
CHECK YOUR RIGHTS AT THE DOOR: RETHINKING CONFISCATORY REGULATION

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ABSTRACT

Traditionally, regulatory takings scholarship has focused myopically on real property. Instead, this Article explores an underappreciated side of the Takings Clause, offering a systematic analysis of the various strands of takings law that may affect the regulation of commercial activity. This Article gives special attention to two fresh U.S. Supreme Court decisions that may invite legal challenges to regimes and regulatory practices that have gone unchallenged in the past.

*The Supreme Court's decision in *Horne v. U.S. Department of Agriculture* makes clear that commercial regulation violates the Takings Clause if it conditions the right to engage in commerce on a requirement to surrender specifically identified personal assets. Likewise, the Court's decision in *Koontz v. St. Johns River Water Management District* opens the door for commercial actors to contest exorbitant or unnecessary fees imposed in various regulatory permitting regimes. Accordingly, *Horne* and *Koontz* call into question a few common forms of economic regulation, including agricultural checkoff programs, certain required paycheck deductions, regulatory authorizations to use company property for nonbusiness purposes, cap-and-trade regulation, and other regimes.*

*Yet, most regulatory impositions will survive constitutional scrutiny. Accordingly, this Article seeks to demarcate the line between confiscatory regulation that is vulnerable to challenge and the broader realm of economic regulation that must survive. The Article argues this demarcation is firmly rooted in settled takings doctrine, which distinguishes between use restrictions and physical appropriations of private property. Accordingly, since *Horne* makes clear that all forms of property are protected on equal terms, the Takings Clause*

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generally forbids the government from conditioning the right to engage in commerce on a requirement to hand over identified commodities, products, monies, or any other asset. Absent an affirmative defense, these regulations must be enjoined—or, otherwise, just compensation must be paid.

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I. INTRODUCTION

As a general matter, most regulatory impositions—even those viewed as burdensome and unwieldy to the regulated community—will withstand constitutional scrutiny.¹ As such, it bears emphasis at the outset that this Article does not call into question the broad presumption of legitimacy for enacted statutes and lawfully promulgated corollary regulation. Under modern jurisprudence, economic regulation will almost invariably survive direct constitutional assault unless it either arbitrarily singles out an individual or class for special legal burdens without a rational explanation or is so arbitrary that no rational person could envision a plausible policy justification.²

1. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (“The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *see Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937); *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

2. *See, e.g., Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (holding zoning restrictions violate the Equal Protection Clause when imposed on a single owner without a rational basis).

Yet, as always in the law, there is a caveat.³ As explained in *First English Lutheran Evangelical Church v. County of Los Angeles*, the Takings Clause of the Fifth Amendment imposes a condition on the lawful exercise of otherwise-legitimate government powers in the Clause's requirement on the government to pay just compensation for a "taking" of private property.⁴ Accordingly, one might invoke the Takings Clause to challenge economic regulation affecting or abrogating private property rights.⁵

Regulatory takings claims are notoriously difficult.⁶ But, as illustrated in the Supreme Court's still recent decision in *Horne v. U.S. Department of Agriculture*, the Takings Clause is not without teeth.⁷ In that case, the Court ruled the federal government could not enforce a regulation that would require the surrender of a commodity as a condition of allowing a person to engage in commerce.⁸ This necessarily raises the question of whether, and to what extent, the takings doctrine should apply in the realm of commercial regulation. This is an issue worth exploring because takings scholarship has traditionally focused myopically on land-use restrictions.⁹

We are presented with a dynamic, if not a difficult, question. On the one hand, the Supreme Court seemingly closed the door on litigants hoping to invoke the Takings Clause to challenge general commercial regulation in 1998 with its opinion in *Eastern Enterprises v. Apfel*.¹⁰ While the Court was fractured, a plurality concluded that even a retroactively imposed \$50 to \$100 million regulatory liability should not amount to a taking of a coal mining company's property.¹¹ Yet even if *Eastern Enterprises* implies a

3. *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 36 (2012) ("[T]he first rule of case law as well as statutory interpretation is: Read on.").

4. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987) ("[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.").

5. *See id.* at 320.

6. *See generally* Adam R. Pomeroy, *Penn Central After 35 Years: A Three-Part Balancing Test or a One-Strike Rule?*, 22 *FED. CIR. B.J.* 677 (2013).

7. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2428 (2015) [hereinafter *Horne I*].

8. *See id.* at 2431.

9. *See generally* Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York*, 13 *WM. & MARY BILL RTS. J.* 679 (2005) (focusing on land-use restrictions).

10. *E. Enters. v. Apfel*, 524 U.S. 498, 504 (1998).

11. *Id.* at 540 (Kennedy, J., concurring in the judgment and dissenting in part) (joining four other justices in concluding the Coal Act did not effect a taking); *Id.* at 529

general rule that the Takings Clause cannot serve as a sword against commercial regulation, the Supreme Court spelled out an important exception in *Horne*.¹² Moreover, only two years prior, the Court recognized a separate exception in *Koontz v. St. Johns River Water Management District* wherein Justice Samuel Alito explained that *Eastern Enterprises* does not control in cases where a building permit is conditioned on a requirement to pay money into a public fund.¹³

Horne and *Koontz* illustrate there must be a line by which we can compartmentalize commercial restrictions that are vulnerable to challenge under the Takings Clause from the broader realm of economic regulation that must survive.¹⁴ This Article suggests this line is already well-established in the distinct tests that courts apply in physical and regulatory takings cases. Accordingly, we might refer to the subset of economic regulation vulnerable to challenge under the Takings Clause as “confiscatory” because we are talking about restrictions that affirmatively require a transfer of an identified private property interest, whether directly or as an imposed condition on one’s right (or privilege) to engage in regulated conduct.¹⁵

Part II sets forth essential background, including both an overview of modern takings doctrines and a summary of the leading authorities that may be relevant in our broader discussion. Part III seeks to contextualize the *Koontz* and *Horne* decisions with the goal of synthesizing takings law as it could be applied in challenges to economic regulation outside the land-use context, while explaining the continued relevance of *Eastern Enterprises*. Part IV further explores the potential implications (and limitations) of the *Horne* and *Koontz* decisions by reviewing a few common forms of economic

(O’Connor, J., plurality opinion) (emphasizing the severe financial impact on *Eastern Enterprises*).

12. See generally *Horne I*, 135 S. Ct. 2419.

13. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 613 (2013) [hereinafter *Koontz I*].

14. Steven J. Eagle, *Property Rights After Horne*, 10 N.Y.U. J.L. & LIBERTY 669, 732 (2016) (“Together, *Horne* and *Koontz* point to a more robust demand that government show why property owners should be deprived of the fruits of their property.”).

15. The Supreme Court has long embraced the notion that confiscatory regulations violate the Takings Clause. *Cf. Willcox v. Consol. Gas Co.*, 212 U.S. 19, 41 (1909) (observing the rule was “well established” that an enactment could not be enforced if it were deemed to “be equivalent to the taking of property for public use without . . . compensation”). But while that principle is easy to restate, it is often difficult to apply in practice.

regulation, including the following: agricultural checkoff programs; paycheck deductions; regulatory authorization to use company property for nonbusiness purposes; unclaimed-property laws; business-licensing regimes; and other conditions imposed on necessary regulatory approvals. Finally, Part V outlines affirmative defenses.

II. DISTINCT APPLICATIONS OF THE TAKINGS CLAUSE

A. Regulation and Appropriation of Real Property

Takings doctrine sharply distinguishes between regulations that merely restrict permissible uses of land and regulations that authorize physical occupation.¹⁶ The latter are deemed per se takings, whereas the former are assessed under a more deferential standard.

1. *Physical Occupations*: *Loretto v. Teleprompter Manhattan CATV Corp.*

The paradigmatic taking occurs when the government asserts physical dominion over one's land—as when real property is appropriated for the construction of a new highway.¹⁷ Typically, the authorities acknowledge their duty to pay just compensation with the commencement of condemnation proceedings, wherein the government forces a formal transfer of title by explicitly invoking the power of eminent domain.¹⁸ But, in other cases, public authorities may take one's land without acknowledging they have an obligation to pay anything.¹⁹

For example, in *Pumpelly v. Green Bay Co.*, the authorities authorized construction of a dam that resulted in flooding of an upland property.²⁰ When the owner sought just compensation, the defendant argued there was no taking because the project was in conformance with a public enactment, which did not seek to acquire title to the land in question.²¹ The Supreme Court unequivocally rejected that argument, holding the public had appropriated a flowage easement over the land and owed fair market value

16. Compare *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978), with *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

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

18. See *id.*

19. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987).

20. *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 175 (1871).

21. *Id.* at 175–76.

for the property interest taken.²² Accordingly, it is now bedrock law that the Takings Clause imposes a “self-executing” duty on the government to pay for the physical taking of land.²³ This means that a landowner is authorized to pursue an action for inverse condemnation to force payment of just compensation when the authorities have failed to voluntarily initiate eminent domain proceedings.²⁴

Thus, in *United States v. Causby*, a North Carolina farmer obtained a judgment that the government had taken his land as a result of recurrent overhead flights from a nearby military base.²⁵ And later, in *Loretto v. Teleprompter Manhattan CATV Corp.*, the Supreme Court crystalized our modern physical takings doctrine, affirming the per se rule that a taking occurs with any permanent physical invasion.²⁶ This is true regardless of how inconsequential a physical occupation may seem.²⁷

22. *Id.* at 177–78 (“It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen . . . instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.”).

23. *Hendler v. United States*, 952 F.2d 1364, 1371 (Fed. Cir. 1991).

24. *See Jacobs v. United States*, 290 U.S. 13, 15 (1933).

25. *United States v. Causby*, 328 U.S. 256, 266–67 (1946).

26. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

27. Since *Loretto*, courts have recognized, “[W]here government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation.” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). But, more recently, the Supreme Court has raised questions as to when a temporary physical invasion will amount to a taking. *See Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23, 33 (2012) (rejecting the argument that there can be no takings liability for a temporary taking); *see also* Brian Hodges, *Arkansas Game & Fish Commission v. United States: A Temporary Fix for Temporary Takings*, ENGAGE, Feb. 2013, at 38, 40 (criticizing Justice Ruth Bader Ginsburg for implying that a balancing test may be appropriate in review of temporary takings claims); Ilya Somin, *Two Steps Forward for*

Notably for our purposes, *Loretto* concerned regulation imposed on an apartment complex: specifically, a requirement to allow the installation of a cable box.²⁸ While the municipal authority maintained it could legitimately impose a condition on the right to devote private property to the rental market, the Supreme Court applied the same standards applicable in more traditional eminent domain cases.²⁹ The Court flatly rejected the notion that this ordinance should be viewed as ordinary economic regulation because it was doing something more than merely restricting permissible uses.³⁰ In requiring the owner to submit to a permanent invasion, the regulation was affirmatively appropriating private property for public use.³¹

2. Land-Use Restrictions: Lucas and Penn Central

The government may also take private property through overly onerous regulatory impositions restricting permissible uses of land.³² But the rules governing these cases have proven especially vexing.³³ In *Pennsylvania Coal Co. v. Mahon*, Justice Oliver Holmes said a land-use restriction effects a taking when it “goes too far.”³⁴ But of course, that amounts to little more than a charge to consider how burdensome a restriction may be for the owner.³⁵ Plainly, a taking is more likely when the restriction imposes burdens

the “Poor Relation” of Constitutional Law: Koontz, Arkansas Game & Fish, and the Future of the Takings Clause, 2012–2013 CATO SUP. CT. REV. 215, 221 (arguing the Supreme Court should have ruled definitively that a taking occurs when a temporary invasion causes physical damage).

28. *Loretto*, 458 U.S. at 421.

29. *Id.* at 440 (“[W]e do not agree with appellees that application of the physical occupation rule will have dire consequences for the government’s power to adjust landlord-tenant relationships.”).

30. *Id.* at 438–39 (“Teleprompter notes that the law applies only to buildings used as rental property, and draws the conclusion that the law is simply a permissible regulation of the use of real property. We fail to see, however, why a physical occupation of one type of property but not another type is any less a physical occupation.”).

31. See *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979); *United States v. Pewee Coal Co.*, 341 U.S. 114, 117–18 (1951); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 11 (1949); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945).

32. See generally *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

33. See R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in Penn Central*, 38 *ECOLOGICAL Q.* 731, 732 (2011).

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

35. *Id.* at 416 (“[T]his is a question of degree-and therefore cannot be disposed of by general propositions.”); see Luke A. Wake, *The Enduring (Muted) Legacy of Lucas*

roughly approximating those suffered by a landowner in a physical takings case.³⁶ Conversely, a restriction is less likely to amount to a taking when the owner retains meaningful rights to use and enjoy the land.³⁷

The only definitive rule was set forth 25 years ago in *Lucas v. South Carolina Coastal Council*, wherein the Court pronounced a taking occurs when the imposition of restrictions goes so far as to entirely deny the owner of all “economically beneficial uses” of the land.³⁸ This is often referred to as a “total taking” because the restriction is so severe that it eliminates all development opportunities or all economic value.³⁹ Yet, beyond that per se rule, we have little guidance on how to assess the impact of regulations on real property.

One might allege a “partial takings” claim where draconian restrictions have abrogated common law property rights, while still permitting some marginal development opportunities or preserving some economic use in the land.⁴⁰ But these claims are reviewed under the amorphous balancing test pronounced in *Penn Central Transportation Co. v. City of New York*, which provides that courts must consider several factors, including the following: (1) the economic impact of the contested restrictions on the parcel as a whole; (2) the owner’s investment-backed expectations; and (3) the character of the government’s conduct.⁴¹ Yet, since first pronounced in 1978, courts and commentators have struggled, perhaps quixotically, to divine

v. South Carolina Coastal Council: *A Quarter Century Retrospective*, 28 GEO. MASON U. C.R. L.J. 1, 5–7 (2017) (placing *Pennsylvania Coal* in historical context and noting Justice Holmes emphasized the “‘extent of the diminution’ of value was a significant consideration”).

36. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005) (emphasizing that any legitimate regulatory takings test must focus on “the *magnitude or character of the burden* a particular regulation imposes upon private property rights”).

37. *Cf. Wake*, *supra* note 35, at 7.

38. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

39. *Wake*, *supra* note 35, at 27–29 (examining the split in authority between jurisdictions holding *Lucas* requires the claimant to demonstrate loss of all residuary value and those holding a claimant need only demonstrate denial of all economically beneficial uses).

40. *See Lingle*, 544 U.S. at 538–39 (“Outside . . . two relatively narrow categories . . . regulatory takings challenges are governed by the standards set forth in *Penn Central* . . .”).

41. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124–25 (1978) (observing the Court has been “unable to develop any ‘set formula’” for assessing regulatory takings claims but then setting forth factors for consideration).

meaningful analytical rules from *Penn Central*—the supposed north star of our regulatory takings jurisprudence.⁴²

As others have observed, *Penn Central* raises more questions than it answers.⁴³ For example, there is no explanation as to how precisely the *Penn Central* factors should be weighed, whether any specific factor may be deemed dispositive, what exactly counts as a satisfactory showing for any single factor, or whether there are other potentially relevant considerations.⁴⁴ For this reason, one might even argue the *Penn Central* test provides no judicially manageable standard at all, which might call into question its legitimacy as a valid constitutional test.⁴⁵ To be sure, lower courts have struggled to apply *Penn Central* with any degree of consistency, thus yielding unpredictable, sometimes wildly inconsistent, results.⁴⁶ That

42. Radford & Wake, *supra* note 33, at 732 n.8 (cataloging articles seeking to divine meaning, predictable rules, and doctrinal coherence from *Penn Central* and its prodigy).

43. See, e.g., John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL'Y 171, 171–72 (2005); Kanner, *supra* note 9, at 679–80.

44. Radford & Wake, *supra* note 33, at 736–42.

45. The Court has said, “There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate.” *Andrus v. Allard*, 444 U.S. 51, 65 (1979). But the Court has said elsewhere that the judicial branch has no prerogative to decide cases in the absence of judicially manageable standards yielding predictable results. See *Vieth v. Jubelirer*, 541 U.S. 267, 277–78 (2004) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)) (emphasizing that a case must be dismissed unless a reviewing court can identify constitutionally based and judicially manageable standards); *Id.* at 313–14 (Kennedy, J., concurring) (opining plaintiffs had failed to identify a workable standard under their theory of the Equal Protection Clause but suggesting a workable standard might emerge in some future case); *Reynolds v. Sims*, 377 U.S. 533, 582 (1964) (affirming that in the absence of judicially manageable standards, a claim under the Guarantee Clause would remain nonjusticiable); see also *Kerr v. Hickenlooper*, 759 F.3d 1186, 1194 (10th Cir. 2014) (Gorsuch, J., dissenting) (mem.) (arguing the plaintiff’s invocation of the Guarantee Clause had failed to “identify judicially manageable standards of decision that might empower an Article III court to decide their case”). This might counsel the Court to rethink *Penn Central* and look for a more workable standard, one rooted in the original public meaning of the Takings Clause, the Fourteenth Amendment, or both. See generally Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729 (2008).

46. Radford & Wake, *supra* note 33, at 735–36 (observing that “there has been little uniformity in the outcome of cases decided under *Penn Central*” and that “[b]y not fleshing out the paradigm it created, the *Penn Central* Court muddled regulatory takings law to the point that land-use practitioners and regulators alike are left virtually without guidance as to whether any given restriction may rise to the level of a taking”).

might explain why Justice Clarence Thomas recently called for scholars to question whether our modern regulatory takings doctrine can be squared with the original public meaning of the Fifth and Fourteenth Amendments.⁴⁷

For our purposes, it is enough to say that partial regulatory takings claims will usually fail. As demonstrated in a recent empirical study, a mere restriction on the use of private property is unlikely to give rise to a meritorious takings claim.⁴⁸

3. Conditions Imposed on Development Permits: Nollan and Dolan

The general rule remains that a restriction imposed on the right to use one's property is to be reviewed under either *Lucas* or *Penn Central*; however, the Supreme Court has carved out an important exception, applicable in cases where the authorities have conditioned a development permit on a requirement to dedicate private property to the public.⁴⁹ In *Nollan v. California Coastal Commission*, a state agency charged with enforcing the California Coastal Act conditioned its approval of a landowner replacing his existing bungalow on a requirement to dedicate an easement for the public to traverse across his property.⁵⁰

The Coastal Act required this condition to be imposed as a means of facilitating greater public access to the beach, and there was a compelling argument that the condition should be viewed as a mere restriction on the owner's right to use the subject property.⁵¹ Yet, the government could not have taken such an easement on its own without incurring a categorical duty to pay just compensation under *Loretto's* physical takings doctrine.⁵² Thus, the question presented was whether the government should be allowed to accomplish indirectly what it was forbidden from doing outright by conditioning permit approval on a dedication requirement.⁵³

47. See *Murr v. Wisconsin*, 137 S. Ct. 1933, 1957–58 (2017) (Thomas, J., dissenting).

48. Pomeroy, *supra* note 6, at 696 (surveying *Penn Central* cases).

49. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545–48 (2005).

50. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 828 (1987).

51. Luke A. Wake & Jarod M. Bona, *Legislative Exactions After Koontz v. St. Johns River Management District*, 27 GEO. INT'L ENVTL. L. REV. 539, 552–54, 555 n.95 (2015).

52. *Nollan*, 483 U.S. at 831 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432–33 (1982)).

53. *Id.* at 834.

Complicating matters was the reality that the owner retained the prerogative to choose whether to accept the condition or to walk away—in a sort of (one-sided) bargain with the government. On the one hand, this might seem reasonable in light of the reality that the government could legitimately deny the permit without violating due process and likely without incurring any takings liability.⁵⁴ But, from the owner's perspective, the bargaining analogy is inapt because the government confers no new benefit in granting a permit.⁵⁵ A permit merely allows the owner to exercise preexisting common law rights inuring in the title to the land, which the government may only restrict for the advancement of a legitimate state interest.⁵⁶ Viewed in that light, a condition requiring the dedication of a property interest, as a term of permit approval, effectively holds the owner's rights hostage.⁵⁷ Or in the words of Justice Antonin Scalia, such a condition amounts to an "out-and-out plan of extortion," unless the condition bears a nexus to some reasonable public concern.⁵⁸

Accordingly, *Nollan* held the government bears the burden of proving that a condition requiring the dedication of a property interest is imposed for the purpose of mitigating some anticipated public impact.⁵⁹ But that is not all. Even after demonstrating a nexus, the authorities must demonstrate the dedication requirement is reasonably calibrated to mitigate the anticipated impacts of the approved project without taking more than necessary.⁶⁰ As explained by Chief Justice William Rehnquist in *Dolan v. City of Tigard*, the imposed condition must be "rough[ly] proportional[]" if it is to survive scrutiny under the Takings Clause.⁶¹

54. *Id.* at 843–45 (Brennan, J., dissenting).

55. See RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 181–84 (1993) [hereinafter EPSTEIN, *BARGAINING*].

56. *Koontz I*, 570 U.S. 595, 608 (2013) ("Even if respondent would have been entirely within its rights in denying the permit for some other reason, that greater authority does not imply a lesser power to condition permit approval on petitioner's forfeiture of his constitutional rights.").

57. *Id.* at 604–05 ("[L]and-use permit applicants are especially vulnerable to . . . coercion . . . because the government often has broad discretion to deny a permit that is worth far more than property it would like to take.").

58. *Nollan*, 483 U.S. at 837 (majority opinion).

59. See J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go from Here*, 59 WASH. & LEE L. REV. 373, 378–79 (2002).

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

61. *Id.*

The problem in both *Nollan* and *Dolan* was that the government was coercively leveraging its prerogative to deny a permit application as a measure to formally appropriate private property that it could not otherwise obtain without initiating eminent domain proceedings and paying just compensation.⁶² In other words, the authorities were improperly conditioning permit approval on a requirement to surrender constitutionally protected property rights.⁶³ As such, these claims fit neatly within the classic formulation of the unconstitutional-conditions doctrine, which prohibits the government from conditioning the receipt of discretionary, government-conferred benefits on a waiver of constitutional rights, except to the extent the imposed condition is viewed as germane and reasonably tailored to a legitimate government interest.⁶⁴

B. Other Potential Applications of the Takings Clause

1. Regulatory Restrictions on Economic Activity

As in cases with real property, courts apply the *Penn Central* balancing test when economic regulation restricts the permissible uses of personal property.⁶⁵ But the Takings Clause is inapposite if the litigant cannot demonstrate the assailed regime burdens a constitutionally protected property right.⁶⁶

a. *Prohibition on the use or sale of personal property*: *Andrus and Monsanto*. The principles set forth thus far are equally applicable in cases concerning government regulation of other forms of property outside the land-use context.⁶⁷ Accordingly, courts invoke the *Penn Central* balancing test when reviewing restrictions imposed on the use or sale of chattels.⁶⁸ For

62. See EPSTEIN, BARGAINING, *supra* note 55, at 183–84.

63. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546–48 (2005).

64. *Koontz I*, 570 U.S. 595, 606–07 (2013).

65. *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1212–13 (Fed. Cir. 2005) (“The protections of the Takings Clause apply to real property, personal property, and intangible property.” (internal quotations omitted)).

66. “First, as a threshold matter, the court must determine whether the claimant has established a property interest for purposes of the Fifth Amendment.” *Am. Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004). “That is because ‘only persons with a valid property interest at the time of the taking are entitled to compensation.’” *Air Pegasus of D.C.*, 424 F.3d at 1212 (quoting *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001)).

67. See *Air Pegasus of D.C.*, 424 F.3d at 1212–13.

68. See *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 441 (8th

example, the Supreme Court held in *Andrus v. Allard* that no compensation was owed for regulations prohibiting the sale of eagle feathers.⁶⁹ This was true notwithstanding the fact that such a restriction would greatly (or perhaps entirely) diminish the economic value.⁷⁰

For that matter, *Andrus* emphasized that the government will not likely incur takings liability unless the imposed restrictions either completely take away all meaningful rights to use and enjoy the property or goes so far as to actually take away the right of possession.⁷¹ In other words, a restriction imposing burdens approximating those felt by an owner suffering an outright appropriation of property may amount to a taking. Yet the government retains the prerogative to limit even the right of possession or to affirmatively destroy property—without paying compensation—if its use or mere existence may be deemed a public nuisance under background principles of state law.⁷²

In perhaps a less extreme example of regulatory oversight, the Supreme Court applied the *Penn Central* factors in *Ruckelshaus v. Monsanto Co.* to uphold a requirement that a pesticide manufacturer had to reveal proprietary information to obtain approval to sell its product.⁷³ This makes sense insofar as the Court viewed the contested requirements as imposing use restrictions akin to those imposed by a land-use authority limiting

Cir. 2007) (“[I]t appears that *Lucas* protects real property only.”); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 674 (3d Cir. 1999) (“[T]he categorical approach has only been used in real property cases . . .”).

69. *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979); see also *Md. Shall Issue v. Hogan*, 353 F. Supp. 3d 400, 408–09 (D. Md. 2018), *appeal filed*, No. 18-2474 (4th Cir. Dec. 13, 2018) (holding a prohibition on bump stocks on firearms did not effect a taking).

70. One might question whether the decision in *Andrus* may be squared with *Lucas*, which held regulations denying all economically beneficial uses or destroying all residuary value amounts to a categorical taking. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992). But *Andrus* assumed the owner might still put the eagle feathers to some economically beneficial use by displaying them in a museum. *Andrus*, 444 U.S. at 66.

71. *Andrus*, 444 U.S. at 65–67 (“At least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety. . . . In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.”); see also *Everard’s Breweries v. Day*, 265 U.S. 545, 563 (1924) (finding no taking for a prohibition on the sale of alcohol).

72. *Lucas*, 505 U.S. at 1031–32; *Miller v. Schoene*, 276 U.S. 272, 279 (1928) (holding the state could destroy blighted trees without incurring takings liability).

73. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1020 (1984).

development opportunities.⁷⁴ But in subsequent cases, the Court has applied the unconstitutional-conditions doctrine in a manner that suggests a more exacting standard of review may be appropriate where the right to sell personal property is formally conditioned upon a requirement to relinquish another protected property interest.⁷⁵ We will explore this issue further in Part III.

b. *Price-control regulation*: *Duquesne Light Co. v. Barasch*. In the land-use context, courts usually apply the *Penn Central* framework in their review of rent-control ordinances.⁷⁶ A similar analytical model may be appropriate in the review of price-control regulation for commodities or services; however, special rules apply in public utility cases where an economic actor is compelled by law to provide a public service but prohibited from charging more than a government-approved rate.⁷⁷ In these exceptional cases, the utility suffers an unconstitutional taking of its property if denied a reasonable rate of return, though that is often a difficult line-drawing exercise.⁷⁸

These public utility cases may be applicable in controversies concerning more traditional business operations where the claimant stands in an analogous position to a public utility, i.e., where a company is bound by law to provide a service while subject to price-control regulation.⁷⁹ For

74. See *id.* at 1005–06.

75. See *infra* Part III.

76. E.g., *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010) (citing *Yee v. City of Escondido*, 503 U.S. 519, 532 (1992)).

77. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (“The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so ‘unjust’ as to be confiscatory.” (citing *Covington & L. Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597 (1896))).

78. *Id.* at 308 (“If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments.”). But see *Smyth v. Ames*, 169 U.S. 466, 546 (1898) (“How such compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be an embarrassing question.”), *overruled by* *Fed. Power Comm’n v. Nat. Gas Pipeline Co. of Am.*, 315 U.S. 575 (1942). Cf. *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968) (“[N]either law nor economics has yet devised generally accepted standards for the evaluation of rate-making orders.”).

79. See *State Farm Mut. Auto. Ins. Co. v. State*, 590 A.2d 191, 207 (N.J. 1991) (holding surtaxes and assessments imposed under New Jersey law did not facially violate the Takings Clause but recognizing insurers might succeed in an as-applied challenge); see also Richard A. Epstein & Paula M. Stannard, *Constitutional Ratemaking and the Affordable Care Act: A New Source of Vulnerability*, 38 AM. J.L. & MED. 243, 263, 267

example, Professor Richard Epstein has argued there would be a takings problem with the Affordable Care Act's requirement that insurance companies must provide essential health benefits to all individuals if the Act's corresponding restrictions prevented insurance providers from charging rates necessary to remain in business.⁸⁰ Likewise, if a state should impose a statutory obligation on cable or Internet providers to continue service to existing clients at a mandated rate, affected cable and Internet companies could insist that the rate should be set so as to allow a modest profit.⁸¹ And businesses must be guaranteed a reasonable rate of return if conscripted to provide other services to the public, such as a requirement that auto shops must provide motor vehicle inspections at a prescribed cost.⁸²

c. *Regulatory requirements imposed on economic actors: Eastern Enterprises.* As implicitly recognized by the public utility line of cases, an individual or business might claim a property interest in the value of its services, just as one claims a property interest in an executed contract.⁸³ Even

(2012) (suggesting health insurance providers stand in the same position as public utilities under the Affordable Care Act insofar as they are required to provide coverage but restricted in rates they may charge and concluding they may present a "regulatory takings argument [with] real weight").

80. Richard A. Epstein, *Impermissible Ratemaking in Health-Insurance Reform: Why the Reid Bill Is Unconstitutional* 6 (John M. Olin Program in Law & Econs. Working Paper Series, Working Paper No. 506, 2009), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1250&context=law_and_economics [<https://perma.cc/37B7-KGLM>].

81. Conversely, these principles may have application in the land-use context because some municipalities impose both rent-control restrictions and regulatory obstacles for exiting the rental market. *See Birkenfeld v. City of Berkeley*, 550 P.2d 1001, 1027 (Cal. 1976). A landlord is entitled to a reasonable rate of return under the public utility line of cases. *Id.* But since due process case law generally ensures a right to a reasonable rate of return, there may be little benefit in pressing this line of argument under the Takings Clause. *See id.* ("The provisions are within the police power if they are reasonably calculated to eliminate excessive rents and at the same time provide landlords with a just and reasonable return on their property.").

82. *See, e.g., Groesbeck v. Duluth, S. S. & A. Ry. Co.*, 250 U.S. 607 (1919) (concerning rates charged by public carriers); N.Y. DEP'T OF MOTOR VEHICLES, MOTOR VEHICLE INSPECTION REGULATIONS § 79.7(c) (2017), <https://dmv.ny.gov/forms/cr79.pdf> [<https://perma.cc/Y67W-4AHU>]. *Cf. Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) ("By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.").

83. *See generally Duquesne Light Co.*, 488 U.S. 308; *see also* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 27, at 19 (C.B. Macpherson ed., Hackett Publ'g Co. 1980)

so, one cannot plausibly invoke the Takings Clause in challenge to general impositions making it more difficult or costly to perform a service or prospectively restricting the provision of services.⁸⁴ For that matter, there can be no takings liability simply on account of the fact that a regulation may prove financially burdensome—otherwise the government would face potential takings claims for almost any commercial regulation.⁸⁵

Nonetheless, the Supreme Court has at least entertained takings claims challenging regulatory mandates requiring the payment or expenditure of money.⁸⁶ For example, in *Connolly v. Pension Benefit Guaranty Corp.*, a company alleged a regulatory mandate to contribute to a pension fund amounted to a taking.⁸⁷ In review, the Supreme Court applied the *Penn Central* factors and concluded there could be no taking where the regulatory mandate was related and proportional to the service that the pension recipients had given to the company, at least where it could be said that the business lacked any reasonable expectation that the government would not impose these financial obligations.⁸⁸ But that at least left the door open for claims challenging costly regulatory impositions.

Later, in *Eastern Enterprises*, Justice Sandra Day O'Connor applied *Connolly*'s rationale in a plurality opinion holding a federal enactment that retroactively imposed major liabilities (“\$50 to \$100 million”) on a coal-mining company unconstitutional.⁸⁹ The plurality opinion stressed no one

(1690) (“Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.”).

84. See *Carpenters Dist. Council v. Dillard Dep’t Stores, Inc.*, 778 F. Supp. 318, 323 (E.D. La. 1991) (holding the Worker Adjustment and Retraining Notification Act did not effect a taking), *aff’d*, 15 F.3d 1275, 1291 (5th Cir. 1994); see also *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 626 (7th Cir. 2014).

85. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”).

86. See, e.g., *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 221–22 (1986).

87. *Id.* at 221; see also *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 647 (1993); *United States v. Sec. Indus. Bank*, 459 U.S. 70, 81–82 (1982).

88. *Connolly*, 475 U.S. at 226–27.

89. *E. Enters. v. Apfel*, 524 U.S. 498, 528–37 (1998) (applying the *Penn Central* factors and concluding the Coal Act effected a taking because “it impose[d] severe retroactive liability on a limited class of parties that could not have anticipated the liability, and [because] the extent of that liability [was] substantially disproportionate to the parties’ experience”).

would reasonably expect to be saddled with financial obligations for lawful conduct occurring 30 years in the past.⁹⁰ As such, Justices O'Connor, Rehnquist, Scalia, and Thomas agreed that the Coal Act effected a taking under the *sui generis* facts of that case.⁹¹

But Justice Anthony Kennedy disagreed.⁹² Though he sided with the O'Connor plurality in finding this retroactive imposition unconstitutional, his concurrence made clear that he saw the case as presenting a due process issue, not a viable takings claim.⁹³ As such, Justice Kennedy dissented in part—siding with Justices Stephen Breyer, John Paul Stevens, David Souter, and Ruth Bader Ginsburg in concluding that a regulation requiring an expenditure of funds could not amount to a taking, even where retroactively imposed.⁹⁴

For Justice Kennedy, the problem with the plurality's takings analysis was that it was unclear how exactly the Coal Act regulation affected any specific property interest for Eastern Enterprises.⁹⁵ Importantly, Justice Kennedy did not dispute that financial assets may constitute a protected property interest under the Takings Clause; however, he maintained that a regulation "impos[ing] an obligation to perform an act" cannot give rise to a takings claim unless it "operate[s] upon or alter[s] an identified property interest."⁹⁶ In other words, Justice Kennedy suggested a regulatory takings claim may only be stated to the extent a statute has "appropriate[d], transfer[red], or encumber[ed]" a specific property interest.⁹⁷

Thus, a law retroactively nullifying a debt lawfully incurred, or another similar property interest, may give rise to a takings claim.⁹⁸ For example, in

90. *See id.* at 532. Note that the Court distinguished between a minor retroactive imposition (i.e., looking back only a few months) and a major retroactive liability (i.e., looking back decades). *Id.* at 534–35.

91. *See id.* at 504.

92. *Id.* at 539 (Kennedy, J., concurring in part and dissenting in part).

93. *Id.* at 547.

94. *Id.* at 545 ("Given that the constitutionality of the Coal Act appears to turn on the legitimacy of Congress' judgment rather than on the availability of compensation . . . the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause.").

95. *Id.* at 544.

96. *Id.* at 540.

97. *Id.*

98. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601–02 (1935) (holding a bank's property had been taken without compensation because of

Armstrong v. United States, the Supreme Court held a statute extinguishing an existing lien amounted to a taking.⁹⁹ This makes sense because such an act may be viewed as a form of appropriation.¹⁰⁰ By contrast, one seeking to advance a takings claim in challenge to regulations compelling, or controlling, economic conduct will usually have trouble proving the enactment either targets a specific property interest or turns upon the use or exercise of a particular piece of property.¹⁰¹ Of course, questions persist as to precisely when *Eastern Enterprises* should apply in practice. But it is clear one cannot simply allege a restriction has encumbered some amorphous interest in the going-concern value of a company—at least not so long as Justice Kennedy’s *Eastern Enterprises* opinion remains controlling.¹⁰²

2. Regulatory Appropriations of Personal Property

As in the land-use context, courts apply more concrete and definitive rules when an economic regulation authorizes public occupation or confiscation of personal property. Such an act of appropriation is deemed a per se taking, unless an affirmative defense applies.¹⁰³

a. *Confiscation or seizure of money or other assets*: *Horne*. Regulations that affirmatively appropriate an interest in private property, whether real property or otherwise, will categorically effect a taking under *Loretto*.¹⁰⁴ The

amendments to the Bankruptcy Act, which deprived mortgagees of previously recognized rights) (“If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public.”); *see also In re Gifford*, 669 F.2d 468, 471–72 (7th Cir.) (“[S]ubsequent Supreme Court decisions, ‘may well refine . . . , but . . . do not destroy the fundamental teaching of *Radford* that Congress may not under the bankruptcy power completely take for the benefit of a debtor rights in specific property previously acquired by a creditor.’”), *rev’d on reh’g*, 688 F.2d 447 (7th Cir. 1982).

99. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960).

100. *See Horne I*, 135 S. Ct. 2419, 2426 (2015).

101. *See E. Enters.*, 524 U.S. at 543. There is some question as to what weight should be given to *Eastern Enterprises* since it was a plurality opinion; however, *Koontz* appears to have affirmed Justice Kennedy’s view that there must be a direct link between the regulation in question and a specific property interest. *See Wake & Bona, supra* note 51, at 583.

102. *See Wake & Bona, supra* note 51, at 583.

103. *See Horne I*, 135 S. Ct. at 2427.

104. *See Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002) (“When the government physically takes possession of an interest in property

Supreme Court made this clear enough in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, holding the Takings Clause precluded the enforcement of a statute requiring the transfer of interest accruing on privately held assets deposited in escrow.¹⁰⁵ As Justice Harry Blackmun emphasized, a legislative enactment cannot appropriate private property while evading the strictures of the Takings Clause simply by redefining the property—*ipse dixit*—from private to public.¹⁰⁶

The Supreme Court affirmed monetary assets are protected against regulatory appropriation in *Phillips v. Washington Legal Foundation*¹⁰⁷ and *Brown v. Legal Foundation*.¹⁰⁸ In *Phillips*, the Court held interest accruing on private accounts was private property subject to the protections of the Takings Clause,¹⁰⁹ while *Brown* held the compelled transfer of interest would be unconstitutional in the absence of just compensation.¹¹⁰ And the Supreme Court reaffirmed monetary assets are protected on the same terms as real property in the Court's 2013 decision in *Koontz*, which held land-use authorities cannot condition a permit approval on a requirement to dedicate money to a public fund absent some special justification.¹¹¹

Yet until the Supreme Court's decision in *Horne*, there was a lingering question of whether *Loretto's* categorical rule would apply with regard to other forms of personal property.¹¹² At issue in *Horne* was a New-Deal-era statute that authorized the U.S. Department of Agriculture (USDA) to compel raisin producers to surrender a portion of their crop each year as deemed necessary to stabilize market prices.¹¹³ When the Horne family refused to surrender its share of raisins as required by governing regulations,

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))).

105. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (“This is the very kind of thing that the Takings Clause . . . was meant to prevent.”).

106. *Id.*

107. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998).

108. *Brown v. Legal Found.*, 538 U.S. 216, 240 (2003).

109. *See Phillips*, 524 U.S. at 171–72.

110. *See Brown*, 538 U.S. at 240.

111. *Koontz I*, 570 U.S. 595, 612, 614 (2013) (“A predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing.”).

112. *See Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1139–41 (9th Cir. 2014) [hereinafter *Horne II*] (citing *Lucas* for the proposition that the “Takings Clause affords less protection to personal than to real property”), *rev'd*, 135 S. Ct. 2419 (2015).

113. *Horne I*, 135 S. Ct. 2419, 2424 (2015).

the USDA imposed a fine approximating the value of the raisins withheld.¹¹⁴ In response, the Hornes invoked the Takings Clause, and the Supreme Court granted certiorari after the Ninth Circuit upheld the USDA's order.¹¹⁵

One might have expected the Court to apply the *Penn Central* balancing test because the USDA's raisin marketing order was characterized as commercial regulation—merely adjusting the benefits and burdens of economic life.¹¹⁶ That was certainly the view of the four dissenters.¹¹⁷ But that approach would have patently conflicted with *Loretto's* per se rule that a physical invasion of private property amounts to a taking, at least insofar as the *Loretto* test applies in the review of regulatory appropriations of chattels.¹¹⁸ And, writing for the majority, Chief Justice John Roberts rejected any suggestion that personal property should receive lesser protections than real property.¹¹⁹ As such, *Horne* made clear that the Takings Clause protects all forms of private property on equal terms against regulatory appropriation.¹²⁰

But perhaps the most important (and underappreciated) aspect of the decision was that *Horne* reaffirmed *Loretto's* categorical formulation has

114. *Id.* at 2425.

115. *Id.* This came only after the Ninth Circuit was ordered to consider the Horne's takings claim as an affirmative defense. *Horne v. Dep't of Agric.*, 569 U.S. 513, 516 (2013) [hereinafter *Horne III*]. Previously, the court had ruled the family would have to pay the \$480,000 fine for the value of the withheld raisins and pursue a separate takings action in the Court of Federal Claims. *See Horne II*, 673 F.3d at 1082.

116. The Government that argued no compensation was owed because the Hornes benefited from inflated prices as a result of the regime and that the statute reserved a contingent interest in the future proceeds for the growers that the government might raise with any sale of the confiscated crop. *Horne I*, 135 S. Ct. at 2428–29. These considerations would have weighed heavily against a finding of takings liability had the Court applied the *Penn Central* balancing test. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 147 (1978) (Rehnquist, J., dissenting) (observing the regulatory takings jurisprudence considers the “reciprocity of advantage” that comes with generally applicable regulatory restrictions).

117. *Horne I*, 135 S. Ct. at 2434 (Breyer, J., concurring in part and dissenting in part) (“On the record before us, the Hornes have not established that the Government, through the raisin reserve program, takes raisins *without just compensation*.” (emphasis in original)).

118. *Id.* at 2429 (plurality opinion) (“[O]nce there is a taking, as in the case of a physical appropriation, any payment from the Government in connection with that action goes, at most, to the question of just compensation.”).

119. *Id.* at 2425–26.

120. *See id.* at 2429.

application outside the land-use context.¹²¹ While *Horne* specifically concerned the regulation of the raisin industry, its rationale should apply in cases concerning other commercial actors.¹²² Indeed, *Horne* should remove any doubt as to whether enacted law may compel—without payment of just compensation—a transfer of a merchant’s inventory or whether enacted regulations may confer a right of public use on a commercial actor’s products, goods, or equipment. This type of regulation might pass muster under due process and equal protection jurisprudence but would violate the Takings Clause in the same way as would a regulatory enactment authorizing physical invasion of real property without compensation.¹²³

b. *Regulatory exactions of money or chattels*: Koontz. In the land-use context, courts employ a special takings analysis in their review of “extortionate” permitting conditions under the nexus and rough proportionality tests set forth in *Nollan* and *Dolan*.¹²⁴ But *Koontz* opens the possibility of applying the nexus and rough proportionality tests more generally in the review of any permitting decision in which regulatory approval is conditioned upon a requirement to dedicate private property to the public.¹²⁵ This is because *Koontz* repudiated a line of cases that had

121. The Court would have had to backpedal from its decisions in *Webb’s Fabulous Pharmacies*, *Phillips*, *Brown*, and *Koontz* if it were to conclude regulatory appropriations of personal property should be assessed under a less exacting standard of review; however, at least one dissenting justice believed *Penn Central* was the more appropriate standard. See *id.* at 2437–38 (Sotomayor, J., dissenting) (“[R]etention of even one property right that is not destroyed is sufficient to defeat a claim of a per se taking under *Loretto*.”). But Justice Breyer’s rationale would have likewise placed a heavy burden on takings claimants seeking to challenge a confiscatory regime, which might, in practice, conflate with the reciprocity of advantage analysis encouraged under *Penn Central*. See *id.* at 2434–36 (Breyer, J., concurring in part and dissenting in part) (arguing that where the economic benefits conferred by regulation equal or exceed the value of what has been taken, there can be no takings problem).

122. For example, a California law requiring the surrender of firearms capable of holding more than 10 rounds was deemed subject to the per se rules under *Horne* and *Loretto*—at least as applied to law-abiding citizens. *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1138 (S.D. Cal. 2017) (concluding plaintiff had demonstrated a likelihood of success on the merits), *aff’d*, 742 F. App’x 218 (9th Cir. 2018).

123. See, e.g., *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 375 (1945).

124. See *Horne I*, 135 S. Ct. at 2437 (Sotomayor, J., dissenting) (suggesting *Nollan* and *Dolan* have application only in the “special context of land-use exactions” (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005))).

125. Cf. Brian T. Hodges, *Koontz v. St. Johns River Water Management District and*

previously limited *Nollan* and *Dolan* to the review of permitting conditions requiring dedication of real property.¹²⁶

Koontz concerned an entrepreneur who sought authorization to develop a commercially zoned lot.¹²⁷ Mr. Coy Koontz was told he would have to make concessions to obtain a building permit.¹²⁸ And while he reluctantly agreed to some of the contemplated conditions, he balked when told he would have to pay for improvements to public lands offsite.¹²⁹

Applying *Nollan* and *Dolan*, the Florida court initially concluded the requirement to improve public property violated the Takings Clause because it bore no nexus to any impact that his project might have had on the public.¹³⁰ The Supreme Court of Florida disagreed, squarely siding with a then-growing body of authority holding *Penn Central* should apply in the review of conditions requiring expenditures of money.¹³¹ But Justice Alito had the last word.

Writing for a 5–4 majority, Justice Alito’s opinion affirmed that *Nollan* and *Dolan* are implicated whenever a permitting condition requires dedication of private property that the authorities could not otherwise acquire through direct appropriation, absent an exercise of eminent domain and payment of just compensation.¹³² As Justice O’Connor explained previously in *Lingle v. Chevron U.S.A. Inc.*, the predicate for both *Nollan* and *Dolan* was that the government would have incurred per se takings liability if it had sought to take the property interest outright.¹³³ Likewise, drawing upon *Webb’s Fabulous Pharmacies*, *Phillips*, and *Brown*, the

Its Implications for Takings Law, ENGAGE, Oct. 2013, at 39, 43 (concluding *Koontz* brought “an end to the argument that some types of property are given less protection against uncompensated takings than others. . . . *Koontz* should assure that every permit condition pass constitutional muster before private property can be taken as the ‘price’ of securing a permit approval”); Wake & Bona, *supra* note 51, at 571–72.

126. The lower courts were long divided as to whether the nexus and rough proportionality tests should apply in the review of conditions requiring dedication of money. See *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1229–30 (Fla. 2011) [hereinafter *Koontz II*], *rev’d sub nom.* *Koontz I*, 570 U.S. 595 (2013).

127. *Koontz I*, 570 U.S. at 599–600.

128. *Id.* at 601–02.

129. See *id.* at 602.

130. *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8, 10 (Fla. Dist. Ct. App. 2009), *rev’d*, 77 So. 3d 1220 (Fla. 2011).

131. *Koontz II*, 77 So. 3d at 1227–30.

132. *Koontz I*, 570 U.S. at 604–06, 612.

133. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546 (2005).

Koontz majority began its analysis with the understanding that a land-use authority cannot simply compel the transfer of financial assets by regulatory fiat.¹³⁴ For that reason, the government bears a heavy duty to justify the conditions requiring dedication of monetary assets, just as it would for the conditions requiring dedication of real property.¹³⁵

But the Water Management District argued the analogy to physical appropriation cases was inapposite and that the better analogy was *Eastern Enterprises*.¹³⁶ Under this view, the District urged the Court to recognize an essential distinction between a regulation forcing a direct transfer from a bank account that would amount to a taking and a regulation merely imposing a requirement that may prove costly.¹³⁷ And the dissenters embraced this rationale, emphasizing *Eastern Enterprises* rejected the notion that one might advance a viable takings claim in challenge to economically burdensome regulatory impositions.¹³⁸

Yet of course, Justice Kennedy proved the decisive vote. Though Justice Kennedy joined without a separate concurrence in *Koontz*, it is obvious he accepted Justice Alito's rationale for why *Eastern Enterprises* should not control in monetary-exactions cases.¹³⁹ Crucially, the *Koontz* opinion elucidates the theoretical foundations of the nexus and rough proportionality tests, while squaring their application with Justice Kennedy's concurring opinion in *Eastern Enterprises*.¹⁴⁰ As such, the Court explained the unconstitutional-conditions doctrine provides an avenue around *Eastern Enterprises*.¹⁴¹

134. See *Koontz I*, 570 U.S. at 612–17.

135. See *id.* at 615. If monetary exactions were exempt from the nexus and rough proportionality tests, “it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*.” *Id.* at 612.

136. The District argued that under *Eastern Enterprises*, there could be no takings claim in challenge to a mere requirement to spend money. Brief for Respondent at 43–46, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2012) (No. 11-1447).

137. See *id.* at 46–48.

138. *Koontz I*, 570 U.S. at 620, 624 (Kagan, J., dissenting).

139. In this instance Justice Kennedy's silence speaks for itself. If he disagreed with the majority's treatment of his opinion in *Eastern Enterprises*, one would expect he would have joined Justice Elena Kagan's dissent or issued a concurrence to clarify his views.

140. See *Wake & Bona*, *supra* note 51, at 560–62, 570.

141. *Koontz I*, 570 U.S. at 614 (majority opinion) (“The fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property.”).

Specifically, the *Koontz* majority recognized Justice Kennedy's controlling opinion in *Eastern Enterprises* as setting forth a general rule that one cannot state a viable takings claim in challenge to regulatory impositions imposing financial burdens; however, exactions cases prove the exception.¹⁴² Justice Kennedy himself posited an exception to the general rule for cases where a regulatory imposition is tethered to a specific property interest.¹⁴³ Accordingly, the *Koontz* majority held the nexus and rough proportionality tests operated within this exception, meaning a requirement to pay money will give rise to a takings claim and will be reviewed under *Nollan* and *Dolan* when that imposition is directly linked to one's right to use and enjoy another regulated property interest.¹⁴⁴

III. THE DEMARCATION OF CONTESTABLE REGULATION

A. Distilling Viable Claims

We must draw a few vital points from the foregoing discussion. First, regulatory restrictions limiting the permissible uses of private property are unlikely to amount to a taking.¹⁴⁵ Second, there is a per se taking under *Loretto* when regulation appropriates private property.¹⁴⁶ And relatedly, *Loretto* is implicated whether the government seeks to directly appropriate the targeted property or to indirectly compel its surrender through an imposed condition in the permitting process.¹⁴⁷

Consistent with this dichotomy, *Eastern Enterprises* establishes commercial regulation imposing an "ordinary liability to pay money" is immune from takings liability, while *Penn Central* applies in the review of restrictions merely limiting the permissible uses of personal property.¹⁴⁸ On

142. *See id.* at 613–15.

143. *E. Enters. v. Apfel*, 524 U.S. 498, 540–44 (1998) (Kennedy, J., concurring in judgment and dissenting in part) (suggesting that to be cognizable, a takings claim contesting a government imposition must "operate upon or alter an identified property interest" or must "relate to a specific property interest").

144. *Koontz I*, 570 U.S. at 599.

145. *See id.*

146. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982).

147. *See id.* at 438–39.

148. Counting Justice Kennedy along with the four dissenters, a majority said that general economic regulation does not even implicate review under *Penn Central*. *See Swisher Int'l v. Schafer*, 550 F.3d 1046, 1054 (11th Cir. 2008) (emphasizing five justices had "expressed the view that the Takings Clause does *not* apply where there is a mere general liability" (emphasis added)); *Commonwealth Edison Co. v. United States*, 271

the other side of the ledger stands our physical takings case law.¹⁴⁹ Drawing on *Loretto*'s per se rule, *Horne* and *Koontz* demarcate the line between lawful economic regulation and unconstitutional confiscatory regulation.¹⁵⁰

The Court directly applied *Loretto*'s per se rule in *Horne*, making clear that an uncompensated appropriation of personal property violates the Takings Clause in the same way as would an uncompensated physical occupation of real property or seizure of a financial account.¹⁵¹ Likewise, *Koontz* was predicated upon *Loretto*'s rule that the government cannot outright take private property without paying just compensation.¹⁵² Accordingly, courts apply heightened scrutiny, under the nexus and rough proportionality tests set forth in *Nollan* and *Dolan*, in their review of permitting conditions requiring the surrender of property as a condition of using another regulated property.¹⁵³

This bifurcated approach makes sense because our takings jurisprudence has long emphasized a strict compartmentalization between regulatory takings that are done through use restrictions and physical takings cases done through appropriations.¹⁵⁴ The Court has stressed it is improper to rely upon physical takings cases when challenging regulatory restrictions.¹⁵⁵ And the converse proposition is that it is inappropriate to invoke regulatory takings case law in defending against a physical takings claim.¹⁵⁶ Bearing in mind this analytical divide, the Supreme Court has

F.3d 1327, 1339–40 (Fed. Cir. 2001) (same); *Parella v. Ret. Bd. of the R.I. Emps. Ret. Sys.*, 173 F.3d 46, 58 (1st Cir. 1999) (same); *United States v. King Mountain Tobacco Co.*, 131 F. Supp. 3d 1088, 1094–95 (E.D. Wash. 2015) [hereinafter *King Mountain Tobacco I*] (rejecting the suggestion that “*Eastern Enterprises* establishes a rule that the taking of unspecified assets through the imposition of a statute of general liability can amount to an unconstitutional taking”), *aff’d*, 745 F. App’x 700 (9th Cir. 2018).

149. *Horne I*, 135 S. Ct. 2419, 2426 (2015) (“The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.”); *Koontz I*, 570 U.S. at 604–06.

150. *See Horne I*, 135 S. Ct. at 2428; *Koontz I*, 570 U.S. at 605–06.

151. *Horne I*, 135 S. Ct. at 2428 (“The reserve requirement imposed by the Raisin Committee is a clear physical taking.”).

152. *Koontz I*, 570 U.S. at 605 (“Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.”); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546 (2005).

153. *Lingle*, 544 U.S. at 546; *see Koontz I*, 570 U.S. at 605–06.

154. *See Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322–23 (2002).

155. *Id.* at 323.

156. *Id.*

already established a bright-line rule for delineating between generally unassailable economic regulation and invalid, confiscatory regulation.¹⁵⁷

Under this analytical model, *Eastern Enterprises* applies in the vast majority of cases where a litigant might seek to invoke the Takings Clause in challenge to a commercial regulation. *Eastern Enterprises* is controlling authority if the case concerns an “ordinary liability to pay money,” as opposed to a use restriction governed by *Penn Central*.¹⁵⁸ But, where the contested regulation is directly linked to a specifically identified property interest, *Horne* and *Koontz* come into play under the physical takings doctrine.¹⁵⁹

B. Untangling *Horne* and *Koontz*

Suppose a newly effective regulation requires the surrender of an identified property interest as a condition of lawfully engaging in commerce. *Eastern Enterprises* does not apply because the restriction is directly linked to a targeted property.¹⁶⁰ Under these circumstances, either *Horne* or *Koontz* should apply; however, the outcome may be very different depending on which case is controlling. The regulation will be deemed a per se taking under *Loretto* if *Horne* applies.¹⁶¹ By contrast, the defendant might be able

157. Economic regulation is considered generally unassailable under the regulatory takings doctrine because *Eastern Enterprises* precludes the regulation’s review under the *Penn Central* balancing tests in most cases. See *E. Enters. v. Apfel*, 524 U.S. 498, 523 (1998). But of course, *Eastern Enterprises* does not disturb the *Armstrong* decision, which found a regulatory taking occurred with an enactment extinguishing a lien. *Armstrong v. United States*, 364 U.S. 40, 48 (1960). That suggests an economic regulation extinguishing property rights may still be legitimately assessed under regulatory takings case law, at least where the regulation identifies or targets a specific property interest. See *id.* at 48–49.

158. *E. Enters.*, 524 U.S. at 554 (Breyer, J., dissenting); *King Mountain Tobacco I*, 131 F. Supp. 3d 1088, 1093 (E.D. Wash. 2015) (rejecting a per se takings claim where a litigant invoked *Horne* in challenge to an assessment imposed in proportion to a tobacco manufacturer’s market share to fund subsidies for tobacco farmers) (“The FETRA assessments were not imposed against any specific, identifiable property, and therefore do not constitute either a classic or regulatory per se taking.”), *aff’d*, 745 F. App’x 700 (9th Cir. 2018).

159. See *Horne I*, 135 S. Ct. 2419, 2443 (2015) (Sotomayor, J., dissenting); *Koontz I*, 570 U.S. 595, 608–609 (2013).

160. See *E. Enters.*, 524 U.S. at 554.

161. See *Horne I*, 135 S. Ct. at 2429 (plurality opinion). As discussed *infra* in Part IV, the burden shifts to the government–defendant to prove an affirmative defense. For example, the imposition might be justified as a lawful tax or a legitimate fee.

to justify a regulatory condition under *Koontz* because the nexus and rough proportionality tests merely place the burden on the government to justify an exaction requirement under an intermediate-like scrutiny.¹⁶²

Unfortunately, *Horne* offered little direction for us in determining whether we should review our contested regulation under *Loretto*'s per se rules or under *Koontz*.¹⁶³ For that matter, *Horne* injects uncertainty in its very framing of the issue presented: "The third question presented asks 'Whether a governmental mandate to relinquish specific, identified property as a "condition" on permission to engage in commerce effects a per se taking.' The answer . . . is yes."¹⁶⁴

Addressing that same question in the proceedings below, the Ninth Circuit upheld the USDA's order under *Koontz*.¹⁶⁵ Therefore, it is curious that the Supreme Court's opinion does not once mention *Koontz*.¹⁶⁶ In fact, reading *Horne* in isolation, one might think the Court faced a binary choice between applying (a) *Loretto*'s rigid per se rule to invalidate the USDA's raisin marketing order or (b) the *Penn Central* balancing test, under which the order would have survived.

Ultimately, the Supreme Court made clear this was a physical takings case, notwithstanding the fact that the case dealt with economic regulation.¹⁶⁷ The USDA's regulations effected a taking under *Loretto* because the contested raisin marketing order conditioned the right to sell raisins at market upon the requirement that the Hornes had to surrender a share of their crop.¹⁶⁸ But one might seek to characterize exactions cases under

162. See *Koontz I*, 570 U.S. at 599.

163. Some commentators have suggested *Horne* may be distinguished from *Koontz* on the grounds that it concerned an affirmative requirement compelling the transfer of a targeted property. See James E. Holloway & Donald C. Guy, *The Aftermath of Koontz and Conditional Demands: A Per Se Test, Personal Property, and a Conditional Demand*, 23 WIDENER L. REV. 37, 58–59 (2017). But both cases involved regulatory conditions imposed on the right to engage in conduct permissible at common law. See, e.g., *Horne I*, 135 S. Ct. at 2425; *Koontz I*, 570 U.S. at 599.

164. *Horne I*, 135 S. Ct. at 2430.

165. See *Horne II*, 750 F.3d 1128, 1141–44 (9th Cir. 2014).

166. See generally *Horne I*, 135 S. Ct. at 2430.

167. *Id.* at 2429.

168. *Id.* at 2428.

Nollan, *Dolan*, and *Koontz* in the same terms since they likewise concern regulatory conditions requiring the surrender of private property rights.¹⁶⁹

The Court did not begin to explain what was wrong with the Ninth Circuit's choice to view the USDA's marketing order through the unconstitutional-conditions' prism.¹⁷⁰ But we might infer something from the fact that the majority viewed the USDA's raisin marketing order as a direct regulatory appropriation under *Loretto*.¹⁷¹ The implication might be that it is unnecessary to delve into the shadowy "looking glass world" of the unconstitutional-conditions doctrine outside of a formal, transactional-like regulatory application or exemption process.¹⁷²

That is the most straightforward explanation for why the Court ignored the nexus and rough proportionality tests. To be sure, *Nollan*, *Dolan*, and *Koontz* all concerned conditions imposed through a permitting process, wherein a permit applicant sought approval to make use of regulated property.¹⁷³ By contrast, *Horne* applies where a regulation directly requires conveyance of some specifically targeted property outside of a formalized permitting regime.¹⁷⁴ This constitutional ordering makes sense because conditions imposed in a permitting regime are in some sense voluntarily accepted for the sake of obtaining a conferred benefit.¹⁷⁵ Viewed in that light,

169. See generally *Koontz I*, 570 U.S. 595 (2013); *Dolan v. City of Tigard*, 572 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

170. See *Horne I*, 135 S. Ct. at 2425.

171. *Id.* at 2428.

172. The trigger for the unconstitutional-conditions analysis is that the contested regime authorizes the conferral of a government benefit with exclusion for those unwilling to surrender protected constitutional rights. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[T]his Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely."); e.g., *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969) (welfare payments), *overruled in part* by *Edelman v. Jordan*, 415 U.S. 651 (1974); *Sherbert v. Verner*, 374 U.S. 398, 404–05 (1963) (unemployment benefits); *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (tax exemptions).

173. The Supreme Court applies the nexus and rough proportionality tests only as the second part of a two-step inquiry, which first asks whether the government could take the property in question without paying just compensation outside of the permitting context. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546 (2005) (observing that in both *Nollan* and *Dolan*, "[T]he Court began with the premise that, had the government simply appropriated the easement in question, this would have been a per se physical taking").

174. See *Horne I*, 135 S. Ct. at 2426.

175. See *Koontz I*, 570 U.S. 595, 604–05 (2013).

the unconstitutional-conditions doctrine exists as a doctrinal backstop, preventing the government from manipulating constitutional rights out of existence through coercive waivers.¹⁷⁶

C. Counterarguments

1. Are There Exceptions to *Horne*'s Per Se Rule?

Horne makes it clear that *Loretto*'s per se approach applies in the review of regulatory requirements that affirmatively compel the transfer of private property, regardless of whether the claimant has knowingly chosen to engage in regulated economic conduct.¹⁷⁷ This makes sense given that courts have previously applied *Loretto*'s per se rule in other cases where the claimant's voluntary actions had triggered regulatory appropriations.¹⁷⁸ But previously, in *Monsanto*, the Court applied the *Penn Central* factors to uphold an economic regulation withholding the issuance of a permit absent public disclosure of corporate trade secrets.¹⁷⁹ Accordingly, we must consider whether there is a way to reconcile *Horne* and *Monsanto*.

The Solicitor General argued the Hornes stood in the same position as Monsanto did when Monsanto sought the Environmental Protection Agency's (EPA) approval to sell pesticides.¹⁸⁰ Indeed, both the Hornes and

176. The whole point of the *Nollan* and *Dolan* framework is to ensure that the government cannot leverage its regulatory powers in order to force waivers of Fifth Amendment rights. *Accord* *Frost v. R.R. Comm'n*, 271 U.S. 583, 594 (1926) ("It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."); see *Koontz I*, 570 U.S. at 604–05.

177. *Horne I*, 135 S. Ct. at 2430. "According to the Government, if raisin growers don't like it, they can 'plant different crops,' or 'sell their raisin-variety grapes as table grapes or for use in juice or wine.'" *Id.* (citation omitted). Chief Justice Roberts rebuffed that argument, quipping: "'Let them sell wine' is probably not much more comforting to the raisin growers than similar retorts have been to others throughout history." *Id.*; see also *id.* ("[P]roperty rights 'cannot be so easily manipulated.'" (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982))).

178. See, e.g., *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1110–11 (S.D. Cal. 2017) (emphasizing the assailed regulation applied only to individuals who had chosen to acquire firearms "capable of holding more than 10 rounds"), *aff'd*, 742 F. App'x 218 (9th Cir. 2018); see also *Love Terminal Partners v. United States*, 97 Fed. Cl. 355, 390 (2011) (recognizing a physical takings claim that was predicated on a government decision to demolish newly constructed and operational facilities), *rev'd sub nom.* *Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331 (Fed. Cir. 2018).

179. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984).

180. See *Horne I*, 135 S. Ct. at 2430.

Monsanto were required to give up protected property as an effective condition of engaging in regulated economic activity.¹⁸¹ But the *Horne* majority concluded *Monsanto* was inapposite.¹⁸² The Chief Justice suggested there was an obvious distinction between the regulation of pesticides that is intended to promote public health and the USDA's raisin marketing order, which merely manipulated market conditions.¹⁸³

But this line of reasoning might seem to imply, contradictorily, that *Loretto*'s per se test is riddled with public-safety exceptions through which governmental defendants might invoke the more lenient *Penn Central* standard.¹⁸⁴ And, without doubt, defendants will seek to undermine *Horne* if they can argue that a contested regulatory requirement to surrender private property is justified by compelling public policy concerns of the sort underpinning the EPA's pesticide-regulation program seen in *Monsanto*.¹⁸⁵ Yet it makes little sense to infer a public-health exception to *Loretto*'s per se rule given that the Court has consistently said any permanent physical appropriation of private property effects a taking, regardless of how compelling the state interest may be.¹⁸⁶

Accordingly, the Chief Justice's proffered distinction should be taken at face value. Given that other portions of the *Horne* decision reaffirm the

181. See *Monsanto*, 467 U.S. at 1003–04 (holding that to the extent Monsanto had an interest in its data under Missouri law, the property right was protected under the Fifth Amendment).

182. See *Horne I*, 135 S. Ct. at 2431.

183. *Id.* (“A case about conditioning the sale of hazardous substances on disclosure of health, safety, and environmental information related to those hazards is hardly on point.”).

184. See John D. Echeverria & Michael C. Blumm, *Horne v. Department of Agriculture: Expanding Per Se Takings While Endorsing State Sovereign Ownership of Wildlife*, 75 MD. L. REV. 657, 687 (2016) (“In some narrow category of cases governed by *Monsanto* . . . the government can defeat a takings claim, without having to demonstrate compliance with the *Nollan/Dolan* standards, by demonstrating that the government's grant of regulatory permission represents the conferral of a ‘privilege.’”); Stephen S. Schwartz, *Horne v. USDA: An Exercise in Minimalism?*, 10 N.Y.U. J.L. & LIBERTY 777, 806 (2016) (“[T]he Court gave frustratingly little guidance on the scope of *Monsanto*. The distinction between ‘dangerous pesticides’ and ‘healthy snacks’ may have distinguished *Monsanto* for purposes of *Horne*, but it does not lend itself to principled application in the future.”).

185. See, e.g., Echeverria & Blumm, *supra* note 184, at 687.

186. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (confirming the historical rule “that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve”).

categorical nature of our physical takings doctrine, we should not infer the Court was saying anything of probative value beyond the conclusion that *Monsanto* was off point.¹⁸⁷ We are left only with the implication that the Court might apply different analytical rules if presented with facts more in line with the EPA's pesticide permitting regime in *Monsanto*. That only makes sense because Horne argued *Monsanto* could apply only in a case where there was a "voluntary submission" to attain a specially conferred "government benefit."¹⁸⁸

If *Loretto*'s per se test is truly categorical in its requirement that the government must pay just compensation for any regulatory appropriation, then the key distinguishing fact cannot be the government's regulatory goals.¹⁸⁹ Rather, the operative fact must be similar to *Monsanto* and concern a *permitting regime*, wherein an applicant seeks to attain a discretionary government benefit.¹⁹⁰ And as suggested in the prior discussion, we must distinguish between general regulatory requirements conditioning the right to engage in economic activity on the surrender of private property and those regimes that indirectly compel surrender through conditions imposed in a formal permitting regime. Only in the case of a permitting regime is there room for the government to invoke pressing public concerns as a justification for the contested condition.¹⁹¹

2. Should Koontz Apply Outside the Land-Use Context?

Governmental defendants will usually urge courts to apply *Penn Central* when facing a takings claim and will therein seek to wall off *Nollan*, *Dolan*, and *Koontz* if possible. Accordingly, a defendant may predictably argue the nexus and rough proportionality tests are uniquely applicable in cases concerning conditions imposed on a building or development permit.

187. See *Horne I*, 135 S. Ct. at 2426.

188. Horne also argued *Monsanto* was of "limited reach" in the wake of *Nollan*:

Just as the government tries to do now, the *Nollan* dissent argued that the government's grant of permission to improve property (in exchange for a mandatory public easement across the property) was a government benefit constituting the sort of voluntary exchange upheld in *Monsanto*. This Court refused to apply *Monsanto* so broadly

Reply Brief for Petitioner at 10, *Horne III*, 569 U.S. 513 (2013) (No. 14-275) (citation omitted).

189. See *Loretto*, 458 U.S. at 426.

190. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984).

191. See *id.* at 1020.

In support of that proposition, the defendant might seek to invoke *Monsanto* because, in that case, the Court applied *Penn Central* in its review of the conditions imposed under the EPA's pesticide permitting regime.¹⁹²

But *Monsanto* was decided before the Supreme Court formulated the nexus and rough proportionality tests in *Nollan* and *Dolan*.¹⁹³ Accordingly, there are compelling reasons to believe the Court would apply the nexus and rough proportionality tests in its review of a similar permitting requirement if the case should arise today.¹⁹⁴ This is because *Nollan*, *Dolan*, and *Koontz* recognize the unconstitutional-conditions doctrine is in play when conditions requiring the surrender of property rights are imposed within a permitting regime.¹⁹⁵ This is true regardless of whether we are dealing with conditions imposed on a development permit or on an operational license if the condition compels transfer of a specifically identified property interest.¹⁹⁶

192. *Id.* at 1005.

193. *See Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987). It is clear *Monsanto* sought to invoke the unconstitutional-conditions doctrine. *Monsanto*, 467 U.S. at 1007 (“*Monsanto* argues that the statute’s requirement that a submitter give up its property interest in the data constitutes placing an unconstitutional condition on the right to a valuable Government benefit.”). But *Koontz* stresses the unconstitutional-conditions doctrine applies so long as the claimant demonstrates the contested condition is tethered to restrictions imposed on the use of a specific property. *See Koontz I*, 570 U.S. 595, 606 (2013). It is therefore difficult to reconcile these cases. *See Echeverria & Blumm, supra* note 184, at 686 (“[T]he *Monsanto* precedent became little more than a legal oddity, and the essential nexus and rough proportionality tests represented the new . . . standards for evaluating takings challenges to government exactions.”).

194. *Compare Monsanto*, 467 U.S. at 1005–08 (emphasizing *Monsanto*’s reasonable, investment-backed expectations), *with Nollan*, 483 U.S. at 837 (emphasizing the constitutional propriety of a regulatory condition requiring the waiver of constitutional rights depends on the existence of a nexus to a public concern that would otherwise justify a complete prohibition on the economic activity in question). *See also* Schwartz, *supra* note 184, at 806–07 (suggesting the Supreme Court may “need to provide clarity” as to when *Monsanto*’s deferential approach should apply “for conditional exactions outside the domain of *Nollan* and *Dolan*” or to expressly overrule *Monsanto*).

195. The Court has repeatedly emphasized the nexus and rough proportionality tests represent a “special application” of the unconstitutional-conditions doctrine. *Koontz I*, 570 U.S. at 604–07; *see Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547–48 (2005). This refrain might potentially be understood as implying that the nexus and rough proportionality tests are carefully crafted to the land-use context, which might mean a more general germaneness test is more appropriate in assessing the propriety of conditions requiring the waiver of constitutional rights in other regulatory cases.

196. *See Monsanto*, 467 U.S. at 1005–08; *see also Nollan*, 483 U.S. at 837.

There is no principled basis for compartmentalizing land-use exaction cases.¹⁹⁷ The unconstitutional-conditions doctrine has historically applied in review of regulatory conditions imposed on economic actors in other contexts.¹⁹⁸ For example, in *44 Liquormart, Inc. v. Rhode Island*, the Supreme Court rejected the suggestion that the government may condition the right to sell a regulated product on a requirement to waive First Amendment rights.¹⁹⁹ Likewise, the seminal unconstitutional-conditions case, *Frost v. Railroad Commission*, held it was unconstitutional for a state to condition its approval of a company to do business on a requirement to waive constitutional rights that the state could not directly abrogate.²⁰⁰ And for that matter, various courts have cited *Koontz* in discussing the unconstitutional-conditions doctrine more generally in non-land-use cases.²⁰¹

It is true the Court has characterized *Nollan*, *Dolan*, and *Koontz* as concerning “special applications” of the unconstitutional-conditions doctrine; however, the implication is that the nexus and rough proportionality tests are uniquely tailored to safeguard the Takings Clause while accommodating legitimate public interests.²⁰² There is nothing

197. A few opinions have held *Koontz* must be narrowly confined to land-use permitting cases; however, they provide no principled explanation for why the nexus and rough proportionality tests should not apply with regard to permits required to use and enjoy personal property, which is a guaranteed protection on the same terms as real property under the Takings Clause. *E.g.*, *BEG Invs., L.L.C. v. Alberti*, 85 F. Supp. 3d 54, 62 (D.D.C. 2015) (holding a condition imposed on a liquor license did not implicate *Koontz* because there was no “direct link to real property”); *Willie Pearl Burrell Tr. v. City of Kankakee*, 56 N.E.3d 1067, 1079 (Ill. App. Ct. 2016) (relying on an Illinois Supreme Court decision interpreting *Eastern Enterprises* that predated *Koontz*).

198. *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969) (welfare payments), *overruled in part by* *Edelman v. Jordan*, 415 U.S. 651 (1974); *Sherbert v. Verner*, 374 U.S. 398, 404–05 (1963) (unemployment benefits); *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (tax exemptions).

199. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 512–13 (1996).

200. *Frost v. R.R. Comm’n*, 271 U.S. 583, 592 (1926).

201. *See, e.g.*, *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019); *Starr Int’l Co. v. United States*, 856 F.3d 953, 961 n.9 (Fed. Cir. 2017), *cert. denied*, 138 S. Ct. 1324 (2018); *San Diego Cty. Water Auth. v. Metro. Water Dist.*, 220 Cal. Rptr. 3d 346, 375 (Ct. App. 2017); *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 147 n.125 (Del. 2016); *Weaver v. Myers*, 229 So. 3d 1118, 1139 (Fla. 2017); *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 51 n.9 (Mo. 2017); *Madison Teachers, Inc. v. Walker*, 851 N.W.2d 337, 393–94 (Wisc. 2014) (Bradley, J., dissenting).

202. *See* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547–48 (2005); *Lebron v. Sec’y of the Fla. Dep’t of Children & Families*, 772 F.3d 1352, 1376 (11th Cir. 2014) (holding

inherent in the nexus and rough proportionality tests limiting their application to land-use permitting cases.²⁰³ Accordingly, the Ninth Circuit's decision in *Horne* was analytically sound, at least on one level. Even though the panel was wrong in suggesting *Koontz* applies outside of a formalized permitting regime, the court was at least correct in understanding *Koontz* may apply in review of conditions imposed on general commercial actors.²⁰⁴

To date, there are few reported cases in which litigants have sought to invoke *Koontz* in challenge to commercial regulation.²⁰⁵ *Levin v. City and County of San Francisco* provides the most trenchant analysis, although this was also a land-use case.²⁰⁶ In *Levin*, the Northern District of California held *Koontz* applies in review of conditions imposed on a permit that was required for landlords to exit the rental market.²⁰⁷ The opinion held the unconstitutional-conditions doctrine is implicated whenever the right to change an established use of land is conditioned upon a requirement to pay money.²⁰⁸

And there is no basis for believing that any different analysis should apply if the right to use other forms of private property are conditioned upon an analogous requirement to surrender financial assets or other protected property interests because *Horne* makes clear that personal property is protected on equal terms with real property.²⁰⁹ For that matter, in *United States v. King Mountain Tobacco*, the Ninth Circuit said analysis under

Koontz was inapposite in a dispute concerning Fourth Amendment rights).

203. See *Lingle*, 544 U.S. at 547–48; *Lebron*, 772 F.3d at 1376.

204. See *Horne I*, 135 S. Ct. 2419, 2430–31 (2015).

205. See, e.g., *Merscorp Holdings, Inc. v. Malloy*, No. X04HHDCV136043132S, 2014 WL 486952, at *12–13 (Conn. Super. Ct. Jan. 10, 2014) (“[T]hat argument runs afoul of the ‘unconstitutional condition doctrine,’ which holds that the government cannot condition the provision of a discretionary benefit (e.g., a permit, license, grant, contract, etc.) upon a requirement that a person give up a constitutionally protected right.”); *Fitchburg Gas & Elec. Light Co. v. Dep’t of Pub. Utilities*, 7 N.E.3d 1045, 1055 n.14 (Mass. 2014) (“[W]here the assessment must come from a specific fund or account, or is tied to a specific piece of property such that the assessment is, for example, a stand-in for a land use exaction, the assessment may constitute a taking.”).

206. *Levin v. City & Cty. of San Francisco*, 71 F. Supp. 3d 1072, 1083 (N.D. Cal. 2014) (applying *Koontz* in review of fees charged to landlords seeking to withdraw from the rental market), *dismissed*, 680 F. App’x 610 (9th Cir. 2017); see also *Eagle*, *supra* note 14, at 709 (explaining *Levin* was not about “the location and physical aspects of buildings, but rather conditions under which participants could enter or leave markets”).

207. *Levin*, 71 F. Supp. 3d at 1072.

208. *Id.*

209. See *Holloway & Guy*, *supra* note 163, at 47–48.

Koontz may be appropriate in the review of regulations over products sold in commerce.²¹⁰ That case concerned assessments imposed on tobacco-product manufacturers and importers, which were contingent upon their “market share of gross domestic volume.”²¹¹ Importantly, the court said *Koontz* would have been implicated if the assessments were imposed against a specific “identified property interest,” but the appellant had failed to “identify a property interest that [the] assessment ‘operate[d] upon or alter[ed].’”²¹²

Even had *Koontz* applied in *King Mountain Tobacco*, the district court said there was an affirmative defense because the assessments were legitimately imposed as taxes.²¹³ We will discuss this and other affirmative defenses in Part V. But for present purposes, the vital takeaway is that one may invoke *Koontz* in challenge to commercial regulation; however, to be successful, the claimant must demonstrate that the permitting regime conditions the right to use or sell specifically identified products or some other article of real or personal property.²¹⁴

IV. FURTHER EXPLORING THE IMPLICATIONS OF *HORNE* AND *KOONTZ* IN ECONOMIC REGULATION

A. Regulatory Restrictions Subject to Review Under Eastern Enterprises

Most takings claims challenging economic regulation will survive under *Eastern Enterprises* because *Horne* and *Koontz* apply only where the

210. See *United States v. King Mountain Tobacco*, 745 F. App’x 700, 702 (9th Cir. 2018) [hereinafter *King Mountain Tobacco II*] (emphasizing *Koontz* requires a regulatory link to some identified property interest).

211. *United States v. King Mountain Tobacco Co.*, No. 1:14-CV-3162-RMP, 2015 WL 4523642, at *1 (E.D. Wash. July 27, 2015), *aff’d*, 745 F. App’x 700 (9th Cir. 2018).

212. *King Mountain Tobacco II*, 745 F. App’x at 702–03.

213. *King Mountain Tobacco I*, 131 F. Supp. 3d 1088, 1093 (E.D. Wash. 2015) (rebuffing the argument that *Horne* should apply and emphasizing that *Horne* and *Koontz* are implicated only if the restriction “operate[s] upon . . . an identified property interest”), *aff’d*, 745 F. App’x 700 (9th Cir. 2018).

214. *King Mountain Tobacco* suggests it is insufficient to plead that the exaction is imposed as a mere condition on the right to engage in commercial activity. See *King Mountain Tobacco II*, 745 F. App’x at 702–03. The burden rests on the claimant to plead facts demonstrating the regime requires payment as a condition of obtaining authorization to use a regulated product. *Id.* at 702. That showing is at least ostensibly easier within the confines of a formal permitting regime. *Id.* at 702–03.

government seeks to take physical control of private property.²¹⁵ The following examples demonstrate the generally prevailing authority of *Eastern Enterprises* outside the land-use context.

1. *Minimum Wage*

Industry actors are eager to find constitutional avenues to challenge minimum-wage laws—especially with the current trend toward balkanization of employment standards at the municipal level.²¹⁶ But the Takings Clause provides no ground for constitutional assault. One might attempt to invoke *Horne* on the view that the government is forcing employers to transfer private property (i.e., money) as an effective condition on the right to operate a business; however, that analogy breaks down because, unlike the raisin marketing order at issue in *Horne* or the regulatory act extinguishing a specific lien in *Armstrong*, minimum-wage laws do not affirmatively operate upon a specifically identified property interest.²¹⁷ While it is true that minimum wage requires the payment of wages at a specified level, these enactments do not require conveyances or transfer from any specific account. Moreover, one cannot plausibly invoke *Koontz* because the requirement to pay minimum wage is untethered to any conditional approval on one's right to use any other property.

Because minimum-wage laws do not operate upon any specific property interest, they may be viewed only as generally burdening the right to operate one's business. Of course, owners maintain a property interest in their business enterprise as a matter of going concern.²¹⁸ Therefore, one

215. See *Burnette Foods, Inc. v. U.S. Dep't of Agric.*, No. 1:16-CV-21, 2016 WL 4708629, at *3 (W.D. Mich. Sept. 9, 2016) (distinguishing between an agricultural marketing order that merely prohibits the sale of a commodity and an order that transfers title or possession).

216. See, e.g., *Tex. Ass'n of Bus. v. City of Austin*, 565 S.W.3d 425, 430 (Tex. App. 2018) (challenging a municipal-paid sick-leave ordinance as an imposition of heightened minimum-wage standards under the due course of law clause of the Texas constitution).

217. See *E. Enters. v. Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring in judgment and dissenting in part).

218. See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) (stating that “value compensable under the Fifth Amendment” includes any “value which is capable of transfer from owner to owner and thus of exchange for some equivalent”); *id.* at 9–10 (explaining “that element of going-concern value which is contributed by superior management may be transferable to the extent that it has a momentum likely to be felt even after a new owner and new management have succeeded to the business property . . . [and that] [t]he value contributed by the expenditure of money in soliciting

might frame a minimum-wage enactment as burdening the use and enjoyment of property rights in a vague sense. But conceptualized as such, the requirement to pay a set wage operates as a mere use restriction—not as an affirmative appropriation of a specifically identified property interest. Accordingly, a takings claim challenging a minimum-wage enactment will be rejected under either *Eastern Enterprises* or *Penn Central*.²¹⁹

2. The Employer Mandate and Other Similar Impositions

The same analysis would apply if an employer sought to challenge the Affordable Care Act's employer mandate, which requires "large employers" to provide "affordable" health insurance coverage for full-time employees.²²⁰ As with the requirement to pay minimum wage, the employer mandate imposes a truly significant financial burden on employers—one that might make it cost prohibitive for some businesses to grow (or to continue current operations), especially for those without access to capital markets.²²¹ Yet again, a takings claim brought in challenge to the employer mandate would be assessed under *Eastern Enterprises* or *Penn Central* because the employer mandate does not affirmatively appropriate any specific property interest.²²² The mandate merely imposes a regulatory restriction—akin to a use restriction—on the right to continue lawful operations.

patronage" and building trade routes may be "recognized as an asset of the business").

219. Justice Kennedy's opinion in *Eastern Enterprises* suggests a takings claim, in challenge to general economic regulation, should be rejected outright. *See E. Enters.*, 524 U.S. at 540. Nonetheless, even if a reviewing court should apply *Penn Central*, it is difficult to fathom a successful takings claim in challenge to ordinary economic regulation. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124–25 (1978). Indeed, it is difficult to question the "character" of this commonplace regulation or to suggest the enforcement of lawfully imposed minimum-wage laws undercuts an entrepreneur's reasonable, investment-backed expectations, to say nothing of the economic-impact prong.

220. 26 U.S.C. § 4980H (2018).

221. In addition, employers must pay minimum wage, unemployment insurance, workers compensation insurance, taxes, and cover other liabilities, such as paid sick leave in some jurisdictions or bonding requirements. *See generally* ANASTASIA BODEN ET AL., MANAGING THE REGULATORY THICKET: CUMULATIVE BURDENS OF STATE AND LOCAL REGULATION (2019), <https://regproject.org/wp-content/uploads/RTP-State-and-Local-Working-Group-Paper-Regulatory-Thicket.pdf> [<https://perma.cc/XB84-DDWF>] (detailing the web of regulatory requirements that small businesses must navigate). In the aggregate, these costs present major challenges for small businesses. *See id.* at 8.

222. *See E. Enters.*, 524 U.S. at 542.

This sort of regulatory imposition will generally survive a takings challenge, regardless of how financially burdensome it may be for affected entities.²²³ As such, it seems unlikely that a regulatory mandate to provide employee benefits should ever give rise to a successful takings claim—not unless the enactment compels the transfer of company stocks or some other specifically defined asset.²²⁴

The only exception is the rare case where a business is legally obligated to continue providing some public service.²²⁵ If such a business is unable to make a reasonable profit on account of the financially burdensome regulations, it might have a valid takings claim under the public utility line of cases outlined in Part II.B.1.b, but that may require a difficult showing.²²⁶

B. Regulatory Restrictions Vulnerable to Challenge Under *Horne*

While *Eastern Enterprises* and *Penn Central* apply in most takings cases challenging economic regulation outside the land-use context, *Horne* demonstrates the sharp distinction between ordinary economic regulation and confiscatory regulation. Under *Horne*, an ordinance, statute, or promulgated regulation affirmatively compelling the conveyance of an identified property interest constitutes a per se taking.²²⁷

1. Agricultural-Checkoff Requirements

In *Horne*, the Supreme Court ruled a regulatory requirement to surrender a certain portion a farmer's raisin crop violated the Takings Clause because chattels are just as protected against uncompensated confiscation as any other form of private property.²²⁸ The USDA's raisin marketing order was a per se taking under *Loretto* because it targeted a specific property interest.²²⁹ Accordingly, *Horne* should call into question any regulatory enactment that affirmatively compels the surrender of a specifically identified property interest.²³⁰

223. See *Swisher Int'l v. Schafer*, 550 F.3d 1046, 1050 (11th Cir. 2008) (concerning an assessment, estimated to cost plaintiff-appellant more than \$100 million over 10 years).

224. See *id.* at 1051.

225. See *supra* Part II.B.1.b.

226. See *supra* note 78.

227. See *Horne I*, 135 S. Ct. 2419, 2430 (2015).

228. *Id.* at 2428.

229. *Id.* at 2430.

230. See Breanne Ruelas, Comment, *Organized Robbery: How Federal Marketing Orders Amount to Unconstitutional Takings Without Just Compensation*, 25 SAN

For example, one might challenge mandatory agricultural-checkoff requirements that state and federal law impose on farmers and ranchers in various jurisdictions because these enactments require them to surrender a portion of the proceeds from the sale of commodities.²³¹ Indiana's Soybean Checkoff Program offers an illustrative example.²³² At the first point of sale, Indiana requires a portion of the sale proceeds (i.e., what the buyer pays for the commodity) to be siphoned off and segregated from the money to be conveyed to the seller.²³³ Specifically, the Program requires an exaction of "0.5 percent of the net market price for each bushel of soybeans sold."²³⁴ These checkoff fees are transferred to the United Soybean Board and the Indiana Soybean Alliance, which use exacted funds for research and marketing campaigns to encourage greater public consumption of soybeans.²³⁵

While some checkoff programs allow for an opt-out option, Indiana allows no similar option for soybean farmers.²³⁶ Accordingly, an objecting soybean farmer retains the option either to grow other commodities or to stop farming altogether.²³⁷ But *Horne* makes it clear that the Takings Clause

JOAQUIN AGRIC. L. REV. 67, 81 (2016) (arguing *Horne* calls into question other agricultural marketing orders).

231. Checkoff programs are nearly ubiquitous throughout the United States. See Mia Guizzetti Hayes, Comment, *First Amendment Values at Serious Risk: The Government Speech Doctrine After Johanns v. Livestock Marketing Ass'n*, 55 CATH. U. L. REV. 795, 797 (2006) ("A checkoff is 'the fixed, per-unit fee that producers are required by [federal] law to pay into the program each time they market a unit of the pertinent commodity.'" (internal citations omitted)). Some are enforced directly by the USDA, while others are enforced under state law—usually with express authorization by federal statute. See Jennifer Williams Zwagerman, *Checking Out the Checkoff: An Overview and Where We Are Now That the Legal Battles Have Quietened*, 14 DRAKE J. AGRIC. L. 149, 151, 159 (2009).

232. See *Frequently Asked Questions*, IND. SOYBEAN ALLIANCE, <https://www.indianasoybean.com/about/frequently-asked-questions> [https://perma.cc/AR5Q-BYAF].

233. *Id.* ("Indiana soybean farmers contribute a portion of their sale proceeds to the checkoff program.").

234. *Id.*

235. *Id.*; see also *Your United Soybean Board (USB)*, UNITED SOYBEAN BOARD, <https://unitedsoybean.org/about-usb/> [https://perma.cc/P6RW-HU99] ("Like producers of other commodities, such as beef, dairy and eggs, soybean farmers collectively invest a portion of their product revenue to fund research and promotion efforts.").

236. See 7 C.F.R. § 1220.223 (2018); see also *Frequently Asked Questions*, *supra* note 232.

237. Typically, these sort of checkoff regimes are imposed only after a vote of

prohibits regulatory appropriations of targeted property interests, regardless of what other options an economic actor might have to avoid the contested imposition.²³⁸

For that matter, a checkoff regime requiring exaction from a portion of the sale proceeds for a commodity is functionally equivalent to a regulatory requirement to surrender a defined portion of one's crop. To be sure, while the *Horne* family initially objected to the confiscation of the physical crop, the Supreme Court ultimately held the USDA was forbidden from exacting monetary penalties for the cash equivalent of what it originally sought to take outright.²³⁹ As such, there is no materially significant basis for distinguishing *Horne*.²⁴⁰

Indeed, the only other distinguishing fact is that checkoff programs compel transfer to a third party, rather than directly to a public entity.²⁴¹ Yet, for the purposes of the Takings Clause, that is a distinction without a difference.²⁴² For one, the Supreme Court has already affirmed that checkoff fees are imposed to advance a public interest, which means a contested checkoff regime would, most likely, survive a challenge under the Public Use Clause.²⁴³ And in any event, a conclusion that checkoff fees are taken to advance purely private interests would provide an independent ground for invalidation.²⁴⁴

In the same vein, one might also challenge the California tourism assessment fee, which is imposed on certain industries that are said to benefit

affected farmers. *Your United Soybean Board (USB)*, *supra* note 235. But once approved, dissenting farmers have no choice but to pay in. *See id.* The public policy rationale is that the farmers collectively benefit from the program and must therefore be compelled to pay into the system. *Id.* This is the same “free rider” argument that labor unions had long invoked to justify laws compelling public employees to provide financial support for union activities. *See Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 222 (1977), *overruled by Janus v. Am. Fed’n of State, Cty., & Mun. Emps. Council 31*, 138 S. Ct. 2448 (2018).

238. *Horne I*, 135 S. Ct. 2419, 2430 (2015).

239. *Id.* at 2433.

240. *See id.*

241. *See Zwagerman*, *supra* note 231, at 152.

242. *See Brown v. Legal Found.*, 538 U.S. 216, 233 (2003); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 171 (1998).

243. *See generally Johannis v. Livestock Mktg. Ass’n.*, 544 U.S. 550 (2005).

244. *Kelo v. City of New London*, 545 U.S. 469, 477 (2005) (“[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation.”).

from tourism.²⁴⁵ Similar to agricultural checkoff fees, money collected through tourism assessments are transferred to a nonprofit, public-benefit corporation that exists to promote California tourism.²⁴⁶ Dissenters have no option to opt out.²⁴⁷ The only distinction is that these assessments are calculated by reference to the company's gross receipts, as opposed to skimming off the top of the proceeds at the point of sale.²⁴⁸ But an assessment taking a percentage of a company's gross sales is nonetheless targeting a specific property interest because it seeks to appropriate a fraction of the proceeds from all transactions aggregated from the prior taxable year. Therefore, *Horne* should apply unless an affirmative defense is available.²⁴⁹ For example, as discussed in Part V, a contested assessment might be defended as either a legitimate fee or tax.²⁵⁰

2. Compulsory Paycheck Deductions

Likewise, *Horne* may call into question the constitutionality of statutory enactments requiring withholdings to be taken from an employee's paycheck.²⁵¹ Withholding requirements are perfectly lawful when justified as a legitimate tax or regulatory fee.²⁵² For example, the Takings Clause is unconcerned with the requirement that employers must withhold and remit money for employees' contribution to Social Security and for their estimated income tax liability.²⁵³ But there may be cases in which employers are required to make withholdings that cannot be justified as lawfully imposed taxes nor justified as fees.²⁵⁴

245. *Assessment Regulations*, CAL. OFF. TOURISM, <https://californiatourism.ca.gov/regulations> [https://perma.cc/3NUX-73FS].

246. *Id.*

247. *Cf. id.*

248. *Calculate Your Assessment*, CAL. OFF. TOURISM, <https://californiatourism.ca.gov/Calculate-Assessment> [https://perma.cc/42DW-NFR9].

249. *See infra* Part V.

250. *See infra* Part V.

251. *See* AFT Mich. v. State, 893 N.W.2d 90, 99–101 (Mich. Ct. App. 2016) (holding a mandatory 3 percent deduction to fund a nonvesting, retiree-health-benefit program violated the Takings Clause), *aff'd in part and vacated in part*, 904 N.W.2d 417 (Mich. 2017).

252. *See infra* Part V.B.

253. *Houck v. Little River Drainage Dist.*, 239 U.S. 254, 264 (1915) (“[T]he power of taxation should not be confused with the power of eminent domain.”).

254. Numerous states fund programs aimed to benefit employees through payroll deductions. For example, New York's Paid Family Medical Leave Act requires payroll deductions to fund paid family leave, which is typically added as a ride-on to the

For example, some states have enacted laws requiring withholdings for retirement savings.²⁵⁵ These compulsory regimes are not justified as an imposed tax but as an exercise of the police powers.²⁵⁶ These withholdings should likely withstand scrutiny under the Takings Clause as long as the employee retains the exclusive right to the money withheld, including an entitlement to accumulate interest.²⁵⁷ Yet if withheld monies are invested on behalf of the employee, the state will more than likely require deductions for asset-management fees, which could raise a takings problem if deemed excessive.²⁵⁸

We may also imagine scenarios in which regulatory deductions are taken for reasons unrelated to the direct provision of benefits to the employee and without justification as an imposed tax. For example, we might look to state laws that (until recently) required public employees to provide financial support for labor-union activities.²⁵⁹ Notwithstanding the Supreme Court's recent decision in *Janus v. AFSCME*, which struck down compulsory public-union fees in Illinois, it is worth questioning whether such a regime could withstand scrutiny under the Takings Clause.²⁶⁰ And this is not an entirely academic exercise. Even in the wake of *Janus*, there may be occasions in which enacted law will require payroll deductions to support

employer's existing disability insurance policy. *Obtaining and Funding a Policy*, N.Y. ST. PAID FAM. LEAVE, <https://paidfamilyleave.ny.gov/obtaining-and-funding-policy> [<https://perma.cc/7NUM-RUJW>]. Insofar as these deductions directly benefit the employees, the deductions are likely to be justified as a legitimate fee. Yet because compulsory payroll deductions compel the transfer of an identified property interest, the burden rests on the state to raise the affirmative defense, as set forth in Part V. *See, e.g.*, N.Y. Ins. Ass'n v. State, 41 N.Y.S.3d 149, 157 (App. Div. 2016) (“[A] fee is a charge, imposed upon certain citizens or entities who use particular services of or obtain benefits from a particular governmental program or agency, to defray the costs of those services or benefits.” (internal citations omitted)).

255. *Oregon's State-Run Retirement Program Requires Employer Action*, *Pension Analyst Compliance Bulletin*, PRUDENTIAL (Aug. 2017), <http://www.retire.prudential.com/media/managed/Bulletin-OregonSaves-0817.pdf> [<https://perma.cc/95TE-T4UA>].

256. *See, e.g.*, Hugh D. Spitzer, *Taxes vs. Fees: A Curious Confusion*, 38 GONZ. L. REV. 335, 346 (2002).

257. *See* Hall v. State, 908 N.W.2d 345, 354–56 (Minn. 2018) (holding interest is owed if the asset would have accrued interest at common law).

258. *See generally* Spitzer, *supra* note 256, at 349–50.

259. *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, Council 31, 138 S. Ct. 2248, 2460–61 (2018).

260. *See id.* at 2486.

labor-union activities.²⁶¹ For example, the California Agricultural Relations Act controversially authorizes a state board to impose compulsory collective-bargaining agreements, which may require payroll deductions (even from dissenting employees) as a matter of law.²⁶²

One might argue the compelled financial support for a union is comparable to a minimum-wage enactment. Just as minimum-wage laws impose a requirement to expend money as an effective condition of engaging an employee, the compulsory payment of union dues was imposed as an effective condition of accepting employment.²⁶³ But unlike the requirement to pay minimum wage, regulations requiring financial support for union activities were linked directly to a specifically defined property interest.²⁶⁴ While the amount owed to employees for their work is conceptually untethered from any specific property interest (e.g., a specific bank account), compulsory union dues were deducted directly from the employee's paycheck each pay period or were otherwise calculated with reference to wages or salary earned.²⁶⁵ In this manner, a regulatory requirement to provide financial support to a union would effectively impose an encumbrance or lien upon a specific property interest, which should trigger review under *Horne*.²⁶⁶

261. Under Act 31, Wisconsin Statutes § 111.01 et seq., Wisconsin employees are free to decline or cancel union membership at any time; however, the Seventh Circuit recently held federal law prohibits Wisconsin employers from honoring an employee's request to immediately discontinue payroll deductions. *Int'l Ass'n of Machinists Dist. Ten & Local Lodge 873 v. Allen*, 904 F.3d 490, 507 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 1599 (2019). If the employee had previously signed an authorization for payroll deductions, the employer must continue to make payroll deductions for a full year and must continue to transfer money from each paycheck during this period. *Id.* at 495 (holding the Taft-Hartley Act preempts Wisconsin's law requiring employers to honor the employee's request to immediately discontinue union deductions). This raises an issue under *Horne* because this interpretation of the Taft-Hartley Act compels a transfer of an identified private property interest. *See Horne I*, 135 S. Ct. 2419, 2426 (2015).

262. *See Gerawan Farming, Inc. v. Agric. Labor Relations Bd.*, 187 Cal. Rptr. 3d 261, 270 (Ct. App. 2015) (observing that the mandatory mediation and conciliation provisions of California's Agricultural Labor Relations Act, California Labor Code §§ 1164 et seq., authorize quasi-legislative individualized rules governing all aspects of employment, from working conditions to union dues and union-membership requirements), *rev'd*, 405 P.3d 1087 (Cal. 2017).

263. *See Janus*, 138 S. Ct. at 2460–61.

264. *See id.* at 2461.

265. *Id.* at 2460–61.

266. *Cf. United States v. Dickinson*, 331 U.S. 745, 748 (1947) ("Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent

3. Regulatory Authorizations to Use Private Company Property

The same rules apply under *Horne* when enacted laws or promulgated regulations operate upon a specifically identified property interest and affirmatively compel its transfer or take away the right to exclude third parties.²⁶⁷ For example, a regulatory requirement authorizing employees to use company property for nonbusiness uses would violate the Takings Clause, absent a guarantee of just compensation.²⁶⁸ To be sure, the Supreme Court has long held a requirement to allow third-party use of real property constitutes a taking.²⁶⁹ And, in the wake of *Horne*, there is no basis for suggesting that different rules should apply for similar impositions on personal property.²⁷⁰

One might then invoke *Horne* and *Loretto* in challenge of a National Labor Relations Board (NLRB) rule purportedly authorizing employees to use a company's private computers or e-mail systems for nonbusiness purposes.²⁷¹ Indeed, such a regulatory imposition goes beyond merely restricting how companies may utilize computers and e-mail systems. In abrogating the right to exclude or limit unwelcomed uses of specifically defined computers and e-mail systems, the NLRB's rule would effect a *per se* taking.²⁷²

that, as between private parties, a servitude has been acquired either by agreement or in course of time.”).

267. See *Nollan v. Cal. Coastal Comm'n.*, 483 U.S. 825, 834 (1987) (“[R]equiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment . . .”); *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979).

268. See *supra* Part II.A.

269. See *supra* Part II.A.

270. *Horne I*, 135 S. Ct. 2419, 2426 (2015) (“Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property.”).

271. See generally *Purple Commc'ns, Inc.*, 361 N.L.R.B. 1050 (2014), *overruled by* *Caesars Entm't d/b/a Rio All-Suites Hotel & Casino & Int'l Union of Paints & Allied Trades*, Dist. Council 16, Local 159, 368 N.L.R.B. 143 (2019); see also Philip Gordon & Noah Lipschultz, *NLRB Creates Right to Use Corporate E-Mail to Organize and to Complain About Work: Ten Key Implications for Employers*, LITTLER (Dec. 15, 2014), <https://www.littler.com/nlr-creates-right-use-corporate-e-mail-organize-and-complain-about-work-ten-key-implications> [<https://perma.cc/2YL9-C4JR>].

272. In the same vein, state law would effect a taking under *Loretto* if it were to take away the right of a business to bring a trespass claim against uninvited activists. *Cf.* *United Food & Commercial Workers Int'l Union v. Wal-Mart Stores, Inc.*, 162 A.3d 909, 912 (Md. 2017) (rejecting the idea that federal law preempts common law nuisance and trespass claims).

4. Unclaimed-Property Laws

Horne should likewise call into question enactments in various jurisdictions that authorize state officials to take control of unclaimed property. For example, in Minnesota, money deposited in savings accounts will be deemed statutorily abandoned after three years if the owners have not taken the steps necessary to safeguard their property rights.²⁷³ Ostensibly, these requirements may seem insignificant because most states require only that the accountholder engage in some minimal interaction with the bank; however, once the account is deemed statutorily abandoned, unclaimed-property laws typically require the holding bank to transfer those funds directly to the state, notwithstanding common law rules.²⁷⁴

These regimes raise potentially serious problems under the Takings Clause because they target specific accounts for appropriation by operation of law. And again, the government may not insulate itself from takings liability simply by pronouncing *ipso facto* that private property rights are abandoned.²⁷⁵ That is not to say that unclaimed-property regimes are indefensible, but the burden rests on the governmental defendant to justify these regimes with an affirmative defense, most likely with reference to preexisting background principles of property law.²⁷⁶

5. Other Charges Assessed Against Private Accounts

Since *Webb's Fabulous Pharmacies*, the Supreme Court has consistently held the government cannot simply raid a private account to take its principal assets or accrued interest.²⁷⁷ *Horne* reinforced this in affirming that the same per se rules apply within the context of a regulated

273. MINN. STAT. ANN. § 345.32 (West 2019).

274. *E.g.*, *Vanacore & Assocs., Inc. v. Rosenfeld*, 201 Cal. Rptr. 3d 97, 109 (Ct. App. 2016) (concerning shares of stock deemed to have escheated to the state under California's Unclaimed Property Law).

275. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

276. For example, in *Hall v. State*, the State of Minnesota successfully argued three of the four plaintiffs were not entitled to interest for their abandoned property because their properties were not earning interest at the time the state took possession. *Hall v. State*, 908 N.W.2d 345, 355 (Minn. 2018). By contrast, with regard to the fourth claimant, the Minnesota Supreme Court found there was a takings problem because the state had denied payment of interest for monies transferred from an interest-bearing bank account. *Id.* at 356.

277. *See supra* Part II.B.2.

marketplace.²⁷⁸ As such, the Takings Clause may be invoked to challenge any charge or assessment levied against specified financial accounts, insurance proceeds, or other targeted assets. For example, a state would violate the Takings Clause if it should enact a bill directing the transfer of monies from a university endowment, unless the state could invoke an affirmative defense.²⁷⁹ We might imagine the legislature appropriating a percentage from a university endowment for the purpose of subsidizing in-state tuition rates or addressing some other crisis in public education. Whatever the purpose, a compelled transfer would have to be justified as either a lawful fee or tax to survive scrutiny.²⁸⁰

Especially in a moment of crisis where legislators are looking to address a budgetary shortfall, there is a risk that the state may seek to levy charges or assessments on private accounts. For example, in 2017 the Montana legislature had an unexpected budgetary shortfall due to unusually high fire-suppression costs.²⁸¹ In response, the legislature enacted Senate Bill 4, which imposed a 3 percent assessment on funds over \$200 million held in the Montana State Fund, which was forecast to generate nearly \$30 million for the state between fiscal years 2018 and 2019.²⁸²

The Montana State Fund is a workers compensation program administered by a nonprofit public corporation.²⁸³ Its holdings are comprised of assets and accrued interest from insurance premiums,²⁸⁴ which are paid by Montana employers for the benefit of their employees.²⁸⁵ Ultimately, a group of policyholders filed a lawsuit invoking the Takings Clause of the Fifth Amendment, in addition to various state law claims.²⁸⁶ Whether the

278. *Horne I*, 135 S. Ct. 2419, 2432 (2015).

279. *See infra* Part V.

280. *See infra* Part V.

281. Holly K. Michels, *Special Session Adjourns - Neither Side Gets What It Wants, but Both Happy to Offset Deeper Cuts*, INDEP. REC. (Nov. 16, 2017), https://helenair.com/special-session-adjourns---neither-side-gets-what-it/article_41cf3d4a-4865-5c53-b64a-848e76f294a8.html [<https://perma.cc/FF58-DJN8>].

282. MONT. CODE ANN. § 39-71-2320 (West 2019).

283. *Id.* § 39-71-2313.

284. *Id.* § 39-71-2321(1).

285. *See id.* § 39-71-2311(1). Those assets are managed by the Montana Board of Investments. *Id.* § 39-71-2315.

286. Verified Complaint for Declaratory Judgment at 11–14, *Moodys Market, Inc. v. Mont. State Fund*, No. DV-18-12 (Mont. Dist. Ct. Jan. 22, 2018); *see also Why NFIB's Recent Montana Lawsuit Matters to Small Business Owners*, NFIB (Jan. 29, 2018), <https://www.nfib.com/content/legal-blog/money/why-nfibs-recent-montana-lawsuit->

policyholders have standing to advance a takings claim is a significant open question.²⁸⁷ But if their case moves to the merits, the burden will rest on the state to justify its assessment with an affirmative defense.²⁸⁸

C. Conditions on Conferred Approvals Subject to Koontz

We have illustrated that *Horne* applies where a regulatory imposition directly appropriates (i.e., compels the transfer) of a specifically identified property interest. But as set forth in Part III, there are situations where a public authority may seek to leverage its regulatory powers to compel waiver of Fifth Amendment rights—so as to accomplish indirectly what *Horne* forbids outright. In such cases, *Koontz* should apply.

It bears acknowledgement that the lower courts are divided as to whether the nexus and rough proportionality tests apply where a regulatory condition is imposed pursuant to a generally applicable legislative enactment.²⁸⁹ For example, the California courts hold *Koontz*, and its forerunning authorities, *Nollan* and *Dolan*, apply only when the permitting authorities exercise discretion, on an ad hoc basis, to impose contested

matters-to-small-business-owners/ [https://perma.cc/D2XU-S9BK].

287. The State argued the policyholders lack standing because they did not have a direct ownership interest in the funds taken. *See* Opinion and Order Granting Defendant State Fund's Motion to Dismiss and Denying Plaintiff's Motion to Amend, *Moodys Market, Inc. v. State Fund*, No. DV-18-12 (Mont. Dist. Ct. June 17, 2018) [hereinafter *Moodys Opinion and Order*]. But the plaintiffs argue that under Montana law, policyholders maintain a contingent and revisionary interest in the State Fund's assets because the public corporation managing those assets owes fiduciary duties to the policyholders, including a requirement to distribute the remaining proceeds among the policyholders in the event of dissolution. MONT. CONST. art. VIII, § 13(4); MONT. CODE ANN. §§ 39-71-2316, 2320, 2322, 2327; Verified Complaint for Declaratory Judgment, *supra* note 286, at 11–14. This issue is now on appeal to the Montana Supreme Court. *See* *Moodys Opinion and Order*, *supra*.

288. The assessment is labeled as a *management fee*. Verified Complaint for Declaratory Judgment, *supra* note 286, at 10. But the plaintiffs maintain the state is not providing any new service that might justify additional asset-management fees. *Id.* Further, they maintain it cannot be a legitimate fee because the assessed monies are directed to the state's budgetary needs (i.e., fire-suppression costs), as opposed to the provision of any benefit to the State Fund or policyholders. *Id.* at 10–11.

289. *See* *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1117 (1995) (Thomas, J., dissenting) (mem.) ("The lower courts are in conflict over whether *Dolan*'s test for property regulation should be applied in cases where the alleged taking occurs through an Act of the legislature.").

conditions.²⁹⁰ By contrast, other jurisdictions hold even legislatively imposed conditions are subject to *Nollan*, *Dolan*, and *Koontz*.²⁹¹

It is beyond the scope of this Article to wade into this controversy in any depth.²⁹² Suffice it to say that in jurisdictions following California's approach (i.e., holding legislative exactions *exempt* from review under the nexus and rough proportionality tests), courts may be expected to further extend that rationale to avoid scrutiny for legislatively imposed conditions that require dedication of private property outside the land-use context.²⁹³ Conversely, those jurisdictions that apply *Nollan*, *Dolan*, and *Koontz* in review of legislatively imposed building-permit conditions may easily extend that logic in other cases where another regulatory approval is legislatively conditioned upon a requirement to dedicate private property.²⁹⁴

1. Conditions Imposed on a Business or Operational License

Koontz applies whenever a requirement to dedicate monetary assets is tethered to the exercise of another identifiable property right.²⁹⁵ One straightforward application would be the review of zoning restrictions requiring the payment of "fees" as a condition of obtaining a license or permit to operate a business on a specific property, i.e., charge for the use of an already-existing structure.²⁹⁶ For that matter, a code requiring a variance

290. Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 1007 (Cal. 2015) (Werdegar, J., concurring).

291. See Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek, 729 N.E.2d 349, 355–56 (Ohio 2000) (declining to distinguish between legislatively and administratively imposed exactions); Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 643 (Tex. 2004) (same).

292. I have argued elsewhere that the better view is to apply *Koontz* on the same terms in review of legislatively imposed exactions as for those imposed on an ad hoc basis. Wake & Bona, *supra* note 51, at 582–83.

293. See generally Cal. Bldg. Indus. Ass'n, 351 P.3d 974.

294. See *City of Beavercreek*, 729 N.E.2d at 355–56; *Stafford Estates*, 135 S.W.3d at 643. It is worth noting that the unconstitutional-conditions doctrine generally applies in review of legislatively imposed conditions when the government seeks to compel waiver of other constitutional rights in other regulatory settings. See James S. Burling & Graham Owen, *The Implications of Lingle on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 STAN. ENVTL. L.J. 397, 407 (2009). Accordingly, when seeking regulatory approval to engage in economic conduct, litigants challenging legislatively imposed monetary-exactions requirements might make a case for a more general invocation of the unconstitutional-conditions doctrine. See *id.* at 400.

295. See *Koontz I*, 570 U.S. 595, 613–14 (2013).

296. For example, some cities require a permit to change the use or occupancy of an

to conduct certain operations or to rent out property would likewise implicate the nexus and rough proportionality tests if approval was made contingent on a requirement to pay money into a public fund because the exaction requirement would be linked directly to the exercise of common law property rights for a specific parcel of land.²⁹⁷

Likewise, *Koontz* should apply, in the same straightforward manner, in any situation where regulatory approval to use a specific facility or article of personal property is made subject to a requirement to dedicate monetary assets or other protected property interests.²⁹⁸ For example, if the Takings Clause protects personal property on equal terms as real property, then the nexus and rough proportionality tests should apply if regulatory authorization to use a specific vehicle or firearm is made contingent upon a requirement to pay an exorbitant registration fee.²⁹⁹ In the same manner, where prospective regulatory approval is necessary to exercise common law

existing structure, for which the applicant must pay fees “based on the valuation of [the] project.” CITY OF PORTLAND, BUREAU OF DEV. SERVS., CHANGE OF USE OR OCCUPANCY 1 (2016), <https://www.portlandoregon.gov/bds/article/125287> [<https://perma.cc/X5V4-6N4P>]. In other cases, a local authority may impose fees in requiring an existing facility to connect to newly constructed public infrastructure. *See, e.g.*, Karen Blackledge, *Residents, Businesses Circulating Petition for Officials to Reconsider Sewer Fees*, DANVILLE NEWS (Aug. 5, 2019), https://www.dailyitem.com/the_danville_news/news/residents-businesses-circulating-petition-for-officials-to-reconsider-sewer-fees/article_4116e98e-c949-5de3-b5c5-949418c845e4.html (discussing the opposition to newly imposed sewer fees in a rural Pennsylvania township).

297. At the outset, a city may require a fee to consider a variance request. *E.g.*, *Variance*, HAYWARD, <https://www.hayward-ca.gov/services/permits/variance> [<https://perma.cc/VA8B-E8HR>]. This will withstand scrutiny if the fees are properly calibrated to cover the public costs incurred in evaluating the request. *E.g., id.* But if a variance is conditionally imposed on a requirement to pay further fees, those charges would likewise need to bear a nexus and rough proportionality to the contemplated change. *E.g., id.*

298. *See* *Levin v. City & Cty. of San Francisco*, 71 F. Supp. 3d 1072, 1083 (N.D. Cal. 2014), *dismissed*, 680 F. App’x 610 (9th Cir. 2017). *Cf.* *Amoco Oil Co. v. Vill. of Schaumburg*, 661 N.E.2d 380, 387–88 (Ill. Ct. App. 1995) (applying *Nollan* and *Dolan* in review of conditions imposed on a permit to improve an existing gas station).

299. One commentator suggested the Ninth Circuit erred in applying *Koontz* to the raisin marketing order in *Horne* because there was no established link between the exaction and specific real property, on the view the panel should have, at the least, explained why a link to specific personal property should be enough to trigger review under *Koontz*. *See* Drew S. Mcgehrin, Casenotes, *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, 412 (2015). But if the Supreme Court’s decision in *Horne* established that real and personal property are truly protected on equal terms, this objection is no longer valid. *See Horne I*, 135 S. Ct. 2419, 2426 (2015).

rights—for example, in the continued operation of a factory with incidental greenhouse gas emissions—the state should bear the burden of justifying any requirement to pay money under *Nollan*, *Dolan*, and *Koontz*.³⁰⁰

While a court might easily extend *Koontz* to review exaction requirements imposed under a permitting or licensing regime governing the use of defined physical spaces or the use of specific articles of property, a more difficult question is presented where exaction requirements are imposed under a more general business or occupational licensing regime. In such a regime, an individual or business is required to maintain a license to operate lawfully, regardless of whether it operates using any specific property.³⁰¹ In such a case, a court would likely apply *Eastern Enterprises* because there is no obvious link connecting the permitting regime to the exercise of property rights.³⁰²

Yet a license or permit might be recognized as a protected property right once vested.³⁰³ As such, one could argue *Koontz* should apply where the right to use a license is made subject to an exaction requirement.³⁰⁴ The

300. See *Koontz I*, 570 U.S. 595, 604–05 (2013); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 836 (1987). It may be difficult to justify imposing conditions for permits required to continue operations or to change the use of an existing facility because the burden rests on the authority to demonstrate that these conditions are necessary to mitigate some reasonably anticipated public impact. *Nollan*, 483 U.S. at 836.

301. See DANA BERLINER, ET AL., OCCUPATIONAL LICENSING RUN WILD 11 (2017), <https://regproject.org/wp-content/uploads/RTP-State-Local-Working-Group-Paper-Occupational-Licensing.pdf> [<https://perma.cc/5GDB-YA8X>].

302. See *King Mountain Tobacco II*, 745 F. App’x 700, 702–03 (9th Cir. 2018) (holding a tobacco-products manufacturer had failed to prove assessments under the Fair and Equitable Tobacco Reform Act violated *Koontz* because they failed to identify a property interest that the assessments “operate[d] upon or alter[ed]”).

303. See *Smith v. Bd. of Med. Quality Assurance*, 248 Cal. Rptr. 704, 710 (Ct. App. 1988) (“Unquestionably, a physician has a vested property right in his or her medical license, once acquired.”); *Kurtzworth v. Ill. Racing Bd.*, 415 N.E.2d 1290, 1307 (Ill. Ct. App. 1981) (“Illinois recognizes that a license to do business, including an occupational license conferred by the Illinois Racing Board, constitutes a property interest that is entitled to due process protection.”); *Jimmy’s Germantown Place, Inc. v. City of Philadelphia*, 862 A.2d 706, 708 (Pa. Commw. Ct. 2004) (“It is axiomatic in our Commonwealth that government licenses to engage in a business create an entitlement to partake of a profitable activity, and hence, such a license constitutes a property right.”), *vacated*, 874 A.2d 1157 (2005) (mem.).

304. Cf. *Stidham v. Peace Officer Standards & Training*, 265 F.3d 1144, 1149–50 (10th Cir. 2001) (concluding that the “Supreme Court has held that a license to practice one’s calling or profession is a protected property right” and that due process protections

obvious objection is that there can be no vested rights in a permit or license until after the applicant has complied with any prerequisite requirements; however, *Koontz* held the nexus and rough proportionality tests apply not just to conditions imposed on an approved permit but also to conditions imposed as an antecedent requirement to the issuance of a permit.³⁰⁵ Accordingly, *Koontz* may have left the door open to this sort of claim. One might argue that business-license and building-permit applicants stand in the same position to the extent that their regulatory authorization to use the property is made contingent upon a prerequisite exaction demand.³⁰⁶

But, given Justice Alito's emphasis on the need for establishing a direct link to a specific regulated property, litigants challenging an occupational or business licensing requirement might be better served to frame their challenges as a more general invocation of the unconstitutional-conditions doctrine, as opposed to arguing that *Koontz* is a directly controlling authority.³⁰⁷ As explained by Kathleen Sullivan and other scholars, the unconstitutional-conditions doctrine is implicated whenever discretionary, government-conferred benefits are conditioned on a requirement to waive constitutionally protected rights.³⁰⁸ Indeed, the seminal unconstitutional-conditions case held the state of California could not condition regulatory approval for an out-of-state business to operate on a requirement to waive due process rights.³⁰⁹ That rationale would seem to apply in the same way in the review of a business or occupational licensing regime where the right to engage in commerce is conditioned upon a requirement to waive Fifth Amendment rights.³¹⁰

must apply with regard to any decision to revoke such a license or certificate (citing *Bell v. Burson*, 402 U.S. 535, 539 (1971))).

305. *Koontz I*, 570 U.S. 595, 606 (2013) ("A contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands as conditions precedent to permit approval.").

306. *See id.* at 605–08.

307. *See id.* at 614.

308. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1463 (1989).

309. *Frost v. R.R. Comm'n*, 271 U.S. 583, 592–93 (1926) ("The naked question which we have to determine, therefore, is whether the state may bring about the same result by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the state altogether to withhold if it sees fit to do so.").

310. *See id.* at 594. The condition invalidated in *Frost*—requiring private carriers to operate as public carriers—was also alleged to violate the Takings Clause. *See id.* at 589.

2. Potential Implications of Applying *Koontz* in Review of Business or Operational Licensing Regimes

As suggested in the foregoing discussion, a broader application of *Koontz* might call into question requirements to dedicate private property whenever they are imposed as an affirmative condition on the issuance of any discretionary regulatory approval, whether that is a license to sell beer and wine, a registration required to operate a vehicle, or some other special permit required to engage in other forms of regulated conduct.³¹¹ Yet the extension of *Koontz* outside the land-use context would be of little consequence for regimes that already roughly calibrate imposed conditions to offset anticipated public impacts.³¹²

It bears repeating that the nexus and rough proportionality tests leave ample room for courts to consider the propriety of imposed conditions where they do in fact mitigate reasonably anticipated public harms.³¹³ For example, business filing fees required by a state's Secretary of State would be justified, so long as the charges roughly approximate the administrative costs that the filing imposed on the state.³¹⁴ A problem would only arise if the imposed filing fees were well in excess of what was actually needed to administer the associated services to the business payer or if collected monies were dedicated to wholly unrelated public expenses such as administering general elections.³¹⁵

311. On the same theory, one might likewise challenge conditions imposed on the issuance of a patent or on the conferral of copyright protections if they require the surrender of a protected property right as a term of approval. *But see* *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1006 (1984).

312. *See Koontz I*, 570 U.S. at 605–06. The nexus and rough proportionality tests allow for an affirmative defense—i.e., demonstration that the contested condition bears a nexus and is roughly proportional to mitigate anticipated public impacts. *See id.* But this analytical model necessarily reverses the presumption of legitimacy that ordinarily stands as a conceptual bulwark against constitutional challenge in the realm of economic regulation. *See id.* at 606. Where applicable, *Nollan*, *Dolan*, and *Koontz* place the burden on the governmental defendant to affirmatively justify imposed conditions. *See id.* at 604.

313. *See supra* Part II. This approach is consistent with the fundamental assumption in *Monsanto* that there can be no valid takings claim in challenge to regulatory restrictions that are carefully tailored to minimize environmental concerns. *See* *Horne I*, 135 S. Ct. 2419, 2431 (2015).

314. *Cf.* *Griswold v. Nat'l Fed'n of Indep. Bus.*, 449 P.3d 373, 382 (Colo. 2019) (considering whether business-licensing exactions must be viewed as fees or taxes).

315. *See* *Judge: Use of Colorado Business Fees for Elections Legal Under TABOR*, DENVER POST (Nov. 3, 2015), <https://www.denverpost.com/2015/11/03/judge-use-of-colorado-business-fees-for-elections-legal-under-tabor/> (subscription required); Bob

Still, it would be a significant development if the courts should construe *Koontz* as setting forth a categorical rule that regulatory fees must satisfy the nexus and rough proportionality tests. Cap-and-trade regulations raise an especially intriguing—and potentially consequential—issue if *Koontz* is held to apply outside the traditional building-permit context. This is because cap-and-trade regimes restrict the right to engage in a certain form of economic conduct (i.e., industrial activities that generate greenhouse gas emissions from defined facilities) on an affirmative requirement to obtain a special, state-issued credit, or allowance, for emissions above some established threshold.³¹⁶ The policy rationale is that the state can reduce greenhouse gas emissions over time by issuing fewer allowances each year—therein forcing industry actors to compete over a depleting supply of permits.³¹⁷ Conceivably, a state might achieve its in-state emission-reduction goals under such a system while freely allocating emission allowances through some equitable-distribution mechanism; however, the prevailing cap-and-trade model distributes emission allowances through state-administered auctions.³¹⁸ For example, California’s cap-and-trade program was forecasted to raise \$2.4 billion in 2015–2016—with the proceeds going to a “special fund and available for appropriation by the Legislature.”³¹⁹

Yet, setting aside the state’s legitimate interest in regulating pollutants, it would be difficult to justify California’s approach under *Koontz*.³²⁰ While the nexus test may be satisfied easily upon a showing that the generated revenues are devoted directly to offsetting the costs of administering the regulatory program, mitigating the impacts of climate change, or both, the rough proportionality test is more problematic for governmental

Stephens, *Secretary of State, Business Disagree on Filing Fees Usage*, CO. SPRINGS BUS. J. (Jul. 20, 2017), <https://www.csbj.com/2017/07/20/secretary-of-state-business-disagree-on-filing-fees-usage/> [<https://perma.cc/NZ5G-2D6K>].

316. See, e.g., *Cal. Chamber of Commerce v. State Air Res. Bd.*, 216 Cal. Rptr. 3d 694, 701 (Ct. App. 2017) (describing California’s cap-and-trade regulations) (“Covered entities must reduce their emissions below a threshold point, or obtain offset credits or emissions allowances, either from the Board or the open market.”).

317. *Id.* at 703.

318. Robert N. Stavins, *A Meaningful U.S. Cap-and-Trade System to Address Climate Change*, 32 HARV. ENVTL. L. REV. 293, 298 (2008).

319. *Cal. Chamber of Commerce v. Cal. Air Res. Bd.*, Nos. 34-2012-80001313, 34-2013-80001464, 2013 WL 12108277, at *2 (Cal. Super. Ct. Aug. 28, 2013); Michael Hiltzik, *California’s Cap-and-Trade Program Has Cut Pollution. So Why Do Critics Keep Calling It a Failure?*, L.A. TIMES (July 29, 2016), <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-captrade-20160728-snap-story.html>.

320. See *Koontz I*, 570 U.S. 595, 606 (2013).

defendants.³²¹ This is because the rough proportionality test requires the government to make an individualized assessment to demonstrate that the amount charged is roughly proportional to the actual costs the public may incur in enforcing a regulatory program or mitigating reasonably anticipated impacts.³²² But, where a regulatory approval is made contingent upon a requirement to pay for an allowance (i.e., permit) at auction, there is little guarantee that the amount charged will approximate the actual public impact of the actor's regulated conduct because the auction price is dictated by innumerable regulatory and economic forces.³²³ As such, a defendant is not likely to satisfy its burden of proving rough proportionality.

V. AFFIRMATIVE DEFENSES

In the foregoing discussion, we have explored the conceptual bounds of our physical takings case law and the unconstitutional-conditions doctrine within the realm of economic regulation. Yet even where a regulatory imposition is properly reviewed under either *Horne* or *Koontz*, that is not the end of the inquiry. For example, while the auctioning of cap-and-trade emission allowances may be problematic under *Koontz*, there could be a defense under the background principles of state law. And while a state law compelling compulsory paycheck deductions or checkoff payments could violate the Takings Clause under *Loretto* and *Horne*, our takings jurisprudence recognizes that lawfully imposed fees or taxes are immune from challenge under the Takings Clause.³²⁴

321. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987).

322. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (“[T]he city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”).

323. While the state establishes a minimum price at which allowances will be sold, there are various regulatory and market factors affecting the cost of emission allowances at auction. See *Auction Information*, CAL. AIR RESOURCES BOARD (Oct. 15, 2019), <https://www.arb.ca.gov/cc/capandtrade/auction/auction.htm>; see also Easwaran Narassimhan et al., *Carbon Pricing in Practice: A Review of Existing Emissions Trading Systems*, 18 CLIMATE POL’Y 967, § 3.1.2 (2018), <https://www.tandfonline.com/doi/full/10.1080/14693062.2018.1467827> [<https://perma.cc/A8NT-9FF2>] (observing economic trends, market innovation, and consumer behavior all impact the demand for emission-allowance credits).

324. See *infra* Part V.B.

A. Background Principles of State Law

In *Lucas*, Justice Scalia explained one can only advance a valid takings claim where it may be said that the contested regulatory restriction abrogates rights inuring in the title to the property in question.³²⁵ This requires courts to look to the background principles of state law to determine whether the assailed regulatory imposition extinguished preexisting common law rights or merely codified preexisting common law standards that would have precluded the conduct in question.³²⁶ For example, on remand in *Lucas*, the Supreme Court directed the South Carolina courts to consider whether the nuisance doctrine would have precluded all development options on Mr. Lucas's beachfront property at common law.³²⁷ Likewise, one might conceivably invoke an expansive conception of the public-nuisance doctrine to justify the auctioning of emission-allowance credits under a cap-and-trade system on the view that no one has the right to pollute the environment.³²⁸

Additionally, in the wake of *Lucas*, the Supreme Court has hinted that, under certain circumstances, preexisting legislative restrictions might be incorporated into the background principles of state law to defeat a takings claim.³²⁹ In fact, the Supreme Court's recent decision in *Murr v. Wisconsin* seemingly expands this defense by suggesting background principles may shift with community norms through the enactment of prospective regulation.³³⁰ Still, there remains significant questions, even a quarter century after *Lucas*, as to when exactly positive law may be invoked as part of a background-principles defense.³³¹ For example, a state's unclaimed-

325. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

326. See F. Patrick Hubbard, *The Impact of Lucas on Coastal Development: Background Principles, the Public Trust Doctrine, and Global Warming*, 16 SE. ENVTL. L.J. 65, 66–67 (2007); see also Wake *supra* note 35, at 10.

327. *Lucas*, 505 U.S. at 1031.

328. The challenge would be in demonstrating that the historic nuisance doctrine could be invoked to enjoin a specific industrial actor from emitting greenhouse gases at common law. See Mathew Hall, *A Catastrophic Conundrum, but Not a Nuisance: Why the Judicial Branch Is Ill-Suited to Set Emissions Restrictions on Domestic Energy Producers Through the Common Law Nuisance Doctrine*, 13 CHAP. L. REV. 265, 275 (2010).

329. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) (emphasizing the right to develop is “subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions”).

330. See *Murr v. Wisconsin*, 137 S. Ct. 1933, 1947–48 (2017).

331. Wake, *supra* note 35, at 37 (discussing background principles and suggesting

property regime, discussed in Part IV.B.4, might survive a takings challenge on the view that residents set up bank accounts and make other financial arrangements subject to the longstanding rules governing unclaimed property.³³²

B. Taxes and Regulatory Fees

Justice Alito’s opinion in *Koontz* affirmed the longstanding rule that legitimately imposed taxes and fees are immune from challenge under the Takings Clause.³³³ But a public authority cannot unilaterally immunize itself against a takings challenge merely by labeling a monetary exaction, *ipse dixit*, as a tax or a fee.³³⁴ For one, *Koontz* clarified that to be legitimate under the Takings Clause, a regulatory fee must be properly calibrated to roughly approximate the reasonable costs that one’s conduct is anticipated to impose on the public.³³⁵ And while there are other legitimate types of fees (e.g., service fees or user fees), most states have developed precise tests for determining whether a fee is legitimate or not—typically on the view that a monetary exaction must be deemed a tax if it cannot be classified as a fee.³³⁶

Importantly, since taxes are inherently unpopular, many jurisdictions guarantee taxpayer protections, usually in the form of constitutionally mandated procedural requirements for the lawful enactment of a new tax.³³⁷

“that an enactment must be of a certain vintage before it may be viewed as a background principle”).

332. See William S. King, Note, *A Bridge Too Far: Due Process Considerations in State Unclaimed-Property Law Enforcement*, 45 SUFFOLK U. L. REV. 1249, 1252–58 (2012) (explaining that escheat is a common law doctrine and that every state has enacted statutes governing unclaimed property, many based on the Uniform Unclaimed Property Act of 1954).

333. *Koontz I*, 570 U.S. 595, 615 (2013).

334. *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

335. See *Koontz I*, 570 U.S. at 618–19.

336. See, e.g., *Colo. Union of Taxpayers Found. v. City of Aspen*, 418 P.3d 506, 515 (Colo. 2018) (emphasizing that regulatory fees must “bear[] a reasonable relationship to the services that [the government] provides to charged payers”); *Bellsouth Telecomms., L.L.C. v. Cobb County*, 824 S.E.2d 233, 236–37 (Ga. 2019) (“[F]ees are a charge for a particular service provided, based on the payer’s contribution to the problem.”).

337. See Joshua G. Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 FORDHAM L. REV. 1263, 1267 (2012) (observing that fiscal restraints are ubiquitous throughout the United States); see also Brief for Nat’l Fed’n of Indep. Bus. as Amicus Curiae Supporting Petitioner at 8–10, *Kerr v. Hickenlooper*, 735 S. Ct. 2927 (2015) (No. 14-460) (cataloguing constitutional protections for taxpayers throughout the country).

For example, Colorado requires voter approval³³⁸ and California requires a supermajority vote in the legislature³³⁹ for newly imposed taxes or tax hikes. And often state law further restricts the power of local authorities to impose taxes.³⁴⁰ Because these restrictions make it difficult to raise revenue, public authorities often seek to label questionable exactions as “fees.”³⁴¹ Conversely, litigants seeking to invalidate contested exactions often invoke taxpayer protections as a sword.³⁴² As a result, there is already an existing and well-developed body of law from which takings claimants and defendants may draw when making a case that an exaction is more properly viewed as a tax or a fee.³⁴³

For example, if state courts have already ruled a contested exaction constitutes a legitimately imposed tax, that would provide a defense against any subsequent takings challenge.³⁴⁴ But more often a governmental defendant will seek to justify a contested exaction as a fee either because (a) the charge cannot survive if viewed as a tax under the state’s existing case law or (b) the state courts have already rejected the contention that the charge should be viewed as a tax.³⁴⁵ In such a case, a takings claimant may prevail by demonstrating the exaction is not a legitimately imposed fee under state law, perhaps, as some states recognize, because a legitimate fee is paid on a voluntary basis or because user or service fees must generally approximate either the value of the benefit conferred or must be tailored to

338. COLO. CONST., art. X § 20.

339. CAL. CONST. art. XIII A, § 3.

340. *See id.*; COLO. CONST. art. X, § 20.

341. *A Tax by Any Other Name: NFIB Asks Colorado Supreme Court to Take-up Business Tax Question*, NFIB (July 28, 2017), <https://www.nfib.com/content/legal-blog/money/a-tax-by-any-other-name-nfib-asks-colorado-supreme-court-to-take-up-business-tax-question/> [<https://perma.cc/9K4V-BEJT>].

342. *See Spitzer, supra* note 256, at 336.

343. *See id.*

344. *But see Koontz I*, 570 U.S. 595, 627 (2013) (Kagan, J., dissenting) (suggesting it may be difficult to distinguish taxes from takings).

345. For example, a California Court of Appeals upheld California’s regulatory cap-and-trade auctions against a state constitutional challenge that alleged the regime amounted to an imposed tax on the right of affected entities to remain in business. *Cal. Chamber of Commerce v. State Air Res. Bd.*, 216 Cal. Rptr. 3d 694, 719–20 (Ct. App. 2017). The decision makes it clear that the auctioning of emission-allowance credits cannot be viewed as a tax under California law. *Id.* at 728. Accordingly, if these auction-emission regulations were assessed under *Koontz*, the state would be compelled to justify the regime as a legitimate fee. *See Koontz I*, 570 U.S. at 615 (majority opinion).

offset the actual costs of providing a utilized service.³⁴⁶ Yet if the fee is justified as an exercise of police powers, it is not enough that it passes muster under state law; regulatory fees must also satisfy the nexus and rough proportionality tests if *Koontz* applies.³⁴⁷

C. Civil Forfeiture and Other Penalties at Law

The government may also defend a contested monetary exaction or other confiscation of property on the view that it is merely imposing a penalty for violation of a law, since nothing in our takings jurisprudence calls into question the power of the states to enforce settled civil or criminal sanctions.³⁴⁸ Ultimately, this defense is rooted in the background-principles doctrine outlined above.³⁴⁹ Vitally, this means that to justify an exaction as a penalty, the authorities must be able to point to preexisting legal standards authorizing penalties at law.³⁵⁰

Likewise, a state might have a valid defense for the continued enforcement of long-established asset-forfeiture laws; however, newer enactments seeking to statutorily redefine what assets are subject to

346. See, e.g., *Scalise v. Sewell-Scheuermann*, 566 S.W.3d 539, 545 (Ky. 2018) (“Regulatory fees cease to be fees and become taxes when ‘the amount exacted becomes disproportionate to the amount expended for regulatory purposes.’”); *State v. Biddeford Internet Corp.*, 171 A.3d 603, 607–08 (Me. 2017) (emphasizing fees are voluntary).

347. *Koontz* distinguished between legitimate regulatory fees and illegitimate fees imposed as an extortionate condition of permit approval. See *Koontz I*, 570 U.S. at 604–06.

348. See *Bennis v. Michigan*, 516 U.S. 442, 452–53 (1996) (holding there can be no takings claim if the property has been “lawfully acquired under the exercise of governmental authority other than the power of eminent domain”). But see *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689–90 (1974) (suggesting there would be a takings problem if civil forfeiture laws were invoked to compel transfer of assets “of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property”); *Nelson v. City of New York*, 352 U.S. 103, 109–10 (1956) (acknowledging a takings problem may arise where an authority retains surplus proceeds in a tax forfeiture proceeding if there is no available avenue for recovery).

349. Cf. *Koontz I*, 570 U.S. at 615 (“This case . . . does not affect the ability of governments to impose property taxes, user fees, and *similar laws and regulations* that may impose financial burdens on property owners.” (emphasis added)).

350. For example, one could not conceivably argue the exactions levied under Indiana’s Soybean Checkoff Program constitute a penalty because the objecting farmer is engaged in perfectly lawful economic conduct. See *Frequently Asked Questions*, *supra* note 232.

forfeiture (or the circumstances prompting forfeiture) may be more problematic.³⁵¹ For example, laws allowing the forfeiture of property used in the furtherance of a crime are ubiquitous and most likely immune from challenge in light of their historic use.³⁵² By contrast, courts in various jurisdictions have found that tax-forfeiture statutes violate the Takings Clause when they allow the authorities to take more property than is necessary to satisfy a tax deficiency.³⁵³

D. *Compensation Is Paid in Full*

Finally, the most complete and straightforward defense would be that an assailed regime ensures payment of just compensation; however, the owner must receive the “full and perfect equivalent” of what has been taken.³⁵⁴ Thus, for example, a mandatory checkoff program discussed in Part IV might survive a takings challenge if it guarantees that an objecting farmer or rancher can seek a dollar-for-dollar return on the money taken during a commodities transaction. For example, Indiana law requires farmers to pay checkoff fees of one-half cent for every bushel of corn at the first point of sale but allows a procedure for an objecting farmer to seek reimbursement.³⁵⁵ That passes muster on its face; however, if there are significant delays, the Just Compensation Clause requires the payment of interest for the time that the farmer’s property was withheld because even temporary takings require compensation.³⁵⁶

351. See David Pimentel, *Civil Asset Forfeiture Abuses: Can State Legislation Solve the Problem?*, 25 GEO. MASON L. REV. 173, 201–02 (2017) (observing that civil-forfeiture confiscations often rely on a tenuous or nonexistent nexus to an alleged crime); see also Anne Teigen & Lucia Brugg, *Evolving Civil Asset Forfeiture Laws*, NAT’L CONF. STATE LEGISLATURES (Feb. 2018), <http://www.ncsl.org/research/civil-and-criminal-justice/evolving-civil-asset-forfeiture-laws.aspx> [<https://perma.cc/YU83-7TWW>] (noting state law varies widely in what crimes implicate civil forfeiture).

352. See Teigen & Brugg, *supra* note 351.

353. See, e.g., *Thomas Tool Servs., Inc. v. Town of Croydon*, 761 A.2d 439, 441 (N.H. 2000); *Bogie v. Town of Barnet*, 270 A.2d 898, 903 (Vt. 1970).

354. *United States v. Miller*, 317 U.S. 369, 373 (1943); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893).

355. *Corn Checkoff Refund Application*, IND. CORN MARKETING COUNCIL <https://www.incorn.org/resources/media/CornCheckoffRefundApp2018.pdf> [<https://perma.cc/CV6Z-CE4B>].

356. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984).

VI. CONCLUSION

The Takings Clause of the Fifth Amendment provides a straightforward guarantee against confiscatory regulation. Notwithstanding the general presumption of legitimacy otherwise applicable in the realm of economic regulation, the Supreme Court's decisions in *Loretto* and *Horne* illustrate the absolute constitutional imperative that the government must pay just compensation when appropriating private property.³⁵⁷ Regulatory appropriations are defensible only to the extent justified by background principles of state property law, including the state's inherent powers to abate common law nuisance, to collect lawfully imposed taxes or fees, to enforce penalties, or to invoke similar preexisting doctrines.³⁵⁸ Accordingly, litigants should consider possible applications of the Takings Clause in labor law and when assessing other regulatory impositions on commercial actors. The operative question is whether the contested regulation directly compels the transfer of a specifically identified property interest by operation of law.

Likewise, litigants should consider invoking the Takings Clause when faced with a requirement to surrender monetary assets or other forms of private property as a condition of obtaining a permit or some other regulatory approval. The Supreme Court has affirmed time and again that the government may not lightly compel waivers of constitutional rights as a condition of engaging in economic conduct.³⁵⁹ As such, there is no reason to limit *Nollan*, *Dolan*, and *Koontz* to land-use permitting cases. The unconstitutional-conditions doctrine should apply with equal force whenever a discretionary benefit is conditioned on a requirement to hand over any form of private property.

357. See *Horne I*, 135 S. Ct. 2419 (2015).

358. See *supra* Part V.

359. See *supra* Part IV.C.1.