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HORNE V. USDA: AN EXERCISE IN MINIMALISM?

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INTRODUCTION

During the Great Depression, Congress saw fluctuations of agricultural commodity prices as a cause for public concern, and set about the goal of stabilizing them. Its solution was the Agricultural Marketing Agreement Act of 1937, [1] which empowered the Department of Agriculture to control prices by, among other means, issuing "marketing orders" to limit the volume of particular agricultural products that could be sold.

One such order was the Raisin Marketing Order, first adopted in 1949.[2] The Raisin Marketing Order established a "raisin reserve" designed, at least nominally, to control the volume of marketed California raisins. Whether the Raisin Marketing Order achieved any public benefit has always been debatable, but its operations continued year after year until, in *Horne v. USDA*, the Supreme

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[1] 7 U.S.C. § 601.

[2] *Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California*, 7 C.F.R. § 989.

Court held that the raisin reserve requirement effected an unconstitutional taking of private property without just compensation.

Ordinarily, the effective invalidation on constitutional grounds of a regulatory regime dating back to the early days of the modern administrative state would be a remarkable event. The Supreme Court's decision followed no fewer than *six* lower court and administrative decisions rejecting the petitioners' Takings Clause arguments on various grounds (plus an earlier visit to the Supreme Court on jurisdictional issues). But, in some respects, there may be less than meets the eye. The uncompensated taking is fairly obvious; the Supreme Court applied well-established precedent and got the result that the precedents compelled. When the Court *could* have taken the opportunity to go beyond existing precedent, it declined to do so. *Horne* should therefore be placed not among cases that recognize new or expanded constitutional protections for individual rights, but among the cases that protect long-established rights from unprecedented attacks.

In Part I, I explain how the Supreme Court's decision fits neatly within existing Takings Clause doctrine. In Part II, I address the ways in which a contrary decision affirming the Ninth Circuit panel and upholding the Raisin Marketing Order would have been the truly radical course. In Part III, I discuss one question in Horne where the Court carefully avoided deciding any more than it considered necessary, and might even have been better advised to explain more.

I. THE SUPREME COURT'S DECISION APPLIED EXISTING PRECEDENT

The most important fact about *Horne* is actually how simple it was — or at least should have been — to reach the conclusion that it involved an uncompensated taking of property. On that subject, at least, there was never much need for the Supreme Court to break new ground; existing Takings Clause doctrine, applied to a realistic, practical view of how the Raisin Marketing Order worked and

under the facts of the Hornes' case, was essentially sufficient to justify the outcome and the remedy.

A. THE RAISIN MARKETING ORDER

It is difficult to characterize the Raisin Marketing Order as effecting anything other than a transfer of raisins — particular, physical raisins — to the government. For the regulations at issue did not merely limit the volume of raisins that could be sold in commerce; rather, as the Supreme Court recognized, title to a portion of a year's raisin crop (the "reserve raisins") would transfer, by operation of law, straight from the raisin grower to the Department of Agriculture's Raisin Administrative Committee (RAC).[3] There was little dispute on that point; indeed, it was the United States' own position in the Supreme Court and the lower courts.[4]

The raisin reserve had all of the hallmarks of a transfer of ownership from raisin producers to the RAC. The percentage of the raisin crop to be held in reserve — that is, the quantity of raisins

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[3] Horne v. U.S. Dep't of Agric., 135 S. Ct. 2419, 2424 (2015) ("The Raisin Committee acquires title to the reserve raisins that have been set aside, and decides how to dispose of them in its discretion."); Evans v. United States, 74 Fed. Cl. 554, 558 (2006) (noting that the Marketing Order ""effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the government, and . . . requires physical segregation of the reserve-tonnage raisins held for the government's account.").

[4] April 22, 2015 Transcript of Record at 31, Horne v. U.S. Dep't of Agric., 135 S. Ct. 2419 (2015) (No. 14-275) ("[F]or purposes of this . . . case, we concede that the government gets legal title."); Mar. 20, 2013 Transcript of Record at 45:17-24, Horne v. U.S. Dep't of Agric., 133 S. Ct. 2053 (2013) (No. 12-123) ("[The raisin handler] takes title to the free-tonnage raisins and the title to the reserve raisins passes, as a matter of law, from the producer to the Raisin Administrative Committee."); *see* Brief for the Petitioner at 43, Horne v. U.S. Dep't of Agric., 673 F.3d 1071 (9th Cir. 2011) (No. 10-15270) (arguing that '"passing title … to the RAC"' is an '"admission ticket"' to the raisin market) (quoting *Evans*, 74 Fed. Cl. at 563); Respondent's Surreply in Opp. to Rehearing at 3, Horne v. U.S. Dep't of Agric., 673 F.3d 1071 (9th Cir. 2011) (No. 10-15270) (explaining that "producers … receive no direct payment when title to a portion of their crop is transferred to the RAC").

that the RAC would assert control over — was set by the Secretary of Agriculture on the RAC's recommendation.[5] The reserve raisins would then be held by raisin handlers "for the account of" the RAC.[6] The raisin reserve was not merely a proportion of the total raisins held by handlers, but specifically identifiable quantities of raisins that were to be stored "separate and apart from" other raisins and delivered on the RAC's demand.[7] Until delivery, the RAC would pay the handler's costs of storage.[8]

Once in possession of reserve tonnage raisins, the RAC could deliver them to third parties at will,[9] use the raisins as security for loans,[10] sell them,[11] or give them away.[12] The regulations guided the RAC's discretion in disposing of the raisins in some respects, but did not give the raisin producers a say. Indeed, the raisin producers retained no further claim whatsoever on the reserve raisins themselves.[13] All they retained was a contingent interest in their pro rata share of the fund left over when the RAC's disposition of the reserve raisins was complete.[14] The Raisin Marketing Order, in short, forced raisin producers to surrender the property interest they had in the raisins in exchange for a paper right.

When the government "physically takes possession of an interest in property," it has a categorical duty to repay the taken property's fair market value.[15] (Such takings are sometimes called "per se" or "categorical" takings.") The RAC is an organ of the

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[5] 7 C.F.R. §§ 989.54(d), 989.65, 989.66(a).
[6] § 989.66(a).
[7] §§ 989.66(b)(2), (b)(4).
[8] § 989.66(f).
[9] § 989.66(b)(4).
[10] § 989.66(g).
[11] §§ 989.67(c)-(e).
[12] §§ 989.67(b)(2)-(4).
[13] 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.53(a), 989.66(h).
[14] *Id.*
[15] Arkansas Game & Fish Comm'n v. United States, 133 S. Ct. 511, 518 (2012); *see* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

USDA, created and governed by regulation.[16] Whatever the outer bounds of takings law might include, the compulsory transfer of an interest in property from a private party to a government agency is the essence of a taking.[17]

Given the mandatory transfer of raisins from producers to the RAC, the only real remaining question was thus whether the government provided compensation. But there was no basis in the administrative record (and little plausible ground to speculate) that the transfer during the crop years at issue left the producers with anything approaching just compensation.

Take the 2003-04 crop year as an example. That year, the RAC took ownership of 30% of the raisin crop, and farmers did not receive a dime's payment in return. In the government's optimistic view (expressed in the Federal Register, albeit completely unsupported in the *Horne* record) the result of that transfer was an increase of roughly 8 percent — from $747 to the documented "field price" of $810 — in the price of free-tonnage raisins that producers retained rights to.[18] For a number of reasons, that figure could not possibly amount to just compensation.

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[16] *See* 7 C.F.R. 989.26.

[17] *See Arkansas Game & Fish Comm'n*, 133 S. Ct. at 518 (finding that the government must pay just compensation whenever it "physically takes possession" of "an interest" in property).

[18] *Compare* Pet. App. 41a (USDA ALJ citing the field price); 69 Fed. Reg. at 50,292 (asserting that the field price was "$63 per ton higher than under an unregulated scenario"). Another study concluded that although the Raisin Marketing Order stabilized prices, "grower net return … averaged zero under the volume control program, suggesting that profits were not above normal." Ben C. French & Carole Frank Nuckton, *An Empirical Analysis of Economic Performance Under the Marketing Order for Raisins*, AM. J. AGRIC. ECON. 581, 592 (1991). In recent years, the RAC had not imposed a raisin reserve even when its own metrics called for one. *See* Sun-Maid Sends Initiative to Eliminate the Raisin Reserve, Am. Vineyard, Jan. 2015, at 19 (noting that "[h]ad the 1949 established program been applied in 2013 for example, growers would have been compelled to put aside 37% of their crop"). Needless to say, the sky did not fall.

Perhaps most obviously, it does not approach the market value of the reserve raisins. Farmers who could have sold 30 percent of their crop for $747 per ton instead got nothing. The simplest back-of-the envelope calculation suffices to show that even if the government's figures were accurate, an 8 percent increase in price is no compensation for a 30 percent reduction in sales volume.

But more fundamentally, the increase in market value could not have counted as compensation at all. Consider: What could have caused such an increase? The government did not argue in the Supreme Court that the RAC did anything to increase demand for raisins; on the contrary, its theory was that demand for raisins was "static," and would have been static even without the RAC or the Raisin Marketing Order.[19] Thus the likeliest way for the reserve requirement to raise prices is by limiting the *supply* of raisins on the market — in other words, by creating scarcity or making distribution less efficient.

If all the Raisin Marketing Order did was limit the availability of raisins on the market, it may not have effected a taking, and almost certainly not a per se taking.[20] The Raisin Marketing Order, however, did not actually limit the supply of raisins. According to the government's own figures, none of the raisins held by the RAC were wasted, and every ton went to some third party for resale or consumption.[21] All the reserve raisins thus went back into the market (albeit to distinct market sectors).[22] Far from creating real scarcity, the Raisin Marketing Order simply changed who sold the raisins, to whom, and who controlled the proceeds. Any increase in prices would have been largely unrelated to — and perhaps in spite

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[19] Brief for the Respondent at 4-5, Horne v. U.S. Dep't of Agric., 135 S. Ct. 2419 (2015) (No. 14-275).
[20] Andrus v. Allard, 444 U.S. 51 (1979) (finding no taking when statute forbade sales of eagle feathers).
[21] Brief for the Respondent at app. at 1a-2a, Horne v. U.S. Dep't of Agric., 135 S. Ct. 2419 (2015) (No. 14-275).
[22] 7 C.F.R. § 989.67(b).

of — the transfer of raisins to the control of the RAC, and so could not have counted as compensation.

Furthermore, insofar as anyone received compensation for the transfer of raisins from producers to the RAC, the Hornes did not. Sale of reserve raisins created a fund of money under the control of the RAC — for the 2003-04 crop year, approximately $112 million. The largest use of that fund — approximately $100 million that year, or about 90 percent — was for export subsidies to aid sale of raisins in foreign markets.[23] Thus, the net effect of the Raisin Marketing Order was to deprive raisin producers of their raisins and write large checks to raisin export operations. But the Hornes are not exporters, and could not benefit from subsidizing the others' international sales. At any rate, the effect of the subsidies would be to raise the price of raisins, and as we have seen the total increase could not have approached compensating producers for the loss of volume.

The obvious conclusion is that the Raisin Marketing Order transfers property from raisin growers to the government without providing just compensation in return.

B. THE HORNES' CASE

Outside of the Raisin Marketing Order's obvious resemblance to a taking, *Horne* had two procedural quirks. Neither of those issues, however, had any necessary bearing on the outcome.

First, on the facts of the case, no property had been taken or was about to be taken. Instead of holding any raisins in reserve and handing them over to the government as required by the Raisin Marketing Order, the Hornes — a family of California raisin growers — had sold all the raisins at issue. All of the producers who had grown the raisins (including the Hornes themselves, plus

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[23] Brief for the Respondent at app. at 1a, Horne v. U.S. Dep't of Agric., 135 S. Ct. 2419 (2015) (No. 14-275).

other raisin farmers who used the Hornes' raisin processing facilities) had been fully paid. The posture was thus somewhat unusual, compared to many other takings cases. Instead of *trying to obtain* property without paying, or *refusing to pay* just compensation for property already taken, the government sought to penalize the Hornes for having *refused to accede* to a taking, *i.e.*, for failing to participate in the Marketing Order scheme.

The other quirk was that the Hornes themselves had not necessarily held legal title to the raisins that the government claimed should have been held in reserve. The Raisin Marketing Order's raisin reserve requirements, as explained above, directly apply not to raisin producers but to handlers (essentially, packers and processors)[24] who "acquire" raisins from producers, pay them for "free tonnage" raisins that are sold on the open market, and hold the rest in reserve for the RAC. In the government's view, by failing to hand any reserve raisins over to the RAC, the Hornes had essentially defaulted in their obligations as middlemen, not as property owners.[25] In point of fact most of the raisins that were to have been held in reserve were grown by other farmers, not the Hornes themselves.

But although the fact pattern was unusual, there was never great reason to consider those anomalies critical to the case's substance. The first is easily resolved by the principle that there is no real distinction between the government violating a right on the one hand or penalizing exercise of a right on the other. Few people today would suggest that the government is prohibited from the former but not the latter; on the contrary, the two forms of restriction are two sides of the same coin.

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[24] 7 C.F.R. § 989.15.

[25] This issue was the key question before the Supreme Court in *Horne v. U.S. Dep't of Agric.*, 133 S. Ct. 2053 (2013) [hereinafter *Horne I*], in which the Court held that the Hornes were entitled to assert their Takings Clause arguments in the District Court in their capacity as handlers rather than going to the Court of Claims.

That same principle applies to the Takings Clause, and has for more than a hundred years.[26] As Justice Ginsburg has put it, "[c]orrelative to the right to be compensated for a taking is the right to refuse to submit to a taking where no compensation is in the offing."[27] Likewise, as the Supreme Court explained in *Koontz*, a "*command*[]" to relinquish money "linked to a specific, identifiable property interest" triggers a categorical takings analysis,[28] whether any money actually changes hands or not. Given that the ordinary operation of the Marketing Order works an uncompensated taking, a fine for refusing to participate is unconstitutional as well, and the Hornes were entitled to oppose it on constitutional grounds. A different rule would have enabled the government to penalize the Hornes for standing on their rights, or, at best, put the Hornes through the pointless exercise of paying the fine and suing to get it back.[29]

The fact that the Hornes brought their claims in their capacity as handlers rather than producers, and as to raisins that were owned by others, is not much more troubling. The Hornes may not have owned the raisins, but they were the target of an enormous fine that they surely had standing to challenge on all relevant legal grounds. Likewise, no fines were to be imposed on any of the raisin producers; on the contrary, the producers had been paid and bore no risk when the government began its proceedings against the Hornes. Having forced the Hornes to bear the entire financial responsibility for the raisins, the government could not reasonably

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[26] *See* Village of Norwood v. Baker, 172 U.S. 269, 271 (1898) (imposition of an "assessment" equal to the amount of compensation due for a condemnation, plus the costs of condemnation, is equivalent to an uncompensated taking); Missouri Pac. Ry. Co. v. Nebraska, 217 U.S. 196, 205-08 (1910) (reversing a fine imposed on a railroad for refusal to surrender property for a grain elevator).

[27] Wilkie v. Robbins, 551 U.S. 537, 583 (2007) (Ginsburg, J., dissenting).

[28] *Horne I*, 133 S. Ct. at 2600 (emphasis added).

[29] Eastern Enters. v. Apfel, 524 U.S. 498 (1988); *Horne I*, 133 S. Ct. at 2063.

argue that there was anything vicarious about the Hornes' assertion of Takings Clause defenses.

What all this goes to show is that identifying an uncompensated taking in this case required nothing novel, merely a straightforward understanding of what the Raisin Marketing Order *did*, followed by the application of well-established takings principles in light of the Order's practical realities.

C. THE REMEDY

The Department of Agriculture's final argument in the Supreme Court was that if the Court held that the Raisin Marketing Order effects a taking, the proper remedy would not be to enter judgment for the Hornes, but to remand to the Ninth Circuit for a determination of just compensation. Taken literally, the idea of "compensation" in the Hornes' case made no sense. Because the Hornes had sold the reserve raisins at issue and had refused to pay the fines assessed by the government, nothing had been taken from them, so no compensation was due. What the government really had in mind was apparently a sort of equitable accounting, in which the supposed benefits of the Raisin Marketing Order would be tallied up and deducted from the money the Hornes earned from selling the reserve — presumably leaving the Hornes to pay the bill.[30]

This issue split the eight-justice majority that had found a taking, with Justice Breyer, Justice Ginsburg, and Justice Kagan dissenting as to the remedy. (Justice Sotomayor did not address the issue.) In the dissenting view, the question whether the Raisin Marketing Order afforded just compensation for reserve tonnage

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[30] *See* Brief of the Respondent at 56, Horne v. U.S. Dep't of Agric., 135 S. Ct. 2419 (2015) (No. 14-275) ("Thus, if the Court concludes that petitioners' takings defense has merit, it would be appropriate to give the lower courts an opportunity to analyze that valuation issue *and determine the proper fine on remand*.") (emphasis added).

raisins was still open, and required further proceedings to ascertain — although in a somewhat narrower way — what the government requested. In such a proceeding, "when calculating the just compensation that the Fifth Amendment requires, a court should deduct from the value of the taken (reserve) raisins any enhancement caused by the taking to the value of the remaining (free-tonnage) raisins."[31] According to the three justice partial dissent, if "the value of the raisins taken … exceed[s] the value of the benefit conferred," then "the reserve requirement effects a taking without just compensation, and the Hornes' decision not to comply with the requirement was justified."[32] But if "the benefit … equal[s] or exceed[s] the value of the raisins taken … the California Raisin Marketing Order does not effect a taking without just compensation," in which case the Hornes "cannot use the Takings Clause to excuse their failure to comply with the marketing order—or to justify their refusal to pay the fine and penalty imposed based on that failure."[33]

The five-justice majority held otherwise, for two reasons. First, it disagreed that "general regulatory activity … can constitute just compensation for a specific physical taking."[34] In other words, even if the workings of the Raisin Marketing Order led to benefits for the Hornes, those benefits would not have counted as compensation for the reserve raisins, making it pointless to calculate them. Second, the majority pointed out that the fine imposed on the Hornes included a calculation of the market value of the raisins that should have been held in reserve.[35] Because the government "[did] not suggest that the marketing order afford[ed] the Hornes

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[31] Horne v. U.S. Dep't of Agric., 135 S. Ct. 2419, 2434 (2015) (Breyer, J., concurring in part and dissenting in part) [hereinafter *Horne II*].
[32] *Id.* at 2435. It is not clear whether Justice Breyer agreed with the government that the Hornes would still potentially have to pay a fine in the amount of their benefit.
[33] *Id.* at 2436.
[34] *Horne II*, 135 S. Ct. at 2432.
[35] *Id*. at 2436.

compensation in that amount," there was no dispute that the Raisin Marketing Order offered less than just compensation.[36]

The majority had the better of the argument on both scores. It is true that when evaluating just compensation after a partial taking, "special benefits" to the property owner's other property are taken into account and deducted from the compensation due. But that question of compensation does not go to whether a taking occurred: If a taking increased the value of the remaining property in an amount greater than the value of the taken property, the compensation due would be zero. Compensation was not an issue in *Horne* because no property had yet been taken; there was no reason, as a result, to work out whether the Hornes were better off or worse off. Furthermore, the kinds of special benefits that are sometimes counted against the amount of compensation involve particular ways that taken property benefits the remaining property (say, land value increasing when a road is widened). Those types of benefits are unlike the supposed benefits of the Raisin Marketing Order. And besides, if the Raisin Marketing Order had any regulatory benefits, they came from volume restriction, not the transfer of raisins to the government.

Historically, when the Supreme Court sides with property owners opposing takings, the remedy has been to reverse, not to remand for determination of whether the property owner would benefit from the taking.[37] *Horne* fits neatly into that rule.

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[36] *Id.*

[37] *See* Dolan v. City of Tigard, 512 U.S. 374 (1994); Eastern Enters. v. Apfel, 524 U.S. 498 (1988); Hodel v. Irving, 481 U.S. 704 (1987); Kaiser Aetna v. United States, 444 U.S. 164 (1979); *Missouri Pac. Ry.*, 217 U.S. at 205-208; *Village of Norwood*, 172 U.S. at 278.

II. AN AFFIRMANCE WOULD HAVE RADICALLY UNDERMINED TAKINGS LAW

Conversely, the real threat to the foundation of takings law came not from the Hornes' challenge, but from the Ninth Circuit panel decision under review. The lower court's decision was truly radical, and an affirmance could have reduced the Takings Clause to little more than a historical relic.

A. PERSONAL PROPERTY

One of the most striking aspects of the panel's decision (and one that attracted particularly intense amicus interest in the Supreme Court) was its holding that the government is *never* categorically obligated to compensate for an appropriation of personal property, even when it actually takes ownership for itself. In the panel's view, the government is categorically obligated to compensate only for takings of *real* property, *i.e.*, land.[38]

If it were true that the categorical duty to pay just compensation only applies to takings of land, even the most blatant appropriation of moveable or intangible property would be subject only to a balancing test. Some would be subject to the test the Supreme Court articulated for regulatory takings in *Penn Cent. Transp. Co. v. New York City*.[39] Here, in the panel's view, the proper standard was the test the Supreme Court developed in *Nollan*[40] and *Dolan*[41] for exactions required by the government as conditions for land use permits.

The balancing tests that the Ninth Circuit panel would have applied to personal property are seldom especially demanding, particularly as compared to a categorical just compensation rule.

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[38] Horne v. U.S. Dep't of Agric., 750 F.3d 1128 (9th Cir. 2014).
[39] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).
[40] Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).
[41] Dolan v. City of Tigard, 512 U.S. 374 (1994).

Penn Central requires an examination of factors such as "the economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action."[42] As discussed infra, the *Nollan* and *Dolan* test that the panel found applicable in this case requires only a "nexus" and "rough proportionality" between a government purpose and an exaction of property,[43] and the panel's application of that test would have drained it of virtually all its substance. In *no* case would the panel's approach grant an owner of personal property the benefit of the Supreme Court's rule in *Loretto* and similar cases that a physical taking is categorically compensable "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[44]

By that standard, much of the most valuable property in the United States would suddenly be subject not just to restrictions on use, but to actual appropriation subject only to mild balancing tests. Allowing the government to seize personal property subject only to balancing is equivalent to a massive windfall for the government at the expense of property owners. The result, moreover, would be disproportionate: landowners could still count on compensation when their land is taken for public works, but nobody else could. Owners of patents, securities, Internet domain names, retirement accounts, and art collections would be out of luck.

The panel's decision was strikingly mistaken in that regard. As the Supreme Court showed, it is inconsistent with Takings law stretching back to Magna Carta, which prohibited any "'constable or other bailiff' from taking 'corn or other provisions from any one without immediately tendering money therefor, unless he can have

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[42] *Penn Cent. Transp. Co.,* 438 U.S. at 124.
[43] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2591 (2013).
[44] *Loretto*, 458 U.S. at 434-35.

postponement thereof by permission of the seller.'" [45] Several antecedents of the Takings Clause in colonial and pre-Constitution state law required just compensation for takings of personal property, and in fact early sources indicated that the Takings Clause was originally intended as a reaction against seizure of war materials by the army during the War of Independence.[46] Since then the Takings Clause had been held to create a categorical right to compensation upon takings of many kinds of intangible or personal property, including patents, [47] boats, [48] money, [49] and liens on movable property.[50] Lower courts, until the Ninth Circuit's opinion, agreed.[51] As the Supreme Court explained, "[t]he Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home."[52] Eight justices agreed with that holding expressly; Justice Sotomayor's solo dissent did not address it.

One commentator on the *Horne* decision, Professor John Echeverria of the University of Vermont, has defended the panel's decision on its own terms, and suggested that including property other than land within the categorical protection of the Takings

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[45] *Horne II*, 135 S. Ct. at 2426 (citing Magna Carta Cl. 28 (1215), in W. McKechnie, *Magna Carta*, A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 329 (2d ed. 1914)).
[46] *Id.*
[47] James v. Campbell, 104 U. S. 356, 358 (1882).
[48] United States v. Russell, 80 U.S. 623, 628 (1871).
[49] Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980); *Koontz*, 133 S. Ct. at 2600.
[50] Armstrong v. United States, 364 U.S. 40, 49 (1960).
[51] *See, e.g.*, Nixon v. United States, 978 F.2d 1269, 1284 (D.C. Cir. 1992); Philip Morris, Inc. v. Reilly, 312 F.3d 24, 51 (1st Cir. 2002) (Selya, J., concurring) ("Limiting per se takings analysis to cases involving real property is a crude boundary with no compelling basis in the law."); Warner/Elektra/Atl. Corp. v. County of DuPage, 991 F.2d 1280, 1285 (7th Cir. 1993) ("It is rare for American governments to requisition personal property, but sometimes they do so and when they do they have to pay just compensation.").
[52] *Horne II*, 135 S. Ct. at 2426

Clause would unsettle other areas of law by calling into question "seizures of adulterated drugs by the Food and Drug Administration," "civil or criminal forfeiture actions," "removal of unwholesome foods from store shelves by local health officials," or "the taking away of abused or otherwise mistreated animals from their owners by local animal control officers," for instance.[53]

At least two rejoinders seem obvious. *First*, as a doctrinal matter, the Supreme Court has always distinguished between takings of private property for public use and reasonable exercises of the police power. Property ownership may, for example, be conditioned on obeying other law.[54] The government has thus been empowered to terminate rights to property if the owner uses the property for a crime, or if the property threatens public health and safety. But that would seem readily distinguishable from the regime of the Raisin Marketing Order. The Marketing Order provided for seizure of raisins not because they were unhealthful or associated with crime,[55] but because the government considered private ownership of the raisin to be economically inefficient. There is no obvious reason why treating the Raisin Marketing Order as a taking need cast doubt on police power forfeitures.

This is not to say that modern forfeiture doctrine is necessarily correct, or sufficiently protective of property rights from the perspective of either individual liberty or economic efficiency.

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[53] John D. Echeverria, *Horne v. Department of Agriculture: Expanding Per Se Takings While Endorsing State Sovereign Ownership of Wildlife*, http://www-assets.vermontlaw.edu/Assets/directories/FacultyDocuments/Echeverria_ExpandingPerSeTakings.pdf.

[54] Texaco, Inc. v. Short, 454 U.S. 516, 529-30 (1982) ("The State surely has the power to condition the ownership of property on compliance with conditions that impose … a slight burden on the owner while providing such clear benefits to the State."); United States v. Locke, 471 U.S. 84, 106, n.15 (1985) ("[L]egislatures can enact substantive rules of law that treat property as forfeited under conditions that the common law would not consider sufficient to indicate abandonment.")

[55] The Supreme Court *unanimously* held that raisins are "a healthy snack." *Horne II*, 135 S. Ct. at 2431, 2441.

Likewise, as with any rule, there are hard cases at the margin of police power and takings law. Professor Echeverria cites, for example, a California law "that authorizes the removal of firearms and ammunition from persons determined to be dangerous to themselves and others." "Surely," he says, "that statute would not work a compensable taking." The issue in such a case may be closer than he acknowledges: If property were to be taken from persons who have committed no crimes, why should they not be compensated? Along similar lines, if a statute authorized a state to take title to, say, automobiles owned by persons whose drivers licenses had been revoked, would that not be a taking? These questions, though, have nothing to do with *Horne*; they are line-drawing problems that have existed all along. The *Horne* Court implicitly applied existing doctrine, under which takings law coexists with law contemplating other types of forfeiture, instead of addressing the more theoretically complicated questions arising from the correctness of the doctrine and where the border lies.

Second, and relatedly, the coexistence of takings law with police power-derived forfeitures has little if anything to do with the distinction between real and personal property. Many instances of forfeiture involve personal property, to be sure, but the government's ability to "condition the ownership of property on compliance with" other law has historically applied to real property interests, such as mineral rights, just as much as to drugs and cars.[56] Thus Professor Echeverria's argument is not, strictly speaking, about recognizing any pre-existing distinction between takings and personal property, but about keeping constitutional protections from property rights from interfering with the police power.

Horne confirms – unremarkably – that the doctrinal distinction between takings and forfeitures applies to personal property as well as to real property. What would have been remarkable, rather, is a

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[56] *See Texaco, Inc.*, 454 U.S. at 529-30.

new rule that the distinction applies *only* to real property, and that the police power entirely displaces the Takings Clause as to personal property. To be sure, *Horne* may well have future applications in other circumstances where the government seizes or destroys property, including circumstances that might otherwise have been treated as exercises of the police power. But even if it does, *Horne* itself simply applied well-trod doctrine to new facts.

A subtler version of the panel's distinction between different types of property appeared in Justice Sotomayor's dissent. In her reasoning, because raisins are a "fungible commodity for sale," where "the income that the property may yield is the property owner's most central interest,"[57] the Hornes supposedly retained the only interest in the raisins worth having. "They wish to use those reserve raisins by selling them, and they value those raisins only because they are a means of acquiring money. While the Order infringes upon the amount of that potential income, it does not inexorably eliminate it."[58] The Raisin Marketing Order was thus distinguishable from the taking in cases such as *Loretto* because it "cannot be said to have prevented the Hornes from making any *use* of the relevant property."[59]

Justice Sotomayor's view that the Takings Clause distinguishes between "fungible" or income-generating property and other types of property would have broken new ground.[60] Existing doctrine did not justify it. For example, it makes no sense as a reading of *Loretto*. The owner of the apartment building in that case presumably "wish[ed] to use [the building] by [renting it], and they value[d] [the building] only because [it was] a means of acquiring

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[57] *Horne II*, 135 S. Ct. at 2439 (Sotomayor, J., dissenting).
[58] *Id.*
[59] *Id.*
[60] I address in the next section Justice Sotomayor's view that the Hornes retained a meaningful property interest, or that that interest bore on the critical takings analysis.

money."[61] The owner of the building retained all the rental income, and so his "most central interest" in the building was preserved even if a small rectangular area of the exterior was occupied.[62] Yet the *Loretto* Court found a taking. The Supreme Court has also found takings in any number of cases involving truly "fungible" property, including money.[63]

The supposed distinction between "fungible" property used for generating income and other types of property has other problems. The seller of "fungible" goods needs to make creative decisions about where, when, and how to market them, so leaving the owner an uncertain stream of money in lieu of real ownership and dispositional control is not an equal trade. Even if it were, the question whether a piece of property is "fungible" or unique is inherently subjective — different people can view the same property in different ways — as is the "centrality" of any given interest from the owner's perspective, so legal doctrine based on such distinctions would be all but incapable of principled, consistent application.

Adoption of Justice Sotomayor's view would have been far more consequential than the majority's holding. The minimum scope of items that would be considered "fungible" under Justice Sotomayor's rule would presumably include almost every mass-produced agricultural and industrial product in the country (chickens, cars, smart phones, t-shirts), and probably even valuable commercial instruments such as stocks, bonds, and other securities. If possession of those kinds of property does not matter, then the government could seize every third car off of General Motors' assembly lines, or a third of the shares issued in every initial public offering on the New York Stock Exchange, without being categorically obligated to pay compensation. The law gave the

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[61] *Horne II*, 135 S. Ct. at 2439 (Sotomayor, J., dissenting).
[62] *Id.*
[63] *See, e.g.*, *Webb's Fabulous Pharmacies*, 449 U.S. 155 (1980); *Koontz*, 133 S. Ct. at 2600.

Court no reason to open up such a possibility, and it declined the invitation.

B. RETENTION OF RESIDUAL INTERESTS

The panel's other basis for holding that no per se taking had occurred was that the raisin owners retained — if not the raisins themselves or their market value — the supposed benefits of the RAC's activities and a contingent interest in the money left over when the RAC was finished selling the raisins, subsidizing the raisin exporters, and so on. "In light of this scheme, the Hornes cannot claim they lose all rights associated with the reserve raisins. [T]heir disposition, while tightly controlled, inures to the Hornes' benefit."[64]

The Supreme Court majority, as well as Justice Breyer's three-justice partial concurrence, rejected the panel's reasoning. "The fact that the growers retain 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[.]"[65] Justice Sotomayor dissented, asserting that the majority's decision would "unsettle an important area of our jurisprudence."[66] But again, the opposite was more accurate: The majority's opinion steered takings law within its historical bounds, and the opposite view would have created chaos.

The view of the panel and Justice Sotomayor was, if anything, even more jarring than the panel's conclusion on personal property. First, and most straightforwardly, it was difficult to reconcile with past doctrine. The Supreme Court's takings cases that address the question of whether a government action deprives a property owner of the property's entire value have arisen in the context of

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[64] Horne v. U.S. Dep't of Agric., 750 F.3d 1128, 1141 (9th Cir. 2014).
[65] *Horne II*, 135 S. Ct. at 2423.
[66] *Id.* at 2443 (Sotomayor, J., dissenting).

regulatory use restrictions, not cases where the government takes possession of property for itself. Where a regulation on property use deprives the owner of all the economic value of property, it is treated as if the government took the property for itself.[67] But as the Court noted in *Tahoe-Sierra*, in cases where the government really does take possession of property, a court "do[es] not ask whether [the seizure] deprives the owner of all economically valuable use[.]"[68]

That approach follows from the history of regulatory takings doctrine, which arose as a pragmatic judicial expansion of classical takings law. Takings law had historically involved seizures[69] or occupations[70] of property, which had to be compensated. As the regulatory state developed, however, courts coalesced around the view that some regulations can go "too far",[71] and so should be compensated in the same way that appropriations of property are compensated. Subsequent cases developed standards to guide courts in applying that insight.[72] It does not follow, though, that standards developed to guide courts in deciding whether a use restriction is equivalent to a taking should apply when the government takes possession of property. To the contrary, it would be perverse to take qualifications on regulatory takings doctrine and impose them on true takings to narrow the historical core of the Takings Clause's application.

Justice Sotomayor took a different understanding of takings doctrine. According to her, in effect, regulatory takings doctrine had taken over the entire field of takings law, essentially eliminating the distinction between governmental appropriations and regulations.

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[67] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992)..
[68] *See* Tahoe-Sierra v. Tahoe Regional Planning Agency, 535 U.S. 302, 323 (2002).
[69] United States v. Russell, 80 U.S. 623, 628 (1871).
[70] *See* Pumpelly v. Green Bay Co., 80 U.S. 166 (1871).
[71] *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
[72] *See Penn Cent. Transp. Co.*, 438 U.S. 104 (1978); *Lucas*, 505 U.S. 1003.

Thus, no matter whether the government seizes property or regulates its use:

> To qualify as a per se taking . . . the governmental action must be so completely destructive to the property owner's rights—all of them—as to render the ordinary, generally applicable protections of the *Penn Central* framework either a foregone conclusion or unequal to the task. Simply put, the retention of *even one* property right that is not destroyed is sufficient to defeat a claim of a per se taking under *Loretto*.[73]

The all-economic-value standard, in other words, matters as much where the government takes possession of property as when it regulates its use.

That reading would have marked a departure from the case law. *Tahoe-Sierra*, which Justice Sotomayor did not acknowledge on that point, confirmed a firm distinction between regulations and physical occupations most explicitly. It is also inconsistent with *Loretto*, her own authority. The property taken in that case, a small area of an apartment building's exterior wall, retained economic value to the owner: It continued to seal the building from the elements, and the building owner retained the ability to sell the building or take it out of commercial use (which would have lifted his obligation to permit the intrusion). Justice Sotomayor's "even one property right" standard thus would not have been met.

The Court in *Loretto* also rested its decision on an affirmation of the distinction between use restrictions and physical occupations:

> As *Penn Central* affirms, the Court has often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public

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[73] *Horne II*, 135 S. Ct. at 2438 (Sotomayor, J., dissenting).

> interest. At the same time, we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the government action" not only is an important factor in resolving whether the action works a taking but also is determinative. When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking.[74]

Second, the view of the panel and the dissent does not lend itself either to principled, coherent application or to robust protection for property. There were, in effect, three analytically separate rights in play under the Raisin Marketing Order: (1) the right to possess and sell the reserve raisins themselves, which the Raisin Marketing Order entirely extinguished, (2) the rights established by the Raisin Marketing Order, including the beneficial interest in the RAC use of the raisins and the contingent right to the residual funds, and (3) the categorical right to just compensation, created by the Takings Clause. The effect of the Raisin Marketing Order was to substitute a right to a share of proceeds for a right to property; in Justice Sotomayor's opinion, the fact of the substitution meant there had not been a taking that called for categorical compensation. But the major point of the Takings Clause is to govern the purposes and circumstances under which the government can substitute money for people's property rights: As relevant here, it requires that the money and property be of equal economic value. Some substitutions are adequate, others are not, and the Takings Clause provides the appropriate yardstick.

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[74] *Loretto*, 458 U.S. at 426-27.

If substitution of a beneficial interest and a theoretical right to money in the place of property does not call for application of the Takings Clause's just compensation standard, then it is not clear when it would ever apply. For one thing, legitimate takings of property are, by definition, "for public use," including the use of the previous owner, so the property owner almost *always* retains some kind of "right" or "benefit" from what was formerly his. The panel's argument that there was no categorical taking because "the reserved raisins continue to work to the Hornes' benefit after they are diverted to the RAC" would thus appear to apply to almost every taking.[75] The Takings Clause forecloses that reasoning, establishing instead that "the public as a whole" should be required to compensate the owner nonetheless.[76]

Relatedly, it ignores the record on the Raisin Marketing Order's economics. Recall that the "rights" raisin producers retained were worthless; in one year at issue, they received nothing at all for the reserve raisins transferred to the RAC, and the total value of their entire crop was less than it would have been without the reserve. To hold that such an interest distinguishes the categorical takings rule merely because the producers retained some theoretical right is tantamount to saying that by leaving a property owner *less* than the market value of taken property, the government can at a minimum avoid the categorical duty to pay just compensation, and as a practical matter, probably avoid just compensation completely. Justice Sotomayor responded that the fact the remaining interest is small or nothing "turns on market forces for which the Government cannot be blamed and to which all commodities—indeed, all property—are subject,"[77] an absurd suggestion considering the sum of money collected by the RAC and how it was disposed of.

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[75] Horne v. U.S. Dep't of Agric., 750 F.3d 1128, 1141 (9th Cir. 2014).
[76] *Armstrong*, 364 U.S. at 49.
[77] *Horne II*, 135 S. Ct. at 2439 (Sotomayor, J., dissenting).

The consequences of such a rule would be serious for property rights. If retention of "even one property right" of little or no value were enough to defeat the government's categorical duty of just compensation, governments would have a virtual roadmap to avoid their categorical duty of compensation almost at will. A Takings Clause-savvy government could no doubt find a way to structure a wide variety of takings — for all types of property, including for physical takings that would otherwise unquestionably call for just compensation — in ways that reserve some kind of nominal interest to the owner. It follows that if reservation of small interests in taken property is enough to defeat the categorical duty of compensation, the panel's opinion would have allowed the government to avoid having to compensate property owners through procedural gamesmanship and financial devices.

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Justice Sotomayor accused the majority of resting its decision on an improper and judicially unmanageable distinction between "retained property interests that are substantial or certain enough to count and others that are not,"[78] and predicted that the result would be "to unsettle an important area of our jurisprudence."[79] The reverse, however, is more accurate. Eight justices applied the traditional doctrinal distinction between retention of property and the quantum of compensation. It was Justice Sotomayor who erroneously conflated the existence of a taking with the amount of compensation, and whose analysis would entail endless, meaningless distinctions between different types of interests in different types of property.

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[78] *Id.* at 2442.
[79] *Id.* at 2443.

III. WHERE THE COURT COULD HAVE MADE MORE THEORETICALLY AMBITIOUS MOVES, IT DECLINED TO DO SO

I have discussed above the ways in which the Supreme Court majority applied well-settled doctrine to reach what should have been an uncontroversial conclusion. The alternative approaches of the Ninth Circuit panel and Justice Sotomayor, in contrast, would have broken new ground in ways that would have been disruptive of both the doctrine and of property rights expectations.

A further aspect of the *Horne* Court's minimalism, though, is the way in which it declined to reach a more theoretically challenging aspect of the case. As to that question, the *Horne* Court went no further than it had to in order to resolve the case, and (arguably) not far enough to create clear rules for future application.

One significant issue in *Horne*, which previous Supreme Court case law had left unsettled in some respects, related to the circumstances under which the government can demand property as a condition on commerce. The Ninth Circuit panel, in rejecting the argument that the Raisin Marketing Order effected a taking for which compensation was categorically required, held that the raisin reserve requirement was a condition on placing raisins into commerce. Rather than an ordinary seizure of possession, "the reserve requirement constitutes a use restriction on the Hornes' personal property,"[80] which "appl[ied] to the Hornes insofar as they voluntarily choose to send their raisins into the stream of interstate commerce."[81] According to the panel, "[t]he Secretary did not authorize a forced seizure of the Hornes' crops, but rather imposed

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[80] Horne v. U.S. Dep't of Agric., 750 F.3d 1128, 1141 (9th Cir. 2014).
[81] *Id.* at 1142.

a condition on the Hornes' *use* of their crops by regulating their sale."[82]

The panel's characterization required it to address whether the government can make a demand for property without being subject to the Takings Clause. Prior to *Horne*, the Supreme Court had offered three answers to that question: "Yes," "No," and "Sometimes."

At least one Supreme Court case implied considerable comfort with the government's power to demand property in exchange for allowing use of the property in commerce. In *Ruckelshaus v. Monsanto Co.*,[83] the Court addressed an Environmental Protection Agency regulation, which required chemical manufacturers to give up trade secrets (which the Court held were property subject to Takings Clause protections), effectively destroying them, in exchange for receiving a permit to sell pesticides. The Court held that no taking occurred because the trade secrets were given up as part of a "voluntary exchange" in return for the "Government benefit" of placing pesticides into commerce.[84]

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[82] *Id.*

[83] Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

[84] *Id.* at 1007. Justice Sotomayor pointed to two more cases supposedly justifying seizures as a condition on property use, *Leonard & Leonard v. Earle*, 279 U. S. 392 (1929), and *Yee v. Escondido*, 503 U. S. 519 (1992). *Horne II*, 135 S. Ct .at 2440-41 (Sotomayor, J., dissenting). In *Leonard & Leonard*, "the Court upheld a Maryland requirement that oyster packers remit ten percent of the marketable detached oyster shells or their monetary equivalent to the State for the privilege of harvesting the oysters." *Id.* at 2431 (majority opinion). But, as the majority noted, under Maryland law at the time the oysters were State property to begin, harvested under a license to collect and profit from public property. The ten percent remittance was thus part of the oysterman's compensation *to the State*, or a reservation of the State's *own* property to itself. *Id.* In *Yee*, the Court addressed mobile home park regulations that had the effect of requiring park owners to lease property in perpetuity at below-market rates. But the Court analyzed *Yee* as a regulatory taking, with no transfer of property involved. If there had been a transfer, the *Yee* Court noted, the property owners "would have a right to compensation" and the city "might then lack the power to condition [their] ability to run mobile home parks on their waiver of this right." 503 U.S. at 531-32.

The *Loretto* Court had taken a different view. In a footnote, the Court appeared to firmly reject the notion that by voluntarily placing an apartment building into commerce, the landowner consented to occupation of property by the government:

> It is true that the landlord could avoid the requirements . . . by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. [The contrary argument] would allow the government to require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices. The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated.[85]

The *Loretto* Court's view approaches a rule that the government can never require a property owner to surrender possession of property as a condition on use.

Finally, in *Nollan* and *Dolan*, the Court adopted a middle position under which *some* government exactions of property are not deemed uncompensated takings. *Nollan* and *Dolan* arose in the unique context of land-use exactions, in which the government demands a property right (often an easement) in exchange for granting a permit to develop the land. Those cases establish a two-part test for such exactions: The exaction must have a "nexus" with the public purpose to be served by the exaction, and the exaction must be "roughly proportional" to the need to be served by the

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[85] *Loretto*, 458 U.S. at 430 n.17.

exaction. The Supreme Court's decision in *Koontz* established that the *Nollan* and *Dolan* standard applied even when the "exaction" is of money.[86] To make matters even more complicated, the *Nollan* Court distinguished *Monsanto* on the basis that the pesticide permitting was a "government benefit," while development of land for commerce was not.[87]

The Ninth Circuit concluded that the Raisin Marketing Order was best analyzed under the *Nollan* and *Dolan* standard. According to the panel, *Nollan*, *Dolan*, and *Horne* "[a]ll involve a conditional exaction," with a "government benefit in exchange for an exaction" and an element of "choice" on the part of the property owner.[88] Applying the nexus and rough proportionality test, the government found the *Nollan* and *Dolan* standard satisfied.

Petitioners argued in the Supreme Court that *Nollan* and *Dolan* were not applicable, and that even if they were the standard they establish was unmet. The government countered that the Raisin Marketing Order was justified not only under the balancing test of those cases, but also under the potentially broader rule of *Ruckelshaus v. Monsanto Co*.

The Court rejected the government's reliance on *Monsanto* on the basis that the right to enjoy "basic and familiar uses of property" is not a government benefit subject to conditional exactions. "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 constitutional protection. Raisins are not dangerous pesticides; they are a healthy snack."[89]

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[86] "[W]hen 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." *Koontz*, 133 S. Ct. at 2600.

[87] *Nollan*, 483 U.S. at, 833.

[88] Horne v. U.S. Dep't of Agric., 750 F.3d 1128, 1143 (9th Cir. 2014).

[89] *Horne II*, 135 S. Ct. at 2431.

The Court acknowledged the panel's holding as to *Nollan* and *Dolan*, but did not analyze it.

Here, the Court once again decided the minimum necessary to resolve the case — and possibly too little to establish rules applicable elsewhere. First, the Court gave frustratingly little guidance on the scope of *Monsanto*. The distinction between "dangerous pesticides" and "healthy snacks" may have distinguished *Monsanto* for purposes of *Horne*, but it does not lend itself to principled application in the future. The limits of *Monsanto*-type "voluntary exchange" in return for a government benefit are similarly unclear. According to the majority, "[s]elling produce in interstate commerce, although certainly subject to reasonable government regulation, is . . . not a special governmental benefit that the Government may hold hostage . . . ."[90] Thus, participation in the raisin market cannot be exchanged for property. But what exactly distinguishes permission to enter the pesticide market in *Monsanto* from participation in the raisin market?

The Court's reasoning suggests a few possible answers. It could be that courts must distinguish between "basic and familiar uses" of products that are not "dangerous" (which cannot be conditioned on a government exaction) and other uses of other types of products (which may be), but such a rule seems destined to lead to ad hoc, unpredictable decision making. Another possibility would be to develop a more robust distinction between commercial activity that can be characterized as a "special government benefit" as opposed to ordinary participation in commerce. A third would be to expressly overrule *Monsanto* or limit it to its facts, perhaps limiting the scope of conditional exactions to the context of land use permitting, where *Nollan* and *Dolan* govern. It is reasonable to predict that the Court may ultimately need to provide clarity on its

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[90] *Id.* at 2430-31.

analysis for conditional exactions outside of the domain of *Nollan* and *Dolan*, and it did not take the opportunity to do so in *Horne*.

Second, although the Court acknowledged the panel's holding that *Nollan* and *Dolan* govern here and justify the taking, it did not discuss the issue further. That left a hole in the Court's reasoning. On the panel's reasoning, the Raisin Marketing Order would have had to be analyzed as a conditional exaction even if raisins were transferred to the government. The Court's holding shows that it implicitly rejected the panel's position in some way, but it did not explain why.

Again, there are a number of possibilities. One is that it assumed that the *Nollan* and *Dolan* standard applied, but concluded that the test was not met. It could have done so on multiple grounds. If sale of an agricultural product on the market causes any harms at all — perhaps price instability — they are unlike the kinds of public harm that justify seizing easements on developed land. Assuming that instability in raisin prices counts as a public harm at all, the regulatory response tailored to remedying it would be to restrict the volume of raisin sales, not to transfer the raisins to the government, sell the raisins back into the market, and use the proceeds to subsidize exporters. There is thus no "nexus" between the goal of stabilizing the price of raisins and the raisin reserve. By the same token, transferring property to the government could not have been "proportional" to the problem of price instability if a simple volume restriction would have been adequate.[91]

Other possibilities about the Court's reasoning raise more theoretical questions about the applicability of *Nollan* and *Dolan* outside their original context. One is that *Nollan* and *Dolan* in fact have no application outside the "special context" of land use exactions, as petitioners argued.[92] As the Court noted in *Koontz*,

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[91] *See* Dolan v. City of Tigard, 512 U.S. 393 (1994).
[92] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005).

land use permitting involves unique public and private concerns. Land development can create a wide range of public costs, and "dedications of property" for public use can potentially "offset" those harms.[93] The government accordingly has broad discretion to adjudicate permits for land use on a case-by-case basis, but landowners' investments depend on the outcomes of those permitting processes,[94] creating a heightened risk of abuse. Hence the perceived need for a test that allows the government some leeway to demand property in the course of land use permitting, but which allows courts to intervene when the government attempts to extort too much property or for reasons unconnected to offsetting public harms.

Those concerns have less force, to say the least, with other types of property use. Entry of raisins into commerce, for example, does not lead to the same kind of public costs as developing a property that threatens public beach access as in *Nollan*,[95] or construction and pavement alongside a creek as in *Dolan*,[96] (though the particular exactions in those cases were rejected by the Court). Even if it did, dedicating raisins to public ownership does not "offset" those harms, at least not in the same way that land easements might protect the public against the consequences of land development.

The Court would have had ample ground to limit *Nollan* and *Dolan* to their original context. If that is the rule, and if *Monsanto* remains good law, then the government may demand property without compensation either in exchange for certain "government benefits," or (subject to the "nexus" and "rough proportionality" test) in adjudicating land use permits. If *Monsanto* were overruled, then the government could only condition property use on a partial

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[93] *Koontz*, 133 S. Ct. at 2594-95.
[94] *Id.*
[95] *See Nollan*, 483 U.S. at 428-29.
[96] *See Dolan*, 512 U.S. at 379-82.

transfer of ownership in land use permitting, and *Nollan* and *Dolan* would provide the standard for scrutiny.

In the alternative, particularly if *Monsanto* is still good law, another possibility is that the Court believes that *Nollan* and *Dolan* provide the test applicable *any* time the government conditions a "benefit" on surrender of property, including when the government confers a "benefit." In theory, when the government makes such a demand, a court could first consider whether the context involves a legitimate government benefit as exists in *Monsanto*-type regulatory schemes or in the context of land use permitting. If so, the court could consider whether the proposed exchange is voluntary or unduly coercive, applying the *Nollan* and *Dolan* standard. If not, then the court could apply a categorical rule requiring just compensation. That rule would have the advantage of judicial oversight over the government's ability to use *Monsanto* to demand something more than a "voluntary exchange."

The panel's treatment of the Raisin Marketing Order raised a question of how far the government can go in demanding a transfer of property as a condition on commerce. The Court rejected the argument that the government could do so in this case, but provided little explanation. The questions remain open.