

# Horne v. Department of Agriculture: Expanding Per Se Takings While Endorsing State Sovereign Ownership of Wildlife

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## **Symposium: Essays from the 18th Annual Conference on Litigating Takings Challenges to Land Use and Environmental Regulations**

### ***HORNE V. DEPARTMENT OF AGRICULTURE: EXPANDING PER SE TAKINGS WHILE ENDORSING STATE SOVEREIGN OWNERSHIP OF WILDLIFE***

JOHN D. ECHEVERRIA\* & MICHAEL C. BLUMM\*\*

In *Horne v. Department of Agriculture* (“*Horne II*”),<sup>1</sup> the Supreme Court relieved Marvin and Laura Horne of financial penalties for violating the rules governing the Department of Agriculture’s raisin marketing program, reasoning that enforcement of the rules would have resulted in a “taking” of their raisins under the Fifth Amendment.<sup>2</sup> Widely viewed as a

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\* Professor, Vermont Law School. Professor Echeverria filed *amicus curiae* briefs in support of the government in *Horne I* and *Horne II* on behalf of the International Municipal Lawyers Association.

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1. 135 S. Ct. 2419 (2015). *Horne II* follows an earlier Supreme Court decision in the same case, *Horne v. USDA*. (“*Horne I*”), 133 S. Ct. 2054 (2013) discussed *infra* at notes 33–37 and accompanying text.

2. *Id.*

strange, slightly comedic legal controversy,<sup>3</sup> the *Horne* case is likely to have ramifications extending far beyond the world of raisins. In particular, the case raises important questions about how the Takings Clause applies, in general, to personal property—from patents to cigarettes to drugs to firearms. In our view, the Court majority badly mishandled the case given the record before the Court, applicable precedent, and established takings principles. However, as we explain below, the Court’s analysis is so confused and confusing that it remains to be seen how much change or damage to established takings doctrine will flow from the *Horne II* decision.

At the same time, the Court’s decision contains a remarkable silver lining from the point of view of government regulators responsible for enforcing wildlife regulations: a ringing affirmation of the venerable but sometimes misunderstood doctrine of sovereign ownership of wildlife. The biggest surprise coming out of this apparently pro-property rights decision is that regulators now have a powerful defense against allegations that the federal Endangered Species Act (“ESA”)<sup>4</sup> and other similar federal or state laws result in compensable takings.

This Essay proceeds as follows. The first Section describes the basic elements of the raisin marketing program and the convoluted course of the *Horne* litigation. As will become apparent, laying out these details is necessary in order to explain how badly the Court went astray. The second Section identifies the major mistakes the Court made in deciding this case. These include (1) failing to recognize that the Hornes, in their capacity as raisin “handlers,” held no property interest in any raisins, and therefore their takings argument should have failed at the threshold; (2) failing to honor the common sense distinction between personal and real property under the Takings Clause previously recognized by the Court; (3) failing to consider the substantial offsetting benefits conferred on the Hornes by the raisin marketing program for the purpose of determining whether the Hornes were threatened with an unconstitutional taking “without just compensation”;<sup>5</sup> and (4) failing to recognize (assuming the takings argument was otherwise viable) that the merits of the argument should have been assessed under the standards of *Nollan v. California Coastal Commission*<sup>6</sup> and *Dolan v. City of Tigard*.<sup>7</sup>

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3. See, e.g., *The Daily Show with Jon Stewart: Raisin Growers Lawsuit* (Comedy Central television broadcast Aug. 13, 2013), <http://www.cc.com/video-clips/pmrodj/the-daily-show-with-jon-stewart-raisin-growers-lawsuit> (parodying *Horne I*).

4. 16 U.S.C. § 1531 (2012).

5. U.S. CONST. amend. V.

6. 483 U.S. 825 (1987).

7. 512 U.S. 374 (1994).

The third Section of this Essay focuses on the case's silver lining: the Court's surprising reaffirmation of the doctrine of sovereign ownership of wildlife. The Hornes' convoluted arguments and the Court's misguided reasoning help explain why the Court's conservative majority found itself in the odd position of having to affirm this venerable doctrine in order to grant the Hornes victory in the case. Nonetheless, the Court's reaffirmation of the doctrine is very real and will likely serve as a powerful precedent insulating federal and state wildlife regulation from successful takings claims. We contend that the *Horne II* decision's long-term significance lies in the Court's reaffirmation of state sovereign ownership of wildlife, not in the decision's problematic expansion of the Court's per se takings rule to certain kinds of personality.

Before examining the details of the case, one procedural oddity of the litigation requires highlighting to make the following description and analysis of the case clear. A takings claim against the United States is typically litigated by filing a claim for just compensation in the U.S. Court of Federal Claims, followed by a potential appeal to the U.S. Court of Appeals for the Federal Circuit, and then followed by possible review on a writ of certiorari to the U.S. Supreme Court.<sup>8</sup> In this case, however, following extensive administrative proceedings, the takings issue was litigated in the U.S. District Court for the Eastern District of California,<sup>9</sup> followed by an appeal to the U.S. Court of Appeals for the Ninth Circuit,<sup>10</sup> and then on to the U.S. Supreme Court.<sup>11</sup> The Department of Agriculture initiated the litigation as an enforcement proceeding to impose monetary penalties on the Hornes for failing to comply with the rules governing the reserve raisin marketing program.<sup>12</sup> The Hornes presented various defenses to the penalties, including claiming that they would have suffered a taking of their property interests in raisins had they complied with the program rules.

In an ordinary case, the Hornes would have been barred from raising the Takings Clause as a defense in district court on the ground that their

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8. See 28 U.S.C. § 1491 (2012) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."). *But see* 28 U.S.C. § 1346(a)(2) (2012) (granting the district courts jurisdiction concurrent with the U.S. Court of Federal Claims over monetary claims against the United States not exceeding \$10,000).

9. *Horne v. USDA*, No. CV-F-08-1549-LJO-SMS, 2009 WL 4895362, at \*1 (E.D. Cal. Dec. 11, 2009), *aff'd*, 673 F.3d 1071 (9th Cir. 2012), *rev'd*, 133 S. Ct. 2053 (2013), *remanded to 750 F.3d 1128* (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015).

10. *Horne v. USDA*, 673 F.3d 1071 (9th Cir. 2012), *rev'd*, 133 S. Ct. 2053 (2013), *remanded to 750 F.3d 1128* (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015).

11. *Horne I*, 133 S. Ct. 2053 (2013).

12. 7 C.F.R. § 989 (1949).

exclusive remedy for the alleged taking was a suit seeking just compensation in the U.S. Court of Federal Claims.<sup>13</sup> However, in an earlier decision in this same case (*Horne I*), issued in 2013, the Supreme Court ruled that the unusual statutory provisions<sup>14</sup> governing judicial review of enforcement proceedings arising from this agriculture marketing program grant district courts jurisdiction to consider constitutional (including takings) defenses to a penalty, impliedly repealing the ordinarily exclusive jurisdiction of the U.S. Court of Federal Claims over takings issues.<sup>15</sup> Thus, while parties challenging government action as a taking ordinarily must sue for compensation in the U.S. Court of Federal Claims, the Hornes, in this unusual case, were permitted to raise their takings argument as a defense to the enforcement action filed in federal district court.

The upshot was that, when the Supreme Court took up the *Horne* case for a second time in 2015, no one disputed that the lower courts had properly exercised jurisdiction over the takings issue. Clearly, the Hornes had suffered no actual taking of any property interest in raisins because they defied rules, the enforcement of which, they alleged, would have resulted in a taking. The Supreme Court addressed the merits of the takings question by asking whether there would have been a taking of the Hornes' property without just compensation if the Hornes had complied with the program rules. While clear enough in theory, the unusual procedural posture of the takings issue undoubtedly contributed to the Court's confusion about this case, as we discuss below.

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13. See *Preseault v. I.C.C.*, 494 U.S. 1, 11 (1990) (“[T]aking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act.” (quoting *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 195 (1985))); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127–28 (1985) (“[E]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to a taking.” (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984))).

14. See 7 U.S.C. §§ 608c(15)(A)–(B) (2012) (“Any handler subject to an order may file a written petition with the Secretary of Agriculture . . . . The District Courts of the United States in any district in which such handler is an inhabitant . . . are hereby vested with jurisdiction . . .”).

15. *Horne I*, 133 S. Ct. at 2063 (“Under the AMAA’s [Agricultural Marketing Agreement Act] comprehensive remedial scheme, handlers may challenge the content, applicability, and enforcement of marketing orders. Pursuant to § 608c(15)(A)–(B), a handler may file with the Secretary a direct challenge to a marketing order and its applicability to him. We have held that ‘any handler’ subject to a marketing order must raise any challenges to the order, including constitutional challenges, in administrative proceedings. Once the Secretary issues a ruling, the federal district court where the ‘handler is an inhabitant, or has his principal place of business’ is ‘vested with jurisdiction . . . to review [the] ruling.’ These statutory provisions afford handlers a ready avenue to bring takings claim against the USDA. We thus conclude that the AMAA withdraws Tucker Act jurisdiction over petitioners’ takings claim. Petitioners (as handlers) have no alternative remedy, and their takings claim was not ‘premature’ when presented to the Ninth Circuit.” (footnote omitted) (citation omitted) (first citing *see United States v. Ruzicka*, 329 U.S. 287, 294 (1946); and then quoting 7 U.S.C. 608c(15)(B) (2012))).

I. THE RAISIN MARKETING PROGRAM AND THE *HORNE* LITIGATION

Congress adopted the Agricultural Marketing Agreement Act of 1937 (“AMAA”)<sup>16</sup> in response to painful economic conditions in rural America brought about by low and fluctuating commodity prices during the Great Depression.<sup>17</sup> The Act authorizes the issuance of so-called “marketing orders” designed to stabilize prices. Under the Raisin Marketing Order,<sup>18</sup> adopted in 1949, the market stabilization function is carried out by the Raisin Administrative Committee (“RAC”), a governmental entity composed mostly of growers and others in the raisin business appointed by the Secretary of Agriculture.<sup>19</sup> In periods of excess raisin production, the RAC is authorized to require growers to set aside a portion of their crops “for the account” of the RAC (i.e., the government).<sup>20</sup> The RAC then disposes of the reserve raisins by donating them or selling them in noncompetitive markets. The economic principle underlying the program is that constraining the market supply of raisins will tend to drive prices up, to the benefit of raisin growers.<sup>21</sup>

The marketing program draws an important distinction between raisin “producers” (who grow raisins),<sup>22</sup> and raisin “handlers” (who process and pack raisins).<sup>23</sup> Under the regulations, a single individual can, at different times, wear each of these hats. Raisin handlers are responsible for physically holding raisins in reserve on behalf of the RAC, and are potentially subject to penalties for failing to comply with the marketing program regulations. Raisin producers, after physically handing over their raisins to handlers, retain an interest in any net proceeds from the RAC’s disposition of the raisins, less the RAC’s administrative expenses. Unlike handlers, producers are not directly subject to regulation (or potential penalties) under the marketing program.

The Hornes, raisin farmers with a decidedly libertarian bent, objected to the longstanding raisin marketing program as an unreasonable intrusion

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16. 7 U.S.C. § 601 et seq. (2012).

17. This description of the Department of Agriculture’s raisin marketing program is drawn largely from the Supreme Court’s decisions in *Horne I* and *Horne II*.

18. 7 C.F.R. § 989 (1949).

19. *Horne II*, 135 S. Ct. 2419, 2424 (2015).

20. *Id.* at 2428 (quoting 7 C.F.R. § 989.66(a) (2015)).

21. *Horne v. USDA.*, No. CV-F-08-1549-LJO-SMS, 2009 WL 4895362, at \*23 (E.D. Cal. Dec. 11, 2009) (“[T]he ‘primary focus’ of the market control program is to ‘maximize return to the grower.’” (quoting Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 SAN JOAQUIN AGRIC. L. REV. 3, 6 (1995)), *aff’d*, 673 F.3d 1071 (9th Cir. 2012), *rev’d*, 133 S. Ct. 2053 (2013), *remanded to* 750 F.3d 1128 (9th Cir. 2014), *rev’d*, 135 S. Ct. 2419 (2015)).

22. 7 C.F.R. § 989.11 (1949).

23. *Id.* at § 989.15.

into their business affairs.<sup>24</sup> In an attempt to evade the program's rules, and in particular to avoid having to comply with the reserve requirement, the Hornes developed a new business model they believed would allow them (and some of their like-minded neighbors) to grow, process, and sell raisins without being subject to the marketing program rules. The Hornes' principle legal strategy was to structure their business operations so that in the course of processing raisins they did not become the legal owners of any raisins. The Department of Agriculture's rules define a handler subject to regulation under the marketing program as someone who "acquires" raisins.<sup>25</sup> The Hornes believed that if they did not become the legal owners of the raisins they processed, they would not "acquire" raisins within the meaning of the regulations.<sup>26</sup> In other words, although the Hornes took physical possession of the raisins, they believed that because they were providing processing services on a fee basis for the actual owners (i.e., the producers), they could not be handlers.<sup>27</sup> In accord with this scheme, the Hornes proceeded to process raisins they grew themselves and raisins that were grown by other producers without complying with the reserve requirement. The Hornes then sold their entire crop on the open market, and the other raisin producers for whom they provided processing services

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24. As the Court explained in *Horne I*:

The Hornes wrote the Secretary and to the RAC in 2002 setting out their grievances: "[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."

133 S. Ct. at 2057 n.3 (quoting Appendix to Petition for Writ of Certiorari at 60a, *Horne I*, 133 S. Ct. 2053 (2013) (No. 12-123)).

25. 7 C.F.R. § 989.15 (2015) (defining a "handler" as any "processor or packer" of raisins); 7 C.F.R. § 989.13 (2015) (defining a "processor" as "any person who receives or acquires" raisins). The Hornes also contended that they were not "handlers" because they did not meet the definition of a "packer." See 7 C.F.R. § 989.14 (2015) (defining a "packer" as "any person who, within the area, stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins . . ."). The Hornes' contention that they were not handlers was rejected at every step of the administrative and judicial review process. See, e.g., Marvin D. Horne, Laura R. Horne, et al., 65 Agric. Dec. 805, 816 (U.S.D.A. 2006) (indicating that the Hornes were indeed "handlers").

26. Marvin D. Horne, Laura R. Horne, et al., 65 Agric. Dec. 805, 816 (U.S.D.A. 2006) ("Respondents dispute that they are handlers in that they never obtained any raisins through purchase or transfer of ownership to any of the business entities that they operate and argue, therefore, they did not *acquire* raisins within the meaning of the Raisin Order.").

27. See, e.g., *Horne v. USDA*, No. CV-F-08-1549-LJO-SMS, 2009 WL 4895362, at \*4 (E.D. Cal. Dec. 11, 2009) ("According to Plaintiffs, Raisin Valley Marketing sold raisins on behalf of its members, while the growers maintained ownership. According to Mr. Horne, Raisin Valley Marketing held grower sales funds in a trust account, paid Lassen Vineyards for the use of their equipment, paid a third party broker fee, and distributed the net proceeds to the growers."), *aff'd*, 673 F.3d 1071 (9th Cir. 2012), *rev'd*, 133 S. Ct. 2053 (2013), *remanded to* 750 F.3d 1128 (9th Cir. 2014), 135 S. Ct. 2419 (2015).

sold the entirety of their crops on the open market as well. As a result of this scheme, the Hornes (and their confederates) reaped a larger financial return from their raisin crops than other growers who complied with the regulations and dutifully reserved a portion of their crops for the RAC.<sup>28</sup>

The Department responded to the Hornes' actions by initiating an administrative proceeding to impose penalties on them based on the dollar value of the raisins the Hornes failed to turn over to the RAC as well as for violations of various other rules applicable to handlers. The Hornes' defenses against the sanctions failed at every step in the administrative process and on subsequent review in the federal courts—until the Supreme Court. In accord with their novel business plan, the Hornes' principal argument at the outset and throughout most of the litigation was that they did not own the raisins, and therefore they were not “handlers” and could not be charged with violating the rules applicable to handlers. The Hornes also argued, beginning at later stages of the litigation, that had they complied with the reserve requirement, the regulation would have constituted a taking under the Takings Clause.

When this convoluted case first reached the U.S. Court of Appeals for the Ninth Circuit, the court issued a decision rejecting all of the Hornes' defenses and upholding the penalties.<sup>29</sup> Accepting the position of the Department on the statutory issue, the court said it did not matter that the Hornes were not the legal owners of raisins they processed; to become handlers who had “acquired” raisins it was sufficient that they took physical custody of the raisins. There was no doubt the Hornes gained physical custody of the raisins in order to process them. The court also rejected their takings argument: one of the Ninth Circuit's rationales was that the Hornes could properly be compelled to comply with the reserve requirement because they had voluntarily decided to enter the raisin business.<sup>30</sup>

In response to a petition for rehearing filed by the Hornes objecting to the court's voluntariness theory,<sup>31</sup> the same panel of Ninth Circuit judges

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28. See Marvin D. Horne, Laura R. Horne, et al., 65 Agric. Dec. 805, 815–16 (U.S.D.A. 2006) (“[B]y avoiding the requirements of the Raisin Order . . . respondents obtained an unfair competitive advantage over everyone in the raisin industry who complied with the Raisin Order and its regulations. That is what this proceeding is really about.”).

29. Horne v. USDA., No. 10-15270, 2011 WL 2988902 (9th Cir. July 25, 2011), *opinion amended and superseded*, 673 F.3d 1071 (9th Cir. 2012), *rev'd*, 133 S. Ct. 2053 (2013), *remanded to* 750 F.3d 1128 (9th Cir. 2014), ECF No. 25-1, *rev'd*, 135 S. Ct. 2419 (2015), <http://cdn.ca9.uscourts.gov/datastore/opinions/2011/07/25/10-15270.pdf>.

30. *Id.* at 9470 (“Far from compelling a physical taking of the Hornes' tangible property, the Raisin Marketing Order applies to the Hornes only insofar as they voluntarily chose to send their raisins into the stream of interstate commerce.”).

31. See Petition for Writ of Certiorari at 3–4, *Horne I*, 133 S. Ct. 2053 (2013) (No. 12-123), 2012 WL 3058322, at \*3–4 (“A panel of the Ninth Circuit initially affirmed the judgment of the District Court on the merits. The panel reasoned that the regulatory scheme's requirement that petitioners forfeit a substantial portion of their raisin crop to the government was not a taking for which just compensation is due because the regulation ‘applies to [petitioners] only insofar as they



issued a new, superseding opinion.<sup>32</sup> The panel's decision on rehearing again rejected the statutory handler argument, using the same reasoning as in the initial decision. But the panel took an entirely new tack on the takings issue, abandoning the voluntariness theory and adopting the view that the court had no business addressing the merits of the takings argument in the first place. The panel ruled that the federal district court (and the Ninth Circuit on appeal) lacked jurisdiction to consider the takings argument as a defense in an enforcement action because the Hornes could and should have pursued their takings argument by filing a lawsuit for just compensation in the U.S. Court of Federal Claims.

The Hornes, now represented by expert Supreme Court counsel,<sup>33</sup> filed a petition for certiorari in the Supreme Court focused on the Ninth Circuit's disposition of the takings issue. The Court proceeded to grant the petition, and reversed the Ninth Circuit in *Horne I*.<sup>34</sup> As discussed above,<sup>35</sup> the Court, in an opinion by Justice Clarence Thomas, ruled that under the judicial review provisions applicable to this agricultural marketing program, the district court had jurisdiction to address the Hornes' constitutional challenges (including takings). The Court determined that because the Department had brought this enforcement action against the Hornes on the theory that they were handlers, and the Department had succeeded on that argument, the Hornes necessarily were raising their takings defense to the penalties solely in their capacity as handlers.<sup>36</sup> Based on this analysis, the Court determined that the Hornes, in their capacity as handlers, were entitled to a resolution of the merits of their takings argument in the Ninth Circuit, and reversed and remanded the case for further proceedings.<sup>37</sup>

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voluntarily choose to send their raisins into the stream of interstate commerce.' After petitioners filed a rehearing petition pointing out that the panel opinion was inconsistent with *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982), the panel abruptly changed course and held . . . that the court lacked jurisdiction over the takings issue." (citation omitted) (quoting Appendix to Petition for Writ at Certiorari at 43a, *Horne I*, 133 S. Ct. 2053 (2013) (No. 12-123)), *remanded to* 750 F.3d 1128 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015).

32. *Horne v. USDA*, 673 F.3d 1071 (9th Cir. 2012), *rev'd*, 133 S. Ct. 2053 (2013), *remanded to* 750 F.3d 1128 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015).

33. Michael W. McConnell, who represented the Hornes before the U.S. Supreme Court, has argued before the U.S. Supreme Court a total of fourteen times, is Of Counsel with the firm Kirkland & Ellis, and formerly served as a judge on the U.S. Court of Appeals for the Tenth Circuit. See Michael W. McConnell, STANFORD LAW SCHOOL, <https://law.stanford.edu/directory/michael-w-mcconnell/> (last visited Dec. 21, 2015).

34. *Horne I*, 133 S. Ct. 2053, 2056 (2013).

35. See *supra* notes 14–15 and accompanying text.

36. *Horne I*, 133 S. Ct. at 2060 ("It is undisputed that the Marketing Order imposes duties on petitioners only in their capacity as handlers. As a result, any defense raised against those duties is necessarily raised in that same capacity.").

37. *Id.* at 2064. The Court did not dispute that if the Hornes had raised the takings issue in their capacity as raisin *producers* (as opposed to handlers), they would have had to seek relief in the claims court. See *id.* at 2062 n.7 ("That is not to say that a producer who turns over her reserve-tonnage raisins could not bring suit for just compensation in the Court of Claims.").

On remand, the same panel of Ninth Circuit judges again rejected the takings argument on the merits, but on different grounds than in the superseded 2011 decision.<sup>38</sup> The panel surveyed the potentially applicable takings theories, first stating that a direct appropriation theory did not apply: “the Hornes cannot—and do not—argue they suffered this sort of ‘paradigmatic taking.’”<sup>39</sup> The panel also rejected a categorical claim under *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>40</sup> reasoning that the marketing regulations applied to personal property rather than real property, and in any event the Hornes would not have been deprived of all the economic value of their property because they retained an interest in the net proceeds of raisin sales by the RAC.<sup>41</sup>

After rejecting these alternative theories, the Ninth Circuit settled on applying the *Nollan/Dolan* standards to assess the merits of the Hornes’ takings argument, reasoning that the reserve requirement represented the same kind of “condition” on conducting a business as the land development exactions at issue in *Nollan* and *Dolan*.<sup>42</sup> The panel had no difficulty concluding the application of the reserve requirement to the Hornes satisfied the *Nollan/Dolan* standards. As to the *Nollan* “nexus” test, the panel said, “By reserving a dynamic percentage of raisins annually such that the domestic raisin supply remains relatively constant, the Marketing Order program furthers the end advanced: obtaining orderly market conditions.”<sup>43</sup> As to the *Dolan* “rough proportionality” test, the panel said the reserve requirement was not simply in “‘rough’ proportion” but was in “more or less *actual* proportion” to the goal of achieving market stability: “By annually modifying the ‘extent’ of the reserve requirement to keep pace with changing market conditions, the RAC ensures its program does not overly burden the producer’s ability to compete while reducing to the producer’s benefit the potential instability of this particular market.”<sup>44</sup>

The Hornes once again sought review in the Supreme Court and, pulling off a rare coup, persuaded the Court to grant a petition for certiorari

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38. See *Horne v. USDA*, 750 F.3d 1128, 1144 (9th Cir. 2014) (“[O]ur observation that the Secretary has endeavored to preserve as much of the Hornes’ ownership of the raisins as possible, leads us to conclude the Marketing Order’s reserve requirements—and the provisions permitting the Secretary to penalize the Hornes for failing to comply with those requirements—do not constitute a taking under the Fifth Amendment.”), *cert. granted* 135 S. Ct. 1039 (2015 (Mem)), *and rev’d* 135 S. Ct. 2419 (2015).

39. *Id.* at 1138.

40. 458 U.S. 419 (1982) (finding that cable television wire on a New York City apartment worked an unconstitutional taking as a permanent physical occupation).

41. *Horne*, 750 F.3d at 1139–41.

42. *Id.* at 1143 (citing *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)).

43. *Id.*

44. *Id.* (citation omitted) (quoting *Dolan*, 512 U.S. at 391).

a second time in the same case.<sup>45</sup> In *Horne II*, the Court, in an opinion by Chief Justice John Roberts, reversed the Ninth Circuit again.<sup>46</sup> First, the Court decided that the case involved a physical appropriation and that a per se takings rule governed appropriations involving either real property or personal property, such as raisins.<sup>47</sup> Second, the Court ruled that the Hornes' retention of an interest in net proceeds from the RAC's sale of raisins did not preclude application of the per se rule.<sup>48</sup> Third, the Court resolved the final question posed by the petition—"Whether a governmental mandate to relinquish specific, identifiable property as a 'condition' on permission to engage in commerce effects a per se taking"—by answering "yes," "at least in this case."<sup>49</sup>

The Court also declined to accept the Department's argument (arguably already disallowed by *Horne I*)<sup>50</sup> that it should reject the takings argument because a taking violates the Constitution only if there is no compensation, and the Hornes were free to seek just compensation in the claims court.<sup>51</sup> Likewise, the Court rejected the government's argument that the case should be remanded to determine whether or not the Hornes were entitled to any compensation given that the economic burden caused by the alleged taking likely would have been offset, perhaps in its entirety, by the benefit the Hornes received from higher prices for the raisins they sold in the marketplace.<sup>52</sup> Based on all of these conclusions, the Court ruled that the Hornes should be relieved of the obligation to pay the penalties imposed on them by the Department of Agriculture.

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45. *Horne II*, 135 S. Ct. 1039 (Mem).

46. *Horne II*, 135 S. Ct. 2419 (2015).

47. *Id.* at 2428.

48. *Id.*

49. *Id.* at 2430.

50. *See infra* note 57 and accompanying text.

51. *Id.* at 2431.

52. *Id.* at 2431–33. One issue the Court might have addressed in *Horne II*—but did not—was whether property owners can routinely challenge government regulations as takings in lawsuits seeking to enjoin the government from acting (or, what amounts to the same thing, defying the law and resisting resulting penalties by contending that enforcement of the law would have resulted in a taking). The Hornes urged the Court to adopt a broad view of the remedies available under the Takings Clause, *see* Brief for Petitioner at 27–31, *Horne II*, 135 S. Ct. 2419 (2015) (No. 14-275), 2015 WL 881767, at \*27, and several of the Hornes' *amici* also urged the Court to embrace this position. *See, e.g.*, Brief of the States of Texas, Arizona, and North Dakota as *Amici Curiae* in Support of Petitioners, *Horne II*, 135 S. Ct. 2419 (2015) (No.14-275), 2015 WL 1048421. In *Horne II* there was no debate the Hornes were entitled to raise the takings issue as a defense to the sanctions, given the ruling in *Horne I* that, in this relatively rare instance, the Hornes, *qua* handlers, were barred from pursuing ordinary compensatory relief. The Court avoided addressing the remedy issue raised by the Hornes and their *amici* presumably because it was unnecessary to resolve the case. The merits of this remedy issue are debated in Thomas Merrill, *Anticipatory Remedies for Takings*, 128 HARV. L. REV. 1630 (2015) and John Echeverria, *Eschewing Anticipatory Remedies for Takings: A Reply to Professor Merrill*, 128 HARV. L. REV. 202 (2015).

Justice Thomas filed a concurring opinion, joining the Court's opinion "in full," but contending that a claim for just compensation likely would have failed because the alleged taking of raisins by the marketing program would not have involved a taking for "public use."<sup>53</sup> Justice Breyer, joined by Justices Kagan and Ginsburg, argued for remanding the case to determine whether the benefits conferred on the Hornes by the raisin marketing program exceeded the economic burden imposed on them, such that they would not have been entitled to any compensation, and therefore could not oppose the sanctions on the ground that they had been threatened with a taking "without just compensation."<sup>54</sup> In solitary dissent, Justice Sonia Sotomayor argued for affirming the Ninth Circuit, essentially embracing the Ninth Circuit's reasoning in its last decision that the marketing order did not threaten to deprive the Hornes of all of their property interests in the raisins.<sup>55</sup> In addition, endorsing the argument abandoned by the Ninth Circuit four years earlier, she contended that the government could require giving up of property rights as a condition of a voluntary entry into a regulated market without effecting a taking.<sup>56</sup>

## II. THE SUPREME COURT'S ERRORS IN *HORNE*

For four separate and independent reasons the Supreme Court should have rejected the conclusion that the Hornes were threatened with a per se taking and therefore were entitled to avoid the penalties imposed on them for violating the rules of the raisin marketing program. The Court should either have affirmed the Ninth Circuit ruling upholding the penalties or adopted Justice Breyer's suggestion and remanded the case for additional proceedings. We examine each of the Court's errors in turn.<sup>57</sup>

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53. *Horne II*, 135 S. Ct. at 2433 (Thomas, J., concurring) (quoting U.S. CONST. amend V).

54. *Id.* at 2433–36 (Breyer, J., concurring in part and dissenting in part) (quoting U.S. CONST. amend V).

55. *Id.* at 2437–40 (Sotomayor, J., dissenting).

56. *Id.* at 2440–42.

57. The Department made several arguments before the Supreme Court that were probably ill-advised, which we are not inclined to defend. First, the Department argued that the reserve requirement did not result in a per se taking because raisin growers retained the right to any net proceeds left over after the RAC had disposed of the raisins and covered its administrative expenses. Brief for Respondent at 24–28, *Horne II*, 135 S. Ct. 2419 (2015) (No. 14-275), 2015 WL 1478016, at \*24–28. A partial monetary return after a taking has already occurred can properly count towards the compensation due for the taking, but a partial return represents an improbable ground for seeking to defeat the claim altogether. By contrast, an integrated regulatory program, such as a transferable development rights scheme, which simultaneously restricts the use of some parcels and grants a claimant the right to develop others at higher density, strikes us as quite different and more easily defended. *See, e.g.,* *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 740–42 (1997) (recognizing that transferable development rights ("TDRs") should be considered in assessing the economic effect of a regulatory restriction).

Second, the Department argued that the raisin marketing program could not be a taking because raisin producers were free to seek just compensation for any taking in a suit filed in the

A. *The Lack of Property*

First, the Hornes, as petitioners before the Supreme Court in *Horne II*, were not, and never had been, the owners of the raisins at issue, a defect which should have been fatal to their case. The Takings Clause proscribes the taking of “private property” for public use without just compensation. If a takings claimant can point to no property entitlement, her takings case is dead in the water.<sup>58</sup> Because the Hornes as handlers did not own the raisins at issue, they should have lost in the Supreme Court.

Yet the Court concluded that the Hornes did “own” the raisins, including both the raisins they had grown themselves and those grown by other producers. In the Court’s words, “[t]hey own the raisins they grew and are handling for themselves, and they own the raisins they handle for other growers.”<sup>59</sup> This conclusion was patently erroneous based on the record in the case and the long course of the litigation leading up to the Court’s decision. By successfully persuading the Court to embrace this mistaken position, counsel for the Hornes seriously misled the Court.

In *Horne II*, the threshold ownership issue presented a very specific question: whether the Hornes, in their capacity as raisin “handlers,” had an ownership interest in raisins sufficient to support a takings argument. If the raisin marketing program did not result in a taking of a property interest held by the Hornes qua handlers, they should have been barred from raising the takings argument as a defense to the sanctions imposed on them for failing to comply with the regulations. Because, in fact, the Hornes qua handlers never owned any raisins, their takings defense should have failed in the Supreme Court.

To understand the ownership issue in *Horne II*, recall that in *Horne I* the Supreme Court reversed the Ninth Circuit’s rejection of the Hornes’ takings argument for lack of jurisdiction. The Ninth Circuit assumed the Hornes were pursuing their takings argument in their capacity as raisin “producers.”<sup>60</sup> Based on that understanding, the court ruled that the Hornes could have pursued the takings issue via a suit for compensation under the Takings Clause in the U.S. Court of Federal Claims.<sup>61</sup> Because they had the option to sue in the claims court, the Ninth Circuit reasoned, the Hornes

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U.S. Court of Federal Claims. But in *Horne I*, the Supreme Court ruled that this suit involved a challenge to the raisin marketing program brought by petitioners in their capacity as raisin “handlers” and only as raisin handlers. See *Horne I*, 133 S. Ct. 2053 (2013). Given that prior ruling, it seems unexceptional for the Court to have concluded in *Horne II* that this suit brought by the Hornes as handlers could not be defeated by pointing to litigation options available to the Hornes as raisin producers. See *id.* at 2431.

58. See *E. Enters. v. Apfel*, 524 U.S. 498 (1998).

59. See *Horne I*, 133 S. Ct. at 2431.

60. *Horne v. USDA*, 673 F.3d 1071, 1080 (9th Cir. 2012), *rev’d*, 133 S. Ct. 2053 (2013), *remanded to* 750 F.3d 1128 (9th Cir. 2014), *rev’d*, 135 S. Ct. 2419 (2015).

61. *Id.*

were barred from raising their takings argument in district court (or on appeal in the Ninth Circuit).<sup>62</sup>

In *Horne I* the Supreme Court reversed that ruling.<sup>63</sup> The Court did not disagree with the Ninth Circuit's premise that, if the Hornes had been pursuing the takings case as producers, they would have been required to file a takings claim in the claims court.<sup>64</sup> Instead, the Court ruled that the Hornes were presenting their takings argument not as producers, but in the capacity of handlers, and as handlers the Hornes could raise their takings argument as a defense to the penalties in federal district court.<sup>65</sup> Accordingly, the Supreme Court said that the Ninth Circuit erred in ruling that the Hornes could not present their takings argument in this case.<sup>66</sup> In sum, following *Horne I*, it was crystal clear that the Hornes were litigating the takings issue in this case only in their capacity as handlers.

It also was clear—or should have been—that, because the Hornes were pursuing their case as handlers, their takings argument was now doomed to ultimate failure. The Hornes, qua handlers, never owned any raisins, and therefore could not claim they had been threatened with a taking of any property interest in any raisins.<sup>67</sup> This is true whether one looks at the issue through the lens of the regulations the Hornes should have complied with or the lens of the illegal alternative business model they devised.

On the one hand, if the Hornes had played by the Department's rules and embraced their status as handlers, they could not have claimed a taking of any "reserve" raisins held by them qua handlers. Under the regulations, when handlers take possession of raisins, title to the raisins automatically transfers to "the account" of the Raisin Administrative Committee, meaning that the United States, not the handlers, owns the reserve raisins.<sup>68</sup>

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62. *Id.*

63. *Horne I*, 133 S. Ct. 2053 (2013).

64. *See id.*

65. *Id.* at 2060–61, 2063–64.

66. *Id.* at 2064.

67. Before the Ninth Court on remand following the ruling in *Horne I*, the Hornes implicitly acknowledged their quandary by presenting various strained arguments for why they still could proceed with their lawsuit, including that they had standing to prosecute their takings arguments as "bailees." *See* Supplemental Brief for Appellee at 5, *Horne v. USDA*, 750 F.3d 1128 (2012) (No. 10-15270), *rev'd*, 133 S. Ct. 2053 (2013), *remanded to* 750 F.3d 1128 (9th Cir. 2014) *rev'd*, 135 S. Ct. 2419 (2015). None of the authorities the Hornes cited in support of this imaginative theory actually support the theory. *See* *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340 (Fed. Cir. 2013) (not addressing bailment); *Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1572 n.32 (Fed. Cir. 1994) (merely referring to bailment as an illustration of the "diversity" of property interests).

68. *See* *Horne v. U.S. Dep't. of Agric.*, No. CV-F-08-1549-LJO-SMS, 2009 WL 4895362, at \*24 (E.D. Cal. Dec. 11, 2009) ("Title to the 'reserve tonnage' portion of the producer's raisins automatically transfers to the RAC for sale in secondary, non-competitive markets."), *aff'd*, 673 F.3d 1071 (9th Cir. 2012), *rev'd*, 133 S. Ct. 2053 (2013), *remanded to* 750 F.3d 1128 (9th Cir.

Although producers might allege a taking as a result of the reserve requirement and the resulting transfer of ownership of raisins from them to the RAC, a handler could not claim ownership of the reserve raisins or any property interest in the raisins as a result of the reserve requirement. Producers could claim some continuing interest in the reserve raisins held by the RAC because they had a right to any net proceeds from sales of the raisins by the RAC.<sup>69</sup> But the Hornes, in their capacity as handlers, would never have had any ownership interest in the raisins.

On the other hand, under the novel business model adopted by the Hornes, they also were not owners of any of the reserve raisins. As discussed above,<sup>70</sup> the Hornes' legal strategy for evading the regulations applicable to handlers was to avoid becoming the legal owners of the raisins they were processing. The Hornes believed that if they did not become owners of any raisins, they would not "acquire" raisins within the meaning of the marketing program regulations and, therefore, would not fall under the definition of a handler.<sup>71</sup> If they were not handlers under the regulations, they would not be exposed to sanctions for failing to comply with the regulatory requirements applicable to handlers, including the reserve requirement.

Arguing before the Supreme Court in *Horne II* that they were the owners of the raisins, the Hornes not only presented a position that had no support in law, they contradicted the position they had espoused for most of the litigation. Up to and including the initial appeal to the Ninth Circuit, the *main issue* in the case was whether the Hornes were "handlers" within the meaning of the regulations.<sup>72</sup> The Hornes contended that they were not handlers because the rules of the marketing program only apply to handlers, and the Hornes believed they could escape liability for the penalties imposed on them by the Department if they could establish they were not handlers.<sup>73</sup> The Hornes believed they could avoid the label of handler if they could establish that they were not the owners of any raisins. Thus, they vociferously and repeatedly argued they were not the legal owners of

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2014) *rev'd*, 135 S. Ct. 2419 (2015); *see also Horne II*, 135 S. Ct. 2419, 2424 (2015) ("The Raisin Committee acquires title to the reserve raisins that have been set aside . . .").

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

70. *See supra* note 26 and accompanying text.

71. *E.g.*, Marvin D. Horne, Laura R. Horne, et al., 67 Agric. Dec. 18, 19 (U.S.D.A. 2008) ("Marvin R. Horne and the other respondents dispute that they are handlers claiming they never obtained any raisins through purchase or transfer of ownership to any of the business entities that Mr. Horne and his partners operate. Mr. Horne and his partners argue that they did not acquire raisins within the meaning of the Raisin Order.").

72. *See Horne v. USDA*, 673 F.3d 1071, 1078 (9th Cir. 2012), *rev'd*, 133 S. Ct. 2053 (2013), *aff'd*, 750 F.3d 1128 (9th Cir. 2014).

73. *See supra* notes 25–26 and accompanying text.

raisins.<sup>74</sup> The Department of Agriculture and the lower courts repeatedly rejected the Hornes' argument that they did not meet the statutory definition of a handler, and the Hornes abandoned the argument by the time their case reached the Supreme Court. Importantly, however, at no stage in this lengthy litigation did any party, administrative officer, or court question the factual accuracy of the premise of the Hornes' legal argument on the handler issue, that is, that they were *not* the owners of any raisins.

The Hornes' previously held position that they were not the owners of the raisins had the virtue of being entirely consistent with the novel business model they developed. The Hornes negotiated contracts with other growers under which the growers remained the owners of their raisins, and the Hornes simply provided processing services on a fee basis.<sup>75</sup> There is no basis for questioning the validity or enforceability of these contractual arrangements. The same conclusion applies, although for a slightly different reason, to the raisins grown by the Hornes. Of course, the Hornes owned the raisins they grew themselves in their capacity as raisin producers. But that does not answer the question whether the Hornes were the owners of the raisins they produced when they took on the functions of a handler. As the Supreme Court emphasized in *Horne I*, a single individual or firm can be either a producer or a handler at different stages of the process of producing and distributing raisins.<sup>76</sup> So far as we know, there is nothing in the record to suggest that the Hornes qua producers transferred ownership of the raisins they grew to themselves qua handlers. Such a move would have been exceedingly unlikely because it would have undercut the Hornes' main argument throughout the litigation that they were not handlers because they did not own any raisins.

Before the Supreme Court in *Horne II*, the Hornes made an about-face on the ownership question. By that time, their "we-are-not-a-handler"

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74. *E.g.*, Brief of Appellants at 15, *Horne v. USDA*, 673 F.3d 1071 (9th Cir. 2012) (No. 10-15270) ("No transfer of ownership or control occurred with Respondents' grown raisins, or raisins grown by third parties."), *rev'd*, 133 S. Ct. 2053 (2013), *remanded to* 750 F.3d 1128 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015); Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment, *Horne v. USDA*, No. CV-F-08-1549-LJO-SMS, 2009 WL 4895362 (E.D. Cal. Dec. 11, 2009), (same) *aff'd*, 673 F.3d 1071 (9th Cir. 2012), *rev'd*, 133 S. Ct. 2053 (2013), *remanded to* 750 F.3d 1128 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015) (No. CV-F-08-1549-LJO-SMS) (same).

75. Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment at 10, *Horne v. USDA*, No. CV-F-08-1549-LJO-SMS, 2009 WL 4895362 (E.D. Cal. Dec. 11, 2009), *aff'd*, 673 F.3d 1071 (9th Cir. 2012), *rev'd*, 133 S. Ct. 2053(2013), and *aff'd*, 750 F.3d 1128 (9th Cir. 2014) (No. CV-F-08-1549-LJO-SMS) (explaining the Hornes' contractual arrangements with other growers and that the growers "maintain[ed] right, title, ownership and control of the raisins until they [were] sold to the consumer market").

76. *Horne I*, 133 S. Ct. 2053 (2013) (concluding that the Hornes' takings argument was ripe in the Ninth Circuit because the Hornes were making the argument in their "capacity" as handlers rather than in their "capacity" as producers), *remanded to* 750 F.3d 1128 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015).



statutory argument had fallen by the wayside, eliminating all incentive for the Hornes to continue to argue that they did not own any raisins. In addition, in *Horne I* the Court had clarified that the Hornes could proceed only with their takings argument in their capacity as handlers. With the case recast in this fashion, the Hornes' previous insistence that they were not the owners of raisins became fatal to their case. In a brazen display of chutzpah, the Hornes' Supreme Court counsel abandoned all memory of their prior position on the ownership issue and asserted a new, opposite position: that the Hornes, in their capacity as handlers, *were* in fact the owners of the raisins. During oral argument, Hornes' counsel asserted, in artfully vague and misleading fashion, the following:

[A]s handlers, the Hornes actually assumed the full financial responsibility for the raisins that were not turned over to the Department of Agriculture. The producers in this case were fully paid for their raisins. This is a factual finding to be found in the judicial officer's opinion at 66a of the appendix to the—to the petition. The Hornes paid the producers for their raisins. According to the judicial officer, those raisins became part of the inventory of the Hornes. . . . [W]hen the Raisin Administrative Committee . . . came after the raisins, it was the Hornes and the Hornes only who bore the economic burden of this taking.<sup>77</sup>

Chief Justice Roberts, speaking for the Court, relied on this passage from the oral argument as his sole support for the factual conclusion that the Hornes, in their capacity as handlers, "owned" raisins.<sup>78</sup> The Chief Justice might reasonably be faulted for relying on counsel's vague statements during oral argument to support such a crucial factual premise for the Court's decision. Importantly, both the Department of Agriculture and one of its *amici* explicitly explained to the Court that the Hornes qua handlers could not properly claim ownership of any raisins.<sup>79</sup> Nonetheless, it is understandable that the Chief Justice may have been misled by counsel's argument, since the quote above strongly suggests, if it does not say so explicitly, that the Hornes acquired ownership of other growers' raisins in exchange for payments by the Hornes to these other growers. The reference

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77. Transcript of Oral Argument at 3–4, *Horne II*, 135 S. Ct. 2419 (2015) (No. 14-275), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/14-275\\_2b8e.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-275_2b8e.pdf).

78. *Horne II*, 135 S. Ct. 2419, 2431 (2015).

79. Brief for Respondent, *supra* note 57, at 52 ("[H]andlers have no property interest in reserve raisins and face no economic burden from compliance with the marketing order. To be sure, handlers who flout the reserve requirement, as petitioners did, become subject to civil sanctions, 7 C.F.R. 989.166(c)—but petitioners' asserted takings defense to those penalties rests on the novel proposition that a fine for violation of the reserve requirement cannot lawfully be imposed against handlers because that requirement effects a taking of someone else's property."); Brief of Amicus Curiae International Municipal Layers Association in Support of Respondent at 6–11, *Horne II*, 135 S. Ct. 2419 (2015) (No. 14-275).

to “inventory” likewise suggests that the Hornes became owners of the raisins. In fact, in the cited page of the administrative decision, the Judicial Officer merely observed that in some instances the Hornes accepted payment from raisin *buyers* and then either passed that money on to the growers or deducted that sum from the amount growers owed the Hornes for processing their raisins.<sup>80</sup> These transactions in no way suggest that the Hornes became owners of the raisins, and they are entirely consistent with the Hornes’ business model of providing processing services to others who were the actual owners of the raisins. Equally important, other passages in the Judicial Officer’s opinion clearly indicate that the Hornes denied ownership of the raisins, and the Judicial Officer did not dispute the correctness of these assertions.<sup>81</sup>

It also was misleading for counsel to suggest that the Hornes “bore the economic burden of this taking.”<sup>82</sup> In terms of actual raisins, neither the Hornes nor any of their confederate growers could possibly allege to have suffered a taking: after determining not to allow any of their raisins to be held in reserve, they sold all of their crops at fair market prices. With respect to the monetary sanctions, it is certainly correct that the Hornes were assessed financial penalties for violating the Department’s regulations applicable to handlers. But bearing a financial penalty for violating a federal regulation is not the same thing as being subjected to a taking of private property. Throughout this litigation the Hornes recognized that their takings challenge to the penalties rested on the theory that the marketing rules threatened them with a taking of their property interest in the raisins.<sup>83</sup> The Hornes never contended that they suffered any actual economic loss that would support a takings claim.

At the end of the day, it is hard to avoid the conclusion that the Supreme Court dropped the ball on the ownership issue. The Court decided the case on the premise that the Hornes *qua* handlers owned the raisins at issue, when in fact they did not. Whether the Court was bamboozled on this issue, or simply chose to uncritically embrace counsel’s ruse, is hard to say.

One potential response to this critique is that it is technical in nature, because it boils down to an argument that handlers are powerless to raise a takings challenge to the raisin marketing program, and that only raisin producers can raise the takings issue. If the Hornes or some other producer had proceeded in the proper fashion by filing suit, *qua* producers, in the

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80. Marvin D. Horne, Laura R. Horne, et al., 67 Agric. Dec. 18, 24 (U.S.D.A. 2008).

81. *Id.* at 19, 35.

82. Transcript of Oral Argument, *supra* note 77, at 4.

83. *See* Horne v. USDA, 750 F.3d 1128, 1137 (9th Cir. 2014) (“In effect, the Hornes argue the constitutionality of the penalty rises or falls with the constitutionality of the Marketing Order’s reserve requirement.”), *rev’d*, 135 S. Ct. 2419 (2015).

claims court, and if the case had reached the Supreme Court through a different appellate route, the Supreme Court might have reached many of the same conclusions that it did in *Horne II*, including that takings claims based on seizures of personal property, such as raisins, are governed by a per se rule. So, no harm no foul? Actually, we think not. The Court has an obligation to pay attention to the facts in the case before it and to follow the rule of law. When the Court cuts a corner to reach other issues it deems more important, it undermines the institution and the credibility of its rulings on those other issues.

*B. Personal Versus Real Property*

The Supreme Court also should have rejected the Hornes' takings argument because it rested on the theory that government appropriations or seizures of personal property are governed by a categorical, or per se, takings rule. Under a per se approach, government actions affecting private property are presumed to be takings, without regard to the various nuanced factors normally considered in takings analysis.<sup>84</sup> The Ninth Circuit refused to recognize a per se rule for interferences with the Hornes' interests in raisins because raisins represent a form of personal property.<sup>85</sup> But the Supreme Court reversed and embraced the Hornes' per se theory, despite the fact that this ruling violated common sense and the overwhelming weight of precedent.

First, the Court's new per se rule appears nonsensical because there are numerous examples of seizures of personal property that cannot plausibly be called takings. Some examples include seizures of adulterated drugs by the Food and Drug Administration,<sup>86</sup> loss of personal private property through civil or criminal forfeiture actions,<sup>87</sup> removal of unwholesome foods from store shelves by local health officials,<sup>88</sup> or the taking away of abused or otherwise mistreated animals from their owners by local animal

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84. See generally *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536–40 (2005) (explicating the per se takings tests and how they fit into the Court's takings jurisprudence).

85. See *Horne*, 750 F.3d 1128.

86. Federal Food, Drug, and Cosmetic Act § 304, 21 U.S.C. § 334 (2012) (authorizing FDA seizure of “[a]ny article of food, drug, or cosmetic that is adulterated or misbranded”).

87. *Bennis v. Michigan*, 516 U.S. 442, 452 (1996) (rejecting claim that seizure of automobile pursuant to Michigan forfeiture statute represented a taking; “[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain” (first citing *United States v. Fuller*, 409 U.S. 488, 492 (1973); and then citing *United States v. Rands*, 389 U.S. 121, 125 (1967))).

88. *N. Am. Cold Storage Co. v. City of Chi.*, 211 U.S. 306, 308 (1908) (allowing the seizure, without prior judicial process, of forty-seven barrels of poultry from a Chicago food storage warehouse after city inspectors determined they were “putrid, decayed, poisonous or infected in such a manner as to render it unsafe or unwholesome for human food”).

control officers.<sup>89</sup> In 2014, California Governor Jerry Brown signed into law a measure that authorizes the removal of firearms and ammunition from persons determined to be dangerous to themselves and others.<sup>90</sup> Surely, that statute would not work a compensable taking. Yet the Court's per se theory seems to dictate the conclusion that the statute does take private property.

It is possible that in the future the Court will recognize exceptions to its new per se rule, or otherwise cabin its scope. But *Horne II* suggested no exceptions or qualifications to the new per se rule and did not even acknowledge that the new rule may generate some "hard" cases. In other takings cases the Court has said that so-called "background principles" of federal or state law may limit the scope of its per se rules.<sup>91</sup> But as discussed below, it is not obvious how previously recognized "background principles" defenses can sensibly be applied to the context of personal property or how new background principles might be devised for personal property takings cases. For the moment, the Court has adopted a new per se rule for personal property that, on its face, is both sweeping in scope and utterly implausible.

Second, the Court's new per se rule was inconsistent with the Court's prior indications that the Court's takings analysis applies differently to personal property than to real property. In *Lucas v. South Carolina Coastal Council*, in which the Court held that regulatory restrictions that eliminate all economically viable uses of land constitute per se takings, the Court articulated a distinct rule for regulations that destroy the economic value of personal property: "[I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)."<sup>92</sup> The Ninth Circuit, logically enough, relied on this reasoning in *Lucas* to support its

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89. See, e.g., MISS. CODE ANN. § 97-41-2(1) (West 2015) ("All courts in the State of Mississippi may order the seizure of an animal by a law enforcement agency, for its care and protection upon a finding of probable cause to believe said animal is being cruelly treated, neglected or abandoned.").

90. See, e.g., CAL. PENAL CODE § 18120(b)(1) (West 2016) ("Upon issuance of a gun violence restraining order issued pursuant to this division, the court shall order the restrained person to surrender all firearms and ammunition in the restrained person's custody or control, or which the restrained person possesses or owns . . ."); see also Patrick McGreevy, *Governor OKs Temporary Gun Seizures from People Judged to be a Danger*, L.A. TIMES (Sept. 30, 2014), <http://www.latimes.com/local/political/la-me-pc-california-jerry-brown-gun-seizures-20140929-story.html> (describing the legislative debate over AB 1014).

91. See, e.g., *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1030 (1992).

92. 505 U.S. at 1027–28 (citing *Andrus v. Allard*, 444 U.S. 51, 66–67 (1979) (prohibition on sale of eagle feathers held not a taking)).

conclusion that even if an appropriation of realty is a per se taking, a per se rule should not apply to appropriations of personal property.<sup>93</sup>

The Supreme Court rejected this reading of *Lucas*, asserting that regulatory restrictions on property use are distinguishable from appropriations. Regardless of what *Lucas* had to say about applying a per se rule to personal property in the regulatory takings context, the Court contended, without citation, “people still do not expect their property, real or personal, to be actually occupied or taken away.”<sup>94</sup>

This conclusion is problematic on multiple counts: it is correct that regulatory restrictions on property use and appropriations of property represent distinct types of government actions. But there is no reason to think the distinction should matter for the purpose of deciding whether per se analysis extends to personal property. Just as it traditionally exercises a “high degree of control over commercial dealings” in personal property in the regulatory context,<sup>95</sup> the government also commonly seizes commercial personal property for a variety of public purposes, as demonstrated by the examples cited above.<sup>96</sup> This parallelism suggests that an across-the-board exception from per se analysis for personal property is appropriate.

In *Lucas* Justice Scalia justified the per se rule he announced by observing “that total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation.”<sup>97</sup> If these two types of takings are equivalent, recognizing an equivalent personal property exception for both types of takings makes perfect sense. The Court’s observation that people “do not expect” either their real or personal property to be seized is simply judicial *ipse dixit*. Some may agree; but others will not. There is nothing in the Constitution that privileges a judge’s assessment of people’s expectations over those of the people’s elected representatives in this context.<sup>98</sup>

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93. *Horne v. USDA*, 750 F.3d 1128, 1139–40 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 1039 (2015), and *rev’d*, 135 S. Ct. 2419 (2015). The Ninth Circuit also discussed *Loretto v. Manhattan CATV Teleprompter*, 458 U.S. 419 (1982), and concluded that the per se rule for permanent physical occupations discussed in that case was exclusively focused on land. *Horne*, 750 F.3d at 1140.

94. *Horne II*, 135 S. Ct. 2419, 2427 (2015).

95. *Lucas*, 505 U.S. at 1027.

96. *See supra* notes 86–90 and accompanying text.

97. *Lucas*, 505 U.S. at 1017; *cf.* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (stating that all of the Court’s various takings tests “share a common touchstone;” that is, “[e]ach aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain”).

98. The same objection about a free-wheeling judiciary can be made in relation to the Court’s statement in *Lucas* that, as a result of the State’s traditionally high degree of control over commercial transactions, an owner of personal property (at least if it is used for sale or manufacture for sale) “ought to be aware of the possibility that new regulation might even render his property economically worthless.” *Lucas*, 505 U.S. at 1027–28. But the analysis in *Lucas*

The Court also observed that, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, it recognized a “longstanding distinction” between regulatory takings and physical takings, suggesting that this statement supported the conclusion that the personal property exception to the *Lucas* per se regulatory takings rule should not apply to appropriations of personal property.<sup>99</sup> But the Court’s reliance on this passage from *Tahoe-Sierra* was unwarranted. In *Tahoe-Sierra* the Court addressed how to apply the so-called “parcel as a whole” rule to a development moratorium, and in the cited passage simply observed that the Court had a “longstanding” practice of applying the parcel rule differently in regulatory takings cases than in physical takings cases. Nothing in *Tahoe-Sierra* addressed or was even relevant to the issue of whether takings claims involving personal property should be governed by a per se rule.

The Court’s other reasons for applying a per se rule to raisins and other personal property were hardly more convincing. The Court maintained that a uniform per se takings rule was supported by the text of the Takings Clause because it protects “private property” without distinguishing between personal property and real property.<sup>100</sup> This interpretation missed the point because there is no dispute that interests in personal property constitute property within the meaning of the Takings Clause. The relevant issues are whether government action affecting personal property effects a taking and according to what standard. The Supreme Court’s takings cases have articulated diverse tests and standards for determining whether government action constitutes a “taking.”<sup>101</sup>

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reasoning had the virtue of leaving policy choices about social and economic regulation largely to the people’s elected representatives.

99. *Horne II*, 135 S. Ct. at 2427 (quoting *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 323 (2002)).

100. *Horne II*, 135 S. Ct. at 2426.

101. The *Horne* Court largely elided the distinction between “appropriations” and “physical occupations,” treating them as variations on the generic category of “physical takings.” *Horne II*, 135 S. Ct. at 2427. But these labels appear to identify distinctive types of government action: an appropriation involves a seizure, for the benefit of the government or some third party, of their physical property itself or of title to the property; an occupation involves physical entry onto property, for example as a result of flooding or trespass. Occupations appear to involve land exclusively, while appropriations can involve both real and personal property. Other Court opinions more clearly distinguished between appropriations and physical occupations. See *Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511, 518 (2012) (initially observing that “[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner,” but then turning to the issue of whether temporary physical occupations constitute takings (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002))); see also *Lingle*, 544 U.S. at 537 (“The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property.”) (emphasis added). The Supreme Court precedents support the conclusion that temporary appropriations may be subject to a per se rule. See, e.g., *Kimball Laundry v. United States*, 338 U.S. 1, 13–14 (1949); *United States v. Gen. Motors*, 323 U.S. 373, 381–82 (1945). Temporary physical occupations, however, are not subject to a per se rule. See *Ark. Game & Fish Comm’n*, 133 S. Ct. at 518.

Consistent with this jurisprudence, the Court could have recognized a different takings standard for alleged takings of personal property than for alleged takings of real property.

Second, the Court asserted that “history” supported its position, pointing to such diverse sources as the Magna Carta and the Massachusetts Bay Colony’s Body of Liberties.<sup>102</sup> But these sources merely show that personal property deserves protection under the Takings Clause (which no one disputes), and that government action impairing a personal property interest can result in a taking (which no one disputes).<sup>103</sup> These venerable authorities do not speak to the issue of whether takings claims involving personal property should be evaluated using a per se test. The reason is obvious: the Supreme Court did not even begin to articulate the distinction between per se and non-per se takings analysis until the end of the twentieth century.<sup>104</sup> Thus, the Court’s historical analysis was hopelessly anachronistic.

Finally, the Court claimed that “precedent” supported its embrace of a per se rule. It does not. *Dictum* in one nineteenth-century case cited by the Court suggests that appropriations of at least certain kinds of personal property should be the equivalent of appropriations of land.<sup>105</sup> But the Court’s other authorities merely confirmed that personal property is protected by the Takings Clause.<sup>106</sup> This ambiguity in the precedents is again understandable given the fact that the Court had not recognized the distinction between per se and non-per se analysis at the time of the decisions.

More importantly, modern cases, decided after recognition of this distinction, point away from applying a per se test to personal property.

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102. *Horne II*, 135 S. Ct. at 2426.

103. See William Michael Treavor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 837 (1995) (“The liberal end of the clause established a rule of law barring the federal government from physically taking real or chattel property, including slaves, without compensation.”).

104. The Court first explicitly articulated a categorical or per se takings test in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982). The Court took this step in response to the New York Court of Appeals’ rejection of Mrs. Loretto’s takings claim based on the multi-factor *Penn Central* analysis articulated just four years earlier in the *Penn Central* case. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 423 N.E.2d 320, 330–31 (N.Y. 1981) (evaluating the takings claim based on an inquiry into “the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations”); see also *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

105. See *James v. Campbell*, 104 U.S. 356, 357–58 (1882) (rejecting claim that government appropriated patent rights).

106. For example, the *Horne II* Court explained that the Takings Clause was apparently adopted in response to appropriations of personal property during the Revolutionary War, a proposition that is surely correct, see 135 S. Ct. at 2426, but that hardly establishes that appropriations of personal property in general should be governed by a per se takings rule.

Thus, in *Bennis v. Michigan*,<sup>107</sup> the Court rejected a takings challenge based on the seizure of an automobile pursuant to the Michigan forfeiture law, a result plainly inconsistent with the notion that government seizure of personal property is invariably a taking.<sup>108</sup> In *Webb's Fabulous Pharmacies v. Beckwith*,<sup>109</sup> the Court ruled that a government appropriation of the interest accruing in an interpleader fund was a taking, but reached this conclusion only after observing that “[n]o police power justification is offered for the deprivation”—indicating that consideration of the purpose of an appropriation of personal property can lead to the conclusion that a seizure is not a taking.<sup>110</sup> This precedent is also inconsistent with a sweeping per se rule for appropriations of personal property. The Court in *Horne* simply ignored both *Bennis* and *Webb's Fabulous Pharmacies*, even though they were arguably the recent Court precedent (apart from *Lucas*) most directly relevant to the issue before the Court.<sup>111</sup>

In sum, the new per se rule established in *Horne II* is disappointing from many perspectives. The Court's ruling lacked support from the text of the Constitution, history, or relevant precedent, and the decision threatens to upend important government law enforcement functions at all levels of the federal system. Yet the Court's opinion exhibited no awareness of the potential ramifications of the new per se rule. It is possible that this is a per se rule for this case only, and the Court will quickly back away from its ruling on a different set of facts. Equally remarkable was the Court's failure to identify possible exceptions or limitations to its new per se rule, contrary to the Court's more careful approach in both *Loretto* and *Lucas*. Perhaps the Court intends to devise some future “background principles” exceptions to temper the apparent severity of its new per se rule. But it is difficult to discern the likely doctrinal basis for such a move. The nuisance exception recognized in *Lucas*, which of course involved the use of land, was based on the notion that no one can claim a right to use land in a

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107. 516 U.S. 442 (1996).

108. *Id.* at 452–53.

109. 449 U.S. 155 (1980).

110. *Id.* at 163.

111. The Court also overlooked the decision in *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 235 (2003), in which the Court assumed—but only for the sake of argument—that a requirement that interest earned on bank accounts be transferred to Washington Legal Foundation was “akin” to a per se taking but then rejected the takings claim on the merits. The defendants vigorously contested whether a per se takings test should apply in this case. *See* Brief for Respondents Legal Foundation of Washington and Its President at 24–33, *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003) (No. 01–1325), 2002 WL 31387472, at \*24–33. Not surprisingly, given the availability of an alternative basis for rejecting the takings claim, the *Brown* Court studiously avoided resolving whether a per se theory governed this alleged appropriation of personal property. In *Horne*, a mere twelve years later, the Court cavalierly treated the application of a per se test to personal property as almost a foregone conclusion.



fashion that unreasonably interferes with others' use of their land.<sup>112</sup> It does not seem likely that this important but relatively specific qualification on property rights in land can be transferred to personal property. The Court may eventually find some way to craft needed exceptions to its *per se* rule, but it is hard to see how the Court will pull it off.

In the end it remains somewhat of a mystery why a majority of the Court felt compelled to adopt an apparently uncompromising *per se* rule for government appropriations of personal property, especially in such a quirky case involving New Deal-era regulation of raisins. While the Court's decision makes no explicit reference to the broader implications of its decision, it seems likely the Court had in mind the potential for government impairment of more intangible personal property, such as copyrights and patents. On its face, the new *per se* rule applies to personal property of any and all kinds. But the wide variety of contexts in which regulation of personal property may give rise to takings claims in the future makes it difficult to predict what problems and questions may arise as litigants attempt to apply this precedent beyond the realm of raisins.

### C. Offsetting Benefits

Third, the Court erred by refusing to permit the Department to try to show that the economic benefits conferred on the Hornes by the raisin marketing rules equaled or exceeded the burdens imposed on them by the rules. A taking is unconstitutional only if it is uncompensated,<sup>113</sup> and a taking must be compensated only if the claimant can show that she suffered some economic loss as a result of the taking. If a claimant can demonstrate no entitlement to just compensation because she suffered no loss, even if it is undisputed that a taking has occurred, there has been no violation of the Takings Clause.<sup>114</sup> Absent a viable takings claim, the Hornes were not entitled to raise the Takings Clause as a defense to the penalties imposed on them for violating the rules of the raisin marketing program.

The Department contended that the Hornes failed to demonstrate that they would have suffered any net economic loss under the program, pointing out that the raisin reserve requirement was designed primarily to benefit raisin growers by restricting the market supply of raisins, thereby keeping prices elevated.<sup>115</sup> It was well within the realm of possibility that

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112. See RESTATEMENT (SECOND) OF TORTS § 826 (1979) (defining a nuisance as “[a]n intentional invasion of another’s interest in the use and enjoyment of land”).

113. See *First English Evangelical Lutheran Church v. Cty. of L.A.*, 482 U.S. 304, 314 (1987) (the Takings Clause “does not prohibit the taking of private property, but instead places a condition on the exercise of that power”).

114. See *Brown*, 538 U.S. at 240 (rejecting takings claim where claimants suffered no net loss as a resulting of challenged government action).

115. *Horne II*, 135 S. Ct. at 2419, 2431 (2015).

the positive effects of the marketing order on the prices the Hornes received from selling non-reserve raisins would have exceeded the adverse economic effects of complying with the reserve requirement. Because the Hornes had not demonstrated that they would have suffered a net adverse economic effect, the government contended that the program did not threaten them with a taking without compensation.

Justice Breyer, in dissent, joined by Justices Ginsburg and Kagan, found this argument compelling. Invoking the traditional rule concerning offsetting benefits, he observed that the amount of compensation due under the Takings Clause generally must be calculated by subtracting from the compensation due any offsetting benefits conferred by the government action that caused the taking.<sup>116</sup> A classic application of this rule is when the government takes a portion of a parcel of land for a right-of-way for a road, and the amount due for the right-of-way is reduced by the increase in the value of the remaining land due to the enhanced access provided by the new road.<sup>117</sup> While conceding that this rule has been commonly applied in the context of direct condemnations, Justice Breyer maintained that, logically, the same rule should apply in inverse condemnation actions.<sup>118</sup> Recognizing that the lower courts had yet to come to grips with this issue, he argued for a remand to consider whether any compensation would have been due had the Hornes complied with the regulations.<sup>119</sup>

The Court majority disagreed. Without disputing the general principle of offsetting benefits, Chief Justice Roberts maintained that the rule did not apply in the context of regulatory benefits: “Cases of that sort [involving offsetting benefits] can raise complicated questions involving the exercise of the eminent domain power, but they do not create a generally applicable exception to the usual compensation rule, based on asserted regulatory benefits of the sort at issue here.”<sup>120</sup> This conclusion, offered without any supporting analysis, seems indefensible. The doctrine of inverse condemnation (including but not limited to regulatory takings) is built on the understanding that a unified set of principles govern takings law, and that the basic rules governing takings cases are the same regardless of whether the government initiates a condemnation action or a court finds a taking in an inverse condemnation action initiated by a property owner. This equivalence is, after all, at the foundation of the Court’s landmark ruling in *First English Evangelical Lutheran Church v. City of Los*

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116. *Id.* at 2434 (Breyer, J., dissenting).

117. *Id.* (quoting *Bauman v. Ross*, 167 U.S. 548, 574 (1897)) (“[W]hen part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered.”).

118. *Id.* at 2435.

119. *Id.* at 2436.

120. *Id.* at 2432 (majority opinion).

*Angeles*,<sup>121</sup> which resolved that the default remedy for a regulatory taking is an award of just compensation.<sup>122</sup> As the *First English* Court stated, “While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings.”<sup>123</sup> Given the essential equivalence of direct condemnations and inverse condemnations, there is no logical reason to suppose that off-setting benefits should matter in condemnation cases and not in inverse condemnation cases. Tellingly, the Chief Justice cited no precedent supporting his position, and there does not appear to be any.<sup>124</sup>

The Chief Justice also maintained that, “in any event,” this case provided “no occasion” to resolve how the offsetting benefits rule should apply in an inverse condemnation case because “[t]he Government has already calculated the amount of just compensation in this case, when it fined the Hornes the fair market value of the raisins.”<sup>125</sup> This alternative argument was plainly mistaken as well.

The applicable regulations state that if a handler fails to comply with the reserve requirement, the handler “shall compensate the [RAC] for the amount of the loss resulting from his failure to so deliver.”<sup>126</sup> In other words, if a handler fails to deliver some quantity of raisins to the RAC, the regulations require the handler to pay the dollar equivalent of the raisins improperly withheld; this calculation ensures that the handler is not unjustly enriched by a violation of the rules, and the RAC is made whole for the violation. There is no reason to think that the amount of this administrative penalty, designed to secure compliance with the marketing program, is necessarily the measure of the “just compensation” that could be claimed by a handler under the Takings Clause if he had complied with the rules and could assert a viable takings claim. The penalty and the potential just compensation award serve different purposes, are calculated differently, and there is no reason to think they will be the same figure. For the reasons just discussed,<sup>127</sup> there is a substantial argument that the amount due in compensation under the Takings Clause would have to be discounted, if not erased, to take account of any offsetting benefits. By pointing to the government’s calculation of the penalty amount as if it would self-evidently

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121. 482 U.S. 304 (1987).

122. *Id.* at 314–22.

123. *Id.* at 316.

124. See *Horne II*, 135 S. Ct. at 2436 (Breyer, J., dissenting) (“I [am not] aware of any precedent that would distinguish between how the *Baumann* doctrine applies to the reserve requirement itself and how it applies to other types of partial takings.”).

125. *Id.* at 2433.

126. 7 C.F.R. § 989.166(d) (1978).

127. See *supra* notes 116–119 and accompanying text.

be equivalent to a just compensation award under the Takings Clause, the *Horne II* majority plainly erred.

*D. Failure to Apply the Nollan/Dolan Analysis*

Fourth, the Court also stumbled by failing to recognize—assuming the Hornes were otherwise entitled to present a takings argument in opposition to the penalties—that their takings argument should have been evaluated under the “essential nexus” and “rough proportionality” tests articulated in *Nollan v. California Coastal Commission*<sup>128</sup> and *Dolan v. City of Tigard*.<sup>129</sup> If the Court had applied these standards, it likely would have concluded, like the Ninth Circuit, that the takings argument failed on the merits, meaning that the penalties should have been upheld.

To understand why the Court missed this issue it is necessary to unpack the case a bit further. The third question in the petition for certiorari read as follows: “Whether a governmental mandate to relinquish specific, identifiable property as a ‘condition’ on permission to engage in commerce effects a per se taking.”<sup>130</sup> The presence of this question in the petition for certiorari is baffling because it does not refer either to an argument the government presented to the Ninth Circuit following the remand in *Horne I*,<sup>131</sup> or to a position embraced by the Ninth Circuit on remand. As discussed above, the Ninth Circuit in 2011 originally ruled that the Hornes were barred from making a takings claim because they had entered the raisin business voluntarily, but in response to the Hornes’ petition for rehearing the Ninth Circuit rescinded its ruling on that issue.<sup>132</sup>

Given this course of proceedings, the Supreme Court had no business addressing the third issue presented in the petition for certiorari in *Horne II*. A party who has succeeded in persuading a lower court to withdraw a ruling obviously cannot legitimately file a petition for certiorari asking the Supreme Court to review the merits of the ruling the lower court has abandoned.<sup>133</sup> In their petition for certiorari in *Horne II*,<sup>134</sup> the Hornes presented an issue that, at that late stage of the case, was no longer a

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128. 483 U.S. 825 (1987).

129. 512 U.S. 374 (1994).

130. Petition for a Writ of Certiorari at i, *Horne II*, 135 S. Ct. 2419 (2015) (No. 14–275), 2014 WL 4404781, at \*i.

131. See generally Supplemental Brief for Appellee, *supra* note 67.

132. See *supra* notes 31–33 and accompanying text.

133. “Ordinarily,” the Supreme Court “do[es] not decide in the first instance issues not decided below.” *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) (quoting *Nat’l Collegiate Athletic Ass’n. v. Smith*, 525 U.S. 459, 470 (1999)). It logically follows from this basic principle governing the Supreme Court’s certiorari jurisdiction that if a lower court explicitly decides not to address an issue, that issue is not appropriate for review in the Supreme Court. This is especially true in a case like *Horne II* where the petitioner succeeded in persuading the court below to rescind its opinion addressing the issue.

134. See generally Petition for a Writ of Certiorari, *supra* note 130.

legitimate part of the case. Unfortunately, in its opposition to the petition, the Department of Agriculture raised no objection to the petitioners' effort to interject the issue.<sup>135</sup> As a result, when the Court granted the petition for certiorari, it granted the petition *in toto*, without excluding the third issue from consideration.<sup>136</sup> At the merits stage, the Department found itself in the unenviable position of defending an argument the Ninth Circuit had abandoned.

The Court answered the third question in the Hornes' petition in the affirmative, despite the fact that its precedents unambiguously supported a negative answer. In *Nollan v. California Coastal Commission*<sup>137</sup> and *Dolan v. City of Tigard*,<sup>138</sup> the Court ruled that when the government grants permission to engage in particular activity on the condition that a person surrender some property interest, the forced exaction of the property may or may not be a taking depending on the circumstances. An exaction is a taking if there is no nexus between the government's regulatory objectives and the purpose of the exaction,<sup>139</sup> or if the burden imposed by the exaction is not roughly proportional to the public harms threatened by the regulated activity.<sup>140</sup> On the other hand, an exaction is not a taking if the "essential nexus" and "rough proportionality" tests are satisfied.

Thus, in *Horne II*, applying the *Nollan/Dolan* analysis, the answer to the takings question—whether "a governmental mandate to relinquish a specific, identifiable property" as a condition of obtaining permission to engage in a particular business effects taking—should have been: "It depends." Consequently, the correct answer to the question presented in the petition—whether such a mandate results in a per se taking, that is, whether it *invariably* results in a taking—should have been "no." Unfortunately, the Court's answer to the question in the petition was "yes."<sup>141</sup> As discussed below, it is hard to know how seriously to take the Court's answer.

The Department of Agriculture should have addressed the third question in the petition by arguing that a per se takings test did not apply (and therefore the answer to the question posed in the petition was "no"), that (at most)<sup>142</sup> the Hornes were entitled to the benefit of the relatively

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135. See generally Brief for Respondent, *supra* note 57.

136. *Horne II*, 135 S. Ct. 1039 (2015). The other two issues raised in the petition for certiorari—whether a per se rule governs a takings claim based on an alleged governmental seizure of an interest in personal property, and whether application of a per se rule was barred by the fact that the Hornes were entitled to the net proceeds from the RAC's sale of reserve raisins—were addressed by the Ninth Circuit and were properly raised by the petition for certiorari.

137. 483 U.S. 825 (1987).

138. 512 U.S. 374 (1994).

139. *Nollan*, 483 U.S. at 837.

140. *Dolan*, 512 U.S. at 391.

141. *Horne II*, 135 S. Ct. 2419, 2430 (2015).

142. We suggest "at most" because application of the *Nollan/Dolan* analysis would have been appropriate only if a direct appropriation of raisins, outside of the context of the raisin marketing

stringent *Nollan/Dolan* standards, and that the Department should have prevailed under those standards, as the Ninth Circuit had concluded below.<sup>143</sup> Instead, the Department's primary argument on the merits, relying on the Court's 1984 decision in *Ruckelshaus v. Monsanto Co.*,<sup>144</sup> was that the marketing program, far from effecting a per se taking, worked no taking at all as a matter of law. *Monsanto* rejected a takings claim based on a regulation requiring pesticide manufacturers to hand over their trade secrets on health and safety issues as a condition of receiving an EPA license to sell pesticides. The *Monsanto* Court ruled that "a voluntary" exchange of property interests in trade secrets "for the economic advantages of a registration can hardly be called a taking."<sup>145</sup> In *Horne II* the Department argued that just as there was no taking in requiring Monsanto to turn over trade secret data to the government as a condition of obtaining an EPA license, there was no taking in requiring the Hornes to turn over a portion of their raisin crop as a condition of gaining permission to sell their raisins.

The Supreme Court made short work of this argument, principally because the Court's intervening *Nollan* decision had already reduced the *Monsanto* precedent to the size of a pea. *Monsanto*, *Nollan*, and *Dolan* all involved the same basic fact pattern: the government granted an authorization (a license to use pesticides in *Monsanto* and permission to develop land in *Nollan* and *Dolan*), in exchange for citizens giving up some property interest to the government (trade secrets in *Monsanto* and easements in land in the other cases). In *Nollan*, decided three years after *Monsanto*, the California Coastal Commission defended against the takings claim by invoking *Monsanto*, arguing that exacting an easement as a condition of a development permit was the equivalent of exacting trade secrets as a condition of an EPA license. The *Nollan* Court rejected this argument, distinguishing *Monsanto* on the ground that, unlike the right to sell pesticides, "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot

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program, would necessarily have resulted in a taking. See *Nollan*, 483 U.S. at 831–34 (justifying the demanding "essential nexus" standard on the premise that there was "no doubt" a direct mandate to the Nollans to allow the public to pass across their beach would have been a taking); *Dolan*, 512 U.S. at 375 (applying the same reasoning to justify applying "rough proportionality" test to an exaction involving a bike path and greenway). For the reason discussed above, see *supra* notes 86–141 and accompanying text, we do not think that premise necessarily applies in this case, because a per se rule should not be applied to resolve a takings claim based on a freestanding government appropriation of personal property. However, even if the premise were correct, the Court still should have allowed the Department to attempt to defend its regulations under the *Nollan/Dolan* standards, rather than resolving the issue by fiat using a per se rule.

143. *Horne v. USDA*, 750 F.3d 1128, 1143 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 1039 (2015), *and rev'd*, 135 S. Ct. 2419 (2015).

144. 467 U.S. 986 (1984).

145. *Id.*

remotely be described as a ‘governmental benefit.’”<sup>146</sup> As a result, the Court said, “the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary ‘exchange,’ that we found to have occurred in *Monsanto*.”<sup>147</sup> Following *Nollan* (and then *Dolan*), the *Monsanto* precedent became little more than a legal oddity, and the essential nexus and rough proportionality tests represented the new, relatively more exacting standards for evaluating takings challenges to government exactions.

In *Horne II*, in response to the Department’s attempt to defeat the takings claim by invoking *Monsanto*, the Court rejected the argument, applying the narrow reading of *Monsanto* it previously adopted in *Nollan*. Moreover, the *Horne II* Court placed a new gloss on *Monsanto*, arguably narrowing the significance of that precedent still further. *Monsanto*, the *Horne* Court explained, involved a voluntary exchange of property interests for a “valuable Government benefit . . .—a license to sell dangerous chemicals.”<sup>148</sup> By contrast, the alleged taking in *Horne* could not “reasonably be characterized as part of a similar voluntary exchange.”<sup>149</sup> Just as the use of land at issue in *Nollan* and *Dolan* was not a government benefit “on the same order as a permit to sell hazardous chemicals,” *Horne II* reasoned, “[s]elling produce . . . is similarly not a special governmental benefit that the Government may hold hostage to be ransomed by the waiver of constitutional protection.”<sup>150</sup> In addition, the Court quipped, “Raisins are not a dangerous pesticide; they are a healthy snack.”<sup>151</sup> By emphasizing that *Monsanto* involved not only the grant of a benefit, but the benefit of selling a “dangerous” product, *Horne II* arguably narrowed the circumstances in which *Monsanto* will serve as a useful precedent in the future.<sup>152</sup>

The glaring gap in the Court’s reasoning in *Horne II* was that, if *Monsanto* was not the controlling precedent and did not defeat the takings

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146. *Nollan*, 483 U.S. at 834 n.2.

147. *Id.* (citation omitted) (quoting *Monsanto*, 467 U.S. at 1007 (1984)).

148. *Horne II*, 135 S. Ct. 2419, 2430 (2015).

149. *Id.*

150. *Id.* at 2430–31.

151. *Id.* at 2431.

152. In addition, in light of the Court’s effort in *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013), to position the Court’s exactions cases within the larger context of unconstitutional conditions doctrine, it is difficult to know whether there is anything left of *Monsanto* at all. Unconstitutional conditions, as generally understood, proscribe the denial of a government “benefit” because a citizen refused to give up a constitutional right. See *Perry v. Sindermann*, 408 U.S. 593 (1972). Given this basic understanding of the unconstitutional conditions doctrine, it is far from clear why it matters that the license at issue in *Monsanto* could be characterized as a “benefit.” But cf. John Echeverria, *The Costs of Koontz*, 39 VT. L. REV. 573 (2015) (contending that, contrary to the Court’s apparent reasoning in *Koontz*, *Nollan* and *Dolan* are based on a different conception of unconstitutional conditions than that involved in cases involving First Amendment issues).

claim (a conclusion that was hard to dispute, at least after *Nollan*), it did not logically follow that a per se takings rule applied. In *Nollan* the Court rejected the government's position, based on *Monsanto*, that it could defeat a takings claim by treating the grant of an easement as a voluntary exchange for a land use permit. But the *Nollan* Court said the government could still defeat the takings claim by showing an essential nexus between the government's regulatory purposes and the purpose of the easement. Following the reasoning of *Nollan*, which the Court purported to apply in *Horne II*, if selling raisins is not a "privilege" in the same sense that developing land is not a privilege, that did not mean that the Hornes could claim the benefit of a per se rule. At most it meant only that in order to defeat the takings claim, the Department would have to try to defend the reserve requirement under the *Nollan* and *Dolan* standards. The Ninth Circuit already had concluded that *Nollan* and *Dolan* applied in this case, and that the reserve requirement did not result in a taking under those standards.<sup>153</sup> But the Supreme Court simply ignored the Ninth Circuit's application of the *Nolan/Dolan* standards, applying a per se takings test instead.

The analysis in *Horne II* can be read to add a new layer of complexity to exactions doctrine. In some narrow category of cases governed by *Monsanto*, involving dangerous pesticides, for example, the government can defeat a takings claim, without having to demonstrate compliance with the *Nollan/Dolan* standards, by demonstrating that the government's grant of regulatory permission represents the conferral of a "privilege." In that circumstance, the government can legitimately exact some property interest in voluntary exchange for the conferral of the privilege without offending the Takings Clause. In other cases, involving permits for the use of land, for example, the government can also impose exactions without triggering the Takings Clause, but only if it can satisfy the *Nollan/Dolan* standards. Finally, *Horne II* suggests that there might be a third category of exactions—involving neither the granting of a privilege nor the granting of permission to use land—where the demand for an exaction as a condition of allowing some activity, such as selling some non-dangerous product (like raisins), can be challenged directly as a per se taking without reference to the *Nollan/Dolan* standards.

It seems implausible, given the importance the Court has attached to rights in land in other takings cases,<sup>154</sup> that the Court intends to grant the government *more* latitude under the Takings Clause in imposing conditions

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153. *Horne v. USDA*, 750 F.3d 1128, 1143 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 1039 (2015), *and rev'd*, 135 S. Ct. 2419 (2015).

154. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 (1992) (referring, in the context of land use regulation, to "the historical compact recorded in the Takings Clause that has become part of our constitutional culture").



on the use of land than in imposing conditions on the conduct of ordinary business affairs, such as the sale of raisins. Yet that is the implication of the new outline of exactions doctrine after *Horne II* sketched out above. Perhaps the Court simply goofed in *Horne II* by failing to recognize that the government should at least have been allowed to try to defeat the takings challenge based on *Nollan* and *Dolan*. The Department of Agriculture's failure to vigorously defend the Ninth Circuit's use of the *Nollan/Dolan* tests helps explain this error in *Horne II*. So also the too-clever-by-half advocacy by the Hornes' Supreme Court counsel in framing the petition for certiorari helps explain how the Court managed to go so far astray.<sup>155</sup>

One hint that the Court itself may not take its ruling on this issue very seriously is the carefully worded response to the third question in the petition: "The answer," the Court said, "at least in this case, is yes."<sup>156</sup> Perhaps the underscored language indicates that its new per se rule may apply in the *Horne* case only, much like its view of the Equal Protection Clause in *Bush v. Gore*, which was good for only that day.<sup>157</sup>

### III. *HORNE'S* REAFFIRMATION OF STATE SOVEREIGN OWNERSHIP OF WILDLIFE

Notwithstanding the Court's advancement of the libertarian property rights agenda in the above rulings in *Horne II*, the case contains a significant, surprising silver lining for government defendants—a ringing reaffirmation of the doctrine of sovereign public ownership of wildlife.<sup>158</sup>

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155. See *supra* note 142 and accompanying text.

156. 135 S. Ct. at 2430 (emphasis added).

157. *Bush v. Gore*, 531 U.S. 98, 109 (2000) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

158. Another silver lining for the government side in *Horne II* was the Court's implicit endorsement of an expansive view of the "public use" requirement of the Takings Clause. Since the Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), there has been considerable scholarly debate about whether the *Kelo* Court correctly ruled that a seizure of private property for transfer to another private party to achieve some public purpose can satisfy the public use requirement. See generally ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON & THE LIMITS OF EMINENT DOMAIN* (2015). In *Horne II* the Court implicitly reaffirmed *Kelo's* broad reading of the public use requirement by ruling that the raisin marketing program, which authorizes government transfers of raisins from growers to various other private parties, constituted a taking "for public use." *Horne II*, 135 S. Ct. 2419, 2431 (2015). Justice Thomas, in a concurring opinion, underscored the significance of *Horne II* for the public use debate by observing that the premise that the raisin marketing program served a public use was inconsistent with his view, expressed in his dissenting opinion in *Kelo*, that the public use requirement should be interpreted to mean that "the government may take property only if it actually uses or gives the public a legal right to use the property." *Id.* at 2433 (Thomas, J., concurring) (quoting *Kelo*, 545 U.S. at 521) (Thomas, J., dissenting).

A. *Reaffirmation of the Sovereign Ownership Doctrine*

The 1929 decision in *Leonard & Leonard v. Earle*,<sup>159</sup> presented a conundrum for the Court in *Horne II*. In that nearly ninety-year-old case the Supreme Court ruled that there was no taking when Maryland required oysters packers, as a condition of receiving a business license, to hand over a portion of their emptied oyster shells to the state for use as a substrate to propagate more Chesapeake Bay oysters.<sup>160</sup> Like the reserve raisin requirement in *Horne*, this condition represented a direct seizure of private property from individual owners. Also as in *Horne*, the seizure aimed to benefit members of the regulated industry. Thus, *Leonard* was on all fours with the *Horne* case and appeared to be a strong and somewhat startling precedent in support of the government.<sup>161</sup>

The Court could have avoided *Leonard*'s no taking rule by explaining that *Leonard*, like *Monsanto*, had been superseded by the Court's later decisions in *Nollan* and *Dolan*. Like *Nollan* and *Dolan*, *Leonard* concerned whether the government could, as a condition of offering some benefit (a license to pack oysters or local land use permission), require the property owner to hand over some property (empty oyster shells or a public easement) to the government. The Court might have reasoned that, in light of *Nollan* and *Dolan*, the government could no longer justify an exaction of oyster shells as a voluntary exchange for the benefit of receiving a license to engage in oyster packing. Employing this approach, the Court would have said that such an exaction could be defended against a takings claim only if the government could show that the exaction met the essential nexus and rough proportionality requirements. The problem with that line of argument, from the Hornes' standpoint, is that it might have led to the conclusion that, just as the Ninth Circuit had ruled, the Hornes had never been threatened with a taking because the reserve requirement satisfied the *Nollan/Dolan* standards. Accordingly, from a strategic standpoint, it is understandable that the Hornes did not point the Court in that direction, and the Court did not find that path on its own.

But the petitioners were in an equally difficult quandary if they accepted *Leonard* as binding precedent and ignored *Nollan* and *Dolan*. On

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159. 279 U.S. 392 (1929).

160. *Id.* at 396.

161. The Department of Agriculture cited the *Leonard* case only once in its merits brief, *see* Brief for Respondent, *supra* note 57, at 26, and did not discuss the decision at any length or highlight its significance for the *Horne* case. Thus, it came as something of a surprise during the oral argument when Justices Sotomayor and Kagan closely questioned counsel for both sides about the *Leonard* case. *See* Transcript of Oral Argument *supra* note 77, at 7–9, 47–49. Justice Alito asked why the Department had not highlighted the case more prominently in its brief. *Id.* at 46 (“I take it that you don’t think that the *Leonard* case has a very important bearing on this case because you cite it one time in your brief, it’s a passing reference, on the issue of fungible goods.”).

its face, *Leonard* supported applying the voluntary exchange analysis followed in *Monsanto* outside the domain of dangerous pesticides. The oysters at issue in *Leonard* were plainly benign, just as benign as the raisins in *Horne*. So, given the Court's clear rejection of the oyster packers' takings claim, *Leonard* suggested that the Court should reject the takings argument in *Horne* as well. In other words, in order to avoid the logical conclusion that *Leonard* required rejection of the Hornes' takings claim, the petitioners had to distinguish *Leonard*. Enter the doctrine of sovereign public ownership of wildlife.

Chief Justice Roberts, embracing the Hornes' argument, thought that the doctrine of sovereign ownership of wildlife made the *Leonard* decision "readily distinguishable" from the *Horne* case.<sup>162</sup> The oyster exaction was not an unconstitutional taking because the oysters, "unlike raisins," were state-owned *ferae naturae*.<sup>163</sup> The Chief Justice quoted from the Maryland court's decision in *Leonard* to the effect that "[n]o individual ha[d] any property rights in them other than such as the state may permit him to acquire."<sup>164</sup> Thus, "[t]he oyster packers did not simply seek to sell their property, they sought to appropriate the State's."<sup>165</sup> Consequently, the real issue in *Leonard*, the Court concluded, was not just compensation for the packers, but "reasonable and fair compensation" to the state for the harvest of publicly owned oysters.<sup>166</sup>

Chief Justice Roberts saw the distinction between oysters and raisins quite clearly: "Raisins are not like oysters: they are private property—the fruit of the growers' labor—not 'public things subject to the absolute control of the state.'"<sup>167</sup> Thus, while the public character of the oysters foreclosed *Leonard*'s taking claim in the case of the oyster exaction, the labor that the Hornes invested in their raisin crop apparently warranted compensation for that exaction.

Ironically, the enduring significance of *Horne II* may lie not so much in its uncertain expansion of the per se takings rule to personality as in the contrast the Court drew between private property—raisins—and public property, like oysters. The Court's recognition of the public character of wildlife was a ringing endorsement of the state ownership doctrine, which

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162. *Horne II*, 135 S. Ct. at 2431.

163. *Id.*; see also *id.* (observing that "'the [oyster] packers did 'not deny the power of the State to declare their business a privilege,' and the power of the State to impose a 'privilege tax' was 'not questioned by counsel.'" (quoting *Leonard*, 279 U.S. at 396)).

164. *Id.* (quoting *Leonard v. Earle*, 155 Md. 252, 258, 141 A.714, 716 (1928)).

165. *Id.*

166. *Id.* (noting that "the Maryland Court of Appeals saw the issue as a question of 'a reasonable and fair compensation' from the packers to 'the state, as owner of the oysters.'" (quoting *Leonard*, 155 Md. at 259, 141 A. at 717)).

167. *Id.* (quoting the Maryland Court of Appeals decision in *Leonard*, 158 Md. at 258, 141 A. at 716).

should serve to insulate regulations protecting wildlife from takings claims in the future.

*B. The Implications of Reaffirming Sovereign Ownership*

Sovereign ownership of wildlife, a doctrine inherited from English law,<sup>168</sup> has long been recognized in American jurisprudence.<sup>169</sup> During the post-Civil War era, many states invoked the doctrine in an effort to curb the market hunting that was extirpating bird species like the passenger pigeon.<sup>170</sup> The U.S. Supreme Court upheld those efforts resoundingly in its 1896 decision of *Geer v. Connecticut*,<sup>171</sup> which approved a state law forbidding the post-season out-of-state transport of game legally harvested—on the ground that the state owned the wild game, and thus had plenary authority to establish harvest and post-harvest regulations.<sup>172</sup> Today, virtually all states claim sovereign ownership of wildlife held in trust for the public.<sup>173</sup>

The state wildlife ownership doctrine is in fact about as settled a principle as exists in natural resources law.<sup>174</sup> Its origins lie in the English Crown's claim of ownership of wildlife,<sup>175</sup> and the American states succeeded to the Crown's prerogatives after the Revolution.<sup>176</sup> However, unlike in feudal England, the states initially adopted a freewheeling rule of capture, providing for subsistence hunters.<sup>177</sup> In the nineteenth century,

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168. See *infra* notes 174–176 and accompanying text. See generally MICHAEL J. BEAN & MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 10–11 (3d ed. 1997) (explaining the English origins of wildlife law); ERIC T. FREYFOGLE & DALE D. GOBLE, *WILDLIFE LAW: A PRIMER* 25 (2009).

169. See FREYFOGLE & GOBLE, *supra* note 168, at 25 (“By the end of the nineteenth century, ownership trust language . . . regularly appeared in American judicial rulings.”).

170. F. Wayne King, *The Wildlife Trade*, in *WILDLIFE AND AMERICA* 253–54 (Howard Brokaw ed., 1978) (discussing the inadequacy of individual state laws to curb the hunting and extinction of pigeons and other animals).

171. 161 U.S. 519 (1896).

172. *Id.* at 534 (wildlife trust implies a legislative duty “to enact such laws as will best preserve the subject of the trust and secure its beneficial use in the future to the people of the State”).

173. See Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 UTAH L. REV. 1437, 1488–1504 (listing forty-seven state claims of sovereign ownership or claims of wildlife trust).

174. See BEAN & ROWLAND, *supra* note 168, at 10–11 (discussing the development of the state ownership doctrine).

175. See FREYFOGLE & GOBLE, *supra* note 168, at 22 (“The legal rule in medieval England was that game species were owned by the Crown, not by landowners . . .”).

176. See *Martin v. Waddell's Lessee*, 41 U.S. (1 Pet.) 367, 416 (1842) (“And when the people of New Jersey took possession of the reins of government, and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the crown or the parliament, became immediately and rightfully vested in the state.”).

177. Epitomizing the rule of capture is the famous case of *Pierson v. Post*, 3 Cai. R. 175, 182, 2 Am. Dec. 264 (N.Y. Sup. Ct. 1805), which has introduced generations of students to their study

most states—many relying on the sovereign ownership doctrine—turned to controlling harvests to preserve game from extirpation.<sup>178</sup> These sovereign ownership claims were universally upheld by state courts,<sup>179</sup> and, as discussed, by the Supreme Court in *Geer v. Connecticut*.<sup>180</sup>

Sovereign ownership of wildlife means that challenges to state wildlife regulations under the Takings Clause will generally fail.<sup>181</sup> The state ownership principle is the quintessential “background principle” of state property law that serves to insulate state regulation from successful takings claims.<sup>182</sup> The doctrine provides insulation against takings claims because the public nature of wildlife means that no landowner can claim a property interest sufficient to trigger the Constitution’s proscription against taking private property for public use without paying just compensation.<sup>183</sup> The Supreme Court established the background principles defense a quarter century ago as an “antecedent inquiry” in takings cases.<sup>184</sup> Numerous

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of property law. The rule of capture was strong enough in early America to override the landowner’s right to exclude. *See, e.g., McConico v. Singleton*, 2 Mill Const. 244, 246, 9 S.C.L. (1 Mill) 244 (S.C. Const. App. 1818) (upholding a hunter’s right to enter privately owned unenclosed lands to search for and harvest wild game).

178. The evolution of state regulation of wildlife under the state ownership doctrine is told by JOHN F. REIGER, *AMERICAN SPORTSMAN AND THE ORIGINS OF CONSERVATION* (3d ed. 2001). *See also* FREYFOGLE & GOBLE, *supra* note 168, at 26–27; George Cameron Coggins, *Wildlife and the Constitution: The Walls Come Tumbling Down*, 55 WASH. L. REV. 295, 305 (1980).

179. *See, e.g.,* *Magner v. People*, 97 Ill. 320, 336 (1881) (holding that a game restriction statute does not violate the commerce clause of the constitution); *Gentile v. State*, 29 Ind. 409, 417 (1868) (upholding a state’s ability to regulate fish because “fish are *ferae naturae*, and as far as any right of property in them can exist, it is in the public, or is common to all”); *Nickerson v. Brackett*, 10 Mass. (1 Tyng) 212, 216 (1813) (“[T]he privilege of fishing . . . [is] liable to be regulated, restrained and limited by the legislature.”); *Phelps v. Racey*, 60 N.Y. 10, 14 (1875) (explaining that game preservation can be determined by the legislatures of the states and the court does not review this discretion).

180. 161 U.S. 519, 535 (1896). *See* Blumm & Paulsen, *supra* note 173, at 1459–60.

181. *See, e.g.,* *Alford v. Finch*, 155 So.2d 790, 795 (Fla. 1963) (declining to enforce state regulation limiting hunting on private land); *Allen v. McClellan*, 405 P.2d 405, 407–08 (N.M. 1965) (same).

182. *See* John D. Echeverria & Julie Lurman, “*Perfectly Astounding*” *Public Rights: Wildlife Protection and the Takings Clause*, 16 TUL. ENVTL. L.J. 331, 338 (2003) (observing that wildlife regulations “have proven essentially noncompensable under the Takings Clause”).

183. U.S. CONST. amend. V. State ownership of wildlife also equips the states with the authority, and perhaps the duty, to collect damages for injuries to wildlife, and should authorize the public to challenge state failure to carry out its wildlife trust duties. *See* Echeverria & Lurman, *supra* note 182, at 342, 354–56.

184. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992). The *Lucas* decision established a categorical per se takings principle for regulations wiping out all economic value, but this principle did not apply to regulations that merely codified background principles of property and nuisance law. *Id.* at 1029. Although *Lucas* concerned a regulation apparently producing such an economic wipeout, courts in other takings contexts have also used the background principles defense. *See, e.g.,* *Nw. La. Fish & Game Comm’n v. United States*, 574 F.3d 1386, 1392–93 (Fed. Cir. 2009) (ruling that federal navigational servitude barred physical takings claim based on government-caused flooding); *John R. Sand & Gravel Co. v. United States*, 60 Fed. Cl. 230, 235 (2004), *vacated on other grounds*, 457 F.3d 1345 (Fed. Cir. 2006),

ensuing lower court decisions have applied the background principles defense.<sup>185</sup>

Notwithstanding the venerable pedigree of the sovereign ownership doctrine, a series of Supreme Court decisions over the course of the twentieth century had cast something of a cloud over the doctrine. For example, in *Missouri v. Holland*,<sup>186</sup> the Court rejected the argument that the Migratory Bird Treaty Act invaded the states' exclusive authority to manage wildlife, commenting that to attack the constitutionality of the Act based on sovereign ownership of wildlife was "to lean upon a slender reed."<sup>187</sup> In *Toomer v. Witsell*,<sup>188</sup> the Court struck down a South Carolina statute imposing exorbitant fees on nonresident fishermen as inconsistent with the Privileges and Immunities Clause.<sup>189</sup> The *Toomer* Court rejected the state's defense based on sovereign ownership, observing that "[t]he whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource."<sup>190</sup> And, in 1979, in *Hughes v. Oklahoma*,<sup>191</sup> which involved a Commerce Clause challenge to a statute virtually identical to the statute at issue in *Geer*, the Court partially overruled *Geer*, and in the process described the sovereign ownership doctrine as "19th-century legal fiction."<sup>192</sup>

Taken together, these statements from the Supreme Court seemed to relegate the public ownership doctrine to the dustbin of history. But as some courts<sup>193</sup> and commentators<sup>194</sup> have recognized, the Court's rhetoric

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*aff'd*, 552 U.S. 130 (2008) (recognizing that background principles of nuisance and property law can bar physical takings claim based on environmental remediation activities).

185. Background principles of property would include but are not limited to sovereign ownership of wildlife. See Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 341–64 (2005) (collecting cases which applied background principles to defeat takings claims).

186. 252 U.S. 416 (1920).

187. *Id.* at 434.

188. 334 U.S. 385 (1948).

189. *Id.* at 406–07.

190. *Id.* at 402 (citing ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 197–202 (1922)).

191. 441 U.S. 322 (1979).

192. *Id.* at 335–36.

193. See, e.g., *Shepherd v. State*, 897 P.2d 33, 40–41 (Alaska 1995) (ruling that the state ownership doctrine retains vitality absent a "conflict with paramount federal interests") (citing *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 385–86 (1978)); *State v. Fertterer*, 841 P.2d 467, 470 (Mont. 1992) (affirming the convictions of two individuals for killing game without a license, rejecting the argument that *Hughes* "effectively preclude[d]" the state from relying on its ownership of wild game to regulate hunting).

194. See Hope M. Babcock, *Should Lucas v. South Carolina Coastal Council Protect Where the Wild Things Are? Of Beavers, Bob-o-Links, and Other Things That Go Bump in the Night*, 85

was more than the case law justified. First, all the cases discussed above involved conflicts between federal law and state law that could have been resolved on Supremacy Clause grounds without implicating the public ownership doctrine. Second, within our constitutional structure, the United States Supreme Court lacks the authority to review and jettison substantive state law rules with which the justices disagree.<sup>195</sup> In short, the Supreme Court's unreflective apparent dismissal of sovereign ownership seemed unnecessary *dicta* and implausible. As Oliver Houck pithily observed, the Supreme Court "did not, and could not, overrule principles dating back to Roman law that wild animals are the common property of the citizen of a state."<sup>196</sup> Still, the Court's statement that state ownership was a "legal fiction" called the doctrine's viability into question. However, the states have resoundingly (and nearly unanimously) either ignored or rejected the apparent demise of the state ownership doctrine.<sup>197</sup>

*Horne II* made clear that, at least in the context of takings clause analysis, the epithet "legal fiction" had to do only with the states' attempt to assert a property claim against federal sovereign power. That was the so-called "fiction" that the Court disregarded in *Hughes v. Oklahoma*,<sup>198</sup> not state claims that they could regulate the taking of wildlife and its habitat without serious private rights challenges. State ownership of wildlife was—and always had been—a short-hand (but accurate) way of describing the state's plenary control over the taking and conservation of wildlife, so long as it respected federal prerogatives. *Horne II* was an emphatic affirmation of state sovereign authority to control the private taking of wildlife.

The implications of the *Horne II* Court's endorsement of the state ownership of wildlife doctrine are far-reaching. First, the decision implicitly recognized the longstanding understanding that states may define wildlife as public property, as they almost universally have done.<sup>199</sup> Consequently, states may control the acquisition of private rights in

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IOWA L. REV. 849 (2000); Anna R. C. Caspersen, *The Public Trust Doctrine and the Impossibility of "Takings" by Wildlife*, 23 B.C. ENVTL. AFF. L. REV. 357 (1996).

195. See, e.g., G. Merle Bergman, *Reappraisal of Federal Question Jurisdiction*, 46 MICH. L. REV. 17, 25–26 (1947) (discussing the limitations of the Supreme Court's jurisdiction as it applies to state laws).

196. Oliver A. Houck, *Why Do We Protect Endangered Species, and What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute "Takings"?*, 80 IOWA L. REV. 297, 311 n.77 (1995).

197. At least forty-seven states have endorsed state sovereign ownership of wildlife. See *supra* note 173.

198. *Horne II*, 135 S. Ct. 2419 (2015).

199. See *Geer v. Connecticut*, 161 U.S. 519, 529–30 (1896); FREYFOGLE & GOBLE, *supra* note 168, at 26–27; Blumm & Paulsen, *supra* note 173, at 1451–65, 1488–504.

wildlife,<sup>200</sup> unless preempted or interfering with the federal commerce clause.<sup>201</sup> Second, *Horne II* clarified that state regulation of wildlife owned by states in a sovereign capacity cannot give rise to viable takings clause claims.<sup>202</sup> Third, although the *Leonard* case involved harvest regulations, the logic of the *Horne II* Court's endorsement of the sovereign ownership doctrine extends to takings claims based on restrictions on destruction or modification of habitat upon which species depend for their survival<sup>203</sup>—the chief cause of species jeopardy in the United States today.<sup>204</sup> Consequently, the public ownership doctrine may serve as a powerful defense to takings claims based on the federal Endangered Species Act or other similar federal or state laws.

A fourth implication of *Horne II*'s recognition of state sovereign ownership concerns the encouragement it signals to states that they may collect damages from those who injure state wildlife from pollution or habitat destruction.<sup>205</sup> Finally, *Horne II* may encourage state courts to give full effect to the trust that sovereign ownership implies by granting the

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200. See, e.g., *Pullen v. Ulmer*, 923 P.2d 54, 59 (Alaska 1996) (holding that wildlife is the state's property); *Wright v. Dep't of Nat. Res.*, 562 S.E.2d 515, 517–18 (Ga. App. 2002) (same); *People v. Zimberg*, 33 N.W.2d 104, 106 (Mich. 1948); *State v. Hanlon*, 82 N.E. 662, 664 (Ohio 1907) (holding that licensing fishing is an appropriate exercise of the state police power).

201. See, e.g., *Kleppe v. New Mexico*, 426 U.S. 529, 546 (1976) (upholding the constitutionality of the Wild Free-Roaming Horses and Burros Act); *United States v. Massachusetts*, 493 F.3d 1, 7 (1st Cir. 2007) (discussing the preemption analysis in terms of maritime laws); *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280, 1285–86 (W.D. Tex. 1992) (holding that “[t]he Clean Air Act does not preempt source-state common law claims against a stationary source”).

202. *Horne II*, 135 S. Ct. at 2431.

203. State courts have traditionally interpreted the scope of the doctrine of sovereign ownership of wildlife to extend to habitat protection. See, e.g., *Barrett v. State*, 116 N.E. 99, 100 (N.Y. 1917) (ruling that the public ownership doctrine justified not only the protection of beavers themselves, but of their “dams, houses, homes or abiding places of same” (quoting *Laws 1904*, c. 674 § 1 (1904))); *Columbia Fishermen's Protective Union v. City of St. Helens*, 87 P.2d 195, 198–99 (Or. 1939) (upholding a suit to restrain pollution of the Willamette and Columbia Rivers in order to protect public fisheries based on the public ownership doctrine, observing that the state's authority based on public ownership doctrine “extends not only to the [direct] taking of its fish, but also over the waters inhabited by the fish,” and that states’ “care of the fish would be of no avail if it had no power to protect the waters from pollution”).

204. See *The Extinction Crisis*, CTR. FOR BIOLOGICAL DIVERSITY, [http://www.biologicaldiversity.org/programs/biodiversity/elements\\_of\\_biodiversity/extinction\\_crisis/](http://www.biologicaldiversity.org/programs/biodiversity/elements_of_biodiversity/extinction_crisis/) (last visited Dec. 27, 2015).

205. *In re Steuart Transp. Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980) (“Under the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources. Such right does not derive from the ownership of the resources but from a duty owing to the people.” (citing *Toomer v. Witsell*, 334 U.S. 385, 408 (1948))); *State Dep't of Fisheries v. Gillette*, 621 P.2d 764, 767 (Wash. App. 1980) (“Representing the people of the state—the owners of the [spawning grounds that were] destroyed by violation of the statute—the Department of Fisheries thus has a right of action for damages. In addition, the state, through the Department, has the fiduciary obligation of any trustee to seek damages for injury to the object of its trust.”).



citizen beneficiaries standing to challenge judicially state actions that fail to carry out the trust responsibility. A trust imposed upon the state without a means of public enforcement would be a chimera.

#### IV. CONCLUSION

The *Horne* case was full of surprises. The Court's interest in twice deciding a case about the government's role in raisin marketing was startling. Perhaps the reason for the Court's enduring interest in the case was its belief that raisin growers—producers of a benign “healthy snack”<sup>206</sup>—needed judicial protection from economically irrational government overreaching, even if the marketing program was aimed at benefitting the raisin growers themselves.<sup>207</sup> The Court obviously thought this New Deal program was anachronistic, so it effectively scrapped it, since Congress seemed to lack the will to do so.

Perhaps the Court thought it was simply performing the function of updating the law, something common law judges have done for centuries. However, overturning statutes is not quite the same as updating common law, the former requiring a good deal more judicial activism. The kind of judicial activism the *Horne* Court encouraged may portend a new era of close substantive scrutiny of statutes based on the policy preferences of a few judges. Some judges are sensitive to the widespread criticism the Court endured during the *Lochner*-era of judicial policymaking in the early twentieth century.<sup>208</sup> Other judges are not as concerned, possibly seeing cases like *Horne* as a license to retire outdated government-subsidy programs one day and overturn government police powers, like zoning and environmental law, the next.

Another surprise in *Horne*—the silver lining of the case for state governments—is its express ratification of the state sovereign ownership of wildlife doctrine. A public property right recognized in virtually every state<sup>209</sup>—and now expressly endorsed by the Supreme Court<sup>210</sup>—state

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206. *Horne II*, 135 S. Ct. at 2431.

207. See *supra* note 21 and accompanying text.

208. See, e.g., David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003) (discussing *Lochner v. New York*, 198 U.S. 45 (1905) as an “anti-precedent[.]” the symbol for an “era in which the Supreme Court invalidated nearly two hundred social welfare and regulatory measures,” like laws setting minimum wages, recognizing union activities, and establishing pensions for workers). For withering criticism by a well-known Legal Realist, see JEROME FRANK, *LAW AND THE MODERN MIND* (1930) (debunking judicial objectivity, a cornerstone assumption of *Lochner* era case law that emphasized dichotomies like “manufacturing” versus “commerce” and “direct” versus “indirect” effects).

209. See Blumm & Paulsen, *supra* note 173.

210. See *Horne II*, 135 S. Ct. at 2431 (“The oysters, unlike raisins, were ‘ferae naturae’ that belonged to the State under state law, and ‘[n]o individual ha[d] any property rights in them other than such as the state may permit him to acquire.’” (quoting *Leonard v. Earle*, 155 Md. 252, 258, 141 A. 714, 716 (1928))).

sovereign ownership of wildlife implies a trust duty to protect the public's property interest. State courts are now free to interpret their wildlife laws with the assurance that the United States Supreme Court has recognized the state sovereign ownership doctrine as a defense against takings claims. Given recent pronouncements from the Court about the importance of state sovereignty,<sup>211</sup> we think that the *Horne* Court meant exactly what it said about state sovereign ownership of wildlife, and that affirmation of plenary state authority will be *Horne's* chief legacy to takings doctrine in the years ahead.

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211. See *PPL Montana v. Montana*, 132 S. Ct. 1215, 1235 (2012) (“Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders . . . .”); *South Carolina v. North Carolina*, 558 U.S. 256, 267 (2010) (discussing the importance of state sovereignty in the context of water rights); *Massachusetts v. EPA*, 549 U.S. 497, 519–20 (2007) (recognizing the states’ sovereign interest in submerged lands affected by climate change and granting standing to the state of Massachusetts to challenge EPA’s rejection of a petition to regulate carbon emissions under the Clean Air Act).