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THE RAISINS OF WRATH: THE CONSTITUTIONALITY OF INTEREST ON LAWYERS' TRUST ACCOUNTS FOLLOWING *HORNE V. USDA*

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INTRODUCTION

Legal aid programs in this country are funded in a peculiar way. Although Congress directly appropriates funds for the Legal Services Corporation, there exists a second program that requires lawyers and their clients to transmit all interest on certain accounts to government-established funds that pay for free legal services to the poor. Lawyers often hold money in trust for their clients. These trusts are required by law to be deposited in interest-bearing

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accounts. When the amounts involved are too small to warrant either the bank's fees or the lawyer's labor to set up a new account, a lawyer is permitted to pool the client's funds with other similarly situated clients so that interest may be earned collectively. These pooled accounts are known as interest on lawyers' trust accounts ("IOLTA accounts").[1]

The Supreme Court, in a five-to-four 2003 decision in *Brown v. Legal Foundation of Washington*, upheld such a program against a Fifth Amendment takings challenge.[2] The *Brown* Court agreed there was a taking under the Fifth Amendment, but that no compensation was due because "if petitioners' net loss was zero, the compensation that is due is also zero."[3] In light of subsequent Supreme Court decisions, the Court's reasoning in *Brown* is no longer tenable. The culmination of the post-*Brown* jurisprudence is *Horne v. United States Department of Agriculture*, which held that government conferred benefits to personal property cannot be conditioned on the relinquishing of a constitutional right.[4]

Much like *Kelo v. New London*,[5] *Horne* has captured the imagination of the American public.[6] Given the broad language the

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[1] This Note will refer to "IOLTA accounts", instead of IOLT accounts, even though the latter is technically accurate.

[2] Brown v. Legal Found. of Wash., 538 U.S. 216, 237 (2003).

[3] *Id*. at 237.

[4] Horne v. Dep't of Agric., 135 S. Ct. 2419, 2433 (2015).

[5] Kelo v. City of New London, 545 U.S. 469 (2005).

[6] In addition to the constitutional import of the case, the ease one can pun with raisins has helped to capture the public's imagination. *See, e.g.*, *Horne*, 135 S. Ct. 2419, 2433 (2015) (Thomas, J., concurring) ("[H]aving the Court of Appeals calculate "just compensation" in this case would be a fruitless exercise."); Richard Epstein, *Raisin' A Raw Deal*, Defining Ideas, Hoover Institution (July 6, 2015), http://www.hoover.org/research/raisin-raw-deal; The Daily Show with Jon Stewart: Raisin Growers Lawsuit (Comedy Central television broadcast Aug. 13, 2013), *available at* http://thedailyshow.cc.com/videos/pmrodj/raisin-growers-lawsuit; Michael W. McConnell, *The Raisin Case*, CATO SUP. CT. REV., 2014-2015, at 313, 332 ("A decade ago, the case would have died on the vine . . . *The Raisin Case* suggests that Rehnquist's admonition is bearing fruit.").

Supreme Court used to affirm an expansive reading of the Fifth Amendment, *Horne* urges a reconsideration of the rationale of *Brown*.

This note begins with an explanation of the genesis and operation of IOLTA accounts. These accounts, arising out of congressional and state action, consist of funds that are pooled by a lawyer on behalf of his clients.[7] According to various state laws, regulations, and judicial rulings, interest from these accounts is not transmitted to clients as is usually required, but must be handed over to the state.[8] Although states are under no constitutional obligation to do so, they often fund legal aid programs with the remitted interest.

The note will then examine the legal reasoning of *Brown*. The basic argument advanced by the majority was that no compensation is due to clients because the net interest that could be earned in the absence of the accounts would be zero.[9]

In examining whether the rationale of *Brown* has been eroded in subsequent years, we will examine two particular holdings in *Horne*—the Court's unconstitutional conditions and offset rulings. These form the backbone of the renewed challenge to IOLTA, and so these sections of the opinion will be analyzed closely and situated in the case law.

The stricture of unconstitutional conditions prohibits the government from conditioning the grant of a benefit on a recipient's relinquishing of his constitutional rights.[10] Some conditions, however, are permissible if they are in some way connected or

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[7] *Brown*, 538 U.S. at 221.
[8] *See, e.g.,* Washington State Court Rules of Professional Conduct 1.15A(i)(1); N.Y. Judiciary
Law § 497.
[9] *Brown*, 538 U.S. at 237 (2003).
[10] *See* Speiser v. Randall, 357 U.S. 513 (1958); *see also* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988).

germane to the purposes of the program.[11] For example, a state-run alcohol rehabilitation facility can condition the program on abstention from alcohol, even though an individual is legally free to drink, because of the connection between the condition and the purposes of the program.

When property is partially taken by the government, there may be a benefit from the taking to the remaining property. The classic example of this is a road that is built using partially taken property, but increases the economic value to the rest of the owner's land because of increased traffic and commercial activity. As first articulated by the Court in *Bauman v. Ross*, any benefits that redound to the value of remainder property in a partial taking will be offset against the just compensation due.[12] What constitutes such a special benefit and how it is calculated will be explored in light of the remedy provided by the Court in *Horne*. By not remanding to a lower court for a calculation, the Court effectively limited *ex post* rationalizations of takings.

This note argues that the twin holdings of *Horne* are that both the doctrines of unconstitutional conditions and offsets apply beyond real property, meaning that all government action must comport with these constitutional strictures. This has the potential to alter numerous government programs because when a physical, also known as a *per se*, taking is effected, a panoply of constitutional protections is activated.

Relying on the reasoning of *Horne*, a constitutional challenge to the taking of interest from IOLTA accounts should be sustained given that the Court's reasoning was incorrect. Thus, this note is

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[11] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2595 (2013) (government may "condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal.").

[12] *See* Bauman v. Ross, 167 U.S. 548, 574 (1897).

both an analysis of the Court's jurisprudence, as well as a template for litigation.[13]

I. ORIGIN AND OPERATION OF INTEREST ON LAWYERS' TRUST ACCOUNTS

An interest on lawyers' trust account ("IOLTA") is a mechanism for pooling client funds that would not otherwise be able to earn interest. State rules prohibit a lawyer from commingling funds, and he must set up a separate, interest-bearing account for each of his clients, unless falling into the IOLTA exception.[14] This exception to the general rule against commingling was enacted because states recognized the burden on the lawyer of having to set up a separate account for each client, no matter how small the amount or how short a period of time the funds are held.

Before 1980, when Congress allowed federally-insured banks to provide interest on certain non-profit accounts, pooled client funds "were typically held in non-interest-bearing federally insured checking accounts." [15] Following this change, states began to categorize IOLTA accounts as warranting interest and required that the money accrued go to fund programs that the state would choose.

New York State provides a typical example of one of these mandatory programs. In 1983, the state established a fiduciary fund, known as the "New York interest on lawyer account (IOLA) fund," whose 15-member board is appointed by the governor.[16] The fund's mandate is to distribute funds, "for the purpose of delivering

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[13] *Cf.* Karl H. Marx, *Theses on Feuerbach* (1888) ("Philosophers have hitherto only interpreted the world in various ways; the point is to change it.") available at https://www.marxists.org/archive/marx/works/1845/theses/index.htm.
[14] Ann. Mod. Rules Prof. Cond. § 1.15.
[15] *Brown*, 538 U.S. at 221.
[16] N.Y. State Fin. Law § 97-v (McKinney) (2015).

civil legal services to the poor and for purposes related to the improvement of the administration of justice . . . ."[17]

New York requires lawyers to deposit into IOLA funds which, ". . . in the judgment of the attorney, are too small in amount or are reasonably expected to be held for too short a time to generate sufficient interest income to justify the expense of administering a segregated account for the benefit of the client or beneficial owner."[18] Banking institutions are then required to remit to the IOLA Fund, "at least quarterly any interest earned on the account directly to the IOLA fund, after deduction of service charges or fees, if any, are applied."[19]

According to the New York IOLA Fund annual report there are approximately 45,000 IOLTA accounts in the state held at 170 banking institutions.[20] From its creation in 1983 until the first quarter of March 2015, the IOLA Fund has awarded over $377 million.[21] In 2015, the Fund awarded $46 million in two-year grants to organizations such as the Bronx Defenders, the Legal Aid Society, and the Northern Manhattan Improvement Corporation.[22] This puts the total amount funded at $423 million.

Every state in the country, along with the District of Columbia and Virgin Islands, has an IOLTA program and only two are

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[17] *Id.*
[18] N.Y. Judiciary Law § 497 (McKinney) (2015).
[19] *Id.*
[20] *The Interest On Lawyer Account Fund Of the State of New York, Annual Report* (2014). *Available at* https://www.iola.org/board/Grantee%20Annual%20Report%202014-15/Annual%20Report%202014(final).pdf.
[21] *Id.*
[22] *The Interest on Lawyer Account Fund of the State of New York (IOLA) Awards $46 Million in Legal Assistance Grants*, Press Release. *Available at* https://www.iola.org/grantees/Press%20Release/2015-17%20Grant%20Award%20Press.pdf.

voluntary.[23] They are created by various means, including by statute, state bar rules, and professional conduct rules.[24] These programs benefit different organizations, but are generally directed towards legal services for the poor.[25] The constitutionality of these programs is largely unquestioned following *Brown*.

According to the American Bar Association, since their creation IOLTA programs have generated over $3.8 billion nationwide. Although this number has come down in recent years from a peak of $371 million in 2007, in 2014 the programs still generated $75 million nationally.[26]

Although interest rates have remained at near-zero since the recent financial crisis, the Federal Reserve in late 2015 announced that it raised the federal funds target rate by 25 basis points.[27] Raising short-term interest rates has the potential to increase the amount of money earned on IOLTA accounts, which have suffered from the Federal Reserve's zero interest rate policy.[28] Although in *Loretto v. Teleprompter Manhattan CATV Corp.* the Court ruled that a taking is a taking no matter how small,[29] as a practical matter, the

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[23] *Status of IOLTA Programs*, American Bar Association (2014). *Available at* http://www.americanbar.org/groups/interest_lawyers_trust_accounts/resources/status_of_iolta_programs.html.

[24] *See, e.g.,* Haw. Sup. Ct. R. 11; N.Y. Judiciary Law § 497 (McKinney) (2015); Ala. Rules of Pro'l Conduct R. 1.15 (2012); Andrew Arthur, *A Good Rule, Poorly Written: How the Financial Crisis Highlighted the Inadequacy of IOLTA Rate Rules*, 64 CATH. U. L. REV. 729, 732 (2015).

[25] *Id*.

[26] Data on file with *the Journal of Law and Liberty*, available on request.

[27] Tyler Durden, *Fed Hikes Rates, Unleashing First Tightening Cycle In Over 11 Years*, ZEROHEDGE, (Dec. 16, 2015). *Available at* http://www.zerohedge.com/news/2015-12-16/fed-hikes-rates-unleashing-first-tightening-cycle-over-11-years.

[28] Andrew Arthur, *A Good Rule, Poorly Written: How the Financial Crisis Highlighted the Inadequacy of IOLTA Rate Rules*, 64 CATH. U. L. REV. 729, 738-39 (2015).

[29] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982) ("In short, when the 'character of the governmental action,' *Penn Central*, 438 U.S., at 124, is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves

stakes are raised on the constitutionality *vel non* of these state programs.

A. THE *BROWN* DECISION

In *Brown*, the Court held that just compensation was not due to lawyers and their clients on interest accrued from IOLTA accounts.[30] The petitioners in *Brown* were individuals who were engaged in real estate transactions in Washington state. In the course of the transaction, they paid an earnest money deposit that was put in an IOLTA account, pooled with other clients.[31] The state required that the interest earned on that principal be transmitted to the Legal Foundation of Washington, a non-profit organization established by the Supreme Court of Washington.[32] The petitioners challenged Washington's IOLTA account program on the grounds that just compensation is required when private property is taken for public use.

Sitting *en banc* and reversing a prior panel, the Ninth Circuit applied an *ad hoc* takings analysis to hold that there was no taking of petitioner's property and even if there were, the compensation due would be zero.[33] The Supreme Court granted certiorari on two questions: 1) "Whether the regulatory scheme for funding state legal services by systematically seizing this property violates the Takings Clause of the Fifth Amendment to the Constitution . . . ." and 2) "Whether

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an important public benefit or *has only minimal economic impact on the owner*.") (emphasis added).

[30] Brown v. Legal Found. of Wash., 538 U.S. 216 (2003).

[31] *Brown*, 538 U.S. at 229.

[32] http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=ELC&ruleid=gaelc1515.07; The Foundation, "provides time, money and other available resources to civil legal aid programs to assist low-income people throughout Washington state and supports policies and initiatives which enable the poor to overcome barriers in the civil justice system."[32]

[33] Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835, 861 (9th Cir. 2001).

injunctive relief is available to enjoin a State from committing such a violation of the Takings Clause, where the legislative scheme in issue clearly contemplates that no compensation would be paid to the owners of the interest taken, and where the small amount due in any individual case often renders recovery through litigation impractical."[34]

The Court's analysis in *Brown* begins by establishing that there had been a *per se* taking, avoiding the *ad hoc* analysis of *Penn Central*.[35] It is this *per se* framework that the Court has crystalized in subsequent decisions to be discussed below.[36] This characterization is important because it is what triggers the below holdings of *Horne*.

There is similarly no doubt in the Court's opinion that the taking was for public use.[37] Whether legal aid programs are an effective use of money is beyond the scope of this article.[38] The analysis in *Brown* turned solely on the question of just compensation.[39]

According to the majority opinion written by Justice Stevens, the amount of just compensation due to the petitioners was nothing. The reason why no compensation was required by the taking was because the loss to the client was "zero."[40] This argument rests on the proposition that in the absence of these IOLTA accounts, the interest accrued on the client's principal would be zero. Washington, like many other states, allows the lawyer to determine

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[34] Brief for Petitioner, Wash. Legal Foundation v. Legal Foundation of Wash., 2002 WL 1974400.

[35] "…the transfer of the interest to the Foundation here seems more akin to the occupation of a small amount of rooftop space in Loretto." Brown v. Legal Found. of Wash., 538 U.S. 216, 235 (2003).

[36] *See infra* Section II.

[37] *Brown*, 538 U.S. at 232.

[38] *But see* Jonathan R. Macey, *Mandatory Pro Bono: Comfort for the Poor or Welfare for the Rich?*, 77 CORNELL L. REV. 1115 (1992).

[39] *Brown*, 538 U.S. at 235-36 (2003).

[40] *Brown*, 538 U.S. at 240.

in which type of account his client's funds should be deposited.[41] On the Court's reasoning, if a client could have earned meaningful interest above the costs of a separate account, then his lawyer would be violating the state's rules by not depositing them in a separate account. Therefore, the commingling of the funds did not deprive the clients of any money because they would not have received anything otherwise.

As pointed out by the dissent, however, the reason the client would not have received anything was because of the structure of the government program. Had the IOLTA account regulation been written so as to require the funds to be transmitted in *pro rata* share to the clients and not the state's Foundation, then the clients would surely receive money and the compensation required would not be zero. As the dissent put it in *Brown*, the majority found no just compensation was required "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."[42] Because there was nothing to prevent the interest from being transmitted to the clients in a *pro rata* share, what the Court relies on is an argument that the benefit of the commingling is permitted to be transmitted to the government instead of the individual clients. Although it does not explicitly say so, underlying the opinion is the rationale that it was the government program itself that allowed interest from commingling, and so the government should receive the benefit.

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[41] "Determining whether client funds should be deposited in accounts bearing interest for the benefit of the client or the Foundation is left to the discretion of each lawyer, but the new rule specifies that the lawyer shall base his decision solely on whether the funds could be invested to provide a positive net return to the client. This determination is made by considering several enumerated factors: the amount of interest the funds would earn during the period they are expected to be deposited, the cost of establishing and administering the account, and the capability of financial institutions to calculate and pay interest to individual clients." New CPR DR 9–102(C)(3).

[42] *Brown*, 538 U.S. at 241 (2003) (Scalia, J., dissenting).

The majority rejects this characterization of the argument by saying that the compensation due would be zero because otherwise a lawyer would be violating the state rules, which would require him to place the money in a separate account. The majority says, "no net interest can be earned by the money that is placed in IOLTA accounts in Washington" and that is why the net loss is zero. But as the dissent points out, the only reason no net interest can be earned is because the state program did not allow *pro rata* transmission to clients instead of the state itself.[43] It is this initial prohibition that the dissent implicitly challenged. The majority recognized that net interest was being earned—this was the money that was going to fund the programs. Where the majority and dissent disagreed was on whether the state could condition participation in the program, a benefit, on the turning over of interest to the Foundation.

This frames the fundamental disagreement in *Brown*, and we can now look to subsequent cases, most notably *Horne*, that cast doubt on the *Brown* majority's rationale.

II. SUBSEQUENT JURISPRUDENCE

A. *HORNE V. USDA*

Marvin and Laura Horne grew raisins.[44] Under the Agricultural Marketing Agreement Act, the Hornes were required to set aside a portion of their raisins each year for the government to collect.[45] The exact percentage of raisins reserved for the government was determined by the government through its Raisin Administrative

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[43] "The reason the Court finds there has been a 'a net loss of zero' is that the interest on petitioners' funds is entirely attributable to the merging of those funds into the IOLTA account—but for IOLTA, they would have earned no interest at all. That is to say, no compensation is due on the interest because the 'interest was created by a state regulatory program.'" *Brown*, 538 U.S. 216 n.4 (2003) (Scalia, J., dissenting).

[44] More accurately, they grew grapes, which they dried to produce raisins. For the purposes of clarity, this paper refers to raisin growers.

[45] 7 U.S.C. § 608(b).

Committee.[46] Raisins to be set aside for the government were deemed "reserve raisins," while the leftovers were known as "free-tonnage raisins." In the 2002-03 season, the Committee set the government's share of the raisins at 47 percent and the following season they set the requirement at 30 percent. The Department of Agriculture promulgates this system of output restriction through decrees called "Marketing Orders."[47]

When government agents came to collect the raisins at eight o'clock one morning, the Hornes refused them entry and did not turn over the reserve raisins. In response, the government fined the Hornes $480,000 for the missing raisins and $200,000 for refusing to comply with the Marketing Order.[48]

The Hornes opposed the Marketing Order and wrote to the Secretary of Agriculture explaining their ideological and economic opposition to the scheme enforced by the USDA.[49] To oppose the fine, they filed a lawsuit in the Eastern District of California against the Department of Agriculture. Their contention was that any taking of their property for public use necessitated just compensation under the Fifth Amendment. This constitutional claim was initially rejected by the lower courts as beyond their jurisdiction.[50] The first time the case reached the Supreme Court, the Court ruled that the lower courts had jurisdiction and remanded

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[46] *Horne*, 135 S. Ct. at 2424.
[47] *Id.*
[48] *Id.* at 2425.
[49] "[W]e are growers that will pack and market our raisins. We reserve our rights under the Constitution of the United States.… [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.… [W]e will not relinquish ownership of our crop. We put forth the money and effort to grow it, not the Raisin Administrative Committee. This is America, not a communist state. *Horne v. U.S, Dep't of Agric.*, 2013 WL 357830 (U.S.), 124 (U.S., 2013) (Joint Appendix).
[50] Horne v. U.S. Dep't of Agric., No. CV-F-08-1549LJOSMS, 2009 WL 4895362, at 27 (E.D. Cal. 2009) *aff'd*, 673 F.3d 1071 (9th Cir. 2012).

the case to the United States Court of Appeals for the Ninth Circuit to rule on the merits of the case.[51]

The Ninth Circuit characterized the seizure as a constitutional use restriction instead of a physical, or *per se*, taking. Furthermore, the panel declared that personal property is not afforded the same constitutional protection as real property.[52]

B. TAKINGS JURISPRUDENCE RESTATED

Writing for the majority, Chief Justice Roberts structured his opinion through answering the three questions posed in the petition for certiorari.[53] They were the following: 1) whether the Fifth Amendment protects personal, in addition to real property, 2) whether the government's provision of a contingent interest allows them to escape the Amendment's just compensation requirement, and 3) whether certain conditions on selling into interstate commerce are unconstitutional.

The first question asked "Whether the government's 'categorical duty' under the Fifth Amendment to pay just compensation when it 'physically takes possession of an interest in property,' applies only to real property and not to personal property."[54] The Court answered no. This answer, joined by all except for Justice Sotomayor, is a sharp rebuke to the Ninth Circuit, which incorrectly interpreted the Supreme Court as holding, "the Takings Clause affords less protection to personal than to real property."[55]

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[51] Horne v. Dep't of Agric., 133 S. Ct. 2053 (2013).
[52] Horne v. U.S. Dep't of Agric., 750 F.3d 1128, 1139 (9th Cir. 2014) ("But, as the Supreme Court stated in *Lucas*, the Takings Clause affords less protection to personal than to real property…").
[53] *Horne*, 135 S. Ct. at 2425.
[54] *Id.*
[55] Horne v. U.S. Dep't of Agric., 750 F.3d 1128, 1139 (9th Cir. 2014).

Horne is unique in the explicit affirmance that the Fifth Amendment extends to personal property. With this simple clarification, however, comes a deluge of doctrine. Fifth Amendment jurisprudence does not end at determining whether a taking is a *per se* or regulatory taking. There are numerous areas of takings doctrine, including just compensation and public use, which now explicitly apply to personal property. The Court's subsequent analysis applies concepts finding their genesis in the sphere of real property. For instance, the Court cited *Loretto v. Teleprompter Manhattan CATV Corp.* for the proposition that a physical appropriation, even if it is of "a small corner of [a] rooftop[,]" is still a *per se* taking.[56] With this analysis, the Court gives us no reason to believe that doctrines like offsets or unconstitutional condition protections do not apply to personal property. Thus, the Court would not find it constitutionally relevant that the IOLTA programs only appropriate a relatively small amount of money from each individual client in the context of *Loretto*.

The next question posed by the Court is "Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion."[57] Like the previous question, the Court answers no.

The Court's reasoning relies again on the distinction between physical and regulatory takings. Here, because there is an actual transfer of title, just compensation is required. The Court analogized to *Loretto*, where the physical installation of a small cable box was deemed a *per se* taking, even if the owner "could of course still sell and economically benefit from the property."[58] What is driving the Court's analysis is the bright-line they see that stems

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[56] *Horne*, 135 S. Ct. at 2429.
[57] *Id.* at 2428.
[58] *Id.* at 2429.

from the transfer of title and the threat of physical appropriation or trespass on an owner's personal property.

Relevant for our purposes is the conclusion that when a *per se* taking occurs, compensation is required, "without regard to the claimed public benefit."[59] Whether a cartelized raisin market or the provision of legal aid are public uses or "outdated, and by some lights downright silly, regulation[s]" is beyond the scope of a takings analysis.[60] Indeed, some have argued that we know whether a program is worth doing through the just compensation requirements, which is a true reflection of the costs of the program.[61]

1. Unconstitutional Conditions

The final question posed by the Court is "Whether a governmental mandate to relinquish specific, identifiable property as a 'condition' on permission to engage in commerce effects a *per se* taking." Here, the Court says yes.[62]

The doctrine of unconstitutional conditions finds its modern fountainhead in cases involving the First Amendment.[63] The growth of government programs has increased the ability for the state to control its citizens by posing them Hobson's choices—choices that are not really.[64] In *Speiser v. Randall*, for example, the Court held unconstitutional California's conditioning of tax benefits to veterans

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[59] *Id*. at 2427.
[60] *Id*. at 2438 (Sotomayor, J., dissenting).
[61] *See* Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1995).
[62] *Horne*, 135 S. Ct. at 2430.
[63] *See* Speiser v. Randall, 357 U.S. 513 (1958).
[64] *Cf.* "Of course, it was for the interest of the company to get the certificate. It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." U.S. Pacific R. Co. v. Public Service Comm'n, 248 U.S. 67, 70 (1918).

on their swearing a loyalty oath.[65] As the Court has articulated, "even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely."[66]

Although often used in the context of speech cases and civil liberties, the doctrine of unconstitutional conditions has teeth in the economic context, and the Court's holding in *Horne*, again eight-to-one, is nearly unanimous in breathing life into the doctrine.[67] The argument advanced by the federal government in *Horne* was that because the raisin growers voluntarily chose to produce raisins, the government could condition growers' selling into interstate commerce on their acceptance of cartelization and price controls.[68] Note the similarity between this argument and the argument advanced by the government in *Speiser*—the veterans voluntarily chose to participate in the tax benefit scheme and so the government can condition their participation on the swearing of a loyalty oath. Viewed in this light, it is not surprising that the Court rejected the federal government's argument in *Horne*.

But loyalty oaths are not like industrial production, and the Court has sometimes afforded less constitutional protection to economic liberties.[69] The one major Supreme Court precedent supporting the government's argument is *Ruckleshaus v. Monsanto Corp*, a case where the Court held that the Environmental Protection Agency could condition approval of pesticides on a company's revelation of its trade secrets.[70] The Court distinguished this case in *Horne* by noting the difference between the "benefit" of being able

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[65] *Id*. at 515.
[66] Perry v. Sindermann, 408 U.S. 593, 597 (1972).
[67] *See Horne* Part II.B.
[68] Gov't Br. 29, 33, Horne v. United States Dep't of Agric., 2015 WL 1731465 (U.S.), 9 (U.S. 2015).
[69] *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955).
[70] Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

to sell into interstate commerce and the benefit of receiving a permit under a regulatory system of preclearance.

As put by Professor McConnell, "it is not a 'benefit' for the government simply to refrain from forbidding a person to do something he would otherwise be free to do."[71] Doctrinally, this proposition comes from a case called *Nollan v. California Coastal Commission*, which explained that, "the right to build on one's own property . . . cannot remotely be described as a 'government benefit.'"[72] More deeply, however, this proposition is embedded in the philosophy of the Framers of the Constitution. As articulated by John Locke, men have certain rights that antedate their involvement in civil society.[73] As enumerated by the Declaration of Independence, these include "life, liberty, and the pursuit of happiness." On this theory of government, the purpose of the state is merely to secure these rights. Voluntary exchange is one of these rights; not only is this right not a "benefit," but the only justification for curtailing it is to in some way protect other natural rights. At least on the view of the world that the Supreme Court has implicitly adopted in *Horne* and *Nollan*, it is hard to imagine how a fruit cartel's monopolistic profits is a natural right deserving of state enforcement through the curtailment of voluntary exchange.

Horne thus advanced unconstitutional conditions and takings doctrine in two ways. The first is by explicitly applying the unconstitutional conditions analysis to personal property. *Nollan* and *Loretto* were both cases involving real property, and at least the Ninth Circuit thought that their protections could be limited to real property.[74] This error has been remedied and now the doctrine of

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[71] Michael W. McConnell, *The Raisin Case*, CATO SUP. CT. REV., 2014-2015, at 313, 327.

[72] Nollan v. California Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987).

[73] John Locke, *Two Treatises of Government*, ed. Thomas Hollis, § 131 (London: A. Millar et al., 1764).

[74] Horne v. U.S. Dep't of Agric., 750 F.3d 1128, 1139 (9th Cir. 2014).

unconstitutional conditions applies to personal property, such as raisins and bank accounts. The second is by crystalizing the principle of *Nollan* that it is not a government benefit to allow someone to exercise his property rights. The limiting principle here, as will be shown below, appears to be the Roman principle, "*Sic utere tuo ut alienum non laedas* [So use your own as not to injure another's property]."[75] Because a person does not have a right to send dangerous chemicals out into the world in the absence of preclearance, the government is justified in exacting a certain price for that ability.

2. Offsets, Special Benefits, and Just Compensation

The final and most important aspect of the Court's opinion for IOLTA accounts is the remedy provided to the Hornes. This remedy advances the Court's oft-neglected offset doctrine, which holds that the government can offset just compensation due to a property owner with any benefits that inure to his remaining property. While still commanding a five-vote majority, this section of the opinion loses three justices who had so far concurred: Justices Breyer, Ginsburg, and Kagan.

If a taking has already occurred, a property owner will bring what is known as an "inverse condemnation" action.[76] The Hornes, however, did not bring such an action because they refused to turn over the raisins and thus were seeking to enjoin a prospective taking. What this meant was that they challenged a fine levied against them of $483,843.53 and additional civil penalties. From this, the Court held that there did not need to be a just compensation hearing because the government had already

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[75] THE FREE DICTIONARY BY FARLEX, sicuteretuoutalienumnonlaedas.

[76] *See* United States v. Clarke, 445 U.S. 253, 255-58 (1980); Thomas W. Merrill, *Anticipatory Remedies for Takings*, 128 HARV. L. REV. 1630, 1637 (2015).

assessed the value of the taken raisins, *viz.* $483,843.53.[77] On this point, three justices dissented, still leaving a majority who rejected the need for a hearing. Justice Breyer argued for the dissent that the higher prices effected by the Marketing Orders acted as an offsetting benefit that would diminish the amount of just compensation due. He would have remanded the lower courts to calculate this offset.[78] Although both the majority and partial dissents mention special benefits, it is worth recapitulating the doctrine to understand how future claims of offsets will be dealt with by the Court.

When property is "partially" taken, the Supreme Court has held that the government can constitutionally offset the compensation due by taking into account benefits provided by the taking to the owner's remaining property.[79] There is a developed corpus of law dealing with partial takings of real property without an equivalent for partial takings of personal property.[80]

The Supreme Court's first major articulation of the doctrine came in *Bauman v. Ross*, 167 U.S. 548 (1897). There, the Court held constitutional a highways bill[81] for Washington D.C. that allowed for beneficial offsets to be taken into consideration when assessing

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[77] *Horne*, 135 S. Ct. at 2433.

[78] Horne v. Dep't of Agric., 135 S. Ct. 2419, 2436 (2015) (Breyer, J., concurring in part and dissenting in part).

[79] Bauman v. Ross, 167 U.S. 548, 575 (1897).

[80] During the Revolutionary and Civil War, acts were passed authorizing the confiscation of property, including chattels. The Supreme Court held that because the acts were passed under the war powers of Congress, they were constitutionally beyond the protections of the Fifth Amendment. Miller v. United States, 78 U.S. 268, 305 (1870); *see also* DANIEL W. HAMILTON, THE LIMITS OF SOVEREIGNTY: PROPERTY CONFISCATION IN THE UNION AND THE CONFEDERACY DURING THE CIVIL WAR (2007) (arguing that a liberal, individualist interpretation of property rights in the aftermath of the wars, as articulated by Justice Field, curbed confiscation against both Tories and ex-Confederates).

[81] 33 U.S.C.A. § 595 (West).

just compensation.[82] At the time, the Court noted that an "overwhelming number" of state courts adopted that view.[83]

Since then, the Court has ruled numerous times that non-monetary offsets, *i.e.* in-kind payments, may be taken into consideration when calculating just compensation.[84] One recent judicial articulation of the rule comes from the Court of Federal Claims in *Bassett, New Mexico LLC v. United States*, 55 Fed. Cl. 63 (2002).[85] In *Bassett*, the court refused to apply an offset to the remainder property because the United States did not provide any evidence in the trial record to support the alleged benefit.[86]

With the above in mind, we can look to the Court's refinement of its offset jurisprudence. There are two major points to note. The first, as mentioned above, is that the holding applied the Court's offset doctrine to personal property. Justice Breyer's dissent-in-part refers to "*Bauman* and its progeny," which he used as the basis for his vote to remand. Justice Breyer wanted the lower court to

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[82] "When . . . the part which [the owner] retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened." Bauman v. Ross, 167 U.S. 548, 574 (1897); *cf.* Monongahela Nav. Co. v. United States, 148 U.S. 312, 326 (1893) ("We do not in this refer to the case where only a portion of a tract is taken, or express any opinion on the vexed question as to the extent to which the benefits or injuries to the portion not taken may be brought into consideration.").

[83] Bauman v. Ross, 167 U.S. 548, 575 (1897).

[84] *See, e.g.*, Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 95 S. Ct. 335 (1974) ("No decision of this Court holds that compensation other than money is an inadequate form of compensation under eminent domain statutes.").

[85] "When only a portion of private property is physically taken, the amount of compensation owed to the property owner must be reduced by any special benefits from the government action accruing to the remainder of the property." Bassett, New Mexico LLC v. United States, 55 Fed. Cl. 63, 75 (2002) (citing Hendler v. United States, 38 Fed. Cl. 611, 617 (1997).

[86] "Even if the Court accepted the United States' argument that the removal action benefits the Property's value, the United States failed to include any evidence in the trial record regarding the amount by which said benefit increases the Property's value. Thus, we cannot offset compensable damages for the benefits allegedly conferred by the removal action." Bassett, New Mexico LLC v. United States, 55 Fed. Cl. 63, 76 (2002).

determine whether "[t]he value of the raisins taken might exceed the value of the benefit conferred."[87] If the benefit conferred exceeded the value of the taken raisins, then no just compensation would be due because the taking would be offset by the special benefit. As applied to the personal property context, this proposition can be stated another way: if the government cannot show a special benefit of a *per se* taking, then full just compensation is due. As will be shown below, no such showing can be made with respect to IOLTA, which the Court has said is a *per se* taking.

The second refinement is a procedural one. The majority did not attack Justice Breyer's reasoning on the constitutionality of permitting special benefits as offsets. Instead they relied on the procedural point that the federal government never made a distinct showing below about special benefits. Instead, their only claim of the value of the raisins was their initial assessment, which is what the fine was based on. As the Court put it, "The Government cannot now disavow [their previous] valuation."[88] This is in line with what lowers courts have said, namely that the burden is on the government to show that there is a benefit to the remaining property.[89] This is the same burden that the influential Nichols treatise on property adopts.[90] One of the benefits of this burden is that it forces the government to engage in an internal calculus that has them weigh the costs and benefits of their decisions to take. The

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[87] *Horne*, at 2419 (Breyer, J., concurring in part and dissenting in part).
[88] *Horne* at 17.
[89] Bassett, New Mexico LLC v. United States, 55 Fed. Cl. 63, 75 (2002).
[90] "Since benefits are raised as a defense to severance damages, it logically follows that damages must first be claimed before evidence of benefits can be offered. The condemning authority has the burden of proving that its project resulted in a measurable benefit to the owner's remaining land. To meet this burden, the government must offer proof that the increase in value of the condemnee's remainder resulted directly and peculiarly from the public improvement, over and above that appreciation in value enjoyed by neighboring property." 3 NICHOLS, EMINENT DOMAIN [3d ed.], § 8A.02[5] at 8A-43.

Court here is saying that if the government does not engage in such a calculus, then they cannot do so as an *ex post* justification.

It is with the above observations in mind that we can proceed to analyze the Court's decision in *Brown* to determine if it is still good law.

III. BROWN AFTER HORNE

A. UNCONSTITUTIONAL CONDITIONS

The key doctrinal difference between the majority and dissent in *Brown* is in how to analyze the condition placed on the owner who has had his property taken. Much like the Marketing Order scheme in *Horne*, the accounts in *Brown* were wholly a creation of the government and its monopoly power in regulating banking institutions. Were it not for the government's power to regulate interstate commerce or the banking system, there would be no alleged benefit that could be taken by the government.

Following *Horne*, the question becomes whether the condition ought to be analyzed under the *Nollan-Speiser* framework or under the framework of *Monsanto*. This will be determined by whether the benefit here is something that the recipient would otherwise be free to do. Challengers to the scheme will argue that a lawyer's ability to earn interest on his client's account is much closer to the right to sell into interstate commerce than the right to sell hazardous chemicals.

To begin, there is nothing in the nature of earning interest that requires the government to intervene prospectively. Just as the Court distinguished *Monsanto*'s scheme from the Raisin Marketing Order, so too can it distinguish the IOLTA scheme. Selling hazardous chemicals could be reasonably argued to fall under the ambit of a regulatory scheme of preclearance. The benefit of securing a license to sell such chemicals was much more of a special government "benefit" than being able to sell into interstate commerce, which is a part of the ordinary exercise of a person's natural right to exchange his property. No one necessarily has a right to sell these chemicals without first insuring their safety. This is not true of earning interest.

Much like buying and selling goods in interstate commerce, earning interest is a transaction between two parties that does not have any potential to affect third parties. Only a strained reading of the term "harm" can justify requiring a preclearance for the provision of interest. In fact, the selling into interstate commerce presents a more compelling case for regulation because of actual economic externalities. [91] The Court, however, rejected these nebulous economic harms as a basis for requiring preclearance. Additionally, just as "raisins are not dangerous pesticides," so too is interest not a dangerous pesticide.[92] These are reasons to believe that the IOLTA program should be subject to the *Nollan-Spesier* framework of unconstitutional conditions.

If this is the case, then the government can condition a benefit only if it can demonstrate "rough proportionality between its demand and the impact of the proposed development."[93] Here, the stated purpose of the program is to help third-parties by providing them with free legal services or militating for policies on their behalf. There is no connection between this and the provision of IOLTA accounts. The reason for this can be seen by looking at non-pooled accounts. Clients whose funds warrant a separate, interest-bearing account are not subject to the same transmission requirement, even though the accounts are functionally the same. Although the government can certainly require one property owner

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[91] "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." Horne v. Dep't of Agric., 135 S. Ct. 2419, 2430-31, 192 L. Ed. 2d 388 (2015).

[92] Unless the pest is a [loan] shark, in which case an orderly, industrialized system of credit would kill it without government action. Todd J. Zywicki and Astrid Arca, *The Case Against New Restrictions on Payday Lending*, Mercatus on Policy, No. 64, (Jan. 2010) available at http://mercatus.org/sites/default/files/publication/MOP64_FMWG_Payday%20Lending_web.pdf

[93] Horne v. Dep't of Agric., 135 S. Ct. 2419, 2437 (2015) (Sotomayor, J., dissenting).

over another to install some improvement, it must do so with reference to the proposed development.

In *Koontz v. St. Johns River Water Mgmt. Dist.*, the Supreme Court held that the government may not condition approval of a land-use permit on the property owner's funding of an offsite project to improve government property.[94] Extending the reasoning, the government may not condition the earning of interest on an account holders funding of an unrelated government program. Under the IOLTA scheme, third-party beneficiaries are in no way connected to the practice of law or the provision of interest-bearing accounts. Even if they were, they would be related to all interest-bearing accounts, not simply the clients that do not have enough money to warrant their own accounts. Although a challenge based on the Equal Protection Clause would not likely succeed, there is certainly disparate treatment under the law of those clients with enough money and those without.

Justice Sotomayor, the sole dissenter on the question of whether there was a taking, thought it was relevant that, "[t]he Hornes, however, retain[ed] at least one meaningful property interest in the reserve raisins: the right to receive some money for their disposition." Here, there is no similar retention of a meaningful property right. All of the interest is taken and it cannot be recovered through, say, a higher interest rate on a lawyer's remaining accounts that he can disperse to his IOLTA clients.

An additional argument that could be leveled to distinguish *Horne* from *Brown* relies on the concept of backgrounds of prohibition. Arguably, in *Horne* an individual has a right to sell into interstate commerce and the government was conditioning that right on relinquishing of a Fifth Amendment right to property. In *Brown*, however, a lawyer does not have the right to commingle funds freely under ethics rules, and so the government is not

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[94] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2595 (2013).

conditioning a benefit of the relinquishing of such a non-right. The trouble with this argument is that it proves too much by giving the power to evade the doctrine of unconstitutional conditions by simply defining the right in question as not a right because it is subject to regulation. Such an argument would allow the reasoning of *Monsanto* to extend beyond dangerous pesticides by saying that because all selling into interstate commerce can be subject to prohibition through regulation, it is not a right that the government is asking an individual to relinquish.

We ought to look to the motives of the legislature in crafting the background prohibition of commingling funds. The fact that the state is willing to drop its objection to the practice in exchange for the money that would be earned is compelling evidence that the sole reason for the prohibition is to extract funds. Any of the concerns about the dangers of commingling can therefore be addressed more narrowly by requiring, for instance, a lawyer to keep track of funds in a meticulous manner.

It thus seems clear that after being again classified as a *per se* taking, the Court would, in the wake of *Horne*, not find it relevant that participation in the government program is what created the property to be taken. The Court would now likely claim that more than zero compensation is due. We will now investigate any possible offset that the government could claim in its IOLTA taking.

B. SPECIAL BENEFITS

With respect to interest accrued from IOLTA accounts, the case is even stronger than in *Horne* against engaging in any kind of offset. In *Horne*, the government did not take all of the Hornes' property but rather a portion of it. In the context of IOLTA accounts, the entire interest is taken. Although this does not constitute the entirety of the lawyers' and clients' funds since principal still remains, the Court's offset jurisprudence only allows special benefits to be considered in calculating just compensation. Here, there is no special benefit to lawyers who participate in trust accounts.

Admittedly, the line between special and general benefits is a difficult one to draw, but once we look at the general principle animating the distinction, we find the IOLTA-funded programs to be classic general benefits. On the federal test of "direct and peculiar to the particular property," there is nothing direct that the taking of interest does to increase the value of the remaining principal.[95] And regarding the Nichols test of the "creation of a vested right in the reminder estate," there are no additional entitlements that the principal accounts have after the Taking.[96]

Here, the particular property of the lawyers that would need to be benefitted is their other bank accounts or, even construed more broadly, the value of their practices. There is no obvious link between the provision of free legal services by the government and the value of a lawyer's practice. There is no indication that lawyers are able to charge more, for instance. Finally, as shown above, the government bears the burden of proving this link and cannot use an *ex post* rationalization.[97]

CONCLUSION

Although *Horne* may seem like a simple case with an unremarkable holding, its insights into the nature of our government and its relation to the citizenry are profound. By explicitly applying the Fifth Amendment's protections of private property to personal property, the Court opened the door to challenging previous decisions that did not take these protections seriously enough. Specifically, *Horne* demands that in the context of

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[95] United States v. 2477.79 Acres of Land, More or Less, Situate in Bell County, Texas, 259 F.2d 23, 28 (5th Cir. 1967); United States v. River Rouge Improvement Company, 269 U.S. 411, 415-16 (1926) (holding that the district court erred in not instructing the jury to consider special benefits to riparian landowners' remainders after the government's partial taking).

[96] NICHOLS, § 8A.02[4][a] at 8A-37-8.

[97] *Cf.* Bauman v. Ross, 167 U.S. 548, 574 (1897).

personal property, the doctrine of unconstitutional conditions is applied. In doing so, the Court has effectively overruled *Brown*.