



PROPERTY RIGHTS AFTER *HORNE*

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ABSTRACT: This Article analyzes the Supreme Court's 2015 decision in *Horne v. Department of Agriculture*, which extended to personal property rules regarding "physical takings" previously applicable only to real property. It considers how the majority and other opinions in *Horne* relate to substantive and procedural issues in regulatory takings jurisprudence. In particular, the Article asserts that *Horne*, in tandem with the Court's 2013 decision in *Koontz v. St. Johns County Water Management District*, may be a basis for rectifying problems resulting from complexities emanating from *Penn Central Transportation Co. v. City of New York* and other takings doctrines.

INTRODUCTION

In *Horne v. Department of Agriculture*,¹ the U. S. Supreme Court held that government appropriation of personal property violates the Fifth Amendment's Takings Clause.² As Chief Justice Roberts

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¹ *Horne v. U.S. Dep't of Agric.*, 135 S. Ct. 2419, 2428 (2015).

² U.S. CONST., amend. V ("[N]or shall private property be taken for public use, without just compensation.").

pithily noted for the Court, “The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your house.”³ While that basic principle apparently enjoyed unanimous support,⁴ the Court’s opinion broke no other ground. Taken together, the Justices’ four opinions revisited troubled aspects of the Court’s takings jurisprudence and presaged its need to revisit fundamental issues long unresolved.

This Article analyzes *Horne* in the context of possible future developments in takings law. It asserts that, in conjunction with other recent property rights cases, *Horne* demonstrates the Court’s enhanced receptivity to arguments that takings jurisprudence has become too encrusted with procedural snares and is too conceptually convoluted.

While *Horne* applied the Court’s precedents, distinguishing physical from regulatory takings to personal property, I assert that its ultimate importance for both takings and unconstitutional exactions law might be in decreasing reliance upon rigid multi-factor tests and multi-pronged analysis and increasing faithfulness to the Court’s admonition in *Armstrong v. United States*⁵ that, “The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁶

More specifically, the Article suggests that *Horne* reinforces *Koontz v. St. Johns County Water Management District*,⁷ in which the

³ *Horne*, 135 S.Ct. at 2426.

⁴ See *infra* note 31 and accompanying text.

⁵ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

⁶ *Id.*

⁷ *Koontz v. St. John’s River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2596 (2013).

Court declared “impermissibly burden[ing]” Takings Clause rights to be violative of the Fifth Amendment.⁸

By any account, in extending the rules applicable to appropriation of real property to personal property, *Horne* implicitly restates, and also exacerbates, foundational problems in the Court’s takings jurisprudence.

I. HORNE AND ITS DISCONTENTS

A. RAISIN REGULATION AND THE HORNES

As Justice Thomas noted in 2013 for a unanimous Court in *Horne v. Department of Agriculture (Horne I)*,⁹ Congress enacted the Agricultural Marketing Agreement Act of 1937¹⁰ (AMAA) during the Great Depression “in an effort to insulate farmers from competitive market forces that it believed caused unreasonable fluctuations in supplies and prices.”¹¹ Pursuant to the AMAA, the Secretary of Agriculture promulgated a California Raisin Marketing Order (Marketing Order) in 1949, which was administrated by a Raisin Administrative Committee (RAC), comprised of 35 members representing raisin producers, ten members representing raisin “handlers” (processors or packers), and one member representing the public.¹² Each year, the RAC would determine whether a portion of the annual crop should be placed in a reserve pool

⁸ *Id.* (“Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.”).

⁹ *Horne v. U.S. Dep’t of Agric.*, 133 S. Ct. 2053 (2013) [hereinafter *Horne I*].

¹⁰ 7 U.S.C.A. §§ 601-627 (1937).

¹¹ *Horne I*, 133 S. Ct. at 2056-57 (internal quotation marks omitted).

¹² *Id.* at 2057.

("reserve-tonnage"), with the balance of the year's crop available for sale in the open market ("free-tonnage").¹³

Under the Marketing Order's reserve requirements, a producer is only paid for the free-tonnage raisins. The reserve-tonnage raisins, on the other hand, must be held by the handler in segregated bins "for the account" of the RAC. The RAC may then sell the reserve-tonnage raisins to handlers for resale in overseas markets, or may alternatively direct that they be sold or given at no cost to secondary, noncompetitive domestic markets, such as school lunch programs. The reserve pool sales proceeds are used to finance the RAC's administrative costs. In the event that there are any remaining funds, the producers receive a pro rata share. As a result, even though producers do not receive payment for reserve-tonnage raisins at the time of delivery to a handler, they retain a limited interest in the net proceeds of the RAC's disposition of the reserve pool.¹⁴

The petitioners, Marvin and Laura Horne, functioned in the capacity as producers of California raisins for over 30 years. Justice Thomas noted that "after becoming disillusioned with the AMAA regulatory scheme, they began looking for ways to avoid the mandatory reserve program. Since the AMAA applies only to handlers, the Hornes devised a plan to bring their raisins to market without going through a traditional handler."¹⁵ They subsequently sold not only their own produce, but also that of sixty neighbors.¹⁶ Thereafter, the USDA informed the Hornes that they were "handlers," and initiated an enforcement action. They resisted the

¹³ *Id.*

¹⁴ *Id.* at 2058 (citations omitted).

¹⁵ *Id.*

¹⁶ *Id.*

Government's assessments and raised, *inter alia*, affirmative defenses, including that the Marketing Order violated the Fifth Amendment prohibition against takings without just compensation.¹⁷

A USDA judicial officer imposed \$202,600 in civil penalties, \$8,783.39 in assessments, and \$483,843.53 for the value of the California raisins that petitioners failed to hold in reserve for the two crop years at issue. The judicial officer believed that he lacked the authority to adjudicate the Hornes' constitutional claims and declined to do so.¹⁸

In the Hornes' action for judicial review of the USDA's decisions, the U.S. district court granted summary judgment to the agency. It found that there was substantial evidence supporting the USDA determination that the Hornes were "handlers" subject to the Marketing Order. The Hornes renewed their physical takings claim. Justice Thomas subsequently noted:

Though the District Court found that the RAC takes title to a significant portion of a California raisin producer's crop through the reserve requirement, the court held that the transfer of title to the RAC did not constitute a physical taking. . . . ("[I]n essence, [petitioners] are paying an admissions fee or toll—admittedly a steep one—for marketing raisins. The Government does not force plaintiffs to grow raisins or to market the raisins; rather, it directs that if they grow and market raisins, then passing title to their "reserve tonnage" raisins to the RAC is the admissions ticket."").¹⁹

¹⁷ *Id.* at 2059.

¹⁸ *Id.*

¹⁹ *Id.* at 2059-60 (quoting *Evans v. United States*, 74 Fed. Cl. 554, 563-64 (2006)) (internal citations omitted).

The Ninth Circuit affirmed that the Hornes were “handlers,” but did not adjudicate their takings claims. It reasoned that the AMAA’s “comprehensive procedural scheme and administrative exhaustion requirements” for raisin handlers displaced the Tucker Act’s grant of jurisdiction in the U.S. Court of Federal Claims (CFC), but that the Hornes had brought suit in their capacity as producers, thus requiring that they should have sued in the CFC rather than district court.²⁰

The Supreme Court reversed the Ninth Circuit in *Horne I*, noting that “[p]etitioners’ takings claim, raised as an affirmative defense to the agency’s enforcement action, was properly before the court because the AMAA provides a comprehensive remedial scheme that withdraws Tucker Act jurisdiction over takings claims brought by raisin handlers.”²¹

On subsequent remand to adjudicate whether the fines and civil penalties violated the Fifth Amendment, the Ninth Circuit

viewed the reserve requirement as a use restriction, similar to a government condition on the grant of a land use permit. As in such permit cases, the Court of Appeals explained, the Government here imposed a condition (the reserve requirement) in exchange for a Government benefit (an orderly raisin market). And just as a landowner was free to avoid the government condition by forgoing a permit, so too the Hornes could avoid the reserve requirement by “planting different crops.” Under that analysis, the court found that the reserve requirement was a proportional response to the Government’s interest in

²⁰ *Id.* at 2060 (reviewing *Horne v. U.S. Dep’t of Agric.*, 673 F.3d 1071, 1079-80 (9th Cir. 2012)).

²¹ *Id.* at 2056.

ensuring an orderly raisin market, and not a taking under the Fifth Amendment.²²

The Ninth Circuit also held that there was no *per se* physical taking, that the *Nollan* and *Dolan* “rough proportionality” rule applied, and that the Marketing Order satisfied the rule.²³

In its 2015 merits decision, *Horne v. Department of Agriculture*,²⁴ the Supreme Court again reversed. The substantive aspects of its ruling and their ramifications for the future are discussed in subsequent parts of this Article. In summary, the Court held that the reserve requirement constituted a physical taking, that the failure to pay growers and handlers for the reserved raisins violated the Fifth Amendment Takings Clause, and that the retention of a contingent interest in a portion of the value of the reserved raisins did not negate the Government’s duty to pay just compensation;²⁵ that the requirement to reserve part of the raisin crop as a condition to engage in the market was a *per se* taking;²⁶ and that raisin growers and handlers were not required to pay the fines prior to contesting them, and an earlier government demand was dispositive on the amount of damages.²⁷

However, in urging a remand for determination of damages, Justice Breyer, joined by Justices Ginsburg and Kagan, examined important issues regarding the role of average reciprocity of advantage in determining the extent to which implicit

²² *Horne v. U.S. Dep’t of Agric.*, 135 S. Ct. 2419, 2425, 192 L. Ed. 2d 388 (2015) (quoting *Horne v. U.S. Dep’t of Agric.*, 750 F.3d 1128, 1143 (9th Cir. 2014)).

²³ *Horne v. U.S. Dep’t. of Agric.*, 750 F.3d 1128, 1144 (9th Cir. 2014) discussing (*Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)), *overruled by Horne*, 135 S. Ct. at 2419.

²⁴ 135 S. Ct. 2419 at 2433.

²⁵ *Id.* at 2428-30. See discussion *infra* Part I.B.1.

²⁶ *Id.* at 2430-31. See discussion *infra* Part II.B.1.

²⁷ *Id.* at 2431-32. See discussion *infra* Part II.A.1.

compensation might be provided.²⁸ Justice Thomas concurred, reiterating his narrow interpretation of “public use” in *Kelo v. City of New London*,²⁹ and adding that a remand in *Horne* would not be “fruitful.”³⁰ The only dissenter was Justice Sotomayor, who asserted that the appropriation was not complete so as to trigger application of a *per se* rule, and that the setting aside of the personal property was not a physical taking.³¹

B. THE JURISPRUDENCE OF “PHYSICAL” VERSUS
“REGULATORY” TAKINGS

Prior to considering the effects of extending the rule that physical appropriations are *per se* takings requiring just compensation, it is important to examine the underpinnings of the rule itself.

1. *The Physical-Regulatory Distinction is Merely
Heuristic*

In his opinion for the Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,³² Justice Stevens explained:

Th[e] longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that

²⁸ *Id.* at 2433-36 (Breyer, J., concurring in part and dissenting in part). See discussion *infra* Part II.C.

²⁹ *Kelo v. City of New London*, 545 U.S. 469, 520-21 (2005) (Thomas, J., dissenting).

³⁰ *Horne*, 135 S. Ct. at 2433 (Thomas, J., concurring).

³¹ *Id.* at 2441-42 (Sotomayor, J., dissenting).

³² *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323-24 (2002).

there has been a “regulatory taking,” and vice versa. For the same reason that we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings context to regulatory takings claims. Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights.³³

This asserted distinction seems highly undertheorized. Its principal recourse is to precedent (“longstanding” practice), and to common sense (“relatively rare,” “easily identified,” “usually . . . greater affront,” etc.). Such an atheoretical approach is rarely used in scientific endeavor³⁴ and is heavily criticized when it is.³⁵ The Court’s approach is, however, totally consistent with its all-facts-and-circumstances multi-factor analysis in *Penn Central Transportation Co. v. City of New York*.³⁶ Thus, ironically, the physical-regulatory takings distinction, which the Court asserts

³³ *Id.* at 324.

³⁴ *But see*, AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5 (2013) (Publisher’s description) (“This is the standard reference for clinical practice in the mental health field. Since a complete description of the underlying pathological processes is not possible for most mental disorders, it is important to emphasize that the current diagnostic criteria are the best available description of how mental disorders are expressed and can be recognized by trained clinicians.”).

³⁵ *See generally* THOMAS SZASZ, THE MYTH OF MENTAL ILLNESS: FOUNDATIONS OF A THEORY OF PERSONAL CONDUCT (New York: Harper & Row, rev. ed. 1974).

³⁶ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

provides an objective exception to multi-factor ad hoc *Penn Central* analysis, is itself based on generalizations.

Even within the *Penn Central* framework, the crucially important role of “investment backed expectations”³⁷ is self-referential. As Judge Stephen Williams noted, all except the most abrupt changes in regulations would commensurately affect future expectations, so that “regulation begets regulation.”³⁸

There is nothing in *Horne* that would impede a future Court from disclaiming the *Tahoe-Sierra* physical versus regulatory takings distinction as a constitutional rule and characterizing it instead as merely a useful heuristic. The controversy over whether the Court’s *Williamson County* regulatory takings “ripeness” doctrine was constitutionally mandated or merely prudential is analogous.³⁹ Commentators assumed the “ripeness” doctrine was required by the “case or controversy” requirement as well as by prudence.⁴⁰ The Supreme Court was not explicit about the doctrine’s source, stating in *Suitum v. Tahoe Regional Planning Agency*⁴¹ that it “is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.”⁴²

In *Horne I*, however, Justice Thomas wrote for the Court that the Justices “have recognized that it is not, strictly speaking, jurisdictional,” since “[a] ‘Case’ or ‘Controversy’ exists once the government has taken private property without paying for it.

³⁷ *Id.* at 124.

³⁸ *Dist. Intown Props. Ltd. P’ship v. District of Columbia, et al.*, 198 F.3d 874, 887 (D.C. Cir. 1999) (Williams, J., concurring).

³⁹ *Williamson Cty. Reg’l Plan. Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 200 (1985) (holding that a regulatory takings claim against a state or local government is not “ripe” for review in federal court unless the claimant has sought a final determination from the agency and has sought and been denied compensation in state court).

⁴⁰ See, e.g., Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 11-12 (1995).

⁴¹ *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 733 n.7 (1997).

⁴² *Id.*

Accordingly, whether an alternative remedy exists does not affect the jurisdiction of the federal court.”⁴³ In his 2015 *Horne* opinion, Chief Justice Roberts stated that the “distinction flows naturally from the settled difference in our takings jurisprudence between appropriation and regulation.”⁴⁴

Responding to Justice Sotomayor’s criticism that it was “baffling” that the Hornes would object to the reserve requirement while recognizing that the government may prohibit raisin sales without bringing about a *per se* taking,⁴⁵ Roberts cloaked the distinction in Constitutional imperatives.

A physical taking of raisins and a regulatory limit on production may have the same economic impact on a grower. The Constitution, however, is concerned with means as well as ends. The Government has broad powers, but the means it uses to achieve its ends must be “consist[ent] with the letter and spirit of the constitution.”⁴⁶

With the Court expanding the physical taking *per se* rule to encompass personal property, we should anticipate new doctrinal problems. Among those are the limits of “reciprocity of advantage,”⁴⁷ whether there is in fact a meaningful distinction between complete wipeouts of economic use by dint of appropriation as contrasted with regulation,⁴⁸ and whether

⁴³ *Horne I*, 133 S. Ct. at 2062 (2013) (citing *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 729, n.10 (2010)).

⁴⁴ *Horne*, 135 S. Ct. at 2428.

⁴⁵ *Id.* at 2443 (Sotomayor, J., dissenting).

⁴⁶ *Id.* at 2848 (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819)).

⁴⁷ See discussion *infra* Part II.C.

⁴⁸ See *Horne*, 135 S. Ct. at 2429. Chief Justice Roberts was dismissive of arguments raised by dissenters regarding the deprivation of economic value through prohibition on sale. See *Andrus v. Allard*, 444 U.S. 51 (1979). As well as government-forced intrusion into shopping center premises of certain speakers. See *Prune Yard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980). *Id.*

conditioning development approvals on transfers of personalty constitute exactions.⁴⁹

A Manichaeian physical-regulatory distinction still leaves open a question posed by Justice Brennan in *Penn Central*: How to best deal with “interference [with private property] aris[ing] from some public program adjusting the benefits and burdens of economic life to promote the common good?”⁵⁰ Finally, that brings up a question long buried under the rug: Are the fact-intensive and common-sense based questions regarding the taking of personal as well as real property better dealt with using substantive due process analysis rather than a *Penn Central* analysis based on all facts and circumstances?⁵¹

The Court’s regulatory takings doctrine has been a famous “muddle,”⁵² marked by arcane complexity⁵³ and the palpable unwillingness of federal courts to involve themselves in land use regulation.⁵⁴

2. *The Problem of Appropriation*

Even while *Horne* extends the *per se* rule to the appropriation of personal property, it did not have occasion to confront how

⁴⁹ See discussion *infra* Part II.B.1.

⁵⁰ Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

⁵¹ See discussion *infra* Part II.C.4.

⁵² See, e.g., Eduardo M. Peñalver & Lior Jacob Strahilevitz, *Judicial Takings or Due Process?*, 97 CORNELL L. REV. 305, 321 n.64 (2012) (noting the “consensus among most scholars is that the Supreme Court’s takings jurisprudence is a ‘muddle’” and citing examples).

⁵³ See generally Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 PENN ST. L. REV. 601 (2014) (asserting that “parcel as a whole” is of equal importance with the conventional three factors of economic impact, investment-backed expectations, and character of the regulation, and analyzing the factors and their application).

⁵⁴ See Steven J. Eagle, *Penn Central and Its Reluctant Muftis*, 66 BAYLOR L. REV. 1 (2014) (examining the theoretical underpinnings of the case and the devices employed by federal courts to avoid regulatory takings cases).

appropriations of less than the owner's entire interest are to be measured. One aspect of this is that *Horne* vacillates between a government taking of specific property and demands by the government that part of a larger and more fungible property be turned over.⁵⁵ Thus, the ghost of the *Penn Central* "parcel as a whole" test is not entirely exorcised by switching to a "physical takings" framework.⁵⁶

In the case of real property, a temporary physical appropriation of empty rental premises, for instance, triggers the requirement of just compensation for a leasehold interest. In the classic case of *United States v. General Motors Corp.*,⁵⁷ the Government commandeered occupancy of a warehouse during World War II. The Court began with the normal presumption that just compensation is payable only for the "value of the interest taken."⁵⁸ However, since the Government displaced a sitting tenant with a long-term lease, the Court held that measure of damages insufficient.

It is altogether another matter when the Government does not take his entire interest, but by the form of its proceeding chops it into bits, of which it takes only what it wants, however few or minute, and leaves him holding the remainder, which may then be altogether useless to him, refusing to pay more than the "market rental value" for the use of the chips so cut off. This is neither the "taking" nor the "just compensation" the Fifth Amendment contemplates. The value of such an occupancy is to be ascertained, not by treating what is taken as an empty warehouse to be leased for a long term, but what would be

⁵⁵ See *infra* notes 86-93 and accompanying text.

⁵⁶ *Penn Cent. Transp. Co.*, 438 U.S. at 130-31, n.27.

⁵⁷ *United States v. Gen. Motors Corp.*, 323 U.S. 373, 375 (1945).

⁵⁸ *Id.* at 379.

the market rental value of such a building on a lease by the long-term tenant to the temporary occupier.⁵⁹

Another problem is whether there is an appropriation at all, as opposed to a government tort.⁶⁰ In *Hendler v. United States*,⁶¹ the U.S. Court of Appeals for the Federal Circuit found that the placement and maintenance of EPA monitoring wells on the plaintiff's property could constitute a taking. By contrast, "occupancy that is transient and relatively inconsequential ... properly can be viewed as no more than a common law trespass. . . . [A] truckdriver parking on someone's vacant land to eat lunch is an example."⁶² The Federal Circuit presented a practical test for discerning when acts constitute government takings or torts in *Ridge Line, Inc. v. United States*.⁶³ The claimant asserted that storm runoff from construction on federal property constituted a compensable taking of a water flowage easement. The court declared:

The line distinguishing potential physical takings from possible torts is drawn by a two-part inquiry. First, a property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the "direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action." . . . Second, the nature and magnitude of the government action must be considered. Even where the effects of the government action are predictable, to constitute a taking, an invasion must appropriate a benefit to the government at

⁵⁹ *Id.* at 382.

⁶⁰ See *Hansen v. United States*, 65 Fed. Cl. 76 (2005) (providing a good overview of the distinction between appropriation and government tort claims).

⁶¹ *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991).

⁶² *Id.*

⁶³ *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1358 (Fed. Cir. 2003).

the expense of the property owner, or at least preempt the owner's right to enjoy his property for an extended period of time, rather than merely inflict an injury that reduces its value.⁶⁴

In *Arkansas Game and Fish Commission v. United States*,⁶⁵ the Supreme Court held that

government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection. When regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence *vel non* of a compensable taking.⁶⁶

Even the destruction of property by the Government might not be an appropriation resulting in a compensable taking. For instance, in *United States v. Caltex (Philippines), Inc.*,⁶⁷ company employees were conscripted to destroy oil refineries before the critical assets could be captured by advancing Japanese troops. Chief Justice Vinson declared for the Court that the "terse language of the Fifth Amendment is no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war."⁶⁸ Justice Douglas dissented on the grounds that "[t]he property was destroyed, not because it was in the nature of a public nuisance, but because its destruction was deemed necessary to help win the war. It was as clearly *appropriated* to that end as animals, food, and supplies requisitioned for the defense effort."⁶⁹

⁶⁴ *Id.* at 1355-56 (citations omitted).

⁶⁵ *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 522 (2012).

⁶⁶ *Id.* at 522-23 (internal citations omitted).

⁶⁷ *United States v. Caltex*, 344 U.S. 149 (1952).

⁶⁸ *Id.* at 155.

⁶⁹ *Id.* at 203-04 (Douglas, J., dissenting) (emphasis added).

Obviously, personal property is more amenable to loss than real property, and also more amenable to mistreatment. In *Simmons v. Loose*,⁷⁰ for instance, a New Jersey appellate court used a balancing test to discern whether police damage to personal property in the course of executing a search warrant was a compensable taking. In ruling that it did not, the court stressed that “the property has not been put to any productive use by the government” and the “relatively short and reasonably executed search warrant was akin to a trespass, not a taking.”⁷¹ If the facts were instead that the police had commandeered a private automobile to block a highway ahead of a fleeing felon, thus putting the automobile to productive use, and if the automobile subsequently was sequestered for months as evidence, then the determination might have been different.

3. *Conflicting Views of Physical Takings in Horne*

Despite the shaky provenance of separation of physical and regulatory takings jurisprudence, Chief Justice Roberts clung fast to it in *Horne*. His reasoning was that a direct appropriation of private property is a “classic taking” under *Tahoe-Sierra*, that “in the case of real property, such an appropriation is a *per se* taking” under *Loretto*, and that “[n]othing 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.”⁷²

The Chief Justice noted that, according to *Lucas v. South Carolina Coastal Council*,⁷³ “while an owner of personal property ought to be aware of the possibility that new regulation might even render his property economically worthless, such an implied limitation was

⁷⁰ *Simmons v. Loose*, 13 A.3d 366 (N.J. App. Div. 2011).

⁷¹ *Id.* at 389.

⁷² *Horne*, 135 S. Ct. at 2426 (citing *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-435 (1982)).

⁷³ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

not reasonable in the case of land.”⁷⁴ Citing *Tahoe-Sierra*, he declared: “*Lucas*, however, was about regulatory takings, not direct appropriations. Whatever *Lucas* had to say about reasonable expectations with regard to regulations, people still do not expect their property, real or personal, to be actually occupied or taken away.”⁷⁵ He also quoted *Tahoe-Sierra*’s language that “[i]t is ‘inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a ‘regulatory taking,’ and vice versa.”⁷⁶

In her dissent in *Horne*, Justice Sotomayor criticized the Court’s “breezy assertion” that there was a *per se* taking.⁷⁷ She noted that under the Marketing Order, the Hornes explicitly retained “[t]he net proceeds from the disposition of reserve tonnage raisins.”⁷⁸ Since their only interest was in realizing pecuniary value from raisin sales, she asserted, “the Order therefore cannot be said to have prevented the Hornes from making *any* use of the relevant property.”⁷⁹ “The fact that at least one property right is not destroyed by the Order is alone sufficient to hold that this case does not fall within the narrow confines of *Loretto*.”⁸⁰ Also, she noted even that a total ban on the sale of a lawfully owned good in *Andrus v. Allard*⁸¹ did not constitute a taking.⁸²

⁷⁴ *Horne*, 135 S. Ct. at 2427 (internal quotation marks omitted).

⁷⁵ *Id.*

⁷⁶ *Id.* at 2428 (quoting *Tahoe-Sierra*, 535 U.S. at 323 (footnote omitted)). See also text accompanying note 33 for expanded quotation.

⁷⁷ *Horne*, 135 S. Ct. at 2441 (Sotomayor, J., dissenting).

⁷⁸ *Id.* at 2439 (Sotomayor, J., dissenting) (quoting the Raisin Marketing Order, 7 CFR § 989.66(h)).

⁷⁹ *Id.*

⁸⁰ *Id.* at 2440 (Sotomayor, J., dissenting).

⁸¹ *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (banning the sale of eagle feathers obtained before that act became illegal, but not their continued possession, charitable disposition, or devise).

⁸² *Horne*, 135 S. Ct. at 2439 (Sotomayor, J., dissenting).

The Court rejected these assertions, stating that where there is a physical taking, a complete deprivation of all economically valuable use is not required.⁸³ Furthermore, the fact that the Hornes retained a “contingent interest of indeterminate value does not mean there has been no physical taking, particularly since the value of the interest depends on the discretion of the taker and may be worthless, as it was for one of the two years at issue here.”⁸⁴ This comports with the general rule that just compensation is not provided for contingent interests in eminent domain actions.⁸⁵

Proceeding beyond theory, Chief Justice Roberts asserted that there was a “clear physical taking” in *Horne*.⁸⁶

Actual raisins are transferred from the growers to the Government. Title to the raisins passes to the Raisin Committee. The Committee's raisins must be physically segregated from free-tonnage raisins. Reserve raisins are sometimes left on the premises of handlers, but they are held “for the account” of the Government. The Committee disposes of what become its raisins as it wishes, to promote the purposes of the raisin marketing order.⁸⁷

Also, he added, the Government sent trucks to pick up the RAC's raisins, but the Hornes refused entry.⁸⁸

Yet, exactly what constituted the physical taking in *Horne* is not clear. Chief Justice Roberts uses differing formulations. “The Committee disposes of *what become its raisins* as it wishes, to promote the purposes of the raisin marketing order.”⁸⁹ “Here of

⁸³ *Id.* at 2428.

⁸⁴ *Id.* at 2429.

⁸⁵ *See, e.g.,* *Ink v. City of Canton*, 212 N.E.2d 574, 577 (Ohio 1965) (citing authorities).

⁸⁶ *Horne*, 135 S. Ct. at 2428.

⁸⁷ *Id.* (citations omitted).

⁸⁸ *Id.* at 2424.

⁸⁹ *Id.* at 2428.

course the raisin program requires physical surrender of *the* raisins and transfer of title.”⁹⁰ He mentioned “a *percentage of a grower’s crop* [that] must be physically set aside,”⁹¹ and also that “actual raisins *are* transferred.”⁹² The grammatical passivity of these constructions obscures that individual raisins to be reserved were selected by the Hornes from their crop, not specified by the RAC.⁹³ To the extent the referent of the reserve requirement is a part of a larger crop, the language that specific property is appropriated is undercut.

II. HORNE AND TAKINGS JURISPRUDENTIAL CONTROVERSIES

The extension of *per se* takings analysis to personal property in *Horne v. Department of Agriculture*⁹⁴ will not ameliorate existing conceptual and practical problems with the Supreme Court’s takings jurisprudence. On the contrary, it is apt to make them worse.

A. PROCEDURAL COMPLEXITY

One important thread in the Supreme Court’s recent takings jurisprudence, most recently advanced in *Horne I*,⁹⁵ is an increasing concern for those substantially and adversely affected by labyrinthine sets of procedural regulations. In the Court’s second *Horne* opinion, Chief Justice Roberts concluded a rejection of a remand to ascertain damages with the declaration that “[t]his case, in litigation for more than a decade, has gone on long enough.”⁹⁶

⁹⁰ *Id.* at 2429 (emphasis added).

⁹¹ *Id.* at 2424.

⁹² *Id.* at 2428.

⁹³ *Id.* at 2424 (“[I]n 2002, the Hornes refused to set aside any raisins for the Government, believing they were not legally bound to do so[.]”).

⁹⁴ *Horne v. U.S. Dep’t of Agric.*, 135 S. Ct. 2419 (2015).

⁹⁵ *Horne v. U.S. Dep’t of Agric.*, 133 S. Ct. 2053 (2013).

⁹⁶ *Horne*, 135 S. Ct. at 2433.

1. *Takings Claims as Affirmative Defenses*

As previously discussed,⁹⁷ in *Horne I* the Court concluded that the Hornes could assert their takings claims in U.S. district court as an affirmative defense to the fines levied against them without having to pay the fines first and then file a separate suit in the U.S. Court of Federal Claims. Beyond the technical aspects of the Agricultural Marketing Agreement Act's implicit withdrawal of jurisdiction from the CFC,⁹⁸ Justice Thomas' opinion for the Court contained a strong appeal to common sense.

In the case of an administrative enforcement proceeding, when a party raises a constitutional defense to an assessed fine, it would make little sense to require the party to pay the fine in one proceeding and then turn around and sue for recovery of that same money in another proceeding.⁹⁹

2. *Challenges to Environmental Compliance Orders*

In *Sackett v. Environmental Protection Agency*,¹⁰⁰ the landowners had received a compliance order from the EPA stating that their land was subject to regulation under the Clean Water Act (CWA), and that they had violated the Act by filling a half-acre of land in preparation for building a house.¹⁰¹ The EPA claimed that the landowners could not bring suit to challenge its administrative compliance order. If and when the EPA decided to initiate a civil enforcement action under the CWA, the landowners faced a

⁹⁷ See *supra* text accompanying notes 921.

⁹⁸ See *supra* text accompanying notes 20-21.

⁹⁹ *Horne I*, at 133 S. Ct. at 2063.

¹⁰⁰ *Sackett v. EPA*, 132 S. Ct. 1367 (2012).

¹⁰¹ *Id.* at 1369-71.

potential fine of up to \$37,500 for violating the statute, which could be doubled for violating the compliance order.¹⁰²

The EPA ordered the Sacketts to cease construction, remediate the site, and provide the agency with complete documentation. The landowners were denied a hearing by the EPA, and subsequently sued for injunctive and declarative relief.¹⁰³ The U.S. Court of Appeals for the Ninth Circuit concluded that “the Act preclude[s] pre-enforcement judicial review of compliance orders” and “that such preclusion does not violate the Fifth Amendment’s due process guarantee.”¹⁰⁴

In an opinion by Justice Scalia, the Supreme Court reversed. It held that the compliance order “is final agency action for which there is no adequate remedy other than APA review, and that the Clean Water Act does not preclude that review.”¹⁰⁵ Justice Scalia added:

[T]here is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into voluntary compliance without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA’s jurisdiction.¹⁰⁶

In a concurring opinion, Justice Alito warned even more strongly that the Federal Government’s position “would have put the property rights of ordinary Americans entirely at the mercy of

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1371 (quoting *Sackett v. EPA*, 622 F.3d 1129, 1144, 1147 (9th Cir. 2010) (internal citations and quotation marks omitted).

¹⁰⁵ *Id.* at 1374.

¹⁰⁶ *Id.* (internal quotations omitted).

Environmental Protection Agency (EPA) employees.”¹⁰⁷ This strong language might have consequences.¹⁰⁸

3. *Challenges to Corps of Engineers’ Jurisdictional Determinations*

Sackett was predicated on the fact that the landowner faced the dilemma of choosing between expensive and onerous “voluntary” compliance or draconian fines. In the Court’s more recent holding in *U.S. Army Corps of Engineers v. Hawkes Co.*, however,¹⁰⁹ there had been no administrative determining of wrongdoing. Rather, the Government asserted that it could compel the landowner to abandon its plans to extract peat from its land, to accede to the Corps of Engineers requirements for expensive and time-consuming remediation, or to proceed with its project, at the risk of incurring heavy civil fines and penalties, and possible criminal sanctions.¹¹⁰ Chief Justice Roberts, writing for the Court, rejected that the Corps could compel choice without the possibility of judicial review.

The Corps had issued an “approved jurisdictional determination” (“approved JD”) stating that the Hawkes parcel was subject to the Clean Water Act (CWA), since “its wetlands had a ‘significant nexus’ to [a river] 120 miles away.”¹¹¹

Chief Justice Roberts held that the approved JD was ripe for judicial review under the Administrative Procedure Act (APA), since it was a “final agency action for which there is no other adequate remedy in a court.”¹¹² He noted that the approved JD

¹⁰⁷ *Id.* at 1375.

¹⁰⁸ See *infra* Part II.B.2 for discussion.

¹⁰⁹ *Hawkes Co. v. U.S. Army Corps of Eng’rs*, 782 F.3d 994 (8th Cir. 2015), *cert. granted*, 136 S. Ct. 615 (2015), *aff’d*, 136 S. Ct. 1807 (2016).

¹¹⁰ *Hawkes*, 136 S. Ct. at 1815.

¹¹¹ *Id.* at 1813 (quoting approved JD).

¹¹² 5 U.S.C. § 704.

satisfied both prongs of the Court's test for ripeness for APA review contained in *Bennett v. Spear*.¹¹³ It marked "the consummation of the agency's decision-making process," and also was an action "by which rights or obligations have been determined, or from which legal consequences will flow."¹¹⁴

Roberts noted that the Corps itself had referred to approved JDs as a "final agency action,"¹¹⁵ and that, whereas a "negative JD" (finding of no jurisdictional wetlands) would remove the possibility of federal agency litigation against the landowner for a five-year period and eliminate civil liability for past violations," a positive approved JD would have the legal consequence of "denial of the safe harbor that negative JDs afford."¹¹⁶

More germane for present purposes, Chief Justice Roberts reiterated that "the permitting process can be arduous, expensive, and long."¹¹⁷ As in *Sackett*, the property owners faced the choice of acquiescing in the Corps' determination despite the significant hardships that would entail, or disregarding it at the cost of possible heavy fines and penalties. To paraphrase *Horne I*, where a party raises a statutory or constitutional defense to an agency determination with very significant practical consequences, it would make little sense to require the party to acquiesce or instead risk the heavy cost of disobedience.¹¹⁸

4. *Mandated State Litigation as Barring Subsequent Takings Claims*

An even more important area in which the Supreme Court has shown impatience with unnecessary impediments to individuals

¹¹³ 520 U.S. 154 (1997).

¹¹⁴ *Hawkes*, 136 S. Ct. at 1813 (quoting *Bennett*, 177-78).

¹¹⁵ *Id.* at 1813-14.

¹¹⁶ *Id.* at 1814.

¹¹⁷ *Id.* at 1815.

¹¹⁸ See *supra* text accompanying note 99.

asserting their Fifth Amendment rights concerns the state litigation prong of the *Williamson County* regulatory takings “ripeness doctrine.”¹¹⁹ The state litigation prong requires that property owners who wish to assert takings claims against states or localities, founded under the U.S. Constitution, in federal court, first litigate those claims in state court. When landowners wish to argue in federal court that state or local development restrictions constitute regulatory takings, “both sides face years of litigation with an unpredictable result that could prove ruinous to at least one of the litigants.”¹²⁰

Even then, the “ripeness” rule simply is a misnomer. Professor Thomas Roberts noted that the “understandable reaction” of landowners was that the *Williamson County* ripeness doctrine “perpetrates a fraud or hoax.”¹²¹ “[A]n unripe suit,” he added, “is barred at the moment it comes into existence. Like a tomato that suffers vine rot, it goes from being green to mushy red overnight. It is never able to be eaten.”¹²² This view, at the same time cynical and accurate, was vindicated by the Supreme Court in *San Remo Hotel, L.P. v. City and County of San Francisco*.¹²³ There, the Court held that the presentation of substantive takings issues in state court precluded raising the same issues in federal court later, even if the claimant in state court specifically reserved federal causes of action

¹¹⁹ *Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (holding that a regulatory takings claim against a state or local government is not “ripe” for review in federal court unless the claimant has sought a final determination from the agency and has sought and been denied compensation in state court). See also *supra* notes 39-44 and accompanying text.

¹²⁰ Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 3 (1995).

¹²¹ Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. LAND USE & ENVTL. L. 37, 71 (1995).

¹²² *Id.* at 72.

¹²³ *San Remo Hotel, L.P. v. City & Cty. of S.F.*, 545 U.S. 323 (2005).

for subsequent federal review.¹²⁴ The factual issues pertaining to state as-applied takings claims are the same as those pertaining to federal takings claims, and the Court in *San Remo Hotel* declared that takings claimants “did not have the right . . . to seek state review of the same substantive issues they sought to reserve.”¹²⁵ Thus, the application of issue preclusion means that claimants can bring their claims to federal court, but are precluded from raising their substantive takings issues once there.

Chief Justice Rehnquist, joined by Justices O’Connor, Kennedy, and Thomas, concurred in the judgment but challenged the correctness of the state litigation prong of *Williamson County*, noting that state litigation is not required as a precursor to litigating other federal constitutional claims in federal court.¹²⁶ Chief Justice Rehnquist declared:

It is not clear to me that *Williamson County* was correct in demanding that, once a government entity has reached a final decision with respect to a claimant's property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court. The Court in *Williamson County* purported to interpret the Fifth Amendment in divining this state-litigation requirement. More recently, we have referred to it as merely a prudential requirement. It is not obvious that either constitutional or prudential principles require claimants to utilize all state

¹²⁴ *Id.* at 342 (“We have repeatedly held . . . that issues actually decided in valid state-court judgments may well deprive plaintiffs of the ‘right’ to have their federal claims relitigated in federal court. This is so even when the plaintiff would have preferred not to litigate in state court, but was required to do so by statute or prudential rules.”). -

¹²⁵ *Id.* at 346.

¹²⁶ *Id.* at 349-51 (Rehnquist, C.J., concurring in judgment).

compensation procedures before they can bring a federal takings claim.¹²⁷

Rehnquist distinguished *Patsy v. Board of Regents*,¹²⁸ which held that plaintiffs suing under § 1983 are not required to have exhausted state administrative remedies.¹²⁹

5. *The Court's Rejection of Overly-Expansive Takings Dicta*

In 1924, in *Sanguinetti v. United States*,¹³⁰ the Court summarized its prior cases adjudicating when flooding associated with government dams resulted in compensable takings. It stated that “in order to create an enforceable liability against the Government, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, *permanent* invasion of the land.”¹³¹ In 2012, the Court revisited that precedent in *Arkansas Game and Fish Commission v. United States*.¹³² There, the Commission’s valuable trees were substantially damaged by floodwater releases from a government dam that were *intermittent* over several years. “The Government urge[d] the Court to extract from the quoted words a definitive rule that there can be no temporary taking caused by floods.”¹³³ Responding for the Court, Justice Ginsburg stated: “But the Court does not read the passing

¹²⁷ *Id.* at 349 (Rehnquist, C.J., concurring in judgment) (citing *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 733-34 (1997) (prudential requirement) and contrasting *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 516 (1982) (holding that plaintiffs suing under § 1983 are not required to have exhausted state administrative remedies)).

¹²⁸ *Patsy v. Board of Regents of Fla.*, 457 U.S. 496 (1982).

¹²⁹ *San Remo*, 545 U.S. at 349-51 (Rehnquist, C.J., concurring in judgment) (citing *Patsy*, 457 U.S. at 516).

¹³⁰ *Sanguinetti v. United States*, 264 U.S. 146 (1924).

¹³¹ *Id.* at 149 (emphasis added).

¹³² *Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511 (2012).

¹³³ *Id.* at 520.

reference to permanence in *Sanguinetti* as having done so much work.”¹³⁴ In finding for the Commission, she added:

[W]e recall Chief Justice Marshall’s sage observation that “general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.”¹³⁵

In other cases, the Court has rejected that arguably general and long-standing limits on the property rights of market participants actually were limits. As *Horne*¹³⁶ acknowledged, the dicta in *Lucas v. South Carolina Coastal Council*,¹³⁷ a regulatory takings case, “recognized that while an owner of personal property ‘ought to be aware of the possibility that new regulation might even render his property economically worthless,’ such an ‘implied limitation’ was not reasonable in the case of land.”¹³⁸

Likewise, with respect to personal property, what might be considered historical limitations are not hard and fast. In *City of Los Angeles v. Patel*,¹³⁹ decided the same week as *Horne*, the Court struck down as a facial violation of the Fourth Amendment a city ordinance permitting police to search through hotel guest registers both without a warrant and without providing the hotel owner an opportunity to challenge the search in advance. The Court cited the city’s attempts

¹³⁴ *Id.*

¹³⁵ *Id.* (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)).

¹³⁶ *Horne v. U.S. Dep’t. of Agric.*, 135 S. Ct. 2419 (2015).

¹³⁷ *Horne*, 135 S. Ct. at 2427 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. at 1027-28).

¹³⁸ *Id.*

¹³⁹ 135 S. Ct. 2443 (2015).

to recast [its] hodgepodge of regulations as a comprehensive scheme by referring to a “centuries-old tradition” of warrantless searches of hotels. History is relevant when determining whether an industry is closely regulated. The historical record here, however, is not as clear as petitioner suggests.¹⁴⁰

6. *The “Tucker Act Shuffle”*

A last complexity is the “Tucker Act Shuffle,” which results from the fact that the Court of Federal Claims, an Article I court, is granted exclusive jurisdiction by the Tucker Act over most claims for just compensation,¹⁴¹ but cannot grant injunctive or declaratory relief from wrongful administrative actions.¹⁴² Consequently, claims for relief from arbitrary agency conduct must be litigated in U.S. district courts. As Professor Thomas Merrill recently noted, “this means claimants must often split their claims between two courts, giving rise to tricky questions of timing and preclusion. If they file in the wrong court, or get the sequencing wrong, consideration of the takings claim may be foreclosed.”¹⁴³

Among the specific problems is that, under 28 U.S.C. § 1500, suit for just compensation cannot be brought in the CFC while a “claim” is pending in district court.¹⁴⁴ Yet whether claims are “comparable” is “elusive.”¹⁴⁵ “If the claims are distinctly different, [plaintiffs] are excused from the jurisdictional dance required by

¹⁴⁰ *Id.* at 2455 (citations omitted).

¹⁴¹ 28 U.S.C. § 1346 (a)(2)(2012) (giving the CFC exclusive jurisdiction over claims exceeding \$10,000).

¹⁴² *United States v. King*, 395 U.S. 1, 2-5 (1969).

¹⁴³ Thomas W. Merrill, *Anticipatory Remedies for Takings*, 128 HARV. L. REV. 1630, 1630-31 (2015).

¹⁴⁴ 28 U.S.C.A. § 1500 (West 2015).

¹⁴⁵ *Keene Corp. v. United States*, 508 U.S. 200, 210 (1993).

§ 1500.”¹⁴⁶ However, § 1500 does encompass claims presenting the same underlying facts even though seeking different relief.¹⁴⁷

Also, a plaintiff might completely adjudicate the APA claim first, but, “by the time the plaintiff exhausts all appeals challenging the agency, it is possible the CFC’s six-year statute of limitations would have run, barring suit in that court.”¹⁴⁸ Legislation in Congress to eliminate the “Tucker Act Shuffle” has been proposed but not enacted.¹⁴⁹

Professor Merrill noted that the Supreme Court has, in fact, recently adjudicated takings claims in several recent cases, “even though the claimant has not presented a claim for monetary compensation to the court having authority to provide such relief.”¹⁵⁰ He cited *Stop the Beach Renourishment*,¹⁵¹ *Koontz*,¹⁵² and *Horne I*.¹⁵³ Merrill proposed guidelines for the exercise by federal

¹⁴⁶ *Loveladies Harbor v. United States*, 27 F.3d 1545, 1549 (Fed. Cir.1994).

¹⁴⁷ *United States v. Tohono O’odham Nation*, 563 U.S. 307, 313 (2011).

¹⁴⁸ Craig A. Schwartz, *Footloose: How to Tame the Tucker Act Shuffle After United States v. Tohono O’odham Nation*, 59 UCLA L. REV. DISCOURSE 2, 17 (2011) (referring to the statute of limitations, 28 U.S.C. § 2501).

¹⁴⁹ See, e.g., H.R. REP. NO. 105-424, at 2 (1998) (“H.R. 992 is intended to end the ‘Tucker Act Shuffles’ that currently can bounce property owners between U.S. District Courts and the Court of Federal Claims when seeking redress against the federal government for the taking of their property.”).

¹⁵⁰ Merrill, *supra* note 143, at 1634.

¹⁵¹ *Id.* at 1635-36, noting *Stop the Beach Renourishment, Inc. v. Florida Dept. of Env’tl. Protection*, 560 U.S. 702 (2010) (considering “whether the Florida Supreme Court had committed a judicial taking, even though the claimant had made no attempt to secure compensation for the alleged taking in state court.”).

¹⁵² *Id.* at 1636, noting *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013) (“in which the Court determined that a landowner could pursue a takings challenge to an exaction even though the exaction had only been threatened and hence no taking had yet occurred.”).

¹⁵³ *Id.*, noting *Horne v. U.S. Dep’t of Agric.*, 135 S. Ct. 2419 (2013) (“[holding] that a takings claim could be raised defensively in a judicial review proceeding in a court of general jurisdiction without the claimant’s first seeking compensation from the CFC.”).

courts of what he advocated as their authority to enter anticipatory relief under the Takings Clause.¹⁵⁴

B. CONDITIONS ON MARKET ENTRY AND
UNCONSTITUTIONAL EXACTIONS

One area of great potential impact of *Horne v. Department of Agriculture* concerns restrictions on markets, including those for real estate development and housing. Proposals affecting land use by adding urban density and affordable housing are particular flashpoints.

1. *Participation in the Market*

Chief Justice Roberts succinctly stated the third question presented in *Horne*: “Whether a governmental mandate to relinquish specific, identifiable property as a ‘condition’ on permission to engage in commerce effects a per se taking.”¹⁵⁵ He responded: “The answer, at least in this case, is yes.”¹⁵⁶ While the answer was qualified, it is likely to have powerful consequences favoring property owners.

Roberts noted the agency’s argument that “the reserve requirement is not a taking because raisin growers voluntarily choose to participate in the raisin market. 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.”¹⁵⁷

The Chief Justice contrasted those cases in which there had been a “voluntary exchange” of private property for a “valuable

¹⁵⁴ *Id.* at 1669-74.

¹⁵⁵ *Horne v. U.S. Dep’t. of Agric.*, 135 S. Ct. 2419, 2430 (2015).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* (internal quotation marks omitted).

government benefit.” In *Ruckelshaus v. Monsanto Co.*,¹⁵⁸ the consensual trade was the disclosure of “health, safety, and environmental information about pesticides” that constituted trade secrets pertaining to pesticides in exchange for “a license to sell dangerous chemicals.”¹⁵⁹ In *Leonard & Leonard v. Earle*,¹⁶⁰ it was a remission of valuable oyster shells or their cash equivalent in exchange for permission to harvest oysters that belonged to Maryland by dint of its sovereignty over state waters. In those cases, Roberts asserted, the government had surrendered either safeguards of public health and safety or the state’s own property.

Chief Justice Roberts then discussed “exchanges” in which the state did not own what it purported to convey. Perhaps most fundamental, in *Nollan*, Justice Scalia wrote for the Court that

the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a governmental benefit. And thus the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary exchange[.]¹⁶¹

In *Horne*, the Chief Justice built upon *Nollan* and disparaged the precedential value of *Monsanto* in this context:

Selling produce in interstate commerce, although certainly subject to reasonable government regulation, is similarly not a special governmental benefit that the Government may hold hostage, to be ransomed by the waiver of

¹⁵⁸ 467 U.S. 986 (1984).

¹⁵⁹ *Horne*, 135 S. Ct. at 2430 (discussing *Monsanto*, 467 U.S. at 1007).

¹⁶⁰ 279 U.S. 392, 397 (1929).

¹⁶¹ *Id.* at 833 n.2 (referring to *Monsanto*, 467 U.S. at 1007 (1984) (internal quotation marks omitted)).

constitutional protection. Raisins are not dangerous pesticides; they are a healthy snack.¹⁶²

With reference to *Leonard & Leonard*, and perhaps more generally to John Locke's labor theory of value,¹⁶³ Roberts added: "Raisins are not like oysters: they are private property – the fruit of the growers' labor – not public things subject to the absolute control of the state. Any physical taking of them for public use must be accompanied by just compensation."¹⁶⁴

2. *Horne, Koontz and the Future of Development Exactions*

Possibly the most important result of *Horne* is its synergy with the "unconstitutional conditions" doctrine pertaining to land development permits. As initially developed in *Nollan*, the doctrine required an "essential nexus" between the furtherance of a goal within the regulator's authority and the regulator's demand on the property owner.¹⁶⁵ The Commission's demand for a lateral easement along the beach behind the Nollans' home did not comport with its mandate to ensure access to the beach.¹⁶⁶

In the Court's subsequent case, *Dolan v. City of Tigard*,¹⁶⁷ there was a nexus between the Dolans' application to expand their wholesale plumbing supply store and to blacktop their parking lot on one hand, and the city's power to ameliorate flooding in a creek behind the store and to alleviate traffic congestion on the other. The

¹⁶² *Horne v. U.S. Dep't. of Agric.*, 135 S. Ct. 2419, 2430-31 (2015).

¹⁶³ JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 18-21 (Crawford B. Macpherson ed., Hackett Pub. Co. 1980) (1690) ("As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, inclose it from the common.").

¹⁶⁴ *Horne*, 135 S. Ct. at 2431 (internal citation and quotation marks omitted).

¹⁶⁵ *Nollan*, 483 U.S. 825, 837 (1987).

¹⁶⁶ *Id.*

¹⁶⁷ 512 U.S. 374 (1994).

Court required that there be “rough proportionality” between a condition imposed on the landowners and the additional harms created by their store’s expansion, as ascertained in an “individualized determination.”¹⁶⁸

Most recently, in *Koontz v. St. Johns River Water Management District*,¹⁶⁹ the Court extended *Nollan-Dolan* to the denial of development approvals where property owners refuse to accede to the exactions upon which they are conditioned.¹⁷⁰ Justice Alito, writing for the Court, restated the “overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.”¹⁷¹ The Court also held that monetary exactions would be treated the same way as exactions of real property.¹⁷² *Koontz* explained:

Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they *impermissibly burden the right not to have property taken without just compensation*. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.¹⁷³

Whereas the holding in *Horne* was based on the distinction between takings by appropriation and takings by regulation,¹⁷⁴ in

¹⁶⁸ *Id.* at 531.

¹⁶⁹ 133 S. Ct. 2586 (2013).

¹⁷⁰ *Id.* at 2595.

¹⁷¹ *Id.* at 2594.

¹⁷² *Id.* at 2595-97.

¹⁷³ *Id.* at 2596 (emphasis added).

¹⁷⁴ *Horne v. U.S. Dep’t. of Agric.*, 135 S. Ct. 2419, 2428-30 (2015).

Koontz there was no taking at all. The third question presented in *Horne* was “Whether a governmental mandate to relinquish specific, identifiable property as a condition on permission to engage in commerce effects a per se taking.”¹⁷⁵ Chief Justice Roberts’ affirmative response, albeit “at least in this case,”¹⁷⁶ may readily be transposed to an impermissible burden on Takings Clause rights context,¹⁷⁷ for both real and personal property, without breaching the bright-line distinction in *Horne* between physical and regulatory takings.¹⁷⁸

This Article asserts that *Horne* and *Koontz* are mutually reinforcing in substance and in tone. Together, the cases presage a more critical examination of exactions typically employed by municipalities in connection with land development. The reference to “tone” relates to the use of language in *Koontz* and *Horne* as indicative that the majorities in those cases seemed to view the regulatory process as having a proclivity towards predation. Thus, writing for the Court in *Koontz*, Justice Alito stated:

So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable. *Extortionate demands of this sort* frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.¹⁷⁹

Alito added that *Nollan* and *Dolan* equate the “property that the government demands and the social costs of the applicant’s proposal . . . while still forbidding the government from engaging

¹⁷⁵ *Id.* at 2430.

¹⁷⁶ *Id.*

¹⁷⁷ *Koontz*, 133 S. Ct. at 2596. See *supra* note 155 and accompanying text.

¹⁷⁸ See *infra* Part III for discussion.

¹⁷⁹ *Koontz*, 133 S. Ct. at 2595 (emphasis added).

in *out-and-out . . . extortion*,” and that the locality “may not *leverage its legitimate interest* in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.”¹⁸⁰

Likewise, Chief Justice Roberts wrote in *Horne* that selling produce in interstate commerce is “not a special governmental benefit that the Government may *hold hostage, to be ransomed* by the waiver of constitutional protection.”¹⁸¹ He also alluded to government regulators as comparable to Marie Antoinette.¹⁸²

Such strong language is not unique to those cases. In *Sackett v. Environmental Protection Agency*,¹⁸³ Justice Scalia characterized the Government’s view of the Clean Water Act as “*strong-arming*” regulated parties,¹⁸⁴ and the concurring opinion of Justice Alito warned of “put[ing] the property rights of ordinary Americans *entirely at the mercy* of Environmental Protection Agency (EPA) employees.”¹⁸⁵

The substantive aspect common to *Koontz* and *Horne* is the centrality of the predicate to the holdings in *Nollan* and *Dolan* that “the right to build on one’s own property – even though its exercise can be subjected to legitimate permitting requirements – cannot remotely be described as a ‘governmental benefit.’”¹⁸⁶ Quoting that language in *Horne*, Chief Justice Roberts added that there was no “voluntary exchange” for the appropriation of petitioners’ raisins,

¹⁸⁰ *Id.* (internal citations and quotation marks omitted) (emphasis added).

¹⁸¹ *Horne v. U.S. Dep’t of Agric.*, 135 S. Ct. 2419, 2430-31 (2015) (emphasis added). See *supra* text accompanying note 162 for context.

¹⁸² *Id.* at 2430 (2015) (“‘Let them sell wine’ is probably not much more comforting to the raisin growers than similar retorts have been to others throughout history.”)

¹⁸³ 132 S. Ct. 1367 (2012). See *supra* text accompanying notes 100-107 for discussion.

¹⁸⁴ *Sackett*, 132 S. Ct. at 1374 (emphasis added).

¹⁸⁵ *Id.* at 1375 (emphasis added).

¹⁸⁶ *Nollan*, 483 U.S. at 834 n.2 (quoted in *Horne*, 135 S. Ct. at 2430).

since there was no *quid pro quo* in the form of a benefit in the power of the Government to confer.¹⁸⁷

In *Dolan*, Chief Justice Rehnquist stated for the Court:

Under the well-settled doctrine of “unconstitutional conditions,” the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.”¹⁸⁸

Chief Justice Roberts found support for the Court’s view—that the Government conferred no special benefit by permitting the Hornes to enter the raisin market—in *Loretto v. Teleprompter Manhattan CATV Corp.*,¹⁸⁹ where the Court “rejected the argument that the New York law was not a taking because a landlord could avoid the requirement by ceasing to be a landlord. [The Court] held instead that a landlord’s ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation.”¹⁹⁰ Again, while *Loretto* is bound up in the Court’s existing physical-regulatory takings dichotomy, the *Koontz* “impermissibly burden” standard is not.

3. *Applying Koontz and Horne to Mandated Affordable Housing*

An important application of the Court’s approach in *Koontz* and *Horne* might be to affirmative mandates for landlords to provide affordable housing. In *California Building Industry Association v. City*

¹⁸⁷ *Horne*, 135 S. Ct. at 2430.

¹⁸⁸ *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

¹⁸⁹ 458 U.S. 419 (1982).

¹⁹⁰ *Horne*, 135 S. Ct. at 2430 (internal citation and quotations omitted).

of *San Jose, (CBIA)*¹⁹¹ the plaintiff, representing California homebuilders, sought injunctive and declaratory relief against a municipal ordinance that requires that developers sell 15 percent of on-site for-sale units to low-income buyers at prices not to exceed 30 percent of those buyers' median income. The California Supreme Court held that the ordinance was not an unconstitutional exaction and that there was no need for a showing that the restrictions were reasonably related to the impact of a particular development to which the ordinance applied.

Nothing in *Koontz* suggests that the unconstitutional conditions doctrine under *Nollan* and *Dolan* would apply where the government simply restricts the use of property without demanding the conveyance of some identifiable protected property interest (a dedication of property or the payment of money) as a condition of approval. It is the governmental requirement that the property owner convey some identifiable property interest that constitutes a so-called "exaction" under the takings clause and that brings the unconstitutional conditions doctrine into play.¹⁹²

Instead, the California Supreme Court characterized the ordinance as within "municipalities' general broad discretion to regulate the use of real property to serve the legitimate interests of the general public and the community at large."¹⁹³ Since there was no physical taking or deprivation of all viable economic use, there would be no taking except in the "unusual circumstance" where the

¹⁹¹ 351 P.3d 974 (Cal. 2015), *cert. denied*, 136 S. Ct. 928 (2016).

¹⁹² *Id.* at 990.

¹⁹³ *Id.* at 991.

ad hoc, multifactor, regulatory takings test of *Penn Central* would so require.¹⁹⁴ The California Supreme Court also asserted that

when a municipality enacts a broad inclusionary housing ordinance to increase the amount of affordable housing in the community and to disperse new affordable housing in economically diverse projects throughout the community, the validity of the ordinance does not depend upon a showing that the restrictions are reasonably related to the impact of a particular development to which the ordinance applies.¹⁹⁵

The court distinguished cases adjudicating fees imposed for the purpose of offsetting the impact of development.¹⁹⁶ In essence, the California Supreme Court's position in *CBIA* was that developers of multifamily housing projects must obey normal zoning regulations; and requirements for disbursed, affordable housing fit within that rubric. While the economics of such inclusionary programs are self-defeating,¹⁹⁷ it is hardly likely that they will be deemed to violate the Due Process Clause.¹⁹⁸

¹⁹⁴ *Id.* at 996.

¹⁹⁵ *Id.* at 1000.

¹⁹⁶ *Id.*

¹⁹⁷ The seminal work is Robert C. Ellickson, *The Irony of "Inclusionary Zoning"*, 54 S. CAL. L. REV. 1167 (1981). "[Inclusionary] programs are essentially taxes on the production of new housing. The programs will usually increase general housing prices, a result which further limits the housing opportunities of moderate-income families. In short, despite the assertions of inclusionary zoning proponents, most inclusionary ordinances are just another form of exclusionary practice." *Id.* at 1170.

¹⁹⁸ See, e.g., *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring) (describing substantive due process as an "oxymoron"); *Nat'l Paint & Coatings Ass'n v. City of Chi.*, 45 F.3d 1124, 1129 (7th Cir. 1995) (Judge Frank Easterbrook noting acerbically that "[n]ow [the Court has] spent some time looking through the Constitution for the Substantive Due Process Clause without finding it."). See also Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977 (2000).

In his concurrence in the denial of certiorari, Justice Thomas noted that the case of *CBIA* raised an “important and unsettled” Takings Clause issue.¹⁹⁹ He asserted that *Nollan-Dolan-Koontz* would have applied had San Jose’s actions been administrative instead of legislative, and that the lower courts were split on whether the Court’s exactions applied to legislative determinations.²⁰⁰ While noting that the procedural posture of the case did not permit resolution of the issue, Thomas “continue[d] to doubt that the existence of a taking should turn on the type of governmental entity responsible for the taking.”²⁰¹ He added:

Until we decide this issue, property owners and local governments are left uncertain about what legal standard governs legislative ordinances and whether cities can legislatively impose exactions that would not pass muster if done administratively. These factors present compelling reasons for resolving this conflict at the earliest practicable opportunity.²⁰²

The contribution of *Horne* in subsequent adjudications by the United States courts of appeals and likely the Supreme Court in cases presenting facts similar to those in *CBIA* is to buttress that conditions to enter markets not be imposed too readily, lest they become impermissible burdens on Takings Clause rights. As expressed in *Horne*, “Selling produce in interstate commerce, although certainly subject to reasonable government regulation, is similarly not a special governmental benefit that the Government

¹⁹⁹ Cal. Bldg. Indus. Ass’n v. City of San Jose, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in denial of certiorari).

²⁰⁰ *Id.* (citing cases).

²⁰¹ *Id.* (quoting Parking Ass’n of Georgia, Inc. v. City of Atlanta, 515 U.S. 1116, 1117-18; *Id.* at 928 (quoting Parking Ass’n, Inc. v. City of Atlanta, 515 U.S. 1116, 1117-18 (Thomas, J., dissenting from denial of certiorari))).

²⁰² *Id.* at 928-29.

may hold hostage, to be ransomed by the waiver of constitutional protection."²⁰³

In *Levin v. City and County of San Francisco*,²⁰⁴ a federal district court ruled that a City ordinance requiring that landlords withdrawing rent-controlled apartments from the market pay outgoing tenants up to 24 times the difference between their current rent and the alleged fair market value of comparable apartments was an unconstitutional taking. The court observed that San Francisco "faces an affordable housing crisis of remarkable proportions."²⁰⁵ It linked that crisis to "deep structural problems in the housing market, in which increasing demand has met a supply limited by a City that has not produc[ed] housing as [its] population has grown."

The court noted that monetary exactions triggered nexus and rough proportionality requirements under *Koontz*,²⁰⁶ and that "the challenged Ordinance requires a conditional exaction: the loss of substantial funds or physical control over the landlord's unit."²⁰⁷ The plaintiff justifiably relied on the "proposition that when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a *per se* [takings] approach is the proper mode of analysis under the Court's precedent."²⁰⁸ Finally, it noted that tenants could receive up to a quarter-million dollars under the ordinance, that their low rents were a result of government price controls, and that high market rents were caused by "entrenched market forces and structural decisions made by the City long ago in the management of its housing stock."²⁰⁹

²⁰³ *Horne v. U.S. Dep't of Agric.*, 135 S. Ct. 2419, 2430-31 (2015).

²⁰⁴ *Levin v. City & Cty. of S.F.*, 71 F. Supp. 3d 1072 (N.D. Cal. 2014).

²⁰⁵ *Id.* at 1075.

²⁰⁶ *Id.* at 1075 (citing *Koontz*, 133 S. Ct. at 2599).

²⁰⁷ *Id.* at 1083.

²⁰⁸ *Id.* at 1084 (citing *Koontz*, 133 S. Ct. at 2600) (internal quotations omitted).

²⁰⁹ *Id.*

In both *CBIA* and *Levin*, what were being regulated were not the location and physical aspects of buildings, but rather the conditions under which participants could enter or leave markets. Whether correctly or not, the California Raisin Administrative Committee in *Horne* thought that producers, consumers, and society would be better off if it conditioned market entry on appropriation of a substantial part of the raisin producer's crop. Similarly, the cities of San Jose and San Francisco thought that imposing heavy burdens on developers and landlords entering and leaving housing markets would make housing more affordable.

In its wariness of unreasonable restrictions on market participation, *Horne* buttresses the necessity that restrictions be demonstrably reasonable. Where localities mandate that housing units be sold at substantially below market rates, *Koontz* concomitantly indicates that Takings Clause rights might be impermissibly burdened.

The Supreme Court has countenanced rent control on the theory that government is regulating existing landlord-tenant relationships.²¹⁰ However, that rationale does not apply where developers are required to sell inclusionary units to government-approved purchasers at below-market prices. Furthermore, *Horne* suggests that the selection by the developer of the units assigned to the inclusionary housing program is not necessarily an impediment to those units being deemed appropriated.²¹¹

²¹⁰ See, e.g., *Bowles v. Willingham*, 321 U.S. 503 (1944) (rent control); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) ("This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular . . .").

²¹¹ See *supra* notes 86-93 and accompanying text (discussing selection process for reserved raisins in *Horne v. U.S. Dep't of Agric.*, 135 S. Ct. 2419, 2424-29 (2015)).

4. Applying *Koontz* and *Horne* to “Voluntary” Exactions

I have asserted elsewhere the imperative of examining *Koontz* as it plays out in the “gatehouse” of gritty interactions among developers, public officials, and interest groups, as well as in the “mansion” of formal proceedings.²¹² Unsurprisingly, repeat players in real estate development in a geographical area quickly come to accept that it is propitious to accede “voluntarily” to whispered demands that rarely are memorialized in formal correspondence.²¹³ As Professor Jerold Kayden explained decades ago, “zoning for dollars” is pervasive.²¹⁴ Municipalities would “downzone” districts or parcels in the expectation that developers would offer incentives to “upzone” their property to its former, and much more valuable, permitted use. They would get what Justice Alito described in *Koontz* as “leverage.”²¹⁵

While the charged language of *Koontz* and *Horne* suggests the Court’s awareness of the possibilities of political chicanery,²¹⁶ its earlier decisions in *Bell Atlantic Corp. v. Twombly*²¹⁷ and *Ashcroft v. Iqbal*²¹⁸ augur against ferreting it out. In those cases, the Court required that “[t]o survive a motion to dismiss, a complaint must

²¹² Steven J. Eagle, *Koontz in the Mansion and the Gatehouse*, 46 URB. LAW. 1, 22 (2014). The title borrows from Professor Yale Kamisar’s classic study of the disparate treatment often accorded the rights of criminal defendants in the “mansion” of the courtroom and the “gatehouse” of the police precinct house. Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in CRIMINAL JUSTICE IN OUR TIME 1 (A.E. Dick Howard ed., 1965).

²¹³ *Id.* at 9-16.

²¹⁴ Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game? Comments on the Municipal Art Society and Nollan Cases*, 39 WASH. U. J. URB. & CONTEMP. L. 3 (1991).

²¹⁵ See *supra* note 180 and accompanying text.

²¹⁶ See discussion *supra* Part II.B.2.

²¹⁷ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

²¹⁸ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”²¹⁹

In *Goldstein v. Pataki*,²²⁰ a Second Circuit case involving credible allegations that the large Atlantic Yards project, which is now home to the Brooklyn Nets, was “pretextual” and designed for private benefit, the court invoked *Twombly-Iqbal* in refusing to permit discovery that could support plaintiffs’ claims. Yet, where seasoned real estate professionals and officials work together, finding a “smoking gun” takes digging. *Goldstein* did acknowledge, however, that “*Kelo* opened up a separate avenue for a takings challenge” where the asserted public purpose was a pretext for bestowing a private benefit.²²¹

Justice Stevens’ opinion for the Court in *Kelo v. City of New London*²²² implicitly promised that the courts would police the Court’s admittedly deferential standard for public use against abuse.²²³ In his concurring opinion, Justice Kennedy stated that “[a] court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits.”²²⁴ He added that “[t]here may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.”²²⁵

Neither *Kelo* nor *Koontz* apparently have resulted in substantial review by federal courts, and the view that challenges to land use regulation are “garden-variety zoning dispute[s] dressed up in the

²¹⁹ *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570) (internal quotations omitted).

²²⁰ *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008).

²²¹ *Id.* at 60.

²²² *Kelo v. City of New London*, 545 U.S. 469 (2005).

²²³ 5 *Id.* at 487 (asserting that “hypothetical cases [of Public Use Clause abuse] posited by petitioners can be confronted if and when they arise.”).

²²⁴ *Id.* at 490 (Kennedy, J., concurring).

²²⁵ *Id.* at 493 (Kennedy, J., concurring).

trappings of constitutional law” remains prevalent.²²⁶ However, *Levin v. City and County of San Francisco* might be indicative of change.²²⁷

C. PERSONAL PROPERTY, JUST COMPENSATION AND
RECIPROCITY OF ADVANTAGE

The holding in *Horne v. Department of Agriculture*²²⁸ that government appropriations of personal property are exercises of eminent domain requiring “just compensation” raises the question of how the required amount of compensation is to be determined. In ascertaining the appropriate constitutional standard, it is necessary to consider the fair market value of the item, what constitutes a market, and what loss was incurred by the former owner.

Chief Justice Roberts stated that the Government previously had calculated just compensation when it fined the Hornes for the fair market value of the raisins, \$483,843.53, and that it “cannot now disavow that valuation.”²²⁹ He added that the case, “in litigation for more than a decade, has gone on long enough.”²³⁰ However, in his dissent with respect to just compensation, Justice Breyer made salient points that undoubtedly will have to be considered by courts applying *Horne*, especially in the context of regulated markets.

²²⁶ *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988) (Judge Richard A. Posner, holding rejection of a site plan was not a deprivation of substantive or procedural due process).

²²⁷ *Levin v. City & Cty. of S.F.*, 71 F.Supp.3d 1072 (N.D. Cal. 2014). See *supra* notes 206-211 and accompanying text.

²²⁸ *Horne v. U.S. Dep’t of Agric.*, 135 S. Ct. 2419 (2015).

²²⁹ *Id.* at 2432 (citing *Horne v. U.S. Dep’t of Agric.*, 750 F.3d 1128, 1135 n.6 (9th Cir. 2014), cert. granted sub nom. *Horne v. U.S. Dep’t of Agric.*, 135 S. Ct. 1039 (2015), and rev’d sub nom. *Horne v. U.S. Dep’t of Agric.*, 135 S. Ct. 2419 (2015)).

²³⁰ *Id.* at 2433.

1. “Fair Market Value”: A Dialectic

Justice Breyer, joined by Justices Ginsburg and Kagan, dissented from that part of Chief Judge Roberts’ *Horne* opinion pertaining to just compensation and reciprocity of advantage. Breyer declared that, under the Takings Clause, a property owner “is entitled to be put in as good a position pecuniarily as if his property had not been taken,” which is to say that “[h]e must be made whole but is not entitled to more.”²³¹ However, pegging “just compensation” to pecuniary value excludes other real, albeit subjective, elements of value, as well as consequential damages.²³² As Judge Richard Posner summed it up, “[c]ompensation in the constitutional sense is . . . not full compensation.”²³³

In *Horne*, the quest to find the “value” of the raisins appropriated by the Government was conceptually fraught. It plausibly might be free market value, value to the Hornes subject to the Government’s inchoate reserve requirement, or value to the Hornes free of governmental constraints, although those constraints are imposed on other producers.

2. “Fair Market Value” in a Regulated Market

In *United States v. 50 Acres of Land*,²³⁴ Justice Stevens wrote for a unanimous Court that the Fifth Amendment requirement of “just compensation” for the taking of property for public use “normally [is] measured by fair market value.”²³⁵ “Fair market value,” in turn, is “what a willing buyer would pay in cash to a willing seller.”²³⁶ *50 Acres of Land* also quoted from *United States v. Commodities Trading*

²³¹ *Id.* at 2434 (citing *Olson v. United States*, 292 U.S. 246, 255 (1934)).

²³² See generally Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U.L. REV. 677 (2005).

²³³ *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988).

²³⁴ *United States v. 50 Acres of Land*, 469 U.S. 24 (1984).

²³⁵ *Id.* at 25 (footnote omitted).

²³⁶ *Id.* at 25 n.1 (quoting *United States v. Miller*, 317 U.S. 369, 374 (1943)).

*Corp.*²³⁷ that “[d]eviation from this measure of just compensation has been required only when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public.”²³⁸

Most germane here, *Commodities Trading Corp.* also stated:

Since the market value standard was developed in the context of a *market largely free from government controls*, prices rigidly fixed by law raise questions concerning whether a “market value” so fixed can be a measure of “just compensation.” Whatever the circumstances under which such constitutional questions arise, the dominant consideration always remains the same: What compensation is “just” both to an owner whose property is taken and to the public that must pay the bill?²³⁹

In *Commodities Trading Corp.*, the War Department had requisitioned black pepper in 1944 and contended that “just compensation” be measured by the ceiling price under wartime price controls, 6.63 cents per pound.²⁴⁰ *Commodities* demanded 22 cents per pound, claiming that the ceiling price was not the constitutional measure of just compensation, and the Court of Claims awarded 15 cents per pound, which included the loss of “retention value,” since without the requisition the company could have retained the pepper until controls were lifted.²⁴¹

Justice Black, writing for the Court, reasoned that “[t]he word ‘just’ in the Fifth Amendment evokes ideas of ‘fairness’ and ‘equity,’ and these were the primary standards prescribed for ceiling prices,” and that ceiling prices were subject to judicial review to ensure that

²³⁷ *United States v. Commodities Trading Corp.*, 339 U.S. 121 (1950).

²³⁸ *50 Acres of Land*, 469 U.S. at 29 (quoting *Commodities*, 339 U.S. at 123).

²³⁹ *Commodities*, 339 U.S. at 123 (emphasis added) (citation omitted).

²⁴⁰ *Id.* at 122.

²⁴¹ *Id.* at 122-23.

they were “generally fair and equitable.”²⁴² Practical exigencies of business resulted in “ceiling prices of commodities held for sale represent[ing] not only market value but in fact the only value that could be realized by most owners.”²⁴³ Furthermore, Congress “plainly contemplated” that Federal, State, and local governments “should be able to fill their wartime needs at the prices fixed for other purchasers.”²⁴⁴

Black noted also that the price control plan was of “crucial importance . . . for a stabilized war economy.” He elaborated that during the war, approximately half of the nation’s output was sold to government, and that the Court’s award of just compensation above the ceiling price “might prompt many owners to withhold essential materials until the Government requisitioned them.”²⁴⁵

“In the final analysis,” Justice Black wrote, “all [of petitioner’s] arguments rest on the principle that the Government must pay Commodities for potential profits lost because of war and the consequent price controls. We cannot hold that the Fifth Amendment requires the Government to give owners of requisitioned goods such a special benefit.”²⁴⁶

Justice Frankfurter dissented. He discussed the facts of the case at length,²⁴⁷ and noted:

It does not follow that controlled prices automatically meet the requirements for just compensation in the forcible taking of property simply because they replaced free

²⁴² *Id.* at 124.

²⁴³ *Id.*

²⁴⁴ *Id.* at 124-25.

²⁴⁵ *Id.* at 125.

²⁴⁶ *Id.* at 130.

²⁴⁷ *Id.* at 131-39 (Frankfurter, J., dissenting).

market prices which could no longer be relied on to reflect the normal play of free economic forces.²⁴⁸

Likewise, Justice Jackson's dissent declared that the Court's holding "makes the constitutional provision for just compensation meaningless since the Government may first fix the price, as if no sales were compelled, and then compel the sales at the prices so fixed."²⁴⁹

The equation of heavily regulated prices with just compensation in *Commodities* must be understood in the context of wartime emergency. It seems clear that the exigencies of raising regulation adjudicated in *Horne* are not as compelling.

In fact, the regulatory scheme in *Horne* appears designed not to decrease value to producers, but rather to benefit them. As a rudimentary knowledge of public choice economics would suggest,²⁵⁰ agricultural marketing orders are not foisted upon producers. Rather, "marketing orders from their inception were intended as means of increasing producer incomes."²⁵¹ Thus, the "declared . . . policy of Congress" is that prices to farmers will comport with those of the golden era of American agriculture before World War I.²⁵²

²⁴⁸ *Id.* at 134.

²⁴⁹ *Id.* at 140-41 (Jackson, J., dissenting).

²⁵⁰ See, e.g., Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 (1982) ("[L]egislation is a good demanded and supplied much as other goods, so that legislative protection flows to those groups that derive the greatest value from it, regardless of overall social welfare.").

²⁵¹ E.C. Pasour, Jr., *Rent Seeking: Some Conceptual Problems and Implications*, 1 REV. AUSTRIAN ECON. 123, 133 (1987). See also, Ben C. French, *Fruit and Vegetable Marketing Orders: A Critique of the Issues and State of Analysis*, 64 AM. J. AGRIC. ECON. 916, 916 (1982). To be sure, as both authors discuss, economists dispute the extent to which informational asymmetries and ensuing wasteful spikes and declines of production might also justify such regulations.

²⁵² 7 U.S.C. §§ 602, 1301.

In his opinion for a unanimous Court in *Horne I*,²⁵³ Justice Thomas noted that the Agricultural Marketing Adjustment Act of 1937 (AMAA) “contemplates a cooperative venture among the Secretary, handlers, and producers the principal purposes of which are to *raise the price of agricultural products* and to establish an orderly system for marketing them.”²⁵⁴ The California Raisin Marketing Order, issued by the Secretary of Agriculture pursuant to the AMAA “[sought] to stabilize producer returns by limiting the quantity of raisins sold by handlers in the domestic competitive market.”²⁵⁵ The Justices in *Horne* somewhat daintily acknowledged that the purpose of the Marketing Order is to raise the income of farmers.²⁵⁶

The regulation administered by the Raisin Administrative Committee²⁵⁷ is a federal marketing order, led by 47 growers, packers and a public member.²⁵⁸ In an analogous situation in *North Caroling State Board of Dental Examiners v. Federal Trade Commission*,²⁵⁹ the Supreme Court recently struck down a prohibition on non-dentists engaging in teeth whitening, where the majority of members of the state regulatory board were practicing dentists.

²⁵³ *Horne v. U.S. Dep’t. of Agric. (Horne I)*, 133 S. Ct. 2053, 2057 (2013).

²⁵⁴ *Id.* at 2057 (emphasis added) (quoting *Block v. Comty. Nutrition Inst.*, 467 U.S. 340, 346 (1984)).

²⁵⁵ *Id.* (alteration in original) (quoting *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1359 (Fed. Cir. 2005)).

²⁵⁶ *See, e.g., Horne v. U.S. Dep’t of Agric.*, 135 S. Ct. 2419, 2424 (noting a purpose of the Act was to “to help maintain stable markets”); *Id.* at 2434 (Breyer, J., concurring in part and dissenting in part) (“The reserve requirement is intended, at least in part, to enhance the price that free-tonnage raisins will fetch on the open market. And any such enhancement matters.” (citation omitted)); *Id.* at 2439 (Sotomayor, J., dissenting) (noting that the Marketing Order “ensures that reserve raisins will be sold ‘at prices and in a manner intended to maxim[ize] producer returns’” (citation omitted)).

²⁵⁷ 7 CFR § 989.35(a) (2016).

²⁵⁸ 7 CFR § 989.26.

²⁵⁹ *N.C. State Bd. of Dental Exam’rs v. F.T.C.*, 135 S. Ct. 1101 (2015).

The similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. . . . When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest.²⁶⁰

According to Justice Thomas' opinion in *Horne I*,

after becoming disillusioned with the AMAA regulatory scheme, [the Hornes] began looking for ways to avoid the mandatory reserve program. Since the AMAA applies only to handlers, the Hornes devised a plan to bring their raisins to market without going through a traditional handler.²⁶¹

Whatever the validity of their grievances,²⁶² the Hornes accepted the benefits that might accrue from the reserving of raisins produced by others while attempting to circumvent the scheme themselves.

3. *Reciprocity of Advantage as an In-Kind Takings Compensation*

The term "average reciprocity of advantage" famously was used by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*.²⁶³

²⁶⁰ *Id.* at 1114.

²⁶¹ *Horne v. U.S. Dep't. of Agric.*, 133 S. Ct. 2053, 2058 (2013) (footnote omitted).

²⁶² The Hornes had written to the RAC that "[T]he Marketing Order Regulating Raisins has become a tool for grower bankruptcy, poverty, and involuntary servitude. The Marketing Order Regulating Raisins is a complete failure for growers, handlers, and the USDA . . ." *Horne I*, 133 S. Ct. at 2058 n.3 (citation omitted).

²⁶³ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Professor Richard Epstein, in his seminal work on takings, noted that compensation is not required if the government action can be seen to result in “implicit in-kind compensation.”²⁶⁴ The theme of reciprocity of advantage has been recurrent in Epstein’s work,²⁶⁵ as well as that of other commentators.²⁶⁶

As noted,²⁶⁷ marketing orders in general, and the raisin marketing order in particular, were designed primarily to enhance the income of producers. Thus, under the principle of average reciprocity of advantage, the Hornes likely received more than implicit compensation in kind for the taking of their raisins by dint of the fact that similar takings were imposed on other producers.²⁶⁸ Essentially, their situation was no different from that of purchasers in a residential subdivision who favor strict homeowner association controls because they believe that constraints on their conduct would be more than compensated for by the same constraints on the neighbors who otherwise might misbehave.

4. *How Far Might Reciprocity Extend?*

The Marketing Order under which the Hornes were required to reserve a large part of their crop was designed in large part to benefit raisin producers. In his opinion for the Court in *Horne*, Chief Justice Roberts rebuffed contentions that the in-kind compensation

²⁶⁴ See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 195-215 (1985).

²⁶⁵ See, e.g., Richard A. Epstein, *An Outline of Takings*, 41 U. MIAMI L. REV. 3, 11 (1986) (“Some takings can be justified by the police power; and for others implicit in-kind compensation (e.g., the benefit of regulation or taxes) may be provided to the persons whose property is taken, whether in whole or in part, so that the constitutional standard of just compensation is in fact met.”).

²⁶⁶ See, e.g., Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 987 (in-kind compensation).

²⁶⁷ See *supra* notes 250-256 and accompanying text.

²⁶⁸ However, whether smaller market actors like the Hornes actually were benefitted is disputed. See *supra* notes 288-291 and accompanying text.

inuring from higher prices for raisins destined for the market be considered.

Roberts noted the Government's argument that if the Court determined that there was a taking it should remand to the Court of Appeals "to calculate what compensation would have been due if petitioners had complied with the reserve requirement."²⁶⁹ Such a calculation

must consider what the value of the reserve raisins would have been without the price support program, as well as other benefits . . . from the regulatory program, such as higher consumer demand for raisins spurred by enforcement of quality standards and promotional activities.²⁷⁰

Perhaps the Government cast too wide a net, for the Chief Justice had no difficulty in observing that it "cite[d] no support for its hypothetical-based approach, or its notion that general regulatory activity such as enforcement of quality standards can constitute just compensation for a specific physical taking."²⁷¹ That facilitated his conclusion that the Court's "market value of the property at the time of the taking" rule was both "clear and administrable."²⁷²

While ascertaining the impact of "general regulatory activity" indeed might be problematic, taking into account the more direct *quid pro quo* exchanges normally encompassed by the terms "reciprocal advantage" or "in-kind compensation" is not.

²⁶⁹ *Horne*, 135 S. Ct. at 2431-32 (internal quotations omitted).

²⁷⁰ *Id.* at 2432 (internal quotations omitted).

²⁷¹ *Id.*

²⁷² *Id.* ("[O]ur cases have set forth a clear and administrable rule for just compensation: 'The Court has repeatedly held that just compensation normally is to be measured by "the market value of the property at the time of the taking,"' *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984) (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)).")

The more closely government-imposed reciprocity schemes resemble reciprocity arrangements among private market actors, the more likely it is that a direct nexus could be ascertained and measured. Indeed, in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*,²⁷³ the cartel-like arrangement among practicing dentists comprising the board was so blatant as to necessitate the U.S. Supreme Court to state that the need for active supervision by the State was manifest.²⁷⁴

5. *Should Regulation Be Based on “Net” Value*

In *Brown v. Washington Legal Foundation*,²⁷⁵ the Court held that the petitioners were not entitled to just compensation for the “nonpecuniary consequences” of the state’s action, and that any pecuniary compensation must be measured by their net losses rather than the value of the public’s gain.²⁷⁶ The case involved a state requirement that lawyers place small client trust deposits that could not generate net interest if deposited in individual trust accounts in banks in designated Interest on Lawyer Trust Accounts (IOLTA) accounts. IOLTA accounts would earn interest, which would inure to the benefit of state designated legal services organizations. Justice Scalia, writing for the four dissenters, declared:

The Court today concludes that the State of Washington may seize private property, without paying compensation, on the ground that the former owners suffered no “net loss” because their confiscated property was created by the beneficence of a state regulatory program. In so holding the Court creates a novel exception to our oft-repeated rule that

²⁷³ 135 S. Ct. 1101 (2015).

²⁷⁴ See *supra* notes 259-260 and accompanying text.

²⁷⁵ 538 U.S. 216 (2003).

²⁷⁶ *Id.* at 237.

the just compensation owed to former owners of confiscated property is the fair market value of the property taken.²⁷⁷

The “property” in *Brown* had no net pecuniary value to the petitioners, yet had pecuniary value to the state’s designees. The reason was that federal banking regulations forbade payment of interest on bank accounts contained client comingled trust funds, but excepted accounts under which the interest would belong exclusively to charitable organizations.²⁷⁸

The *Brown* Court agreed, in this sense presaging *Horne*, that there was a *per se* taking, since the clients’ principal deposited in an IOLTA account remains the property of the law clients, and since “the transfer of the interest . . . here seems more akin to the occupation of a small amount of rooftop in *Loretto*[.]”²⁷⁹ On the question of compensation, however, it cited Justice Holmes for the proposition that “the question is what has the owner lost, not what has the taker gained.”²⁸⁰ Justice Scalia, on the other hand, maintained that the interest “obviously has *value*” just prior to its transfer to the legal services foundation, and “[i]t is at *that* point that just compensation for the taking must be assessed.”²⁸¹

Computerized accounting techniques easily could have been utilized to attribute to clients their share of interest on funds maintained in lawyer’s offices. Alternatively, permitting the attorney to retain earnings of the comingled trust monies would, in an attenuated fashion, make the relationship with the client more attractive, to the benefit of both. Those possibilities also were foreclosed by federal and state rules forbidding the payment of

²⁷⁷ *Id.* at 241 (Scalia, J., dissenting, joined by Rehnquist, C.J., Kennedy and Thomas, JJ.).

²⁷⁸ *Id.* at 223.

²⁷⁹ *Id.* at 235.

²⁸⁰ *Id.* at 235 (quoting *Boston Chamber of Com. v. Boston*, 217 U.S. 189, 195 (1910)).

²⁸¹ *Id.* at 245 (Scalia, J. dissenting).

interest on private comingled accounts and governing lawyer ethics.²⁸²

If the Supreme Court were inclined to examine the matter differently in the future, it might conclude that the transfer of interest from legal clients objecting to IOLTA and their attorneys was implicit in the creation of “regulatory property,” where the legal services organizations that were the beneficiaries of the IOLTA program received and derived value from the interest primarily because non-charities were forbidden to obtain interest on demand accounts.²⁸³ Neither the clients nor their lawyers had clear legal entitlements to the interest, so the State arrogated it for its designees.

The meaning of “value,” as debated in *Brown*, invokes the subtle dialectic between a focus on making *the owner* whole and paying the fair market value of *the property* taken. But the apparent conflict could be resolved by stating that, with the possible exception of extraordinary exigencies such as war, both value and just compensation should be independent of regulatory efforts to affect them.

While undoubtedly it would be impolitic as a general rule pertaining to regulation of commerce, it would make sense from the perspective of the Takings Clause if, in *Commodities Trading Corp.*, for instance, the “value” of pepper for Fifth Amendment purposes

²⁸² See Steven J. Eagle, *Regulatory Takings, Public Use, and Just Compensation After Brown*, 33 ENVTL. L. REP. 10807, 10811 (2003).

²⁸³ See Bruce Yandle & Andrew P. Morriss, *The Technologies of Property Rights: Choice Among Alternative Solutions to Tragedies of the Commons*, 28 ECOLOGY L.Q. 123, 129 (2001) (coining term and defining “regulatory property” as “a property right created and allocated by a government entity, such as a right to emit specified pollutants into the atmosphere under the terms of a permit issued by a government regulator”).

would be determined with recourse to the world price, adjusted for transportation costs and the like, where feasible.²⁸⁴

III. PER SE TAKINGS, PERSONAL PROPERTY AND PUBLIC POLICY

Just as courts will have to wrestle with both old and new jurisprudential concerns regarding takings in light of *Koontz* and *Horne*, policy makers will have to consider their implications as well.

Horne has been criticized as blurring the distinction between physical and regulatory takings, thus making it harder to resist takings claims, by vitiating “parcel as a whole”²⁸⁵ in essentially regulatory cases.

Under this analysis, when the property is a fungible product like raisins, a government requirement to physically reserve and transfer just a small amount of raisins – say 1% – would be a physical taking. The fact that the raisin grower still had 99% of her crop would not be considered. Under the Court’s analysis, the amount of free-tonnage raisins simply would not matter.²⁸⁶

One answer, of course, is for Congress to replace the system of appropriation of part of producers’ raisin crops with restrictions on crop size. Justice Sotomayor pronounced the present system perhaps “outdated” and even “downright silly.”²⁸⁷ Professor

²⁸⁴ This was the position advanced in Justice Jackson’s dissent in *United States v. Commodities Trading Corp.*, 339 U.S. 121, 141 (1950) (The Court’s holding “makes the constitutional provision for just compensation meaningless since the Government may first fix the price, as if no sales were compelled, and then compel the sales at the prices so fixed.”). See also *supra* note 249 and accompanying text.

²⁸⁵ Penn Cent. Transp. Co. v. City of New York City, 438 U.S. 104, 124 (1978).

²⁸⁶ LYNDIA L. BUTLER, *The Horne Dilemma: Protecting Property’s Richness and Frontiers*, 75 MD. L. REV. 787, 797 (2016).

²⁸⁷ *Horne*, 135 S. Ct. at 2438 (Sotomayor, J., dissenting).

Michael McConnell asserted that the Marketing Order harmed producers.²⁸⁸ He posed the rhetorical question “Why wouldn’t a cartel dominated by the industry benefit the industry?”²⁸⁹ His response was that if volume controls did maintain above-market prices, more producers would enter the business; the Raisin Administrative Committee’s own sales and giveaways likely depressed prices; and imported raisins may enter the U.S. market freely, thus checking prices.²⁹⁰ McConnell stated that it was likely that, in the concentrated industry, a large cooperative with a plurality of seats on the RAC was able to benefit through export subsidies.²⁹¹ If Professor McConnell is correct, the cartel did indeed produce benefit to the industry, although it inured to the largest producers to the detriment of smaller players like the Hornes.

As both Chief Justice Roberts and Justice Sotomayor noted, it was not disputed that the Government may “prohibit the sale of raisins without effecting a *per se* taking.”²⁹² If the industry’s economics change sufficiently as a result of *Horne*, Congress may mandate a change from a system of appropriating raisins to more conventional restrictions on crop production.

A. THE ISSUE OF TRANSPARENCY

I earlier observed that the principal effect of *Horne*, reinforcing *Koontz*, might be more intense judicial review of exactions on real estate development in general and regarding “inclusionary zoning” in particular.²⁹³ One way of warding off takings awards would be for municipalities to replace highly informal wheeling and dealing

²⁸⁸ MICHAEL W. MCCONNELL, *The Raisin Case*, 2014-15 CATO SUP. CT. REV. 313 (2015). Professor McConnell argued *Horne* for the petitioners.

²⁸⁹ *Id.* at 330.

²⁹⁰ *Id.*

²⁹¹ *Id.* at 331.

²⁹² *Horne*, 135 S. Ct. at 2428; see *Horne*, 135 S. Ct. at 2443 (Sotomayor, J., dissenting).

²⁹³ See *supra* Parts II.B.3 and II.B.4.

with fine-grained zoning ordinances that spell out what is permitted.²⁹⁴ “[M]unicipalities must implement nonflexible, definitive, local legislative solutions to the flexibility questions generated by Koontz.”²⁹⁵ “[W]here the embedded bargains employ publicly available terms that are spelled out in detail and broadly available—as in incentive zoning—the scheme seems far more legislative in nature and the case for judicial scrutiny is weaker.”²⁹⁶

Alas, theoretical popular sentiment for ending “sprawl” and creating more egalitarian housing markets through increased density is just that—theoretical. Jason Furman, chairman of President Obama’s Council of Economic Advisors, stated:

There can be compelling environmental reasons in some localities to limit high-density or multi-use development. Similarly, health and safety concerns—such as an area’s air traffic patterns, viability of its water supply, or its geologic stability—may merit height and lot size restrictions. But in other cases, zoning regulations and other local barriers to housing development allow a small number of individuals to capture the economic benefits of living in a community, thus limiting diversity and mobility. The artificial upward pressure that zoning places on house prices—primarily by functioning as a supply constraint—also may undermine the market forces that would otherwise determine how much housing to build, where to build, and what type to build, leading to a mismatch

²⁹⁴ See Eagle, *supra* note 212, at 6.

²⁹⁵ ROBERT H. FREILICH & NEIL M. POWOWITZ, *How Local Governments Can Resolve Koontz’s Prohibitions on Ad Hoc Land Use Restrictions*, 45 URB. LAW. 971, 980-83 (2013).

²⁹⁶ John M. Newman, *Koontz v. St. Johns River Water Management District: The Constitutionality of Monetary Exactions in Land Use Planning*, 76 MONT. L. REV. 359, 388 n.118 (2015) (quoting Lee Anne Fennell & Eduardo M. Pefialver, *Exactions Creep*, 2013 S. CT. REV. 287, 345 (2013)).

between the types of housing that households want, what they can afford, and what is available to buy or rent.²⁹⁷

Proposals to circumvent political headwinds, notably Roderick Hills and David Schleicher's *Planning for an Affordable City*,²⁹⁸ are based on carefully assembled "grand bargains" among interest groups, entrenched through "sticky" planning and the vesting of rights in regulatory property in politically potent stakeholders.²⁹⁹ The dealmaking inherent in such arrangements is far from transparent and abets popular cynicism about government.³⁰⁰ The wariness about regulatory overreach characterizing both *Koontz* and *Horne* may provide an impetus for less "zoning for dollars"³⁰¹ and for more adherence to the principles embodied in the rule of law that laws be determined and articulated in advance, provide stable guidance to citizens, and not be subject to the whim of leaders.³⁰² On the other hand, the Realist concept of "rule skepticism" has permeated contemporary legal thought.³⁰³

²⁹⁷ Jason Furman, Remarks, "Barriers to Shared Growth: The Case of Land Use Regulation and Economic Rents" (The Urban Institute, Nov. 20, 2015).

²⁹⁸ RODERICK M. HILLS, JR. & DAVID SCHLEICHER, *Planning an Affordable City*, 101 IOWA L. REV. 91 (2015).

²⁹⁹ See Steven J. Eagle, *On Engineering Urban Densification*, 4 PROP. RTS. CONF. J. 73, 110-29 (2015) (critiquing the "Grand Bargain" and ensuing cronyism).

³⁰⁰ See generally, SUZANNE METTLER, *THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY* (2011).

³⁰¹ Kayden, *supra* note 214. See generally, *supra* Part II.B.4.

³⁰² See generally RICHARD H. FALLON, JR., "The Rule of Law" as a Concept in Constitutional Discourse, 97 Colum. L. Rev. 1, 8-9 (1997) (articulating standards of the rule of law as a framework for rights). Furthermore, property rights generally are furthered by a general, consistent, and reasonably stable set of rules. An influential exposition is Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

³⁰³ See ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* 152, 155 (1990) (discussing rule skepticism, which maintains that abstract rules cannot be accurate guides to legal outcomes).

B. RECIPROCITY OF ADVANTAGE AND NORMAL USE OF PROPERTY

In her dissent in *Horne*,³⁰⁴ Justice Sotomayor claimed that the mandatory disclosure of trade secrets required for permission to sell certain pesticides in *Ruckelshaus v. Monsanto Co.*³⁰⁵ “was the price Monsanto had to pay for the advantage of living and doing business in a civilized community,” a phrase earlier used in Justice Brandeis’ dissent in *Pennsylvania Coal*.³⁰⁶

The relationship between “a civilized community” and private property rights is at the heart of the regulatory takings problem. On one pole is Justice Scalia’s exposition in *Lucas* of the centrality of property rights as developed in the common law, *i.e.*, as bounded by “background principles of the State’s law of property and nuisance.”³⁰⁷ On the other pole is the New York Court of Appeals’ exposition in *Penn Central* of its view that owners are not entitled to a return on

that ingredient of property value created not so much by the efforts of the property owner, but instead by the accumulated indirect social and direct governmental investment in the physical property, its functions, and its surroundings.³⁰⁸

³⁰⁴ *Horne v. U.S. Dep’t of Agric.*, 135 S. Ct. 2419, 2440 (2015) (Sotomayor, J., dissenting).

³⁰⁵ 467 U.S. 986 (1984).

³⁰⁶ *Horne*, 135 S. Ct. at 2440 (Sotomayor, J., dissenting) (quoting *Andrus v. Allard*, 444 U.S. 51, 67 (1979) (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting))).

³⁰⁷ 505 U.S. 1003, 1029 (1992).

³⁰⁸ *Penn Cent. Transp. Co. v. City of New York*, 366 N.E.2d 1271, 1272-73 (N.Y. 1977), *aff’d*, 438 U.S. 104 (1978).

By this reasoning, Professor William Fischel observed, government is “entitled to appropriate to itself all of the advantages of civilization.”³⁰⁹

Even for those not embracing the view that government’s “accumulated indirect social and direct governmental investment” is to some extent compensation in kind for what otherwise would be takings, there is a need to find an appropriate frame for assessing what the contours of reciprocity of advantage might be. Professor Richard Epstein asserted that Justice Holmes took the view in *Pennsylvania Coal* that “each statute has to stand on its own bottom.”³¹⁰ Epstein lauded this approach to reciprocity of advantage, since it produced strong evidence that the social gains from that individual statute exceeded the losses.

That condition is not satisfied when separate statutes are placed into the same capacious barrel, for now interest group politics can force the passage of statutes that cause enormous losses for losers without generating compensating gains to winners.³¹¹

On the other hand, *Penn Central* took a very different view of reciprocity of advantage, asserting, “the preservation of landmarks benefits all New York citizens and all structures.”³¹² As Professor Daryl Levinson noted, “[t]hese benefits would hardly be sufficient to compensate the owners from their enormous economic loss.”³¹³ Reciprocity among broad groups is what matters, and “[b]enefits

³⁰⁹ WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 50 (1995).

³¹⁰ RICHARD A. EPSTEIN, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 22 (discussing *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922)).

³¹¹ *Id.* at 23.

³¹² *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 134 (1978).

³¹³ DARYL J. LEVINSON, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1341 (2002).

and burdens need not net out nonnegative at the level of any particular individual.”³¹⁴

However, the expansion of reciprocity of advantage to encompass benefit for the citizenry generally, or large swaths of it, flies against the fact that “the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose,” such as enhancement of the general welfare.³¹⁵

While the Takings Clause presupposes that government can take private property without the owner’s consent, the just compensation requirement spreads the cost of condemnations and thus prevents the public from loading upon one individual more than his just share of the burdens of government.³¹⁶

To say that those whose property is taken are members of the broad public, and therefore have received compensation in kind through reciprocity of advantage, is to read the Takings Clause out of the Constitution.

In *Nollan*,³¹⁷ the Court noted that “the right to build on one’s own property . . . cannot remotely be described as a government benefit.”³¹⁸ In *Koontz*,³¹⁹ the Court extended the thrust of *Nollan* to the denial of development approvals through the unconstitutional conditions doctrine when landowners fail to accede to “extortionate demands.”³²⁰

³¹⁴ *Id.*

³¹⁵ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005).

³¹⁶ *Kelo v. City of New London*, 545 U.S. 469, 497 (O’Connor, J., dissenting) (quoting *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893)) (internal quotations omitted).

³¹⁷ 483 U.S. 825 (1987).

³¹⁸ *Id.* at 833-34 n.2 (citation omitted).

³¹⁹ 133 S. Ct. 2586 (2013).

³²⁰ *Id.* at 2594-96.

Aside from its application of categorical takings treatment to appropriations of personal property, *Horne* reinforced the theme of *Nollan* and *Koontz* that the normal, customary use of resources is to be protected³²¹ by specifying that engaging in ordinary interstate commerce “is similarly not a special governmental benefit that the Government may hold hostage.”³²²

C. MIGHT REJECTION OF ARCANE LIMITS BROADEN KOONTZ?

Most intriguingly, the Court’s recent increasingly expansive and full-throated support for property might inform judicial review of those rights in practice. One of the reasons why most commentators of varying ideological perspectives have found the Supreme Court’s takings jurisprudence incoherent has been the Court’s apparent insistence on arcane distinctions not predicated on articulated principles, and its various prongs and sub-prongs that are ultimately unsatisfactory. Those include the vague economic impact, investment-backed expectations, character of the government action, and parcel as a whole tests parsed in numbing detail in *Penn Central* and its progeny.³²³ Also, they include the differing treatments of permanent and temporary takings³²⁴ and, yes, physical and regulatory takings.³²⁵

The holding in *Horne* places government appropriation of personal property on par with government appropriation of real property. To be sure, the opinion of Chief Justice Roberts

³²¹ See Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973) (asserting that the state cannot enjoin normal uses of land, as owners typically engage in).

³²² *Horne v. U.S. Dep’t of Agric.*, 135 S. Ct. 2419, 2430-31 (2015).

³²³ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 130-31 (1978). See generally, Eagle, *supra* note 53.

³²⁴ See *United States v. General Motors Corp.*, 323 U.S. 373, 380-82 (1945).

³²⁵ See *supra* Part I.B.1.

accomplishes this by applying the existing rule governing physical takings, as restated in *Tahoe-Sierra Preservation Council*. Chief Justice Roberts applies the rule, but he does not detour by offering a defense of it. It might be that ultimately the rule will be regarded as prudential, as seems to have happened with the state litigation prong of *Williamson County*.³²⁶

The *Koontz* “impermissibly burden” test³²⁷ gives the Court a fresh way to approach takings cases, enabling it to avoid the encrustations of earlier doctrines. As I suggested elsewhere, government demands that can be refuted in the courtroom are hard to deal with in the anteroom of pre-hearings and quick restroom conversations.³²⁸ 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.

CONCLUSION

Professor Mark Fenster stated, perhaps more with hope than with certainty, that the Supreme Court’s restatement of its takings doctrine in *Lingle v. Chevron U.S.A. Inc.*³²⁹ “appears to have offered a longed-for peace, an end to the pitched legal, political, and philosophical battles that the ‘takings revolution’ and Richard Epstein’s landmark book *Takings* initiated.”³³⁰

Horne makes clear that *Lingle*, despite its neat takings heuristics, has not put the relationship of private property and government power to rest. All of the Justices agree with the general proposition

³²⁶ *Williamson County Reg’l Plan. Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). See also notes 39-44 and accompanying text, *supra*.

³²⁷ *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586, 2596 (2013). See *supra* note 173 and accompanying text.

³²⁸ *Eagle*, *supra* note 212.

³²⁹ 544 U.S. 528, 538-40 (2005).

³³⁰ Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENVTL. L.J. 525, 526-27 (2009) (citing RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985)).

that owners must be compensated when the government takes their cars as well as their homes. Beyond that, the Court seems desirous of reducing procedural complexity, but substantive differences continue unabated. Divisions regarding what constitutes a separate item of “property” and what conditions may permissibly be placed on entering markets will be intensified, as well be the meaning of “value” for Fifth Amendment purposes. The tension between bright-line tests and ad hoc decision-making continues entrenched.

Interesting times will continue for judges, scholars, litigators, owners, and citizens interested in the contours of private property rights.