property interest nor the fact that growers chose to engage in the regulated raisin market prevented the Court from finding the program unconstitutional.<sup>34</sup> With respect to the contingent interest, the Chief Justice, again referencing *Loretto*, asserted that whether owners retain value in their property is immaterial in takings cases involving physical appropriations.<sup>35</sup> Thus, the Court distinguished its per se takings analysis from regulatory takings cases where it had maintained the constitutionality of restrictions in the absence of a complete deprivation of an owner’s property rights.<sup>36</sup>

Finally, the Court held that, with respect to just compensation, the government had “already calculated th[at] amount . . . when it fined the Hornes the fair market value of the raisins.”<sup>37</sup> In reaching this conclusion, the Court rejected the arguments of both the government and Justice Breyer alleging that the benefits of the regulatory program should be accounted for in the determination of just compensation.<sup>38</sup> Reiterating that “just compensation . . . is to be measured by ‘the market value of the property at the time of the taking,’”<sup>39</sup> the Court decisively settled a case it felt had “gone on long enough.”<sup>40</sup>

Justice Sotomayor dissented. In her view, the Hornes’ claim fell within the regulatory takings framework yet did not meet the demands

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<sup>31</sup> 458 U.S. 419 (1982); see *Horne*, 135 S. Ct. at 2428 (citing *Loretto*, 458 U.S. at 435). *Loretto* specifically held that a “permanent physical occupation of property is a taking.” 458 U.S. at 441.

<sup>32</sup> *Horne*, 135 S. Ct. at 2428.

<sup>33</sup> *Id.*

<sup>34</sup> See *id.* at 2430 (citing *Loretto*, 458 U.S. at 439 n.17).

<sup>35</sup> *Id.* at 2429.

<sup>36</sup> See *id.* (differentiating *Andrus v. Allard*, 444 U.S. 51 (1979); and *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980)).

<sup>37</sup> *Id.* at 2433.

<sup>38</sup> See *id.* at 2431–33.

<sup>39</sup> *Id.* at 2432 (quoting *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984)).

<sup>40</sup> *Id.* at 2433. Justice Thomas wrote a one-paragraph concurrence clarifying that the Takings Clause demands that a taking be for public use, a standard he felt might not be met by the reserve requirement. See *id.* (Thomas, J., concurring). Justice Breyer, joined by Justices Ginsburg and Kagan, authored a partial dissent arguing that the Marketing Order might provide just compensation by enhancing the value of the non-reserve raisins. *Id.* at 2433–36 (Breyer, J., concurring in part and dissenting in part).

of any of the *per se* categories of regulatory takings.<sup>41</sup> Justice Sotomayor stressed that, for an action to be a taking under *Loretto*, “each and every property right [must] be destroyed by governmental action.”<sup>42</sup> The Marketing Order, by contrast, preserved for growers the right to receive net proceeds from the sale of the reserve raisins.<sup>43</sup> Thus, because “the retention of even one property right . . . is sufficient to defeat a claim of a *per se* taking under *Loretto*,” Justice Sotomayor resolved that the Hornes’ categorical takings claim must fail.<sup>44</sup>

Justice Sotomayor spent the latter part of her dissent identifying two “fundamental errors” undergirding the majority’s opinion.<sup>45</sup> First, Justice Sotomayor took issue with the majority’s idea that a *per se* taking had occurred, a “breezy assertion”<sup>46</sup> that she maintained ignored the Hornes’ retained right to certain reserve raisin proceeds.<sup>47</sup> Because the majority based its holding on the fact that the retained right was “not substantial or certain enough,” Justice Sotomayor argued that the Court had misapplied the *Loretto* test and undermined its future utility.<sup>48</sup> Finally, Justice Sotomayor criticized the majority’s belief that the physicality of the taking effected by the Marketing Order meant that it must be evaluated as a *per se* taking: this reasoning in her view was unsupported by any principle and could not be squared with the physical taking of data *Ruckelshaus v. Monsanto Co.*<sup>49</sup> endorsed as constitutional.<sup>50</sup> The combined effect of these two errors “unsettle[d] an important area of [the Court’s] jurisprudence” in an “unwarranted” and “baffling” twisting of the takings doctrine.<sup>51</sup>

<sup>41</sup> See *id.* at 2442–43 (Sotomayor, J., dissenting) (disagreeing with the majority’s insistence that regulatory takings cases are “inapposite”).

<sup>42</sup> *Id.* at 2437. Justice Sotomayor underlined the “strict[ness]” of the *per se* rule and “bold[ness]” of any claim made under it, *id.* at 2437–38, pointing to a number of cases where even a “significant restriction” in property rights did not amount to a taking under *Loretto*, *id.* at 2438 (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979)).

<sup>43</sup> See *id.* at 2439. Justice Sotomayor characterized the right to receive income as the “most central interest” for an owner of a “fungible commodity for sale.” *Id.*

<sup>44</sup> *Id.* at 2438. Justice Sotomayor found further support for this conclusion in a line of cases that “teach that the government may require certain property rights to be given up as a condition of entry into a regulated market without effecting a *per se* taking.” See *id.* at 2440–41 (citing *Leonard & Leonard v. Earle*, 279 U.S. 392 (1929); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Yee v. City of Escondido*, 503 U.S. 519 (1992)).

<sup>45</sup> *Id.* at 2441.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 2441–42.

<sup>48</sup> *Id.* at 2442. Specifically, Justice Sotomayor questioned how the once-narrow framework demanding “total destruction” could be administered when merely damaged property rights (“perhaps a 95 percent destruction[?] . . . Perhaps 90? Perhaps 60[?]”) could now work a *per se* taking. *Id.* Such confusion would be “especially pernicious in the area of property rights,” where property owners and the government rely on predictability. *Id.*

<sup>49</sup> 467 U.S. 986.

<sup>50</sup> *Horne*, 135 S. Ct. at 2443 (Sotomayor, J., dissenting).

<sup>51</sup> *Id.*

In *Horne*, the Court faced the novel and nontrivial task of outlining how its takings doctrine should apply to personal property. In so doing, the majority opinion relied heavily on *Loretto*, first using it to distinguish per se takings from regulatory takings and then asserting that *Loretto*'s holding — that a “permanent physical occupation” will “invariably” amount to a per se taking — applies to personal property. Yet in drawing this sharp line, the Court neglected to note that *Loretto* was in fact a regulatory takings case, and that regulatory takings cases can feature a per se approach. These omissions empowered the Court to establish a set formula for “per se personal property takings,” making certain types of regulatory action involving personal property unconstitutional by default. This approach ignores the Court’s earlier guidance about personal property, overlooks the real property orientation of previous per se takings cases featuring regulatory schemes, and jettisons general considerations relevant to regulatory takings, thereby inviting a host of adverse practical consequences.

The Chief Justice’s reasoning in *Horne* is buttressed by his conviction that the Marketing Order, in demanding the “direct appropriation” of property, amounts to a “classic taking.”<sup>52</sup> From there, his opinion proceeds to equate “classic” takings involving direct, physical appropriations with per se takings, which it contrasts with regulatory takings.<sup>53</sup> Thus, the Court ultimately distinguishes *Loretto* and *Horne* — as per se takings cases — from *Lucas*, a regulatory takings case.<sup>54</sup> This line-drawing exercise is no accident: the Court needed to distinguish *Loretto* specifically and per se takings cases generally from regulatory takings cases as a means of avoiding *Lucas*’s instruction that “in the case of personal property . . . [an owner] ought to be aware of the possibility that new regulation might even render his property economically worthless” without triggering the Takings Clause.<sup>55</sup>

Nevertheless, the dichotomy the Court drew is untenable. First, the government action in *Loretto* is best understood not as a “classic” taking, but as a regulatory taking. While that case did involve a “permanent physical occupation,”<sup>56</sup> the Court situated its reasoning and hold-

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<sup>52</sup> *Id.* at 2425–28 (majority opinion).

<sup>53</sup> *See id.* at 2429 (criticizing the government and dissent for “confus[ing] our inquiry concerning *per se* takings with our analysis for regulatory takings”).

<sup>54</sup> *Id.* at 2427 (“Whatever *Lucas* had to say about reasonable expectations with regard to regulations, people still do not expect their property, real or personal, to be actually occupied or taken away.”).

<sup>55</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027–28 (1992).

<sup>56</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Notably, while the *Horne* Court used the words “direct appropriation” to describe the action in *Loretto*, *see, e.g., Horne*, 135 S. Ct. at 2427, those words were never used by the *Loretto* Court.

ing in the context of regulatory takings.<sup>57</sup> Given the fact that the lawsuit in *Loretto* was triggered by a regulation relating to cable television,<sup>58</sup> it is unsurprising that a number of scholars<sup>59</sup> — as well as the Court itself<sup>60</sup> — have recognized *Loretto* as a regulatory takings case. By contrast, “classic” takings have historically involved direct invocations of the state’s power of eminent domain rather than regulations.<sup>61</sup>

Second, the Court’s logic is grounded in the mistaken belief that per se takings and regulatory takings are mutually exclusive categories.<sup>62</sup> *Lucas*, however, was both a regulatory takings case and a per se takings case: the Court there specified that when a “regulation denies all economically beneficial or productive use of land,” courts should “categorical[ly]” require compensation.<sup>63</sup> Whether or not one understands *Loretto* and *Horne* as regulatory cases, the fact that *Lucas* also featured a categorical approach suggests that the Court in *Horne* should not have so readily dismissed *Lucas*’s reasoning as irrelevant.<sup>64</sup> Specifically, just as *Lucas* maintained that its per se approach should not apply to personal property, so too are there reasons that alleged takings of personal property should be considered contextually, particularly when the putative taking is directly tied to a regulatory scheme.<sup>65</sup>

As a starting point, the per se regulatory cases notably cabin their holdings to real property. As previously mentioned, *Lucas* explicitly

<sup>57</sup> See, e.g., *Loretto*, 458 U.S. at 441 (comparing the effect of the government’s action to “other categor[ies] of property regulation”).

<sup>58</sup> *Id.* at 422–25.

<sup>59</sup> See, e.g., Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1610 (1988) (recognizing *Loretto* as a “category of a regulatory taking per se”).

<sup>60</sup> See, e.g., *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (situating *Loretto* in the Court’s “regulatory takings jurisprudence”).

<sup>61</sup> See *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2601 (2010) (“[T]he classic taking is a transfer of property to the State or to another private party by eminent domain . . . .”); see also *United States v. Sec. Indus. Bank*, 459 U.S. 70, 78 (1982) (distinguishing *Loretto* and other regulatory takings cases from those involving “outright acquisitions”).

<sup>62</sup> The Court suggested as much when it painted the history of takings jurisprudence as divided between *Penn Central* and per se cases. See *Horne*, 135 S. Ct. at 2427. That said, even if *Horne* might be read as recognizing but largely ignoring per se regulatory takings cases, the opinion fails to articulate why reasoning from those cases is wholly irrelevant in other takings cases involving a categorical approach.

<sup>63</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). Subsequent cases have reflexively acknowledged *Lucas* as a per se regulatory takings case. See, e.g., *Lingle*, 544 U.S. at 538.

<sup>64</sup> Cf. *Lucas*, 505 U.S. at 1017 (suggesting that *Lucas* and *Loretto* are “equivalent” from the landowner’s point of view).

<sup>65</sup> This comment refers to a category slightly broader than that of “regulatory takings”: whether or not one considers *Loretto* or *Horne* to be regulatory takings — that is, cases involving use restrictions as opposed to a direct appropriation — the takings in both cases were directly tied to a regulatory scheme. By contrast, cases such as *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); or *Kelo v. City of New London*, 545 U.S. 469 (2005), feature the government’s exercise of eminent domain outside the context of a larger regulatory scheme. Cf. *Horne*, 135 S. Ct. at 2443 (Sotomayor, J., dissenting) (suggesting *Horne* renders “regulatory takings jurisprudence irrelevant in some undefined set of cases involving government regulation of property rights”).

limits its application to actions suffered by “owner[s] of real property,”<sup>66</sup> and specifies that a separate framework should apply in cases of personal property.<sup>67</sup> These same limitations also exist in *Loretto*. For instance, the *Loretto* Court noted that its holding will “present[] relatively few problems of proof” because “[t]he placement of a fixed structure on *land* or *real property* is an obvious fact that will rarely be subject to dispute.”<sup>68</sup> Looking to the holding itself — that a regulation imposing a permanent physical occupation or invasion is a per se taking — this limit becomes even clearer. “Occupation” is defined as “the action of living in or using a *building* or other *place*,”<sup>69</sup> while “invade” is similarly tied to real property;<sup>70</sup> no government or military force has ever “occupied” or “invaded” a raisin. Especially given the Court’s insistence that these holdings should be interpreted “narrowly,”<sup>71</sup> the per se regulatory cases imply that the Court should hesitate before extending its categorical approach to personal property.<sup>72</sup>

These limits are unsurprising when one considers how analyzing a real property regulatory taking claim fundamentally differs from analyzing a personal property regulatory taking claim.<sup>73</sup> The first factor courts consider under the *Penn Central* balancing test is the economic impact of the regulation: *Loretto* and *Lucas* both mark situations where space is “empt[ied] . . . of any value”<sup>74</sup> or deprived of “*all* economically beneficial uses.”<sup>75</sup> Regulations of personal property, by contrast, operate on a wholly different scale. While physically appropriating 50% of a raisin crop might reduce the value of an owner’s personal property, it would hardly amount to the same quality of deprivation as

<sup>66</sup> *Lucas*, 505 U.S. at 1019.

<sup>67</sup> *Id.* at 1027–28.

<sup>68</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437 (1982) (emphasis added).

<sup>69</sup> OXFORD DICTIONARY OF ENGLISH 1227 (3d ed. 2010) (emphasis added). “Occupy” is similarly defined with references to either a “place” or “space,” not a “thing.” *See id.*

<sup>70</sup> “Invade” is defined as entering a “place, situation, or sphere of activity” in large numbers. *See id.* at 918.

<sup>71</sup> *See, e.g.,* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (describing *Lucas* and *Loretto* as “two relatively narrow categories” of regulatory takings); *see also Loretto*, 458 U.S. at 441 (“Our holding today is very narrow.”).

<sup>72</sup> This analysis admittedly does not fully respond to the Chief Justice’s argument that the Constitution is concerned with “means as well as ends.” *See Horne*, 135 S. Ct. at 2428. However, such an approach to the doctrine ultimately elevates formalism over fairness and, for reasons discussed below, triggers a number of undesirable practical consequences.

<sup>73</sup> The *Penn Central* balancing test does not apply to all takings cases featuring regulations; *Loretto* and *Lucas* prove as much. Nevertheless, because such per se cases are simply instances when a regulation goes “too far” in the *Penn Central* analysis, *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (quoting *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)), *Penn Central* remains relevant to all regulatory cases.

<sup>74</sup> *Loretto*, 458 U.S. at 436.

<sup>75</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

a taking of real property.<sup>76</sup> Indeed, appropriating a percentage of a raisin crop — unlike appropriating a raisin farm — leaves an owner free to profit off the land the following season.<sup>77</sup> Yet by applying the per se approach to personal property, the Court rejects these distinctions and contends that assuming control of a fungible commodity is analogous, from a takings perspective, to appropriating the land on which that commodity is grown.<sup>78</sup>

Even in cases involving regulations that might deprive personal property of all economic value, the *Penn Central* test would still counsel against embracing a per se approach. The second relevant consideration, the investment-backed expectations of the owner, operates in a unique way in personal property cases. As a starting point, the Court has conclusively affirmed that “the State’s traditionally high degree of control over commercial dealings” means that, unlike in real property cases, a personal property owner “ought to be aware of the possibility that new regulation might . . . render his property economically worthless.”<sup>79</sup> This point is supplemented by the fact that personal property, unlike land, can be lost, abandoned, or destroyed, a reality that clearly affects owners’ expectations.<sup>80</sup> And even between different types of personal property, investment-backed expectations vary wildly. For instance, the expectations of a farmer growing crops for sale in a regulated market diverge radically from those of a weekend gardener growing fruit to include in a family meal.<sup>81</sup> *Horne*’s disregard for these differences thus strays from common sense and precedent.<sup>82</sup>

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<sup>76</sup> Cf. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 498 (1987) (rejecting plaintiffs’ attempt to dissociate their coal reserves as a separate property interest from the land in which the coal is located).

<sup>77</sup> Of course, not all pieces of personal property can be so easily replaced, and some personal property might mean more to an individual than a parcel of land. See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 986–88 (1982) (discussing the difference between personal and fungible property). It is nevertheless unlikely that the government would choose to appropriate sentimentally valued personal property via regulation.

<sup>78</sup> Moreover, in *Horne*, the growers actually retained the right to receive money from the reserve raisins. 135 S. Ct. at 2424. This consideration is also lost when the Court transplants its per se categories to the personal property context.

<sup>79</sup> *Lucas*, 505 U.S. at 1027–28. Though not invoking this principle explicitly, the Court has repeatedly found that regulations that effectively render personal property economically worthless are not takings. See, e.g., *Andrus v. Allard*, 444 U.S. 51 (1979).

<sup>80</sup> Indeed, in many contexts, property laws govern personal property and real property in completely distinct ways. See generally Glen O. Robinson, *Personal Property Servitudes*, 71 U. CHI. L. REV. 1449 (2004) (noting the common law’s “ambivalence” about servitudes on personal property); Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355 (2010) (discussing the common law’s prohibition of the abandonment of real property).

<sup>81</sup> The personal property at issue in those examples, in turn, differs from nonfungible personal property, such as a customized car or yacht, whose owner would have even less reason to expect to forfeit their property to government regulation.

<sup>82</sup> See, e.g., *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992) (rejecting petitioners’ rent control-based takings claim on the basis that they had “voluntarily rented their land to mobile home

All of this comes at the expense of the government's ability to regulate personal property. The Court has repeatedly stressed the "substantial burden" a party faces when challenging a government regulation as an unconstitutional taking,<sup>83</sup> and Justices have protested per se categories in the real property context as improperly eliminating that burden.<sup>84</sup> By applying a categorical rule to a regulation of personal property, the *Horne* Court not only eliminates this burden but deprives the government of the opportunity to defend its myriad regulations of personal property that might fall into this new category. This, in turn, seems to leave the government unable to argue on behalf of mandatory consumer product recalls, seizures of unsafe drugs, or an agency's demands for records.<sup>85</sup> The holding in *Horne* thus threatens to stymie certain key functions of the government, leaving it unable to "go on" effectively without paying sweeping compensation.<sup>86</sup>

None of this implies that the government should not be held accountable under the Fifth Amendment for takings of personal property. However, the appropriate means of making such an assessment is through a context-specific inquiry.<sup>87</sup> Especially in the realm of personal property regulations, "[t]he temptation to adopt what amount to *per se* rules in either direction must be resisted"<sup>88</sup>; to do otherwise risks ignoring the various ways personal property differs from real property. Future courts should thus interpret *Horne* narrowly and avoid categorical rules in takings cases involving the regulation of personal property.

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owners"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984) (dismissing a takings claim because petitioners were "willing to bear [the regulatory] burden in exchange for the ability to market pesticides"). The Chief Justice briefly addressed *Monsanto* by noting that "[r]aisins are not dangerous pesticides; they are a healthy snack." *Horne*, 135 S. Ct. at 2431.

<sup>83</sup> *E. Enters. v. Apfel*, 524 U.S. 498, 523 (1998).

<sup>84</sup> *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374, 411 (1994) (Stevens, J., dissenting) ("The burden of demonstrating that [regulatory] conditions have unreasonably impaired the economic value of the [property] belongs squarely on the shoulders of the party challenging the state action's constitutionality.").

<sup>85</sup> Alternatively, the Court will be forced to distinguish later cases from *Horne*, carving out numerous exceptions that undermine the purpose of having a per se approach.

<sup>86</sup> *See Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

<sup>87</sup> The current ad hoc approach derived from *Penn Central* is far from perfect. *See* Gary Lawson et al., "Oh Lord, Please Don't Let Me Be Misunderstood!": *Rediscovering the Mathews v. Eldridge and Penn Central Frameworks*, 81 NOTRE DAME L. REV. 1, 34-35 (2005) ("It does not do justice to academic criticism of *Penn Central* to describe such criticism as a cottage industry."). Yet any framework that allows the government to defend its regulations is preferable to an approach that forecloses that avenue entirely.

<sup>88</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring).