# The Beginning of the End? *Horne v. Department of Agriculture* and the Future of *Williamson County*

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## Introduction

*Horne v. Department of Agriculture* exposes a fundamental confusion right at the nerve of the Supreme Court's contemporary takings jurisprudence. For nearly 30 years—since, to be precise, its 1985 decision in *Williamson County Regional Planning Commission v. Hamilton Bank*—the Court has insisted that a property owner who wants to raise a takings claim in federal court must first exhaust any post-deprivation remedies made available by state or federal law.[1] The idea is that, in the words of *Williamson County*, "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."[2] So if the government, whichever government it is, provides "an adequate process for obtaining compensation," the claimant has no takings case until he uses that process and is denied relief.[3] And the federal court has no jurisdiction because the claim "is not yet ripe."[4] Therein the confusion.

More than one commentator has noticed that this is a strange definition of ripeness.[5] Traditionally understood, the Article III ripeness

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[1] Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194–95 (1985).

[2] *Id*. at 194.

[3] *Id*.

[4] *Id*.

[5] See, e.g., J. David Breemer, Overcoming *Williamson County*'s Troubling State Procedures Rule: How the England Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims, 18 J. Land Use & Envtl. L. 209 (2003); Peter A. Buchsbaum, Should Land Use Be Different?

doctrine bars claims for injuries that have not yet occurred or are purely speculative.[6] But a property invasion that has already happened, or is bound to happen by the operation of state or federal law, hardly fits that description. There is nothing speculative about it.

In fact, the availability of post-deprivation process has nothing to do with *ripeness*; it has to do with *remedies*. Before *Williamson County*, courts had held for two centuries that if the government took private property but provided no mechanism for compensating the owner, the owner could obtain equitable relief if the taking was not yet complete, or damages if it were. If the government, on the other hand, provided compensation at the time of the invasion or adequate process for obtaining it afterward, equitable relief was not available. The existence of an adequate compensation process determined what sort of remedy the claimant could get. It had nothing to do with whether the property owner's claim was ripe. Indeed, in no case before *Williamson County* did any federal or state court ever suggest that it lacked jurisdiction to hear a takings claim, or that the claim was somehow premature, merely because the claimant had not yet attempted to obtain compensation from the government.

But then that is because earlier American jurists understood the takings principle not primarily as a government promise to pay for certain acts, but as a structural limit on government power—a governmental disability.[7] If the state severely burdened private property without paying a fair price, the takings rule declared the action *ultra vires*, beyond the power of law and void, just as if it had conflicted with the Contracts Clause or the First Amendment.[8] That declaration rendered government actors subject to injunction and perhaps liable

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Reflections on *Williamson County Regional Planning Board v. Hamilton Bank*, in Taking Sides on Takings Issues: The Public & Private Perspective 471, 473–74 (Thomas E. Roberts, ed. 2002) ("This underlying premise [that the government has not acted illegally until you ask for compensation and then it is denied] is, of course, untrue.").

[6] 13B Charles A. Wright et al., Federal Practice & Procedure § 3532 (3d ed. 2008); see Younger v. Harris, 401 U.S. 37, 41–42 (1971) (holding contingent threat of prosecution under state law inadequate to create ripe controversy).

[7] That distinction between government "disabilities" and "duties" belongs to H.L.A. Hart. See H.L.A. Hart, The Concept of Law 64–69 (1961). Robert Brauneis first noticed the applicability of this taxonomy to takings jurisprudence. See Robert Brauneis, The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law, 52 Vand. L. Rev. 57, 60 (1999).

[8] Brauneis, *supra* note 7, at 60–61.

for damages when needed to make the claimant whole.[9] But owners were never required to seek compensation from the government before bringing suit. The burden was rather on the government to demonstrate that it had not exceeded its lawful authority and intended to compensate the owner.

*Williamson County* decisively broke with this understanding of the Takings Clause and converted the "adequate compensation" inquiry—formerly about whether the government had acted lawfully or not—into a jurisdictional test. The effect was to introduce distortions and doctrinal anomalies up and down the length of takings law. Property owners with claims against state governments suddenly found themselves shut out of federal court, thanks to the pairing of *Williamson County*'s exhaustion requirement with federal preclusion doctrines.[10] Federal courts meanwhile struggled to determine whether the exhaustion requirement applied to suits challenging the direct transfer of funds from a property owner to the government,[11] or whether it precluded claimants from raising the Takings Clause as a defense,[12] or what compensation precisely Congress intended to make available under the Tucker Act.[13] Even the Supreme Court found the jurisdictional line too difficult to hold and soon retreated

[9] *Id*. at 67–68.

[10] See San Remo Hotel, L.P. v. City & County of San Francisco, 545 U.S. 323, 351 (2005) (Rehnquist, C.J., concurring). For scholarly commentary, see Stephen E. Abraham, *Williamson County* Fifteen Years Later: When Is a Takings Claim (Ever) Ripe?, 36 Real Prop. Prob. & Tr. J. 101, 104 (2001); Michael M. Berger, Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings, 3 Wash. U. J.L. & Pol'y 99, 102 (2000); Max Kidalov & Richard Seamon, The Missing Pieces of the Debate over Federal Property Rights Legislation, 27 Hastings Const. L.Q. 1, 5 (1999); Thomas E. Roberts, Ripeness and Forum Selection in Fifth Amendment Takings Litigation, 11 J. Land Use & Envtl. L. 37, 37 (1995).

[11] See Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza, 484 F.3d 1, 19–20 (1st Cir. 2007); Wash. Legal Found. v. Tex. Equal Access to Justice Found., 270 F.3d 180, 192–93 (5th Cir. 2001); Washlefske v. Winston, 234 F.3d 179 (4th Cir. 2000); Student Loan Mktg. Ass'n v. Riley, 104 F.3d 397, 401–02 (D.C. Cir. 1997); Bay View, Inc. v. AHTNA, Inc., 105 F.3d 1281 (9th Cir. 1997); In re Chateaugay Corp., 53 F.3d 478, 493 (2d Cir. 1995).

[12] Horne v. Dept of Agric., 673 F.3d 1071, 1078–80 (9th Cir. 2011).

[13] Eastern Enterprises v. Apfel, 524 U.S. 498 (1998); see also Hinck v. United States, 550 U.S. 501, 506 (2007); Lion Raisins, Inc. v. United States, 416 F.3d 1356, 1370 (Fed. Cir. 2005).

to the claim that the exhaustion requirement was a matter of "prudential ripeness," though the Court never quite explained why.[14]

Which brings us to *Horne v. Department of Agriculture*. Here was a case that brought the *Williamson County* confusion to the fore. The Hornes raised the Takings Clause as a defense in a federally initiated enforcement action seeking a transfer of funds from them to the government. The U.S. Court of Appeals for the Ninth Circuit dismissed the case for want of jurisdiction: the Hornes' claim was not ripe, the court concluded, because they had not availed themselves of the post-deprivation hearing on offer under the Tucker Act in the Court of Federal Claims.[15] When the Supreme Court granted certiorari, it looked as if it intended finally to address the disordered state of its takings jurisprudence—or make a start anyway. Instead, the Court (unanimously) avoided the central doctrinal issues and ruled on a narrow statutory ground.

This was, to say the least, an opportunity missed. Still, the case is worth attending to for the spotlight it casts on *Williamson County*'s critical confusion. And the opinion of the Court had at least one intriguing element: In a footnote, the Court suggested for the first time that the central jurisdictional holding of *Williamson County* may be mistaken.[16] If the Court pursues that thought, *Horne* could be the first step on a way forward.

## I. The *Horne* Litigation

Marvin and Laura Horne farm raisins in California's central valley, where they have owned a small operation since 1969. Under a New Deal-era statute called the Agricultural Marketing Agreement Act of 1937 (AMAA) and a subsequent order enforcing it, the Department of Agriculture (USDA) requires "handlers" of raisins to turn over a certain portion of their annual crop to the federal government, which then distributes the raisins for use in school lunches, export stimulation efforts, and other government programs. The aim of the statute and the "marketing order" is to stabilize prices by limiting the volume of raisins available on the open market. Sometimes growers are compensated for the share of their crop they turn over,

[14] Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 733–34 (1997).

[15] 673 F.3d at 1080.

[16] Horne v. Dep't of Agric., 133 S. Ct. 2053, 2062 n.6 (2013).

sometimes not. For the two growing seasons at issue in this case, 2002-03 and 2003-04, the USDA required producers to remit first 47 and then 30 percent of their crops, respectively. For the 2002-03 season, the government paid farmers less than the cost of production. For the 2003-04 season, it paid nothing at all.[17]

The Hornes dutifully remitted whatever percentage of their raisins the government required for 30 years. But eventually they grew disillusioned with a system they believed amounted to "involuntary servitude"[18] and decided to reorganize their business in an attempt to avoid government exactions. Since the statute and the USDA's marketing order applied only to raisin "handlers," which the order defined to include "[a]ny processor or packer," the Hornes stopped using third-party packers and distributors.[19] Instead, they purchased equipment to process the raisins themselves, and then sold the finished product directly to food-processing companies and bakeries without relying on an intermediary. Their revamped operation was functional by 2002, and because they believed they no longer qualified as "handlers" under the statute, the Hornes declined to turn over any percentage of their crop from 2002 to 2004.[20]

The USDA did not share the Hornes' interpretation of the statute. It directed the Hornes to remit the designated percentage of their crop and when they did not, filed an administrative enforcement action against them in 2004. The USDA argued that the Hornes continued to count as "handlers" within the marketing order. The Hornes, for their part, disputed the USDA's statutory interpretation. They also raised, as an affirmative defense, the Fifth Amendment Takings Clause.[21]

Administrative-review officials rejected both the Hornes' statutory claim and their Fifth Amendment defense and ordered them to pay the dollar value of the raisins they would otherwise have

[17] See 133 S. Ct. at 2058–60; Brief for Petitioners at 2–4, Horne v. Dep't of Agric., 133 S. Ct. 2053 (2013) (No. 12-123).

[18] 133 S. Ct. at 2058 n.3.

[19] Brief for Petitioners, *supra* note 17, at 5.

[20] 133 S. Ct. at 2058–60; Brief for Petitioners, *supra* note 17, at 2–4.

[21] 133 S. Ct. at 2059.

withheld, in addition to a civil penalty. The total came to nearly $700,000, more than the value of the Hornes' entire raisin crop.[22]

The Hornes then appealed to the federal district court, which ruled against them on the merits, including on the Takings Clause question. On appeal again, the Ninth Circuit also adjudicated the takings question and concluded that the Hornes could not make out a violation. The court initially affirmed the district court in full.[23] But after the Hornes moved for rehearing, the government argued for the first time that the court lacked jurisdiction.[24] The Ninth Circuit agreed. It withdrew its first panel opinion and substituted one dismissing the appeal for lack of jurisdiction. Although the court acknowledged that the AMAA provides an administrative-review procedure for raisin "handlers" that effectively withdraws Tucker Act jurisdiction—and thus the need to exhaust one's takings claim in the Court of Federal Claims—it found that for purposes of their Takings Clause defense, the Hornes counted as raisin "producers" under the statute.[25] The AMAA does not provide an administrative remedy for producers. Consequently, the court held that the rule of *Williamson County* mandated that the Hornes pay their fine and then seek reimbursement in the Court of Federal Claims.[26] Until that time, their takings defense was not ripe.[27]

In a unanimous decision written by Justice Clarence Thomas, the Supreme Court reversed. "The Ninth Circuit's jurisdictional ruling flowed from its determination that petitioners brought their takings claim as producers rather than handlers," Thomas wrote in the opinion's key passage.[28] "This determination is not correct."[29] All parties agreed that the AMAA imposed duties on the Hornes only in their capacity as handlers. The Hornes' takings defense, then, functioned as an alternative to their statutory argument: the Hornes claimed that if they lost the statutory question and were deemed handlers, the Fifth

[22] *Id*.

[23] Brief for Petitioners, *supra* note 17, at 3.

[24] *Id*.

[25] 673 F.3d at 1080.

[26] *Id*. at 1079–80.

[27] *Id*.

[28] 133 S. Ct. at 2060.

[29] *Id*.

Amendment should bar the government from imposing the fines.[30] Both the district court and the Ninth Circuit had ruled that the Hornes were indeed handlers, Justice Thomas pointed out.[31] And as the Ninth Circuit admitted, the AMAA's "comprehensive remedial scheme" available to handlers withdraws Tucker Act jurisdiction.[32] That ruling meant the Hornes had "no alternative remedy, and their takings claim was not 'premature' when presented to the Ninth Circuit."[33]

This statutory holding relieved the Court of any need to grapple with the substance of the *Williamson County* ripeness rule, postponing that question to another day. Justice Thomas did, however, sound a brief but potentially significant note of skepticism. "[W]e have recognized," he wrote after rehearsing *Williamson County*'s exhaustion requirement, "that [this rule] is not, strictly speaking, jurisdictional."[34] He continued the thought in a footnote: "A 'Case' or 'Controversy' exists once the government has taken private property without paying for it. Accordingly, *whether an alternative remedy exists* does not affect the jurisdiction of the federal court."[35]

These observations did not matter to the disposition of the case. But they did and do represent the Court's first acknowledgment, however oblique, that what *Williamson County* called ripeness may in fact be a question of remedies. That is no small thing. Because as the extensive briefing in *Horne* ably explained, the history of takings doctrine makes abundantly clear that *Williamson County*'s jurisdictional holding is a novelty—and an unfortunate one at that. A return to this history may show the way forward.

## II. Rights, Remedies, and the Power of Eminent Domain

To unravel *Williamson County*, we must begin in the past. The takings jurisprudence of state and federal courts from the early Republic through the middle of the 20th century casts considerable doubt on *Williamson County*'s principal claims. In holding that no takings action was ripe until the government had affirmatively refused to

[30] *Id*. at 2060–61.

[31] *Id*. at 2061.

[32] *Id*. at 2062.

[33] *Id*. at 2063.

[34] *Id*. at 2062.

[35] *Id*. at 2062 n.6 (emphasis in original).

pay, *Williamson County* directly implied that injunctive relief was never available as a takings remedy, not even when the takings claim was raised as a defense. Yet courts from the Founding period forward routinely granted equitable relief to property owners. And they never required claimants to first ask the government for payment before bringing suit.

Behind *Williamson County*'s holding was the idea that the Takings Clause functions, most fundamentally, as a promise by the government to pay for certain activities.[36] Not until the government fails to make the promised payment has the clause been violated.[37] The earlier cases work from a different understanding. They pictured the takings rule, whether located in state law, common law, or the federal Constitution, as a structural limit on government power. That conception, as it turns out, makes far better sense of the takings jurisprudence *Williamson County* struggled to apply and it might, if recovered now, help bring some order to our misshapen takings law.

*A. The Early Understanding: The Takings Clause as Structural Limit*

From the first, both equitable relief and damages were available to takings claimants in American courts. As Robert Brauneis has explained, owner-initiated takings claims before the Civil War typically proceeded in three stages.[38] First, the aggrieved property owner would bring a suit at common law for trespass or trespass on the case, alleging a burden on his property beyond that the government was authorized to impose to protect the general welfare or curb nuisances. The defendant, usually a government official or corporation, would then plead as a defense public law authorizing the action.[39] That left the court to decide, in the final stage, whether the

[36] 473 U.S. at 194–95 ("If the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against the Government for a taking.") (quotations omitted).

[37] *Id.* at 195.

[38] Brauneis, *supra* note 7, at 67–68. This taxonomy describes the process claimants pursued in state courts, where nearly all takings claims were brought until the late 19th century. State courts decided hundreds of just-compensation cases in the 19th century, while the U.S. Supreme Court decided only a handful. See *id.* at 61.

[39] Immunity doctrines prevented suit against the states directly, and against most counties, townships, and municipalities. *Id.* at 72–74.

authorizing law provided adequate compensation to the owner. If it did not, the court invalidated the law as unconstitutional or otherwise void.[40] That judgment in turn freed the successful owner to pursue the remedies for trespass available at common law, including injunctive relief to prevent permanent harm to the property or, if the invasion had already occurred, retrospective damages.[41]

In none of these cases did the court demand that property owners first submit to the taking and bring suit thereafter to retrieve payment. And for good reason. Courts read the Takings Clause, and its state and common-law equivalents, as a strict limitation on the types of burdens the government was permitted to impose in the first instance. Put another way, they read the Takings Clause as a disability on government action. On this view, the government was authorized to burden property in order to protect the health or safety or general welfare of the public. This authority was of a piece with the government's power to abate public nuisances.[42] But if the government went further and imposed on property severe burdens, akin to a trespass at common law, it had to pay the property owner for the property invasion at the time the invasion occurred. The government's action was only *lawful* if it was accompanied by compensation: the power of eminent domain was the power of takings-with-compensation. Failure to observe the bounds of that power rendered the government action null and void.[43]

In *Thacher v. Dartmouth Bridge Company*, for example, decided in 1836, the Massachusetts Supreme Judicial Court held that a state act that "confer[red] a power on [a] corporation to take private property for public use, without providing for . . . the payment of an adequate indemnity" would contravene the Massachusetts constitution's bar on takings, and "the wrongful act would stand unjustified by legislative grant."[44] As a consequence, the aggrieved party was empow-

[40] *Id*. at 67–68.

[41] Thacher v. Dartmouth Bridge Co., 35 Mass. (18 Pick.) 501, 502 (1836).

[42] See Morton J. Horwitz, The Transformation of American Law, 1870–1960, at 27–28 (1992).

[43] Brauneis, *supra* note 7, at 60.

[44] 35 Mass. (18 Pick.) at 502. See also Sinnickson v. Johnson, 17 N.J.L. 129 (1839) (defendants liable in nuisance and trespass on the case for flooding because statute authorized construction of a dam but provided no compensation); Bloodgood v. Mohawk & Hudson R.R. Co., 18 Wend. 9, 78 (N.Y. 1837) (trespass action prohibiting

ered to pursue the traditional remedies of common law.[45] The New Jersey Supreme Court reached a parallel conclusion in *Bonaparte v. Camden & A.R. Company* in 1830, when it enjoined railroad officials acting under the auspices of a state charter authorizing them to take land for railroad construction.[46] "If the law is unconstitutional, it can give no authority," the court concluded, and "the person who acts by colour of law merely is a trespasser."[47]

It made no sense on this view to require property owners to submit to the taking and then bring a later suit for recompense. The government held no general power to burden property in this way. It possessed rather a limited power to take property for public use with compensation. For that reason, the central question in all the early cases was whether the government had exceeded its power of eminent domain. Courts decided that question by asking another one: had the government provided adequate payment at the time of the taking? The onus was not on the property owner to secure compensation after the fact, but on the government to prove it had not acted unlawfully to begin with. The California Supreme Court summarized this view in 1875, explaining that "a taking of private property for public use in the sense in which that phrase is used in the Constitution . . . can only be effected upon the conditions prescribed in the Constitution—that is, upon just compensation being simultaneously made."[48]

*B. A New Synthesis*

In the years before the Civil War, the Takings Clause (and its state equivalents) was enforced primarily through the common law of torts. That changed in the 1870s, as more and more states and the federal government adopted statutes conferring the power of condemnation on private entities, railroads most conspicuously. Sometimes,

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railway that claimed authorization from corporate charter to take property with damages to be paid later from entering land "until [plaintiff's] damages were appraised and paid"); Perry v. Wilson, 7 Mass. 393, 395 (1811) (holding defendant liable in trespass because law purportedly authorizing taking of logs failed to provide just compensation and was thus void).

[45] 35 Mass. (18 Pick.) at 502.

[46] 3 F. Cas. 821 (C.C.D.N.J. 1830).

[47] *Id*. at 827.

[48] San Mateo Waterworks v. Sharpstein, 50 Cal. 284, 285 (1875).

these statutes explicitly created a private right of action for burdened property owners; other times the courts implied one. And quite frequently, the new statutes created a mechanism for owners to obtain compensation for their property after the taking had occurred. The upshot was to displace the common law as the ground of the action and, potentially, as the source of the remedy.

This transition naturally raised the question whether the new statutes fit with the dictates of the Takings Clause, as well as what sort of relief property owners could now secure in a takings claim. The canonical answer to both questions came from the Supreme Court in 1890, in a case called *Cherokee Nation v. Kansas Railway Company*.[49] Congress had delegated to a private railroad the right of eminent domain over lands held in part by the Cherokee Indian tribe. The statute afforded the tribe certain procedures for obtaining compensation following the taking. The tribe sued and asked for a permanent injunction. The Supreme Court held first that the statute did not offend the Takings Clause and second that the tribe was not entitled to injunctive relief.[50] Both holdings rested on the same reason: the statute provided an adequate remedy at the time of the taking.

Under the statute, the Court found, "the owner is entitled to reasonable, certain, and adequate *provision* for obtaining compensation before his occupancy is disturbed."[51] That was enough to satisfy the Takings Clause. Previous cases had emphasized that to be a valid exercise of eminent domain, the government action had to be accompanied by payment. This was the structural limit the takings principle imposed on the state. The Court in *Cherokee Nation* continued to think of the Takings Clause as a governmental disability, but now held that the clause could be satisfied by providing a *mechanism* to the property owner to obtain payment. The Constitution "does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken," the Court reasoned.[52] The Constitution required that the government take only with compensation. The provision of a sure mechanism for payment would satisfy that restraint.

[49] 135 U.S. 641 (1890)

[50] *Id*. at 659.

[51] *Id*. (emphasis added).

[52] *Id*.

Assuming, that is, the mechanism was adequate. "Whether a particular provision be sufficient to secure the compensation to which, under the constitution, [the property owner] is entitled," the Court went on, "is sometimes a question of difficulty."[53] Not just any compensation procedure would do. For one thing, it had to be in place at the time of the taking. The owner was entitled to "a reasonable, certain, and adequate provision for obtaining compensation *before his occupancy is disturbed*."[54] Moreover, the procedure had to afford owners full and fair payment. Just over a decade later, in *Western Union Telegraph Company v. Pennsylvania Railroad*,[55] the Court invalidated a congressional act conferring condemnation power on a telegraph company because the act did not provide an appropriate amount of compensation. In the years following *Cherokee Nation*, the Court similarly invalidated statutes that included compensation procedures too uncertain or too meager.[56]

That left the question of remedies, the sort of relief a property owner could secure from the court if the statute appropriately provided for compensation. *Cherokee Nation* answered this second question by reference to the first. If the payment mechanism was truly and constitutionally "adequate," then claimants were limited to the remedy the statute provided.[57] They could not obtain injunctive relief because they had a remedy at law. If the procedure were inadequate, however, either because it was not in place at the time of the taking or did not provide for fair compensation, courts could grant equitable relief.[58] In other words, an injunction was never available

[53] *Id*.

[54] *Id*. (emphasis added).

[55] 195 U.S. 540 (1904).

[56] See United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) (awarding retrospective damages for taking because Congress previously provided constitutionally inadequate means to obtain compensation in conjunction with treaty); Macfarland v. Poulos, 32 App. D.C. 558, 562–63 (D.C. Cir. 1909) (holding provision for compensation inadequate under *Cherokee Nation*); see also Conn. River R.R. v. Franklin Cnty. Comm'rs, 127 Mass. 50 (1879), cited in Sweet v. Rechel, 159 U.S. 380, 401 (1895) (holding inadequate compensation for taking when it was to be paid "out of the earnings of" private railroad).

[57] 135 U.S. at 659.

[58] See, e.g., Smyth v. Ames, 169 U.S. 466, 549–50 (1898) (enjoining enforcement of rate regulation as unconstitutional taking), overruled on other grounds, Fed. Power Comm'n v. Hope Natural Gas Co., 315 U.S. 575, 605 (1942); Tindal v. Wesley, 167 U.S.

if the government acted lawfully, pursuant to its eminent domain power, but was available if the government exceeded that authority. In this way, the rule of *Cherokee Nation* paralleled the Supreme Court's decision in *Ex Parte Young* that injunctive relief is available to enjoin state officials who violate the Constitution when there is no adequate remedy at law.[59]

*Cherokee Nation* changed the contours of takings suits, but the basic premise of the earlier cases remained intact. The Takings Clause continued to function as a structural restraint on government power. Justice Oliver Wendell Holmes voiced the post-*Cherokee Nation* consensus in 1922 in his opinion for *Morrisdale Coal Company v. United States*.[60] Government regulation was a valid exercise of the takings power when it "provides compensation for obedience to [its] orders."[61] To be sure, the government was not obliged to compensate affected property owners for every regulation it issued, for "no lawmaking power promises by implication to make good losses that may be incurred by obedience to its commands."[62] Rather, the government was obliged to refrain from taking property unless it intended to pay a fair price. If the government exceeded its lawful authority, injunctive relief was available. "If the law requires a party to give up property . . . without adequate compensation the remedy is, if necessary, to refuse to obey it."[63]

### *C. The* Causby *Connection*

As the century wore on, however, courts increasingly characterized the Takings Clause as a government duty to purchase particularly severe property intrusions, rather than a disability from pursuing those intrusions in the first place. With that shift, the earlier notion of the clause as a structural restraint fell into obscurity. The Supreme Court's increasingly expansive interpretation of the Tucker

204, 222–23 (1897) (holding that state officers were subject to ejectment where state had not acquired property by paying just compensation); D.M. Osborne & Co. v. Missouri Pac. Ry. Co., 147 U.S. 248, 258–59 (1893) (injunctive relief available "in view of the inadequacy of legal remedy").

[59] 209 U.S. 123, 163 (1908).

[60] 259 U.S. 188 (1922).

[61] *Id*. at 190.

[62] *Id*.

[63] *Id*.

Act helped drive this trend, typified and accelerated by a mid-century case called *United States v. Causby*.[64] The Court was on the road to *Williamson County*.

First adopted in 1887,[65] the Tucker Act gives the Court of Federal Claims exclusive jurisdiction over any "claim against the United States for money damages exceeding $10,000" when that claim is "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department . . . in cases not sounding in tort."[66] This capacious language was susceptible to more than one interpretation. It might be read to provide a general damages remedy to any claimant for any takings claim brought against the federal government. For the first 70 years of the act's life, however, courts interpreted it in line with the prevailing distinction between lawful government exercises of the eminent domain power and *ultra vires* takings of property, holding that the act provided a mechanism for obtaining fair payment in the former set of cases only. Courts read the act to work like this: If the government acknowledged that its action constituted a taking and that compensation was due, the Court of Claims (later renamed the Court of Federal Claims) had jurisdiction and injunctive relief was not available. If the government contested the obligation to provide payment, on the other hand, the district court retained jurisdiction and the claimant could win equitable relief.[67]

The textual anchor for this reading was the language limiting Tucker Act jurisdiction to cases "not sounding in tort."[68] The Supreme Court treated cases in which the government challenged the duty to compensate as a species of tort action, while those in which the government acknowledged that its activity constituted a

[64] 328 U.S. 256 (1946).

[65] A predecessor statute had established the Court of Claims in 1855. 10 Stat. 612 (1855).

[66] 28 U.S.C. § 1491(a)(1).

[67] Plaintiffs might also challenge government action as failing to meet the "public use" requirement of the Takings Clause. Jurisdiction—and equitable relief—were available for that claim in the federal district court, regardless of whether the government had provided a mechanism for compensation. See City of Cincinnati v. Vester, 281 U.S. 439 (1930) (public use challenge against state government adjudicated in district court); Brown v. United States, 263 U.S. 78 (1923) (public use challenge against federal government adjudicated in district court).

[68] 28 U.S.C. § 1491(a)(1).

taking—and that compensation was due—were treated as a type of implied contract.[69] The Tucker Act provided jurisdiction only over the latter. The idea was that Congress meant to provide a damages remedy only for those instances in which the government intended to use the power of eminent domain. As the Supreme Court put it in 1925, "There can be no recovery under the Tucker Act if the intention to take is lacking."[70]

Then in 1946, the Court unceremoniously changed its mind in *United States v. Causby*. A homeowner alleged that Army and Navy planes flying low over his property disturbed the peace—and his chicken farming—so thoroughly as to constitute a taking.[71] The federal government denied that it had or intended to take the owner's property.[72] Under the prevailing rule, that meant that Tucker Act jurisdiction was unavailable. Nevertheless, the Court held that jurisdiction was proper in the Court of Claims because the case was "founded upon the Constitution."[73] "We need not decide," the Court concluded, "whether repeated trespasses might give rise to an implied contract."[74] Without further discussion, the Court announced that any time "there is a taking, the claim is . . . within the jurisdiction of the Court of Claims to hear and determine."[75]

The likely impetus for this holding was to ensure that the homeowner in the case could have his day in court; besides the Tucker Act,

[69] See, e.g., Tempel v. United States, 248 U.S. 121, 129–30 (1918) ("[U]nder the Tucker Act, the consent of the United States to be sued is (so far as here material) limited to claims founded 'upon any contract, express or implied'; and a remedy for claims sounding in tort is expressly denied. . . . [I]n the case at bar, both the pleadings and the facts found preclude the implication of a promise to pay."); Herrera v. United States, 222 U.S. 558, 563 (1912) ("the record does not show a 'convention between the parties' or circumstances from which a contract could be implied, and that therefore the case is one sounding in tort, and claimants have no right of recovery"); Bigby v. United States, 188 U.S. 400, 406–08 (1903) (stating that the Tucker Act requires a "meeting of the minds of the parties," that is, "an agreement to pay for that which was used for the government").

[70] Mitchell v. United States, 267 U.S. 341, 345 (1925).

[71] 328 U.S. at 258–59.

[72] The government claimed that it already owned the relevant property, the airspace above the petitioner's acreage. See *id*. at 260.

[73] *Id*. at 267 (quoting 28 U.S.C. § 250(1)).

[74] *Id*. at 267.

[75] *Id*.

no other law provided the claimant a forum. But the implications were far broader. If the Tucker Act provided a forum—and a damages remedy—for *any* sort of takings claim brought by a property holder, regardless of whether the government invoked its power of eminent domain, then the Tucker Act might serve as a "reasonable, certain, and adequate" remedy at law for any government burden on property.

That meant, for one thing, that equitable relief might no longer be available in takings claims against the federal government, ever: there would always be a remedy at law. But further, reading the Tucker Act in this way effectively dissolved the longstanding distinction between lawful government exercises of the eminent domain power and government action beyond the power of law. Read in the manner of the *Causby* Court, the Tucker Act would mean that the government always offered to pay for its actions—all of them. If this were true, it would be difficult to go on thinking of the Takings Clause as a structural limit on government power. Takings claims instead were a matter of getting the government to make good on its universal promise to pay.

The full meaning of the *Causby* turn took some while to be felt. In the years immediately following the case, the Supreme Court continued to limit Tucker Act jurisdiction, now based less on principle than on practicality. When a claimant challenged a government action that was already complete, the Court directed the case to the Court of Claims. No equitable relief was available. If the challenged government act was not yet complete, and the government disclaimed any intent to compensate, jurisdiction remained in the district court, and the claimant could seek injunctive relief.[76]

Still, whether the Court recognized it or not, the logic of *Causby* thoroughly undermined the foundations of the *Cherokee Nation* takings jurisprudence, and the pre-Civil War tradition before it. *Williamson County* made these implications plain.

### *D. Rereading* Williamson County

Considering *Causby* and the doctrinal change it helped instigate, it is not so hard to see how *Williamson County* arrived at the result it did—or why that result seemed, to the Court, entirely plausible.

[76] See Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 71 n.15 (1978); Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 149 n.36 (1974); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 584–85 (1952).

*Williamson County* concerned a suit brought by a land developer in federal district court after a regional planning commission rejected his preliminary plat proposal.[77] At the time of suit, the developer had not requested variances from the commission, nor had he appealed the commission's denial of the preliminary plat to the zoning board of appeals. Not surprisingly on those facts, the Court held that the developer's takings claim was premature, but for two independent reasons. The first was that the decision the developer challenged was not final; the commission had denied only the preliminary plat. Because the developer never sought variances, the commission's denial was "not a final, reviewable decision."[78]

The Court might have stopped there; that was surely enough to decide the case. Instead, it pressed on to give a "second reason the taking claim is not yet ripe," having to do with the claimant's failure to use available state compensation procedures.[79] The Court began its analysis on this point by referring to the *Cherokee Nation* rule that compensation need not "be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking."[80] This reason was unremarkable enough; *Cherokee Nation* had been commonplace for 100 years. But the next sentence appended a new conclusion: If the government provided adequate process, the Court went on, "then the property owner has no claim against the Government for a taking."[81] This was logic influenced by *Causby*. Earlier cases had held that the availability of a compensation mechanism determined whether the government acted lawfully and what sort of relief was available to claimants. Now the Court was saying something different, that the availability of a damages remedy at law determined whether there was a claim at all. Unless the government refused to pay, the property holder could not even invoke the Takings Clause—she had "no claim against the Government for a taking."[82]

[77] 473 U.S. at 190.

[78] *Id*. at 194.

[79] *Id*.

[80] 473 U.S. at 194 (quotations omitted).

[81] *Id*. (quotations omitted).

[82] *Id*.

On this view, the Takings Clause did not disable the government from pursuing certain classes of activity, with remedies available to aggrieved owners should the government transgress its bounds. Rather, it gave individuals a cause of action to recover payment from the government after the fact if the government's action was sufficiently burdensome. The *Causby* Court had hinted that the Tucker Act might be a standing promise to pay; *Williamson County* now read the Takings Clause in the same fashion. The clause represented a commitment by government to compensate individuals who complained about a severe property burden. "As we have explained," the Court said, "because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied."[83]

With that logic in place, the rest followed easily enough. The Takings Clause was a promise, a duty to make good, and the government did not violate it until it failed to pay. "The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing" suit, the Court concluded.[84] There simply was no takings problem unless the government denied payment. And this reasoning led the Court to its fateful conclusion that "takings claims against the Federal Government are *premature* until the property owner has availed itself of the process provided by the Tucker Act."[85] Until an owner specifically asked the government to make good, the owner had no claim—because until the government actually failed to pay, it had done nothing wrong. The same reasoning applied to state claims. "[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."[86]

No case had held this before, not *Causby* nor the others the Court cited.[87] *Ruckelshaus v. Monsanto* perhaps came closest, though even it held only that the statute involved in that case, the Federal Insec-

[83] *Id*. 194 n.13 (emphasis in original).

[84] *Id*.

[85] 473 U.S. at 195 (emphasis added).

[86] *Id*.

[87] *Id*.

ticide, Fungicide, and Rodenticide Act, implemented an arbitration exhaustion requirement as a precondition to a Tucker Act suit for takings.[88] It did not hold what *Williamson County* did, that the very availability of a Tucker Act suit prevents a Takings Clause violation from occurring.[89]

It was a transformative holding, reworking two centuries of doctrine. It was also wrong. Just two years after *Williamson County*, the Court admitted that liability under the Takings Clause arises at the time the government interferes with property rights, not at some later date when the government refuses to pay for it.[90] Or as Justice Ruth Bader Ginsburg succinctly put it, dissenting some years later in *Wilkie v. Robbins*, the Takings Clause "confers on [the property owner] the right to insist upon compensation *as a condition* of the taking of his property."[91]

The Court's confusion about these points in *Williamson County* led it, and eventually all of takings law, down a doctrinal cul-de-sac. It is time for a new turn.

## III. Beyond *Williamson County*

If the *Horne* decision gives any reason to hope, it is that it suggests the Court understands this turn is necessary. The mere availability of a damages remedy, the Court noted in footnote 6, cannot "affect the *jurisdiction* of the federal court."[92] That is a start. A different decision of the Court points to the next step.

That case is called *Eastern Enterprises v. Apfel*, decided in 1998.[93] *Apfel* concerned federal regulations on property owners imposed via the Coal Act, a 1992 law that compelled coal companies to pay money into a healthcare fund run for the benefit of coal-industry employees.[94] Eastern Enterprises, a company formerly involved in the mining industry and consequently liable under the act, brought suit

[88] 467 U.S. 986, 1018 (1984).

[89] 473 U.S. at 194.

[90] First English Evangelical Lutheran Church v. Los Angeles Cnty., 482 U.S. 304, 319 (1987).

[91] 551 U.S. 537, 583 (2007) (Ginsburg, J., dissenting) (emphasis added).

[92] 133 S. Ct. at 2062 n.6 (emphasis in original).

[93] 524 U.S. 498 (1998).

[94] *Id*. at 514–15.

in federal district court challenging the payment mandate as a taking without compensation.[95] The Supreme Court was thus obliged to decide whether the Tucker Act required Eastern Enterprises first to file a reverse-condemnation suit in the Court of Federal Claims. In an opinion by Justice Sandra Day O'Connor, a plurality of the Court concluded that it did not.[96] The plurality's reasoning is illuminating.

The Tucker Act appeared to provide a damages remedy for Eastern Enterprises to pursue. After *Williamson County* it was, after all, a standing offer to pay. But O'Connor and the plurality concluded that reading the Tucker Act that way, in this context, yielded nonsensical results. "Congress could not have contemplated that the Treasury would compensate coal operators for their liability under the Act," O'Connor pointed out, "for every dollar paid pursuant to a statute would be presumed to generate a dollar of Tucker Act compensation."[97] That would render the statutory scheme utterly pointless. If government compensation was available to reimburse the property owners for all the monies they paid in, the private healthcare fund would become a public fund financed by the government—just the opposite of what the statute was designed to create.[98] Given this fact, Congress surely had no intention of paying coal companies for their contributions.

And if that were true, if the government had already determined that it was not going to pay, Justice O'Connor reasoned, "a claim for compensation" in the Court of Federal Claims "would entail an utterly pointless set of activities."[99] The presumption of Tucker Act availability had to be reversed.

With this, the plurality reasoned its way to an important insight. The reading of the Tucker Act first suggested by *Causby* and assumed by *Williamson County* made little sense in practice: It simply could not be that the federal government affirmatively intended to pay any time for any infringement found to be a taking. Scores of statutory schemes would be rendered absurdly contradictory. Surely

[95] *Id*.

[96] *Id*. at 521.

[97] *Id*. (quotations omitted).

[98] *Id*.

[99] *Id*.

the Tucker Act applied only to a more limited set of claims—but which ones?

The plurality thought it clear that "the presumption of Tucker Act availability must be reversed where the challenged statute, rather than burdening real or physical property, requires a direct transfer of funds."[100] Congress could not have meant to reimburse property owners in those cases. It made more sense to think that, in those cases, Congress would sooner abandon the project at issue rather than see its character fundamentally transformed by the requirement of government reimbursement.

The plurality did not say more; nothing more was required to decide the case. But it was on to more than perhaps it knew. In focusing again on the government's intent to provide a remedy, the plurality had inadvertently recovered one of the leading features of the *Cherokee Nation* synthesis and the older, structural understanding of the takings power that informed it. According to *Cherokee Nation*, the existence of statutory compensation demonstrated that the government intended to use its power of eminent domain. If the compensation provided was adequate, the power had been used appropriately.[101] The *Apfel* case demonstrates that this focus on the government's intent to invoke eminent domain (or not) can solve the riddle of Tucker Act jurisdiction and also clarify the remedies available to federal takings claimants. It can, that is, lead the law out of the *Williamson County* cul-de-sac.

In a word, the Tucker Act creates jurisdiction in the Court of Federal Claims when the government intends to deploy the power of eminent domain. Absent such intention, jurisdiction in the Court of Federal Claims is unavailable. In practice, this understanding would mean using the ordinary tools of statutory interpretation to discern when Congress has evinced, in a given statute, affirmative intent to compensate aggrieved property owners. *This* is when Congress can be said to have invoked its eminent domain authority. Congress's intent also determines the remedy. If the statute demonstrates an intent to compensate property holders, then the Tucker Act provides a remedy at law and claimants must seek damages in the Court of Federal Claims. If the statute demonstrates no such intent, there is

[100] *Id.*

[101] 135 U.S. at 659.

no remedy at law. The claimant may then bring suit in the federal district court and obtain damages or equitable relief as appropriate.

This reasoning might have decided the *Horne* case, had the Court so chosen. The AMAA imposes financial penalties on property owners for their refusal to comply with the government's marketing program.[102] The statute gives no indication that Congress intended to make those penalties reimbursable. Consequently, Congress did not intend to use its power of eminent domain. The Tucker Act therefore does not provide a remedy, and the Hornes were perfectly entitled both to raise a takings claim in federal district court and to seek injunctive relief.

Before *Causby* and *Williamson County*, the principal question of takings law was whether the government had lawfully deployed its power of eminent domain, which was another way of asking whether the government had complied with the structural limits placed on it by the Takings Clause. Not only does this approach fit with the takings doctrine's history, but it is error-reducing today. It makes sense of Tucker Act jurisdiction and the remedies that follow from it. And more broadly, it explains why the mere availability of a remedy at law never renders a takings claim *premature*. The reason is that the Takings Clause is not fundamentally a promise to pay for certain types of property burdens. It is a limit on the government's power to impose those burdens in the first place.

If the *Horne* case represents the first step toward recovering that understanding, it will be a case worth remembering.

[102] Horne, 133 S. Ct. at 2057–58.