COMMENT

NO APPROPRIATION WITHOUT COMPENSATION: HOW PER SE TAKINGS OF PERSONAL PROPERTY CHECK THE POWER TO REGULATE COMMERCE

WILLIAM SUMNER MACDANIEL*

* St. Mary's University School of Law, J.D., 2017. Special thanks to Professors Michael Ariens, Laura Burney, and Chad Pomeroy for their thoughtful suggestions in organizing this Comment and to the many editors for their time. I am forever grateful to my wife, Amanda, for her constant love and support throughout law school as well as my family for their encouragement throughout this endeavor.

I. INTRODUCTION

"Government has no other end but the preservation of [p]roperty . . . ."[1]

John Locke's *Second Treatise of Civil Government* articulates the simple proposition that property is, at its heart, the greatest means to equalize all citizens in the eyes of the law.[2] This principle, and Locke's advocacy for private property rights, has found a permanent home in the United States Constitution under the Fifth Amendment's Takings Clause.[3] As a result, the right to own and dispose of property is deeply entrenched in American law.[4] However, while property ownership is often associated with political freedom,[5] the government must balance the need to respect individual property rights against its duty to exercise police powers to protect its citizens.[6] Thus, the drafters of the United States Constitution sought to create a government of limitations—one that refrained from infringing upon the lives and property of its citizens while simultaneously acting as a strong, central power.[7]

1. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 329 (Peter Laslett ed., Cambridge Univ. Press 3d ed. 1988) (1690).

2. *See id.* at 287–88 (asserting all people share the common right to one's labor, which is the inestimable gift given by God to do with as one pleases).

3. *See* Jeffrey M. Gaba, *John Locke and the Meaning of the Takings Clause*, 72 MO. L. REV. 525, 526 (2007) ("John Locke, as much as any other figure, has shaped the debate over the issues that underlie the Takings controversies."). Perhaps no other political theorist has influenced America's development and, in particular, America's respect for private property, more than Locke. *See id.* ("Locke's stature as one of the major intellectual figures in American constitutional history is universally acknowledged."); *see also* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 16 (1985) ("The Lockean system was dominant at the time when the Constitution was adopted.").

4. *See* U.S. CONST. amend. V (restricting the government's ability to take private property); *see also* EPSTEIN, *supra* note 3, at 16 ("[P]rotection of private property was a central objective of the original constitutional scheme . . . ."). One example that highlights the extent of America's respect for property ownership is the probate system, where the courts give the greatest amount of judicial deference when determining a testator's wishes to dispose of his or her property. *See generally* Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1 (1992) (discussing the merits and criticisms of the "Dead Hand" theory, which presumes a testator may still bequeath his property even from beyond the grave).

5. *See* Milton Friedman, *The Relation Between Economic Freedom and Political Freedom*, *in* LIBERTY, PROPERTY, AND THE LAW: MODERN UNDERSTANDINGS OF LIBERTY AND PROPERTY 66 (Richard A. Epstein ed., 2000) ("[F]reedom in economic arrangements is itself a component of freedom broadly understood . . . . [It] is also an indispensable means toward the achievement of political freedom.").

6. *See* Gaba, *supra* note 3, at 526 (proclaiming the dispute over the relationship of the individual to the state "has produced much controversy but little coherence"); *see also* EPSTEIN, *supra* note 3, at 107–08 (explaining the police powers of the state and their relation to the Takings Clause).

7. *See* EPSTEIN, *supra* note 3, at 16–17 (1985) (explaining how the Constitution grants enumerated powers to the three branches of government to serve the substantive end of protecting private property and the "'lives, liberties, and estates' that Locke considered the purpose of government").

Today, the balance between these competing interests seems to be shifting in favor of individual property rights. A primary purpose of the Takings Clause is to prevent government from shifting public burdens upon a few citizens when the interests of justice and fairness demand the public bear the burdens as a whole.[8] There are situations, however, when the government's action is so extreme that no matter the interest involved, the court will always find the public should bear the costs; these actions result in a per se taking.[9] Few instances rise to the level of a per se taking and when the Supreme Court has ultimately recognized a per se taking occurred, only real property was involved.[10] This has changed. In 2015, during the Supreme Court's "history-making term" (a term that saw the reaffirmation of the Affordable Care Act and same-sex marriage legalization),[11] the Court declared in favor of Marvin and Laura Horne, two raisin growers in California, who were fined for refusing to turn over a portion of their crop to the federal government.[12] The Raisin Administrative Committee (RAC), whose members are appointed by the Secretary of Agriculture, promulgated the Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California (Marketing Order) to stabilize prices in the raisin market.[13] Under this order, a portion of the raisin harvest handled by the Hornes was to be placed aside in a government reserve, which allowed the government to control the amount of raisins available in the market by disposing of them as the government saw fit.[14] The Hornes were summarily fined for their non-compliance with the Marketing Order and their uncooperative conduct.[15] Asserting they had been denied the use of

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

9. Angela Schmitz, Note, *Taking Shape: Temporary Takings and the* Lucas *Per Se Rule in* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Authority, 82 OR. L. REV. 189, 190 (2003).

10. *Compare* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (holding the installation of cable television equipment on real property is a taking under the "traditional rule that a permanent physical occupation of property is a taking"), *with* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019, 1027 (1992) (recognizing a taking occurs when a regulation deprives a landowner of all beneficial economic use of his land but clarifying that beneficial economic use means use consistent with the landowner's title and differentiating between the rights afforded to real property and the rights afforded to personal property).

11. David Von Drehle, *Two Days that Changed America*, TIME, 2015, at 12.

12. Horne v. Dep't of Agric. (*Horne II*), 135 S. Ct. 2419, 2424–25, 2433 (2015).

13. *Id.* at 2424–25; *see also* Drew S. McGehrin, *Raisin' Contentions: A Farmer's Grapes of Wrath and the Ninth Circuit's Questionable Takings Analysis in* Horne v. U.S. Dept. of Agriculture, 26 VILL. ENVTL. L.J. 385, 388 (2015) (detailing the facts of the controversy in *Horne*).

14. *Horne II*, 135 S. Ct. at 2424.

15. *See id.* (relating the facts of the case before the Supreme Court). The Hornes were fined a total of $695,226.92 by the United States Department of Agriculture for the 2002–2003 and 2003–2004 harvests. Horne v. Dep't of Agric., 750 F.3d 1128, 1135 n.6 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419

their personal property without just compensation, the Hornes challenged the government's action as violative of the Fifth Amendment's Takings Clause.[16] After losing twice in the Ninth Circuit, and arguing before the Supreme Court a second time, the Hornes received a 5–4 decision in their favor.[17] The Court analogized the government's conduct to other instances where a per se taking had occurred,[18] and extended the per se takings doctrine to personal property.[19]

Hailed as a victory for individual property rights,[20] the Hornes' successful challenge of the Marketing Order's reserve requirement reaffirms the value private property rights provide in counterbalancing the government's police powers. This Comment addresses the Supreme Court's holding in *Horne v. Department of Agriculture* (*Horne II*)[21] and demonstrates how the Court's ruling may encourage future constitutional challenges to government regulations through the assertion of individual property rights under the Fifth Amendment. The Fifth Amendment provides protection from government acts when private property is taken for government use by requiring (1) the taking to serve a public purpose and (2) the payment of just compensation to the property owner when private property is taken.[22] *Horne II* impacts

(2015). The fine included $8,783.39 in overdue assessments, $483,843.53 for the monetary value of the raisins not given to the reserve, and $202,600 in civil penalties for failing to comply with the Marketing Order. *Id.*

16. *Horne II*, 135 S. Ct. at 2425.

17. *Id.* at 2423. The Supreme Court's ruling was 8–1 in favor of the Hornes on the question of whether a taking had occurred. *Id.* However, the case's ultimate vote was 5–4 in favor of the Hornes, with three Justices—Breyer, Ginsberg, and Kagan—dissenting on the question of whether just compensation had actually been given to the Hornes. *Id.* (Breyer, J., concurring in part and dissenting in part). This Comment will primarily focus on the takings question and, therefore, the Court's 8–1 decision.

18. The Court compared the government's conduct to the conduct in *Loretto v. Teleprompter Manhattan CATV Corp.*, where the Court found a taking occurred whenever the government directly appropriates private real property. *Horne II*, 135 S. Ct. at 2428 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 431–32, 435 (1982)).

19. *See id.* at 2425 (holding the Fifth Amendment's requirement to pay just compensation for a taking applies equally to personal property as it does to real property).

20. *See* Warren Richey, *Supreme Court Raisin Case a 'Great Victory' for Property Rights: The High Court Rejects the Claim that Government Can Take Personal Property Without Just Compensation, Even in a USDA Raisin-Price Support Program*, CHRISTIAN SCI. MONITOR (June 22, 2015), http://www.csmonitor.com/USA/Justice/2015/0622/Supreme-Court-raisin-case-a-great-victory-for-property-rights-video (remarking how *Horne II* is "an important decision bolstering protections for private property"); *see also* Thomas E. Travis, Horne v. USDA*: The Takings Clause, the Commerce Clause, and the "World's Most Outdated Law"*, 7 KY. J. EQUINE AGRIC. & NAT. RESOURCES L. 399, 400 (2015) (claiming the Roberts Court has instigated a property rights renaissance, and anticipating *Horne II*'s outcome would further cement such reinvigoration).

21. Horne v. Dep't of Agric. (*Horne II*), 135 S. Ct. 2419 (2015).

22. U.S. CONST. amend V.

the second requirement—just compensation—by expanding the per se takings doctrine to personal property.

First, this Comment examines the Takings Clause and explains how courts have interpreted the definition of a taking. Second, this Comment discusses *Horne II* and its impact on the Takings Clause. Third, this Comment analyzes the limitations imposed by *Horne II* on the federal government's ability to regulate commerce, and ultimately concludes the Court's decision was an important declaration for individual property rights, even if its impacts are minimally felt by society.

II. THE TAKINGS DOCTRINE

The Fifth Amendment to the Constitution provides, among other rights, "nor shall private property be taken for public use, without just compensation."[23] This provision, known colloquially as the Takings Clause,[24] codified the principles of Clause 28 of Magna Carta and was intended to protect individual liberty by restricting the instances in which government could seize a person's property by requiring the government, even when such seizure was permitted, to pay the person just compensation.[25] As written, the Takings Clause can be broken down into four specific elements: (1) the property must be private; (2) the property cannot be taken; (3) if taken, the property must be for a public use; and (4) the property cannot be taken without just compensation from the government.[26]

Although straightforward in its text, each element has been litigated substantially, and the application of the Takings Clause has evolved over time in conjunction with the Supreme Court's shifting jurisprudence.[27] As

23. *Id.* The Fifth Amendment is a limit on the federal government's authority but it is made applicable to the states through the Fourteenth Amendment. Kelo v. City of New London, 545 U.S. 469, 496 (2005); *see* U.S. CONST. amend. XIV § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

24. *See Horne II*, 135 S. Ct. at 2426 ("The Takings Clause provides: '[N]or shall private property be taken for public use, without just compensation.'" (quoting U.S. CONST. amend. V)).

25. *See id.* (discussing how the principle of just compensation in the Takings Clause can be traced back to Magna Carta); *see also* Magna Carta, cl. 28 (1215), *translation reprinted in* J.C. HOLT, MAGNA CARTA app. 6 (2d ed. 1992) ("No constable . . . shall take any man's corn or other chattels unless he pays cash for them at once or can delay payment with the agreement of the seller."); Bridget C.E. Dooling, *Take It Past the Limit: Regulatory Takings of Personal Property*, 16 FED. CIR. B.J. 445, 455 (2007) ("[T]he Magna Carta, which provided roots for the U.S. Constitution, and the Takings Clause in particular, protected both real property and personal property.").

26. Dooling, *supra* note 25, at 445 ("There are four distinct and complex aspects to the Takings Clause: (i) private property, (ii) cannot be taken, (iii) for public use, (iv) without just compensation.").

27. *See id.* (explaining the different ways in which the Supreme Court has defined each element of

a result, the Takings Clause encompasses physical takings—those cases involving condemnation of property through eminent domain[28]—as well as takings through regulations.[29] While a physical taking is primarily litigated to determine just compensation, regulatory takings involve the more important and nuanced question of what actually constitutes a taking.[30] This issue, raised by regulatory takings, has been subjected to heightened scrutiny making the Takings Clause more prominent in legal discourse today. Indeed, the Supreme Court has decided over fifty cases since the modern takings doctrine began in 1978.[31]

A. *What Is a Taking—Direct and Regulatory Takings*

Prior to the twentieth Century, the Supreme Court's interpretation of the Takings Clause was formalistic: a taking only occurred when the government formally exercised the right of condemnation (i.e. eminent domain) over an individual's private, real property.[32] The Fifth

the Takings Clause).

28. *See*, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (declaring the per se eminent domain rule that a "permanent physical occupation [of property] authorized by government is a taking without regard to the public interests" and recognizing the "constitutional history confirms the rule").

29. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (establishing the principle that when a regulation "goes too far" it constitutes a taking under the Fifth Amendment); *see also* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 104 (1978) (stating "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose").

30. *See* ROBERT MELTZ, CONG. RESEARCH SERV., 97-122, TAKINGS DECISIONS OF THE U.S. SUPREME COURT: A CHRONOLOGY 1 (July 20, 2015) (reporting condemnation cases are inherently takings because the government concedes the issue by filing the suit leaving only the question of what constitutes just compensation).

31. *Id.* The modern takings jurisprudence began in the aftermath of *Penn Central Transportation Co. v. City of New York*, where the Court outlined three factors to determine when a regulation qualified as a taking. *See Penn Cent. Transp. Co.*, 438 U.S. at 124 ("The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action." (citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)). For a more thorough breakdown of the *Penn Central* holding, see *supra* Section II-A.

32. MELTZ, *supra* note 30, at 1. The majority of takings cases prior to the twentieth Century revolved around the government's exercise of eminent domain. *Id.* The government's condemnation of property qualified as a taking if the property owner was entirely deprived of his rights in the property. *See* N. Transp. Co. v. Chicago, 99 U.S. 635, 642 (1878) (concluding a temporary construction of a dam did not constitute a taking because the owner's property rights were impaired, not deprived), *abrogated by* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177–78 (1871) (holding the construction of a dam which flooded private property constituted a taking because the property rights were wholly deprived). The federal government's use of eminent domain, however, "was not confirmed by the Supreme Court until the 1870s." Adam S. Grace, *From the Lighthouses: How the First Federal Internal Improvement Projects Created*

Amendment "forb[ade] taking private property for public use without just compensation or due process of law. [A taking] has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power."[33] Additionally, when the government took physical possession of private property, no matter how small, a taking occurred and just compensation was required.[34] Indeed, "the 'classi[c] taking' [is one] in which the government directly appropriates private property for its own use."[35] Such appropriation applies to both

Precedent that Broadened the Commerce Clause, Shrunk the Takings Clause, and Affected Early Nineteenth Century Constitutional Debate, 68 ALB. L. REV. 97, 102 (2004); *see also* MELTZ, *supra* note 30, at 16–20 (listing the Supreme Court cases prior to 1922 that dealt with the Takings Clause beginning in 1870 with *Knox v. Lee*). It appears the Supreme Court was given little opportunity to establish the boundaries of eminent domain before 1870 as a result of lingering doubts the power to take private property existed. Grace, *supra*, at 102. Even so, a willingness to exercise federal takings power can be traced back prior to 1870 and evidences a more aggressive use of congressional power. *See id.* at 102–03 (promoting the view that early administrators of the federal lighthouse program were prepared to utilize the government's takings power in the 1790s); *see also* Gregory A. Caldeira & Donald J. McCrone, *Of Time and Judicial Activism: A Study of the U.S. Supreme Court, 1800–1973*, *in* SUPREME COURT ACTIVISM AND RESTRAINT 103, 122 (Stephen C. Halpern & Charles M. Lamb eds., 1982) (concluding the Supreme Court's move to judicial activism can be traced back to at least the Civil War, suggesting the Court was engaged in interpreting the limits of congressional and executive power in the Constitution). A judicially active court does not preclude a formalistic approach to the law but a court that is more active in expanding the law is likely to move away from formalism in the law.

33. Knox v. Lee (*Legal Tender Cases*), 79 U.S. (12 Wall.) 457, 551 (1870), *abrogated by* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002). Professor John Costonis articulated the Court's jurisprudence further:

> The courts of the time, for example, often conceived of property as a physical thing, not as a relation between an owner and a resource. As a consequence, they denied "property" status to such recognized noncorporeal real property interests as easements and treated physical invasions as inherently more suspect than other types of public encroachments. In addition, they deemed injury to private land noncompensable if the injury was "consequential" rather than "direct."

John J. Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465, 474 (1983); *see also* Anthony Saul Alperin, *The "Takings" Clause: When Does Regulation "Go Too Far"?*, 31 SW U. L. REV. 169, 169 (2002) ("The Takings Clause was originally applied only to the actual appropriation of property by the government, either by obtaining physical possession or title to property or by physically rendering it useless." (first citing *Legal Tender Cases*, 79 U.S. (12 Wall.) at 563–64; and then citing *Pumpelly*, 80 U.S. at 177–78)).

34. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (asserting "the traditional rule that a permanent physical occupation of property is a taking").

35. E. Enter. v. Apfel, 524 U.S. 498, 522 (1998) (alteration in original) (quoting United States v. Sec. Indus. Bank, 459 U.S. 70, 77 (1982)).

personal[36] and real[37] property.[38]

The direct appropriation approach was expanded in 1922, when the Supreme Court decided the case of *Pennsylvania Coal Co. v. Mahon*.[39] Faced with the question of whether a state regulation forbidding the mining of coal on private property constituted a taking, the Court determined, for the first time, that a regulation which deprives a property owner of the value of his land may constitute a taking sufficient to trigger just compensation under the Takings Clause.[40] Delivering the majority opinion, Justice Oliver Wendell Holmes declared "[t]he general rule . . . is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[41] But what exactly is too far? Since Holmes delivered this famous line, scholars and courts alike have grappled with the question, attempting to balance the interests of property owners against the state's police power and the federal government's enumerated powers.[42] Despite the uncertainty, *Mahon* established three principles that governed the regulatory takings doctrine, which attorney Anthony Alperin explains are:

> (1) in order to provide for the public good, government must be able to impose restrictions on the exercise of private property rights, even

36. Personal property rights in patents have been protected under the Takings Clause since at least the nineteenth century. The Supreme Court held in *James v. Campbell* that a patent "confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser." James v. Campbell, 104 U.S. 356, 358 (1882).

37. *See generally Loretto*, 458 U.S. 419 (demonstrating the Takings Clause applies even to an appropriation of the smallest amount of real property, space for the installation of a cable box, and required the payment of just compensation).

38. Horne v. Dep't of Agric. (*Horne II*), 135 S. Ct. 2419, 2427 (2015).

39. Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

40. *See id.* at 414–15 (holding a regulation prohibiting the mining of coal under the state police power is invalid because it would deprive the property owner of all the value the coal gives to the land).

41. *Id.* at 415. After *Mahon* was decided, the Supreme Court grappled with the question of when a regulation goes too far. Andrew S. Gold, *The Diminishing Equivalence Between Regulatory Takings and Physical Takings*, 107 DICK. L. REV. 571, 572 (2003). The Court only began to formulate the general framework to clarify the question when the Court decided *Penn Central Transportation Co. v. City of New York*. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–24 (1978) (defining the relevant factors a court should review to determine when a regulation has resulted in a taking).

42. *See* Leonard v. Earle, 279 U.S. 392, 396 (1929) (upholding a Maryland law requiring remittance of a fee for the privilege of harvesting oysters and rejecting the claim the state violated the Takings Clause); Jacob Ruppert, Inc. v. Caffey, 251 U.S. 264, 302–03 (1920) (finding the federal government was not required to pay just compensation when prohibiting the manufacture of intoxicating beverages pursuant to Congress's war powers because the personal property rights were diminished, not taken). *See generally* Alperin, *supra* note 33, at 169–70 (analyzing regulatory takings jurisprudence and explaining *Mahon*'s framework for determining when regulations generate a viable takings claim).

though those restrictions may significantly reduce the value of the property;
(2) property owned with an "implied limitation" that its use is subject to the government's exercise of the "police power"; and
(3) the government's power to regulate is limited by the Constitution, and if the regulation "goes too far," i.e., if the deprivation is too great, compensation is owed.[43]

For over fifty years, the Supreme Court applied *Mahon* to various circumstances without attempting to formulate a precise method for determining when regulations go "too far."[44] But in 1978, the Court returned to the question in *Penn Central Transportation Co. v. City of New York*.[45] In *Penn Central*, the Court further clarified *Mahon*'s "too far" standard by laying out three factors to consider: (1) the overall economic impact of the regulation on the property owner; (2) the extent the regulation has interfered with investment-backed expectations; and (3) the general character of the regulation.[46] Put simply, "[i]f the public interest outweighs the private [interest], no taking is found; if the private [interest] outweighs the public [interest], courts should find a taking."[47] Justice Hugo Black further summed up *Penn Central*'s test in relation to the Takings Clause, stating "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[48]

While not without its criticisms,[49] the *Penn Central* decision and, by

43. Alperin, *supra* note 33, at 176 (citations omitted).

44. For instance, the Court applied *Mahon* to determine when the use of aircraft constituted a taking. *See* United States v. Causby, 328 U.S. 256, 268 (1946) (finding a taking occurred when the effects of low level flights caused a property owner's chickens to die); *see also* Griggs v. Allegheny Cty., 369 U.S. 84, 90 (1962) (holding a property owner was entitled to compensation for a regulatory taking when the value of the residential property was disrupted by the noise generated from aircraft at a nearby airport). The Court also applied *Mahon* in determining a regulation went "too far" by destroying all value in commercial liens. *See* Armstrong v. United States, 364 U.S. 40, 48 (1960) (determining lien holders suffered a taking when the government confiscated incomplete boats upon a default of the contract with the federal government).

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

46. Travis, *supra* note 20, at 408; *see Penn Cent. Transp. Co.*, 438 U.S. at 105 (summarizing the factors used for determining when a regulation has gone too far).

47. Schmitz, *supra* note 9, at 189–90.

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

49. Most of the criticism directed at the regulatory takings doctrine and *Penn Central* focuses on the plain textual meaning of the Takings Clause, with some concluding there is little basis to read in a regulatory takings provision. *See* Andrew W. Schwartz, *No Competing Theory of Constitutional Interpretation*

extension, the regulatory takings doctrine, is the standard for evaluating private property takings committed through regulatory means. In the wake of *Penn Central*, however, many scholars have struggled to explain what regulatory actions constitute a taking and note the Court has given little guidance to answer this question.[50] As a result, the regulatory takings doctrine is criticized for the vague and inconsistent ways it has been applied in the lower courts[51] and at least one scholar has gone so far as to suggest regulatory takings cannot be justified under any legal interpretation of the Constitution.[52] Although defended as a doctrine that "promotes fairness and justice in a free and democratic society that treats each person with equal

Justifies Regulatory Takings Ideology, 34 STAN. ENVTL. L.J. 247, 313 (2015) ("[U]nder any competing theory of constitutional interpretation, regulatory takings is not a legitimate application of the [Takings] Clause."); *see also* Dooling, *supra* note 25, at 447 (arguing the Court's distinction of personal and real property under the regulatory takings doctrine is indefensible and proposing the doctrine be applied equally between personal and real property); Stephen Durden, *Unprincipled Principles: The Takings Clause Exemplar*, 3 ALA. C.R. & C.L.L. REV. 25, 41 (2013) (disputing that the Supreme Court's ad hoc approach under *Armstrong* to regulatory takings questions is clearer than *Mahon*'s too far standard). *But see* James E. Holloway & Donald C. Guy, *Weighing the Need to Establish Regulatory Takings Doctrine to Justify Takings Standards of Review and Principles*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 315, 322 (2010) (arguing there is justification for a regulatory takings clause when the regulation constitutes a per se taking).

50. *See* Durden, *supra* note 49, at 27 ("[T]he [Supreme] Court has struggled to create a sense of coherence in its interpretation of the Takings Clause in general and the *Penn Central* test in particular.").

51. *See* Joseph William Singer, *Justifying Regulatory Takings*, 41 OHIO N.U. L. REV. 601, 605 (2015) ("[T]he critics are correct that the regulatory takings doctrine is sometimes incoherent and often confusing."); Travis, *supra* note 20, at 415 (arguing the Supreme Court's confusing application of the regulatory takings doctrine to personal and real property needs to be clarified and suggesting the Court's 2015 summer term is ripe to answer these glaring problems when the Court decides *Horne II*.).

52. *See generally* Schwartz, *supra* note 49 (arguing the Takings Clause cannot justifiably be expanded under any of the theories of Constitutional interpretation). *But see* Singer, *supra* note 51, at 606 (defending the regulatory takings doctrine and explaining how the doctrine demonstrates a "comprehensible pattern" in determining what a regulatory taking actually is when reviewing the cases that actually concluded a taking had occurred). Singer further takes issue with the "Supreme Court['s] [belief] that there is a constitutional problem when a regulation deprives anyone of an 'established right of private property.'" *Id.* at 604. Singer notes:

> Would we still be plagued with fee tails, for example, if no established property rights could be modified? Would the van Rensselaer feudal estates still persist in New York State? Would we still have no implied warranties of habitability in residential leases? Should slaveholders have been compensated for the lost value of their slaves? Would we still be interpreting a conveyance from O to A "in fee simple" as a life estate because the grantor did not use the magic words "and his heirs"? Would we have to say goodbye to environmental law, zoning law, antidiscrimination law, and equitable distribution statutes? Would we be powerless to regulate subprime mortgages? Would wheelchair access to housing and public accommodations go away? If followed literally and applied to individual "rights or private property," the "established property rights" formula would revive *Lochner v. New York* and disable courts from using common law methods to modernize the law of property.

Id. at 606 (citation omitted).

concern and respect[,]" regulatory takings jurisprudence "is sometimes incoherent and often confusing."[53] Further confounding the problem are regulatory takings recognized by the Supreme Court as categorically per se takings, thereby relegating the *Penn Central* test to irrelevancy.

B. *Per Se Takings*

Issues abound regarding what constitutes a per se taking.[54] At their heart, per se takings are those "categories of government action so extreme and intrusive that they always outweigh the public interest."[55] Inherently these takings are regulatory because they naturally flow from the balancing test outlined in *Penn Central*.[56] But rather than overrule *Penn Central*, the Court chipped away at the standard by pre-balancing categories of regulatory takings in favor of property owners.[57] Prior to *Horne II*, the Court often treated per se takings as those takings which affected real property rather than personal property.[58]

The Supreme Court "explicitly distinguished personal property from the

53. *Id.* at 605, 609.

54. For a thorough breakdown of Takings jurisprudence and a suggested decisional model for determining when a per se taking occurs, see Costonis, *supra* note 33. Professor Costonis suggests the proper means of determining when a taking has occurred is not by the creation of per se rules, but rather through a four-step process where a physical or regulatory taking is considered a presumptive, not per se, taking and the remaining three elements are measures by which the government can overcome that presumption. *Id.* at 469. The remaining three elements are (1) the fairness of the redistribution to satisfy due process, (2) the fairness in the operation of the taking, and (3) the level of scrutiny a court should give towards the previous two inquiries. *Id.* at 490.

55. Schmitz, *supra* note 9, at 190. The Supreme Court has been hesitant to recognize "[a] magic formula [that] enables a court to judge, in every case, whether a given government interference with property is a taking." Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 518 (2012). Despite this, the Court has held a per se taking exists when a regulation denies "a landowner 'all economically beneficial or productive use of land.'" Schmitz, *supra* note 9, at 190 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992)). Additionally, one scholar argues the Supreme Court implicitly ruled a per se taking occurs "whenever a government attaches a monetary obligation to specifically identified assets and the obligation is not a 'tax' . . . requiring just compensation." Michael Castle Miller, *The New Per Se Takings Rule:* Koontz*'s Implicit Revolution of the Regulatory State*, 63 AM. U. L. REV. 919, 923 (2014).

56. *See* Schmitz, *supra* note 9, at 190 (noting the per se doctrine pre-balances the *Penn Central* test).

57. *See id.* (describing per se takings as per-balanced takings under the *Penn Central* balancing test); *see also* STUART BANNER, AMERICAN PROPERTY 267 (2011) ("Rather than trying to overrule *Penn Central* directly, the . . . [Court] gradually chipped away at it by carving out categories of cases that would no longer be governed by its lenient standard.").

58. *See* Dooling, *supra* note 25, at 447 (arguing "regulatory takings jurisprudence disfavors the personal property"); *see also* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002) ("When the government physically takes possession . . . for some public purpose, it has a categorical duty to compensate the former owner." (citing United States v. Pewee Coal Co., 341 U.S. 114, 115 (1951))).

private property protected [under the Fifth Amendment]."[59] In *Lucas v. South Carolina Coastal Council*,[60] the Court determined regulatory takings that deprive a landowner of all economic use of his real property triggers a takings violation, but regulatory takings that deprive a property owner of all economic use of his personal property do not trigger a takings violation because "the State's traditionally high degree of control over commercial dealings . . . [makes a property owner] aware of the possibility that new regulation might even render his property economically worthless."[61] *Lucas* has been widely criticized for its distinction between real and personal property rights.[62] This distinction appears to be improper.[63] Nowhere in the text of the Fifth Amendment is it apparent the Takings Clause was intended to apply only to real property.[64] Indeed, the Court reiterated in

59. Dooling, *supra* note 25, at 446.

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

61. *Id.* at 1027–28. *Lucas* was not the first time the Supreme Court diminished personal property rights. In the Prohibition Era the government's power to outlaw alcohol took precedent over the individual's right to own and sell alcohol on the market. *See* Dooling, *supra* note 25, at 449 (discussing Justice Brandeis' view that regulations during prohibition did not result in actual taking of personal property but in "a lessening of [alcohol's] value due to a permissible restriction imposed upon its use" (quoting Jacob Rupert, Inc. v. Caffey, 251 U.S. 264, 303 (1920))).

62. These criticisms focus primarily on the lack of foundation for the Court's assertion that real property rights are treated differently than personal property rights under the Fifth Amendment. Real property can be equally subjected to takings under eminent domain as personal property can be directly appropriated. *See* Dooling, *supra* note 25, at 455–56 ("[L]and's uniqueness does not prohibit the government from acting for the public good."). The distinction appears more prominent in regulatory takings cases, likely stemming from the government's need to regulate markets. *See id.* at 464 ("[A] more inclusive definition has severe practical implications that would cripple the regulatory state. The exclusion of personal property may be understood as . . . pragmatic . . . ."). Dooling argues:

> The reason for the long-standing distinction between personal and real property quickly becomes clear when one considers an alternative doctrine which demands a payout for every government regulation that strips personal property of all economic use. Such a doctrine would cripple the government's ability to regulate personal property. The worthy goal of the Takings Clause, to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," would lead to impractical results.

Id. at 463 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)). *But see* Schmitz, *supra* note 9, at 219 (concluding landowners might prefer a per se takings approach but can equally recover the loss of their property under the regulatory takings approach).

63. *See* Dooling, *supra* note 25, at 447 (arguing "neither the text itself nor the historical context of the Fifth Amendment conveys a narrow meaning that includes only real property"); Eduardo Moisès Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 ECOLOGY L.Q. 227, 233 (2004) ("[T]he Court's favoritism toward land is an unprincipled one, [and] it cannot save the Court from the unpalatable implications of its Lucas holding for broader economic legislation."); *see also* James v. Campbell, 104 U.S. 356, 357–58 (1882) (holding a property right exists in patents).

64. *See* Dooling, *supra* note 25, at 453 ("Beginning with the plain language of the Fifth

Horne II that the *Penn Central* test "is equally applicable to a physical appropriation of real property."[65] Although *Lucas* distinguished between personal and real property takings, it affirmed the principle that regulations can go too far and result in a taking.[66] Such regulations constitute a per se taking, or those government actions so extreme that a taking has occurred regardless of the public interest.[67]

Including *Lucas*, the Supreme Court has formally recognized three categories of regulations that constitute a per se taking. In *Loretto v. Teleprompter Manhattan CATV Corp.*,[68] the Court declared the physical placement of a fixed structure on real property constituted a per se taking because a "permanent physical occupation . . . is an obvious fact that will rarely be subject to dispute."[69] *Lucas* added a second category—where the regulation wholly deprived a property owner of his land's economic value.[70] The third category of per se takings arose out of two cases, *Nollan v. California Coastal Commission*[71] and *Dolan v. City of Tigard*.[72] The resulting *Nollan–Dolan* test "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 land."[73] It was the *Nollan–Dolan* test that the Ninth Circuit applied to determine whether the direct appropriation of raisins resulted in a taking of the Hornes' property.[74]

Beyond the three recognized per se takings categories, one scholar has argued a per se taking occurs when the government imposes monetary obligations on specifically identified property in a non-tax form.[75] Another interpreted the Supreme Court's holdings in *United States v. General Motors*

Amendment, the text [of the Fifth Amendment] does not define or place an internal limit on the term private property."); Schwartz, *supra* note 49, at 248 (arguing the justification of regulatory takings is not possible from a clear reading of the Takings Clause because the Fifth Amendment makes no distinction between real and personal property).

65. Horne v. Dep't of Agric. (*Horne II*), 135 S. Ct. 2419, 2427 (2015).

66. *Lucas*, 505 U.S. at 1015.

67. *See* Schmitz, *supra* note 9, at 190 (asserting "per se takings are pre-balanced" in favor of the private interest).

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

69. *Id.* at 437–38.

70. *Lucas*, 505 U.S. at 1015; *see also* McGehrin, *supra* note 13, at 394 ("[A] regulation depriving an owner of all economically valuable use of his or her real property also constitutes a per se taking.").

71. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

72. Dolan v. City of Tigard, 512 U.S. 374 (1994).

73. McGehrin, *supra* note 13, at 385–86 (citing *Dolan*, 512 U.S. at 374–75).

74. Horne v. Dep't of Agric., 750 F.3d 1128, 1143 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015); McGehrin, *supra* note 13, at 408.

75. Miller, *supra* note 55, at 923.

Corp.[76] and *United States v. Burnison*[77] as extending an inherent per se takings category to personal property.[78] Despite such arguments, many scholars have noted the Supreme Court's hesitancy to extend the per se takings doctrine to personal property in light of the *Lucas* decision.[79] Prior to *Horne II*, the Supreme Court had not definitively stated whether a per se taking could occur for personal property.[80]

III. *HORNE II* AND ITS IMPACT ON THE PER SE TAKINGS DOCTRINE

The Court's ruling in *Horne II* definitively answered the question of whether a per se taking applies to personal property.[81] The Hornes were asked to transfer to the government 47% of their raisin crop between 2002–2003 and 30% between 2003–2004.[82] They retained an interest in the unsold portion of the raisins and could, when appropriate, recover a portion of the price the raisins would have been sold on the open market.[83] This interest netted the Hornes compensation amounting to less than the cost of production the first year, and nothing the second year.[84] Initially denied compensation by the Ninth Circuit for a lack of jurisdiction, the Supreme Court remanded the Hornes' case in 2013 to determine whether or not a

76. United States v. Gen. Motors Corp., 323 U.S. 373 (1945).

77. United States v. Burnison, 339 U.S. 87 (1950).

78. *See* McGehrin, *supra* note 13, at 396–97 (describing the Supreme Court's position in *General Motors* and *Burnison* that personal property can be equally taken by the government in the same manner real property can). McGehrin further articulates the Court's position on personal property takings, showing "[a]n authorized declaration of taking . . . will put *realty or personalty* at the disposal of the United States for 'just compensation.'" *Id.* at 397 (alteration in original) (quoting *Burnison*, 339 U.S. at 93 n.14).

79. *See* Dooling, *supra* note 25, at 453 (asserting the Supreme Court "did not break new ground in *Lucas*, but merely cemented a practice of treating personal property differently from real property"); Schmitz, *supra* note 9, at 214 ("[T]he temptation to adopt what amount to *per se* rules in either direction must be resisted." (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring))). *But see* McGehrin, *supra* note 13, at 396 ("While the Supreme Court has delivered extensive guidance . . . regarding real property, it has not left analysis of per se takings regarding personal property to the imagination.").

80. *See* Dooling, *supra* note 25, at 462 (suggesting after *Lucas* "the [Supreme] Court should change its definition of private property to include personal property"); Travis, *supra* note 20, at 415 ("[T]he [Supreme] Court needs to clarify whether a *per se* rule applies to personal property or whether personal property may be subject to the [*Penn Central*] balancing test.").

81. Prior to *Horne II*, "the Court need[ed] to clarify whether a *per se* rule applie[d] to personal property or whether personal property [might] be subject to the regulatory balancing test [from *Penn Central*]." Travis, *supra* note 20, at 415. *But see* Michael W. McConnell, *The Raisin Case*, 2015 CATO SUP. CT. REV. 313, 331 (2015) (stating the issue of whether the Takings Clause applied equally to personal property was never truly in doubt).

82. Horne v. Dep't of Agric. (*Horne II*), 135 S. Ct. 2419, 2424 (2015).

83. *Id.*

84. Travis, *supra* note 20, at 410–11.

taking had occurred.[85] Using the *Nollan–Dolan* test, the Ninth Circuit determined no taking had occurred and again denied the Hornes compensation.[86] While the Ninth Circuit applied the standard in *Lucas*—distinguishing between the taking of personal and real property[87]—and the *Nollan–Dolan* test—regarding the essential nexus question[88]—the Supreme Court rejected these applications.[89] Categorizing the reserve requirement as a form of direct appropriation rather than a regulation, the Court bypassed the *Penn Central* balancing test because "[t]he Government's 'actual taking of possession and control' of the reserve raisins gives rise to a taking as clearly 'as if the Government held full title and ownership.'"[90] Echoing the takings principles of eminent domain cases, Chief Justice Roberts stated: "[O]nce there is a taking, as in the case of physical appropriation, any payment from the government in connection with that action goes, at most, to the question of just compensation."[91] In effect, when a direct taking has occurred, the Takings Clause is triggered and just compensation must be given, regardless of whether the property is real or personal.[92]

Extending the per se takings doctrine to include personal property further expands individual property rights. Under *Horne II*, a citizen can now exercise his Fifth Amendment rights against government regulations when such actions amount to a physical appropriation of personal property. As noted by scholars and the Supreme Court in *Lucas*, personal property has historically been treated differently than real property.[93] But after *Horne II*,

85. *Horne II*, 135 S. Ct. at 2425.

86. Horne v. Dep't of Agric., 750 F.3d 1128, 1142 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015).

87. *Id.* at 1140–41.

88. *Id.* at 1143.

89. *Horne II*, 135 S. Ct. at 2427.

90. *Id.* at 2428 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 431 (1982)).

91. *Id.* at 2429.

92. *See id.* ("[O]nce there is a taking, as in the case of a physical appropriation, any payment from the Government . . . goes, at most, to the question of just compensation." (citing Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 747–48 (1997))).

93. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027–28 (1992) ("[I]n the case of personal property . . . [a property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless . . . ."); *Horne v. Department of Agriculture—Leading Cases*, 129 HARV. L. REV. 261, 266 (2015) (criticizing the *Horne II* decision for "ignor[ing] the Court's earlier guidance about personal property . . . [and] overlook[ing] the real property orientation of previous per se takings cases featuring regulatory schemes"). *But see* Dooling, *supra* note 25, at 453–54 (reviewing the Takings Clause's historical roots in English property law and finding no indication the Fifth Amendment was written to differentiate personal property rights from real property rights). Dooling further suggests rights in personal property were given *more* protection than rights in real property in early England:

the distinction between personal and real property rights has diminished, enabling citizens involved in agricultural markets to successfully plead a takings case against what they deem to be unfair and burdensome regulations.[94]

While some may find the Court's holding difficult to justify under the traditional takings jurisprudence,[95] *Horne II* supports the same principle that led Justice Holmes to declare "the natural tendency of human nature is to extend the [regulation] more and more until at last private property disappears. . . . [which] cannot be accomplished . . . under the Constitution of the United States."[96] That is, the purpose of the regulatory takings doctrine is to protect private property rights when regulations overstep their public purpose.[97]

Additionally, critics of *Horne II* should note that the per se category it declares is narrow.[98] As the Court explained, a per se taking of private property occurs only when the government's action is one of "actual taking of possession and control."[99] The Court, in essence, categorized the taking in comparison to *Loretto*,[100] a case where an actual physical taking occurred when the government occupied a portion of real property.[101] This limits the scope of claims that can now be brought under *Horne II*. A regulation

> Although the king could make use of the land without compensation, *he could not take personal property* without compensating the owner. For example, the king could dig for gunpowder on the land, but he could not use horses and oxen without paying for them. This implies that the protection of personal property rights was once greater than the protection of possessory land rights.

Id. (emphasis added) (first citing Penalver, *supra* note 63, at 248–49; and then citing William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 563 (1972)).

94. One scholar argued the personal and real property distinction diminished after the Supreme Court decided *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* in 2002. *See* Schmitz, *supra* note 9, at 208 (observing how applying the per se takings doctrine to moratoria "require[s] a finding that the traditional between physical and regulatory takings is no longer valid").

95. *See Horne v. Department of Agriculture—Leading Cases*, *supra* note 93, at 266 ("[T]he dichotomy the Court drew is untenable.").

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

97. *See Horne II*, 135 S. Ct. at 2428 ("[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way." (internal quotation marks omitted) (quoting *Mahon*, 260 U.S. at 416)).

98. *See id.* at 2430 (responding to the third issue on appeal, whether a per se taking occurs as a condition to engage in commerce with the answer, "at least in this case" as yes).

99. *Id.* at 2428 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 431 (1982)).

100. *See id.* at 2427 (asserting the reasoning of *Loretto* "is equally applicable to a physical appropriation of personal property").

101. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

that limits production of a crop may yield the same economic effect—both on the farmer and the market—as a physical, possessory taking of the crop would.[102] Yet only the physical appropriation of the crop will trigger the Takings Clause.[103] As the Court stipulated, "[t]he Constitution . . . is concerned with means as well as ends,"[104] resulting in the possibility that future constitutional challenges to regulations will arise from those regulations which mirror *Loretto*'s physical occupation category.[105]

Could a taking of personal property occur under the remaining two per se categories, which were defined in *Lucas* and *Nollan–Dolan*? It is certainly possible, though unlikely until the Supreme Court determines otherwise. *Horne II* does not posit that personal property regulations are no longer subject to tighter scrutiny than real property. By qualifying the taking as direct appropriation, the Court left intact the *Penn Central* balancing test in determining when regulatory takings go too far. The test is essentially ad hoc, with individual cases determined by their fact-specific inquiries.[106] The Court's application of the *Loretto* standard in *Horne II*, coupled with the Court's previously articulated hesitancy to push regulatory takings jurisprudence into the realm of personal property,[107] suggests distinctions between real and personal property remain. Nevertheless, *Horne II* adds strength to Takings jurisprudence and reinvigorates the Takings Clause by designing an avenue through which farmers and private property owners may successfully challenge regulations of their property. Indeed, the likely attacks will come from farmers, such as the Hornes, who view the regulation of markets and crops as an antiquated and obsolete system no longer necessary for the common good.

102. *Horne II*, 135 S. Ct. at 2428.

103. *See id.* (accepting the government's ability to regulate, rather than appropriate, crop production to achieve the same result but stating "[t]he Constitution . . . is concerned with means as well as ends").

104. *Id.*

105. Such regulations might include mandatory consumer product recalls, an agency's demands for records, or seizures of unsafe drugs. *Horne v. Department of Agriculture—Leading Cases*, *supra* note 93, at 270.

106. *See id.* (advocating the appropriate determination for whether a taking occurred in personal property is the context-specific inquiry declared in *Penn Central*); Durden, *supra* note 49, at 29 ("In reviewing Takings claims, the [Supreme] Court regularly refers to and relies on an ad hoc approach. . . . first announced in *Penn Central* . . . ." (citations omitted)).

107. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027–28 (1992) (articulating the expectations private property owners ought to have concerning the regulation of their private property); Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring) (warning the Court should resist defining per se categories for regulatory takings and instead look to the *Penn Central* test).

While *Horne II* specifically dealt with a Takings question, its implications may reach beyond the scope of the Takings Clause. Just as the Court stipulated the Constitution "is concerned with means as well as ends,"[108] so too will the expansion of the Takings Clause lead to the repercussions for other constitutional powers, namely the government's authority to regulate interstate commerce within the nation.

IV. THE COMMERCE CLAUSE

Among the enumerated powers the Constitution grants Congress, none are as far-reaching and expansive as the power to regulate commerce.[109] Under Article I, Section 8, Congress has the power "[t]o regulate Commerce with foreign [n]ations, and among the several [s]tates, and with the Indian Tribes."[110] This power, coupled with the Fourteenth Amendment's Enforcement Clause, permits both the federal government and the states to enact legislation to regulate commercial activities;[111] however, to the extent the state's police power conflicts with Congress's power to regulate commerce, the Commerce Clause prevails.[112] Beginning with *Gibbons v. Ogden*[113] in 1824, the Commerce Clause has evolved to include not just the channels of commerce[114] but also the "instrumentalities of interstate

108. *Horne II*, 135 S. Ct. at 2428.

109. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012) ("The power over activities that substantially affect interstate commerce can be expansive."); United States v. Carolene Prods. Co., 304 U.S. 144, 147 (1938) (remarking the power of the Commerce Clause "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution" (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 75 (1824))); *see also* Douglas W. Kmiec, Gonzales v. Raich*:* Wickard v. Filburn *Displaced*, 2005 CATO SUP. CT. REV. 71, 98 (2005) ("A majority of the [*Raich*] Court finds no judicially enforceable limit on the federal commerce power."). The importance of the Commerce Clause can be discerned from a first-year constitutional law class, where this author experienced firsthand how expansive a power the Clause is and the various interpretations the Supreme Court has given the clause since the nineteenth century.

110. U.S. CONST. art. I, § 8, cl. 3.

111. *See* Gonzales v. Raich, 545 U.S. 1, 29, 33 (2005) (holding Congress has the power to criminalize the growing of marijuana, done locally and pursuant to a state law, because the activity substantially affects interstate commerce); United States v. Morrison, 529 U.S. 598, 618 (2000) (reaffirming the right of the states to police citizens, a power "the Founders denied the [n]ational [g]overnment and reposed in the [s]tates").

112. *See Raich*, 545 U.S. at 29 (rejecting the claim that compliance with a valid state law places individuals beyond Congress's reach). The Constitution's Supremacy Clause "unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Id.* (citation omitted).

113. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

114. *Id.* at 86 (holding a state could not authorize exclusive use of shipping channels to individuals without infringing upon Congress' authority to regulate interstate commerce); *see also Morrison*, 529 U.S. at 609 ("Congress may regulate the use of channels of interstate commerce." (quoting United States v.

commerce, or persons and things in interstate commerce"[115] and "those activities having a substantial relation to interstate commerce."[116]

The Commerce Clause is indeed an impressive power delegated to Congress. However, that power is not unlimited.[117] The Supreme Court has not recognized a "blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority."[118] To the extent Congress may regulate interstate commerce, the federal government is still required to pay just compensation whenever a legislative act produces a taking of private property.[119] Unfortunately, raising a constitutional challenge to the Commerce Clause does not inherently prompt a court to determine whether a takings violation occurred because the Takings Clause and Commerce Clause require separate determinations.[120] To strike down a law or regulation as a violation of the Commerce Clause voids the law

Lopez, 514 U.S. 549, 558 (1995))).

115. *Morrison*, 529 U.S. at 609 (quoting *Lopez*, 514 U.S. at 558).

116. *Id.* (quoting *Lopez*, 514 U.S. at 558–59).

117. Each constitutional power delegated to the Executive, Legislative, and Judicial branches are subject to the Constitutional Amendments. U.S. CONST. art. V. As discussed previously, when a regulation made pursuant to the Commerce Clause goes too far or Congress condemns property for public use, the Takings Clause is triggered and the government must pay just compensation for the property taken or restricted. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (articulating the "too far" standard for a regulatory taking); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177–78 (1871) (finding eminent domain takings occur from both direct appropriation and indirect condemnation when the property's value is destroyed entirely). The Takings Clause does not invalidate a congressional power, so Congress and other governmental agencies are still free to enact legislation that takes private property; however, the Clause does categorically require just compensation be given when a taking occurs.

118. Evans v. United States, 74 Fed. Cl. 554, 560 (2006), *aff'd*, 250 F. App'x 321 (D.C. Cir. 2007) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 172 (1979)), *abrogated by* Lion Farms, LLC v. United States, 129 Fed. Cl. 521 (2016); *see also* Travis, *supra* note 20, at 421 (declaring "no court has ever held that the Commerce Clause trumps, eviscerates, or eliminates the Takings Clause in a physical takings case"). In *Evans*, the federal claims court, in deciding a similar case involving the Agricultural Marketing Agreement Act of 1937 (AMAA), observed "the Commerce Clause . . . provide[s] the authority for a taking, but it does not negate the Fifth Amendment's command that the government, having taken a person's property, must pay just compensation." *Evans*, 74 Fed. Cl. at 561.

119. *See* Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979) (noting the question of whether an action qualified as a taking is a separate inquiry from whether Congress properly exercised its Commerce Clause power).

120. For example, in *Wickard*, the Supreme Court was presented only with the question of whether Congress could regulate the agricultural market by limiting the amount of grain the plaintiff could grow on his property. Wickard v. Filburn, 317 U.S. 111, 124–25 (1942). Filburn challenged Congress's authority to do so and lost. *Id.* at 128. The Court was not presented with the question of whether Congress's action triggered the Takings Clause nor did Filburn argue such a position, except as an ancillary argument under the more general claim that Filburn was denied his due process rights. *Id.* at 129–30.

entirely.[121] Finding that a law or regulation constitutes a taking simply entitles a property owner to compensable damages; the law is otherwise a valid exercise of congressional power.[122]

A. *Background to the Modern Commerce Clause*

During the Great Depression, the Commerce Clause became a powerful tool for Congress to control domestic markets and breathe life back into the struggling economy.[123] It was natural for the population to demand greater regulation over economic channels and enterprise after the failure of the free market to prevent the stock market's collapse.[124] Of particular importance was the agricultural market, which President Franklin Roosevelt emphasized in his campaign while seeking the presidency.[125] Together, Roosevelt and Congress passed the Agricultural Marketing Agreement Act of 1937 (AMAA),[126] which stabilized the agricultural market by authorizing

121. *Compare* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2587 (2012) (rejecting the government's claim that the Affordable Care Act's individual mandate can be justified through the Commerce Clause because the mandate "does not regulate existing commercial activity"), *Morrison*, 529 U.S. at 619 ("[T]he Commerce Clause does not provide Congress with authority to enact [the Violence Against Women Act] . . . ."), *and Lopez*, 514 U.S. at 551 (declaring unconstitutional the Gun-Free School Zones Act), *with* Gonzales v. Raich, 545 U.S. 1, 33 (2004) (affirming Congress's authority to criminalize marijuana cultivation under the *Wickard* standard given "the undisputed magnitude of the commercial market" for the drug), *and Wickard*, 317 U.S. at 124 (upholding the Agricultural Adjustment Act (AAA) as valid under the Commerce Clause because "the reach of [the Commerce Clause] extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power").

122. *See* Horne v. Dep't of Agric. (*Horne II*), 135 S. Ct. 2419, 2425, 2428, 2430 (2015) (restating the three issues on appeal). The three issues addressed were (1) "[w]hether the government's 'categorical duty' under the Fifth Amendment to pay just compensation when it 'physically takes possession of an interest in property,'" *id.* at 2425 (quoting Ark. Game & Fish Comm'm v. United States, 133 S. Ct. 511, 518 (2012), (2) "[w]hether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion," *id.* at 2428, and (3) "[w]hether a governmental mandate to relinquish specific, identifiable property as a 'condition' on permission to engage in commerce effects a per se taking," *id.* at 2430. Noticeably absent was any question on whether the AMAA itself was constitutional, leaving the Marketing Order open only to a restriction on the amount the government owes to satisfy the just compensation element of the Fifth Amendment.

123. *See* Jim Chen, Filburn*'s Legacy*, 52 EMORY L.J. 1719, 1730–31 (2003) (discussing the plight of the American farmer and the steps the federal government took to relieve workers during the Great Depression).

124. *See* Travis, *supra* note 20, at 402 (claiming the Great Depression "made it natural for the populace to turn to government to deliver them from financial disaster").

125. *See* Chen, *supra* note 123, at 1730 ("Agricultural relief became a central plank of Franklin D. Roosevelt's presidential campaign.").

126. 7 U.S.C. §§ 671–74 (2012). Section 674 refers to the entire Act as the "Agricultural Marketing Agreement Act of 1937." *Id.* § 674.

the government to promulgate marketing orders to ensure stability of various markets for agricultural products.[127] Pursuant to the AMAA, the Secretary of Agriculture organized the Raisin Administrative Committee (RAC) to determine the annual reserve of raisins farmers would be required to deliver to the federal government.[128]

Prior to the Great Depression, the Supreme Court was suspicious of federal economic regulations, often concluding the free market could not be regulated without violating the now-defunct freedom to contract doctrine.[129] The Great Depression, along with President Roosevelt's New Deal programs, drastically altered the Court's jurisprudence on economic regulations and the Commerce Clause.[130] The definition of commerce and the extent of Congress's authority under the Commerce Clause grew to

127. *See id.* § 608(c)(1) (authorizing the Secretary of Agriculture to issue orders applicable to processors of any agricultural product); *Horne II*, 135 S. Ct. at 2424 ("The [AMAA] authorizes the Secretary of Agriculture to promulgate 'marketing orders' to help maintain stable markets for particular agricultural products."); *see also* Travis, *supra* note 20, at 410 ("Congress enacted the AMAA as part of Great Depression efforts to control prices and insulate farmers from competitive market forces . . . ."). There have been previous challenges to the AMAA, most notably in 1939 when a portion of the Act was challenged as violating the Tenth Amendment. United States v. Rock Royal Coop., 307 U.S. 533, 568 (1939). The Court upheld the Act as constitutional. *Id.* at 574. In *Evans v. United States*, a case similar to *Horne II* and likewise advancing a takings claim, the federal claims court ruled no taking had occurred that required just compensation because the raisin handlers were "paying an admissions fee or a toll" and the reserve tonnage raisins was "their admission ticket" to participate in the market. Evans v. United States, 74 Fed. Cl. 554, 563–64 (2006), *aff'd*, 250 F. App'x 321 (D.C. Cir. 2007).

128. *See* Horne v. Dep't of Agric., 750 F.3d 1128, 1133 (9th Cir. 2014) (summarizing the history and purpose of the AMAA and the California Marketing Order), *rev'd*, 135 S. Ct. 2419 (2015).

129. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 64 (1905) (striking down New York's regulation of an eight hour maximum work day for bakers because the right to contract one's labor was inherent under the Due Process Clause), *abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Echoing the same formalistic approach that Holmes rejected in *Mahon*, the Supreme Court's jurisprudence for the Commerce Clause was routinely criticized by legislators and President Roosevelt for playing a judicially active role in society. This criticism helped lay the groundwork for Roosevelt's Court Packing Plan in 1937.

130. *See* DAN T. COENEN, CONSTITUTIONAL LAW: THE COMMERCE CLAUSE 62 (2004) (remarking on how the Supreme Court's jurisprudence during this time "sharply altered constitutional doctrine, particularly with respect to the scope of the commerce power"); *see also* United States v. Morrison, 529 U.S. 598, 608 (2000) ("Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted."); Travis, *supra* note 20, at 402 ("It can be said that the New Deal birthed the American administrative state . . . ."). The prevailing attitude in academia towards this period in American history begins with the "switch in time that saved nine" when, in 1937, the Supreme Court decided *NLRB v. Jones & Laughlin Steel Corp.* which effectively moved the Court into a more judicially restrained role. *See* COENEN, *supra* note 130, at 60–62 (detailing the Court's shift from opposing to upholding New Deal legislation based on Justice Roberts' switch on the bench); Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 625 (1994) ("[T]he crisis of 1937 was a turning point in our legal history . . . .").

encompass not only those business transactions that fell directly under commerce among the states, but also actions that might themselves impact interstate commerce indirectly.[131] Unsurprisingly, the most significant case illustrating what actions substantially impacted interstate commerce came from the agricultural sector when the Supreme Court decided *Wickard v. Filburn*.[132] Roscoe Filburn filed for an injunction and declaratory order to enjoin the Secretary of Agriculture from enforcing a market penalty he received after harvesting a larger wheat crop than he was permitted to grow.[133] In 1940, the Agricultural Adjustment Act (AAA) permitted Filburn to harvest 20.1 bushels of wheat per acre on 11.1 acres of land; he instead harvested wheat from 11.9 extra acres—totaling 23 acres—and yielded 239 bushels of wheat in excess of his allotment.[134] Filburn fought the regulation, arguing that the wheat he grew was for both sale and personal use, such as feeding his own livestock.[135] He reasoned the regulation would therefore not apply to him because these activities were local and had, at best, an indirect impact on interstate commerce.[136] The Court held a citizen's participation in the wheat market alone brought that individual under interstate commerce and permitted Congress to pass legislation to regulate the production and sale of wheat.[137] Although a Due Process argument was given to the Court, it was ancillary to the initial challenge to

131. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36 (1937) ("The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce."); W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 396–97 (1937) (holding a minimum wage law is permissible under the interstate commerce clause to properly regulate the health and welfare of the population given the dire economic times of the Great Depression). *West Coast* overturned the Court's previous decision in *Lochner*, albeit indirectly, by overturning *Adkins v. Children's Hospital of D.C.*, which upheld *Lochner*'s principles. Adkins v. Children's Hosp. of D.C., 261 U.S. 525, 563–64 (1923), *overruled by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

132. Wickard v. Filburn, 317 U.S. 111 (1942).

133. *Id.* at 113.

134. *Id.* at 114.

135. *See id.* at 113 (detailing Filburn's regular uses of his crop).

136. *Id.* at 119.

137. *See id.* at 127–28 (noting an individual's "own contribution to the demand for wheat may be trivial in itself[, but] it is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial"). Interestingly, in *Filburn* the Court stated the plaintiff could choose not to farm wheat to avoid regulation under the Commerce Clause, an argument the Roberts Court rejected when deciding in favor of the Hornes. *See* Horne v. Dep't of Agric. (*Horne II*), 135 S. Ct. 2419, 2430 (2015) (rejecting the government's argument that the Hornes could avoid the Marketing Order's reserve requirement by farming different crops or selling the grapes as wine and quipping "'[l]et them sell wine' is probably not much more comforting to the raisin growers than similar retorts have been to others throughout history").

the Commerce Clause and did not concern the Takings Clause specifically.[138] Summarizing *Wickard*'s significance and overall impact on the Commerce Clause, Cody Fowler, then-acting President of the American Bar Association, wrote in his annual address:

> We live in changing times . . . . Within the space of a comparatively few years, we have witnessed a revolutionary change in the nature of our federal government. . . . Who of us, thirty years ago, foresaw that a farmer growing wheat to feed his own cattle would one day be subject to quotas established by a federal bureau? Who of us would have dreamed that under the Commerce [C]lause, Congress had the power to legislate with respect to an elevator operator in an office building?[139]

Fowler's words exemplify the extensive and far-reaching consequences of *Wickard* upon the Commerce Clause and speaks to the breadth of authority Congress has to regulate economic markets.[140] This view remained largely unchanged for the majority of the twentieth Century.[141] However, a challenge to *Wickard* eventually came when the Court decided *United States v. Lopez*.[142] In *Lopez*, the Court recognized the reach of the Commerce Clause to regulate guns on school campuses was too attenuated to merit justification.[143] This "too attenuated" principle was upheld in *National Federation of Independent Businesses v. Sebelius*,[144] where the Court struck down the argument that Congress had the authority to regulate an inactive health insurance market under the Affordable Care Act.[145] Despite the Court's decisions in *Lopez* and *Sebelius, Wickard* remains valid today and directs the Supreme Court's analysis when determining the limits of the Commerce Clause.[146] *Horne II* does not challenge that standard, but

138. Travis, *supra* note 20, at 404.

139. Cody Fowler, *The Lawyers' Responsibility to America*, *in* 76 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 442, 442 (1951).

140. *See* Chen, *supra* note 123, at 1747 ("[*Wickard*] is regarded today as the high-water mark of the New Deal's constitutional revolution."); United States v. Lopez, 514 U.S. 549, 560 (1995) (identifying *Wickard* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity").

141. *See* COENEN, *supra* note 130, at 63 (noting how, post-*Wickard*, "for a period of nearly 60 years[] the Court could not identify a single federal law that exceeded the commerce power").

142. United States v. Lopez, 514 U.S. 549 (1995).

143. *See Lopez*, 514 U.S. at 567 (holding possession of a gun in a school zone is in no way economic activity, such that it could be considered interstate commerce for purposes of the Commerce Clause).

144. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

145. *Id.* at 2608.

146. *See* Gonzales v. Raich, 545 U.S. 1, 18 (2004) (holding *Wickard* applies to Congress's authority

nevertheless burdens the federal government's ability to regulate commerce by requiring the government to pay just compensation whenever a physical taking has occurred.[147] It is one of two ways—the other being public use—that the Fifth Amendment limits the Commerce Clause.

B. *Restricting the Government's Ability to Regulate Commerce: Public Use*

The first limitation imposed by the Fifth Amendment is the public use requirement.[148] Congress, or any governmental agency, may not take private property unless the taking is for a public use.[149] It is irrelevant whether the property owner is compensated.[150] Normally, the public use requirement prohibits the government from seizing private property for the sole purpose of conferring the benefit upon another private party.[151] However, just as the Commerce Clause evolved beyond formalistic distinctions between manufacturing and commerce,[152] the definition of

to ban the use of marijuana); Travis, *supra* note 20, at 419 ("[T]he *Wickard v. Filburn* aggregate economic effect doctrine is still valid law.").

147. *See* Horne v. Dep't of Agric. (*Horne II*), 135 S. Ct. 2419, 2428 (2015) (denying the government's ability to avoid paying just compensation in the case).

148. *See* U.S. CONST. amend. V ("[N]or shall private property be taken *for public use*, without just compensation.") (emphasis added)); Dooling, *supra* note 25, at 445 (breaking down the four elements of the Fifth Amendment's Takings Clause).

149. *See* Kelo v. City of New London, 545 U.S. 469, 489–90 (2005) (approving the condemnation of private property for economic development as satisfaction of the Fifth Amendment's public use requirement). The *Kelo* decision has been largely criticized for its inequitable result in the years after the case was decided. *See* Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 498 (2006) (arguing for the abolition of takings for economic development in response to *Kelo*). *But see* Vicki E. Land & Andrew J. Sokolowski, *The Overreaction to the* Kelo *Decision*, 28 L.A. LAW. 52, 52 (2006) ("The fear conjured up in *Kelo*'s aftermath led to the introduction of much ill-considered and poorly drafted legislation that is simply unnecessary . . . ."). The condemned property at issue in *Kelo* was intended to entice Pfizer, Inc. into relocating, thereby improving the land and increasing overall economic development for the public. *See Kelo*, 545 U.S. at 474 ("The NLDC intended the development plan to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract."). Whether or not economic development may justify a taking is irrelevant to the just compensation question, but the limits of governmental authority to take property are nonetheless restricted by more than the just compensation requirement. *See id.* at 477 ("[I]t has long been accepted that the sovereign may not take the property of [a private party] for the sole purpose of transferring it to another private party . . . even though [the first private party] is paid just compensation."); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.").

150. BANNER, *supra* note 57, at 271.

151. *See Kelo*, 545 U.S. at 477 ("The [government] would no doubt be forbidden from taking . . . land for the purpose of conferring a private benefit on a particular private party.").

152. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 39 (1937) (rejecting the argument the Commerce Clause is limited only to actual interstate commerce and not manufacturing, noting "that view ha[s] been so repeatedly pressed . . . and ha[s] been so necessarily and expressly decided to be

public use has now evolved to encompass any taking that is intended to facilitate a public purpose.[153] As recently as 2005, when the Supreme Court decided *Kelo v. City of New London*,[154] the public purpose for a taking can include private economic development.[155] Despite heavy criticism and the nearly unlimited scope for what qualifies as economic development,[156] *Kelo* requires a taking be made for a public purpose or the government's action is rendered unconstitutional.[157] Often, courts will defer to state legislatures and Congress to determine when transfers of private property are for a public purpose.[158] This makes challenging a governmental action for violating the public use requirement difficult. If public use means public purpose and courts look to the legislatures to define public purpose, then property owners can rarely succeed at stopping the government from taking their property.[159] It is only when a finding is made that a government's action amounts to a taking for public use that the just compensation

unsound as to cause the [argument] to be plainly foreclosed").

153. *See Kelo*, 545 U.S. at 480 ("[T]his Court . . . [has] embraced the broader and more natural interpretation of public use as 'public purpose.'" (citing Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158–64 (1896))).

154. Kelo v. City of New London, 545 U.S. 469 (2005).

155. *See Kelo*, 545 U.S. at 484 ("Promoting economic development is a traditional and long-accepted function of government.").

156. Justice O'Connor, in her dissent, observed:

> [N]early any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side effects are enough to render transfer from one private party to another constitutional, then the words "for public use" do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power.

Id. at 501 (O'Connor, J. dissenting); *see also* Cohen, *supra* note 149, at 543 (claiming economic development takings are problematic because there is "virtually no limit to the potential reach of the eminent domain power").

157. *See Kelo*, 545 U.S. at 477–78 (explaining the inability of the government to take private property when the public purpose requirement is not satisfied).

158. *See* BANNER, *supra* note 57, at 272 ("Few judges relished the prospect of second-guessing the wisdom of an enormous range of government decisions . . . . [and] thus tended to be exceedingly deferential to legislative findings . . . .").

159. A clear example is the ongoing growth in urban renewal. Stuart Banner writes:

> Economic Development [has] been one of the standard public purposes justifying the exercise of eminent domain ever since the days of urban renewal. For decades the Court [has] refused to scrutinize the claims of local governments that particular development plans would benefit the public or that the acquisition of particular parcels of land was a necessary component of such plans.

Id. at 274.

question is implicated.[160] This offers little relief to property owners who do not want their property taken in the first place or are unsatisfied with the amount of compensation offered by the government.[161]

The dichotomy between both inquires (and both limitations) is demonstrated by the Supreme Court's final ruling in *Horne II*. The Court ruled 8–1 on the takings issue, yet ultimately split 5–4 on the just compensation question.[162] Had the Court ruled the Marketing Order's reserve requirement was not a taking, the Marketing Order would have continued unhindered. As it stands, the only limitation imposed as a result of *Horne II* is the payment of just compensation.[163] Thus, the Marketing Order, and subsequently the Commerce Clause, are hindered only by the government's ability to pay just compensation.

C. *Restricting the Government's Ability to Regulate Commerce: Just Compensation*

As compensation for the RAC's taking, the Hornes received no additional sum of money.[164] Instead, the Court absolved the Hornes of their obligation to pay the fine (calculated at fair market value) levied against them by the government.[165] As is often the case, just compensation is normally the fair market value of the property at the time the property was taken.[166] But fair market value can often be difficult to determine for personal property and the Court's decision not to remand the case to the Ninth

160. *See* Horne v. Dep't of Agric. (*Horne II*), 135 S. Ct. 2419, 2425, 2428 (2015) (addressing the first question of whether a taking occurred before addressing the second question on whether the government can avoid the just compensation requirement).

161. *See* BANNER, *supra* note 57, at 273–74 (reporting how Kelo and the other plaintiffs refused to sell their land for compensation and noting that "[f]ew constitutional lawyers were surprised when they lost").

162. *See Horne II*, 135 S. Ct. at 2423, 2436 (Breyer, J., concurring in part and dissenting in part) (recommending the case be remanded on the question of just compensation while joining the majority on the takings question).

163. Justice Roberts wrote that "[a] physical taking of raisins and a regulatory limit on production may have the same economic impact on a grower," *id.* at 2428 (majority opinion), but the physical taking is the only one of the two which will necessitate just compensation. *See id.* at 2425 (explaining how the Marketing Order destroys all property rights in the raisins, which amounts to a taking). *But see* Evans v. United States, 74 Fed. Cl. 554, 563 (2006), *aff'd*, 250 F. App'x 321 (D.C. Cir. 2007) (concluding the Marketing Order did not deprive raisin handlers of all property interests because the handlers retained an interest in the proceeds), *abrogated by* Lion Farms, LLC v. United States, 129 Fed. Cl. 521 (2016); *see also Horne II*, 135 S. Ct. at 2442 (Sotomayor, J. dissenting) ("[I]f there is a property right that has not been lost . . . then the Order has not destroyed each of the Hornes' rights . . . and does not effect a per se taking.") (emphasis omitted)).

164. *Horne II*, 135 S. Ct. at 2431–33 (majority opinion).

165. *Id.* at 2433.

166. *Id.* at 2432 (quoting United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984)).

Circuit is problematic.[167] Just compensation for real property is simple to calculate: it is the value of the property at the market price when the taking occurred and is intended to place the property owner in the same position before the property was taken, regardless of whether the property owner invested more or less than the fair market value.[168] The difficulty arises, however, when a portion, rather than the whole, of the real property is taken for public use because the value of the remaining property may substantially increase as a result of the taking, such as when the government appropriates parcels of land to build a highway[169] or intends to encourage economic development.[170] To prevent a windfall, the government is permitted to compensate a property owner the remaining value of the land accounting for the change done to the property's overall worth.[171]

Personal property, on the other hand, fluctuates in price more frequently than real property. This is especially true for agricultural goods, such as raisins, given that price is tied directly to supply and demand of the product.[172] Indeed, one intent behind Roosevelt's New Deal legislation

167. The Just Compensation Clause was written by James Madison and was not requested in the Bill of Rights by the state conventions. D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 509 (2004). Barros recounts how Madison wrote the Just Compensation Clause to protect citizens primarily from direct appropriation of their property due to the vulnerable nature of the political process. *See id.* at 509–13 (discussing the historical background behind the Just Compensation Clause). However, he argues this limited focus was a result of the colonial era and not the intent to limit the clause solely to direct appropriations. *Id.* at 515. Barros claims the Just Compensation Clause aligns with the regulatory takings doctrine presented in *Mahon* and concludes just compensation ought to be given when the diminution of property by regulations renders the property valueless, *id.* at 516–17, a position Justice Breyer espoused in *Horne II*. *See Horne II*, 135 S. Ct. at 2434 (Breyer, J., concurring in part and dissenting in part) (criticizing the majority for ignoring Supreme Court precedent when calculating just compensation for property that is partially taken).

168. *See* Olson v. Unites States, 292 U.S. 246, 255 (1934) ("[A property owner] is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more."). In *Olson*, the Court further noted the value of the property may have changed from when the property owner purchased the real property but the government was required only to pay the value of the property when the taking occurred. *Id.*

169. *See* Bauman v. Ross, 167 U.S. 548, 584 (1897) (holding the benefits of creating a public highway may be considered when calculating just compensation).

170. *See* Kelo v. City of New London, 545 U.S. 469, 489–90 (2005) (permitting the taking of real property for the purpose of economic development). It is important to note *Kelo* did not address whether the property owners were paid just compensation, an argument raised in an amicus brief, *id.* at 489 n.21, but the implications of permitting the taking of private property for economic development suggests the value of the development can be used to determine just compensation.

171. *See* Bauman, 167 U.S. at 584 ("The [C]onstitution . . . contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use . . . .").

172. *See* Horne v. Dep't of Agric., 750 F.3d 1128, 1133 (9th Cir. 2014) (recounting the purpose of the Marketing Order's reserve requirement and noting the raisins "are diverted from the market to

was to ensure agricultural markets regained parity relative to other industrial markets by restoring the purchasing power of farmers.[173] Controlling the price of agricultural goods by limiting the supply empowered farmers to buy and sell their produce at higher rates than the market might normally allow.[174] Justice Breyer voiced legitimate concern on the question of just compensation. Because the market price of raisins was dependent upon the supply in the market, was it possible the Hornes suffered no economic loss, considering the value of the raisins left out of the market might have raised the price of raisins such as to offset the value of raisins the government kept in reserve?[175] If so, the Hornes sustained no injury from the government's taking and could not be placed in the same position before the taking occurred as the Hornes suffered no economic loss.[176] Moreover, such calculation ought to have been considered given the government's appropriation of only a portion of the Hornes' raisin crop. The majority's characterization of the government's action as a taking by direct appropriation rather than a regulation does not dismiss the requirement of calculating just compensation based on the economic impact of the taking; treating personal property and real property the same under the per se takings doctrine should subject personal property takings to the same economic considerations as real property takings.[177]

smooth the peaks of the raisin supply curve"), *rev'd*, 135 S. Ct. 2419 (2015); Trevor Burrus, *New Legal Challenges to U.S. Agricultural Cartels: The* Horne *Decision*, 35 CATO J. 657, 662 (2015) (noting how World War II benefited farmers dealing in nonperishable dried fruits with the added demand from the federal government and allied countries and stating the war era "was a good time to be a raisin farmer").

173. *See* Burrus, *supra* note 172, at 660 (reciting the stated purpose behind the AAA, the precursor to the AMAA, "was to restore 'farm purchasing power of agricultural commodities or the fair exchange value of a commodity'" (quoting WAYNE D. RASMUSSEN ET AL., U. S. DEP'T OF AGRIC., ECON. RESEARCH SERV., AGRIC. INFO. BULL. NO. 391, A SHORT HISTORY OF AGRICULTURAL ADJUSTMENT, 1933–1975 2 (1976), http://naldc.nal.usda.gov/download/CAT87210025/PDF)).

174. *See id.* at 661 (outlining the various prices of milk set in 1985 by amendments to the AMAA for regions of various sizes).

175. *Cf.* Horne v. Dep't of Agric. (*Horne II*), 135 S. Ct. 2419, 2435 (2015) (Breyer, J., concurring in part and dissenting in part) (explaining how the Marketing Order's reserve requirement might have "benefit[ted] . . . or exceed[ed] the value of the raisins taken").

176. *See id.* ("[T]he benefit might equal or exceed the value of the raisins taken."). The Hornes were fined both the market value of the raisins and a civil penalty. *Id.* at 2425 (majority opinion). Absolving the Hornes from paying the entirety of the fine based solely on market value ignores the additional benefits the Hornes could have received from noncompliance with the Marketing Order. *See id.* at 2536 (Breyer, J., concurring in part and dissenting in part) (arguing just compensation should consider all of the benefits received from the Marketing Order and if no taking occurred because the Hornes suffered no economic loss, the fine imposed cannot be avoided).

177. *See id.* at 2426 (majority opinion) (holding the Takings Clause and Supreme Court precedent do not distinguish personal and real property in questions of direct appropriation); *id.* at 2436 (Breyer,

Absolving the Hornes from paying the fine prevented the case from returning to the Supreme Court a third time,[178] but doing so left unresolved the issue of how to calculate just compensation of personal property partially taken. This is a significant question given how susceptible personal property is to price fluctuations in the market.[179] Aside from expediency, the Court offered little explanation for why it chose not to remand the case to determine a measure of just compensation owed to the Hornes.[180] It remains undisputed that the government is required to pay just compensation to property owners when an action eliminates all available property rights.[181] If the Court had defined the reserve requirement as a simple regulatory taking, like *Lucas*, the recourse available to the Hornes would have depended solely on whether the regulation rendered their property valueless.[182] The Court could have determined the Hornes lost some, but not all, of their property rights in the raisins because the Hornes retained, at minimum, the right to receive a portion of the proceeds from the sale by the government.[183] It didn't, finding instead that the taking was a physical appropriation of private property similar to *Loretto*.[184] For cases of direct confiscation, such as *Loretto*, the *Bauman* doctrine applies when only

J. concurring in part and dissenting in part) (claiming there is no precedent that distinguishes the consideration of economic benefits as applicable only to real property).

178. The majority seemed unwilling to allow the Ninth Circuit a third opportunity to hear the case, with Chief Justice Roberts exclaiming "[t]his case, in litigation for more than a decade, has gone on long enough." *Id.* at 2433 (majority opinion)

179. The Court's unwillingness to address the question may also be attributed to the ad hoc nature of Takings inquiries, having answered the third issue in *Horne* by stating "[t]he answer, *at least in this case*, is yes." *Id.* at 2430 (emphasis added).

180. *See id.* at 2433 (concluding the opinion by noting the case "ha[d] gone on long enough").

181. *See id.* at 2428 (describing how the Marketing Order's reserve requirement destroys the entire "bundle" of property rights in raisins by transferring both possession and title of the raisins from the growers to the government).

182. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) ("[W]hen the owner . . . has been called upon to sacrifice *all* economically beneficial uses [of his property] . . . he has suffered a taking."); Barros, *supra* note 167, at 473 ("When properly stated, the regulatory takings question should simply ask whether the government act has rendered the property in question valueless—if the answer is yes, then compensation is due.").

183. This is the position taken by Justice Sotomayor's dissent. *Horne II*, 135 S. Ct. at 2440 (Sotomayor, J., dissenting). The Ninth Circuit took the same position. Horne v. Dep't of Agric., 750 F.3d 1128, 1139 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015).

184. *Horne II*, 135 S. Ct. at 2428 (majority opinion).

part of the property is taken.[185] This was Justice Breyer's main concern.[186] The *Bauman* doctrine considers the total economic value either gained or lost in the property not taken by government to determine the compensation owed.[187] Even if the value of private property is more fluid than the value of real property, "modern courts are capable of . . . accurate valuation."[188] Further, not applying the *Bauman* doctrine appears inconsistent with the Court's reasoning. The Court clearly applied the per se takings analysis to real and personal property without distinction, making it difficult to understand why such distinction matters in determining just compensation.[189] To avoid the unresolved question of compensation left by the Court, the government will only need to avoid directly appropriating crops sold in the market.

As it stands, *Horne II* limits government takings of personal property without delineating from the direct appropriation per se category in *Loretto*, requiring just compensation when all property rights are extinguished.[190] The number of programs *Horne II* directly implicates is admittedly quite low.[191] Only seven other programs operate similarly to the RAC.[192] After the *Horne II* case was published, those programs were not ruled unconstitutional, but were limited only to the extent the government could

185. *See* Bauman v. Ross, 167 U.S. 548, 574 (1897) ("[W]hen part only of a parcel of land is taken . . . the value of that part is not the sole measure of the compensation or damages to be paid to the owner."); Greg Seidner, *Taking Stock: Why the Supreme Court's Decision to Apply the Market-Value Standard in* Horne II *Further Complicates the Just Compensation Requirement*, 15 U. N.H. L. REV. 227, 243 (2016) ("*Bauman v. Ross* established an exception to the "fair-market-value" calculation for just compensation where only a portion of land was taken." (citations omitted)).

186. *Horne II*, 135 S. Ct. at 2434.

187. The Court in *Bauman* explained:

> When the part not taken is left in such shape or condition, as to be in itself of less value than before, the owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened.

Bauman, 167 U.S. at 574.

188. Seidner, *supra* note 185, at 231.

189. *See id.* at 244 (describing how the Court's contrary stance on just compensation from a per se takings analysis "create[s] an internal contradiction undermining the majority's formalistic reasoning").

190. *See Horne II*, 135 S. Ct. at 2427 (majority opinion) (analogizing *Loretto* to *Horne II* and declaring "[*Loretto's*] reasoning—both with respect to history and logic—is equally applicable to a physical appropriation of personal property").

191. *See* Burrus, *supra* note 172, at 666 (explaining the majority of marketing orders do not directly appropriate agricultural goods to regulate markets).

192. The seven programs regulate "California almonds, dates, dried prunes, walnuts, tart cherries [from] seven states, and spearmint oil produced [from] five states." *Id.*

pay just compensation.[193] Additionally, the Court did not bar the government from imposing future marketing orders to regulate the production of goods to achieve the same result of the RAC.[194] Even so, the federal government must now alter a portion of its regulatory approach to agricultural markets or offer up just compensation to all farmers who suffer physical takings of their property.[195]

V. CONCLUSION

Balancing the government's authority with individual private interests is an ongoing struggle, one that continues to define the relationship between the citizens and the state. Property's function in American democracy serves a fundamental role in both limiting and challenging the federal government's power to dictate and control national markets.[196] *Horne II* is emblematic of this role and exemplifies the value and importance the Supreme Court has placed on the Takings Clause in recent years.[197] The overall reaction to *Horne II* has been largely positive and "an important moral victory . . . against the costly New Deal agricultural policies."[198] In affirming that personal property rights are indistinguishable to real property rights under the Fifth Amendment, the Supreme Court revitalized the Takings Clause and made it a viable constraint on federal regulation by requiring the government to reevaluate its methods of regulation under Congress's commerce power. The Court not only opened the door to further challenges from property owners, but also laid the foundation to further expand the regulatory taking doctrine. If the Fifth Amendment

193. *See Horne II*, 135 S. Ct. at 2424 (limiting the scope of the controversy before the Court in determining "whether the Takings Clause of the Fifth Amendment bars the Government from imposing [the reserve requirement] on the growers without just compensation").

194. *Id.* at 2428.

195. *See* Burrus, *supra* note 172, at 666 (summarizing the principles from *Horne II*).

196. *See* Kelo v. City of New London, 545 U.S. 469, 489–90 (2005) (granting the government the ability to take private property for an economic public use but affirming the principle that government may not take property unless the intended purpose is for a public use); Olson v. United States, 292 U.S. 246, 254–55 (1934) (requiring the government to pay just compensation when a proper taking of private property has occurred).

197. Four cases, including *Horne II*, have been decided by the Supreme Court since 2012. MELTZ, *supra* note 30, at 1–4. Those cases are: (1) *Horne II*, 135 S. Ct. 2419; (2) Koontz v. St. Johns River Water Mgmt., 133 S. Ct. 2586 (2013); (3) Horne v. Dep't of Agric. (*Horne I*), 133 S. Ct. 2053 (2013); and (4) Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012).

198. Burrus, *supra* note 172, at 666; *see also* Richey, *supra* note 20 (reporting on the various analysists who judged favorably the Supreme Court's decision). *But see Horne v. Department of Agriculture—Leading Cases*, *supra* note 93, at 261 (criticizing the Court's holding in *Horne II*, suggesting the decision "threatens to radically expand the Court's per se takings doctrine at the expense of the government's ability to operate effectively").

treats real and personal property the same under the Takings Clause,[199] and directly appropriating personal property is a taking in equal weight to directly appropriating real property,[200] then the same ad hoc inquiries for regulatory takings ought to apply equally to personal property as they do to real property. To ensure a regulation does not go too far, it is imperative the regulatory takings doctrine apply uniformly to takings of *all* private property. *Horne II* is one small, yet important step in ensuring private property is given the proper weight and significance intended by the Constitution and counterbalancing the extensive power of the government by protecting the individual from overbroad and unnecessary legislation. The Supreme Court's definitive announcement of the Fifth Amendment was critical to acknowledge personal and real property equally in the eyes of the law.[201] In doing so, the Court left no room for interpretation on how to properly regard personal property in takings analysis.[202] Property owners will undoubtedly rely upon the Court's holding to contest future takings of personal property, a fact Congress and the states will have to accept when regulating commerce. While Congress can still protect and stimulate economic growth, this decision means it must do so knowing it cannot avoid the Takings Clause and the duty to pay just compensation. A small price to pay, it is nonetheless a hindrance for the expansive power Congress currently enjoys, and a powerful tool for property owners to assert their constitutional rights and ensure the proper balance between the government and the people.

199. *See Horne II*, 135 S. Ct. at 2426 (stating the Takings Clause protects all private property "without any distinction between different types").

200. *See id.* at 2427 (adopting *Loretto*'s reasoning for evaluating a takings question of personal property).

201. It is quite extraordinary the Supreme Court had to rely upon precedent dating back to the Nineteenth Century, specifically *James v. Campbell* from 1882, to support the proposition that personal property is protected under the Fifth Amendment. *Id.* *But see* McGehrin, *supra* note 13, at 396–97 (explaining the Supreme Court "has not left analysis of per se takings regarding personal property to the imagination" and offering two cases in support of the Court's favorable treatment of personal property under an implicit per se takings category).

202. The Ninth Circuit did not deny the Takings Clause applied to personal property but asserted the clause "affords less protection to personal than to real property." Horne v. Dep't of Agric., 750 F.3d 1128, 1139 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015). The Supreme Court flatly rejected this interpretation. *Horne II*, 135 S. Ct. at 2427–28.