The Raisin Case

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Any law teacher will say that simple and obvious cases often are the most illuminating because they bring fundamental issues to the fore. *Horne v. Department of Agriculture*, known as *The Raisin Case*, is an example.[1] Each year, an obscure federal government entity, the Raisin Administrative Committee (RAC), requires that all raisin growers withhold a certain percentage of their crop (often quite large) from the market, for the stated purpose of "stabilizing"—propping up—raisin prices, and to deliver those excess raisins to the RAC, for no payment. The RAC disposes of these "reserve raisins" at its discretion. It gives away some of them to school lunch programs and the like. Most it sells to large packers, using the proceeds for export subsidies and administrative expenses. If any money is left over, it is remitted to the raisin growers on a proportionate basis. In the relevant years for this case, 2002–2003 and 2003–2004, the government seized 47 percent and 30 percent of the crop, respectively, and remitted a tiny sum in one year and nothing in the other. The question in the case was whether this was a "taking" of private property without just compensation, in violation of the Fifth Amendment. In an opinion by Chief Justice John Roberts, by a vote of 8–1, the Court held that the raisin program constitutes a taking. (The Court split 5–3 on the question of remedy.)

This seems like an easy question. The government took raisins, sold them, spent most of the proceeds, and remitted far less than market value (in one year, zero). How could this not be a taking? Yet

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[1] 135 S. Ct. 2419 (2015).

the case took three published opinions in the U.S. Court of Appeals for the Ninth Circuit, which decided against the property claim each time (on different theories) and two trips to the U.S. Supreme Court. It even earned a mock investigative report on Comedy Central.[2]

In the course of concluding that the raisin program constitutes an uncompensated taking, the Supreme Court confronted four issues of some complexity. To be sure, the Court did not bring full clarity to any of these questions, but it took a step in that direction, making the jurisprudence of the Takings Clause somewhat less convoluted—and certainly more hospitable to property rights claims.

I. When Has There Been a Taking?

Takings Clause jurisprudence is plagued with misleading terminology. The two large categories are called "per se" takings and "regulatory" takings. This starts off on the wrong track, because those two terms are not parallel: "per se" tells us nothing about the nature of the government's action, but only about the legal consequence; "regulatory" tells us the nature of the government's action, but nothing about the legal consequence. Try to draw a Venn diagram. And why depart from the clear English of the Fifth Amendment itself? The clause is about the obligation of the government to pay just compensation when it "takes" (not "regulates") property for the purpose of public "use." Much of the confusion in Takings Clause jurisprudence could be avoided if we just paid more attention to its words.[3]

According to current doctrine, per se takings occur when the government seizes an ownership interest in what was previously private property or when it effects a permanent or recurring physical invasion of the property. (I will discuss a third version of "per se" takings in a moment.) A better term for this would be an actual "taking." When there is a taking, the government must pay the value of the property taken. It does not matter what the government's reasons are for the taking or how much property is left to the owner afterward; the government must pay for what it takes. This requirement of just compensation is based on the proposition that, as a matter

[2] The Daily Show with Jon Stewart: Raisin Growers Lawsuit (Comedy Central television broadcast Aug. 13, 2013), available at http://thedailyshow.cc.com/videos/pmrodj/raisin-growers-lawsuit.

[3] See Jed Rubenfeld, Usings, 102 Yale L.J. 1077 (1993).

of justice, taxpayers as a whole rather than the particular property owner should bear the cost of achieving the governmental purpose. But there is also an economic logic: if the government has to pay the value of the property taken, it is unlikely to take it unless the public use is more valuable than the market value.

So-called "regulatory takings" are not takings in any traditional sense of the term. They are use restrictions that reduce the value of the property without transferring that value to the government. Regulatory takings are subject to a vague and forgiving balancing test—the *Penn Central* test[4]—that almost never results in compensation being due. In truth, this branch of Takings Clause jurisprudence is nothing but economic substantive due process in different garb. Its primary function in real-world litigation is to allow courts that do not wish to recognize actual takings to pretend that they are still affording property *some* Fifth Amendment protection, even if that protection is essentially illusory. For example, in *The Raisin Case* the Ninth Circuit could say that personal property is still protected by the Fifth Amendment, just not on a per se basis. That sounds less unreasonable than saying personal property is outside the Takings Clause altogether, but it does the owner of personal property confiscated by the government little practical good.

The Supreme Court has carved out one subset of use restrictions and treated them as per se takings: those that eliminate substantially all the value of the property. This is the *Lucas* doctrine.[5] *The Raisin Case* had nothing to do with the *Lucas* doctrine, but both the Ninth Circuit and the dissenting justice thought it did, so I will return to it below as it becomes relevant. The *Lucas* doctrine is peculiar because it kicks in only when substantially all the value of the property is destroyed, which leads to unanswerable questions about how to define "all" of the property. Does the government have to pay if it destroys all the value of a separable part of the property? What is the numerator and what is the denominator? When real takings are involved, this question does not arise, because the government simply pays for what it takes, whether that is the entire property, a particular piece of it, or a particular use of it.

[4] Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

[5] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

The term "regulatory taking" is misleading because it suggests a dichotomy between takings effectuated by means of regulation versus takings effectuated in other ways, such as through eminent domain. The raisin program is plainly "regulatory" in the sense that it is imposed via regulations promulgated by the Department of Agriculture. This inspired the government at one stage in the litigation to assert that it never took "title" to the reserve raisins, but merely regulated the terms of their sale (by taking control of the reserve raisins and selling or giving them away). But it does not matter what species of power the government claims to be exercising; what matters is whether the government has taken ownership and control. The majority opinion used the terms "direct appropriations," "government acquisitions of property," and "physical taking," to distinguish real takings from use restrictions.[6] This helpfully reorients Takings Clause terminology from the technical but meaningless terms "per se" and "regulatory" toward the realistic difference between government seizure of ownership and control versus use restrictions.

Justice Sonia Sotomayor's dissent underscores the importance of distinguishing clearly between takings and use restrictions. She maintained that the raisin program is not a per se taking because it "does not deprive the Hornes of all of their property rights. . . . Simply put, the retention of even one property right that is not destroyed is sufficient to defeat a claim of a *per se* taking."[7] Under the raisin program, she explained, growers "retain at least one meaningful property interest in the reserve raisins: the right to receive some money for their disposition."[8] This is incorrect factually, but it is more importantly wrong as a matter of Takings Clause doctrine.

It is incorrect factually because the raisin grower does not retain any property interest in the property taken, namely their own raisins. Those raisins now belong to the government. The grower instead is given a different form of property: a contingent interest in the proceeds of the raisin reserve as a whole, if any money is left. As the U.S. Court of Appeals for the Federal Circuit explained in another case, "once the raisins were transferred to the RAC, [the producer] no longer had a property interest in the raisins themselves,

[6] Horne, 135 S. Ct. at 2427–28.

[7] *Id.* at 2437 (Sotomayor, J., dissenting).

[8] *Id.* at 2438–39.

but only in its share of the reserve pool proceeds as defined by the regulations."[9] Even under the dissent's legal theory, therefore, there was a taking, because the growers retain no property interest in the raisins that were taken. The growers' collective interest in the reserve pool proceeds is relevant to whether there has been compensation for the raisins, but does not affect whether there was a taking.

More importantly, as the majority observed,[10] Justice Sotomayor's claim that there cannot be a per se taking if the property owner retains "even one property right" confuses the two categories of taking. Under the *Lucas* doctrine a use restriction is treated as a per se taking if and only if it destroys substantially all the economic value of the property. But this principle is wholly inapposite to actual takings. When the government actually takes possession and control of property, it must pay for what it takes—and it does not matter how much property the owner has left. If the government takes one acre from my 100-acre plot to build a post office, it must pay for that acre, even though I retain the other 99. If the government asserts an easement across my land, it must pay for the easement, even though I retain every other property interest in the land.[11] This is clear even from the precedent on which the dissent primarily relies: *Loretto v. Teleprompter Manhattan CATV Corp.*[12] In that case, the Court held that requiring the owner of an apartment dwelling to permit installation of a cable TV box on the exterior of the structure was a per se taking because it was a permanent physical intrusion. Obviously, installation of a cable TV box did not deprive the apartment owner of "all" of its property rights in the apartment. But because it was a physical invasion, it counted as an actual taking. (The just compensation due, however, was negligible; the property owner was awarded one dollar.)

[9] Lion Raisins, Inc. v. United States, 416 F.3d 1356, 1369 n.9 (Fed. Cir. 2005). Justice Sotomayor also erred in thinking that the amount of the remittance depends on "market forces for which the Government cannot be blamed." 135 S. Ct. at 2439 (Sotomayor, J., dissenting). In fact, the amount of the remittance depends largely on how much of the revenues from sale of the reserve raisins is spent on export subsidies and other activities of the Raisin Committee.

[10] Horne, 135 S. Ct. at 2429.

[11] See Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Kaiser Aetna v. United States, 444 U.S. 164 (1979).

[12] 458 U.S. 419 (1982), cited in Horne, 135 S. Ct at 2437–40, 2441 n.3, 2442 (Sotomayor, J., dissenting).

The total-loss rule has long been recognized as a conceptual disaster area, incapable of objective and consistent administration.[13] It should be abandoned where it now holds sway—as an upper bound on permissible uncompensated use restrictions—not extended to the core and settled territory of actual takings. If Justice Sotomayor's approach were adopted, it would be a relatively simple matter for governments to avoid their just-compensation obligation by allowing the property owner to retain some slight "property interest" even as it takes the rest. The cavalry could commandeer your horses, so long as it allows you to retain the contingent right to get them back at the end of the war (assuming they are alive). It is a blessing that no other justice joined the dissent.

One quibble with the majority opinion is that it did not supply a bit more theory about why this key distinction between actual takings and use restrictions makes sense. Why do the full protections of the Fifth Amendment apply when the government takes possession and control of property, though property owners must suffer use restrictions of comparable economic impact, with only the lame protections of "regulatory takings" jurisprudence (that is, substantive due process)? It makes little sense to attach dramatically different constitutional consequences to government actions that have similar purposes and effects.

This is not merely an abstract question. The stated purpose of the raisin program is to stabilize and increase prices of raisins by prohibiting growers from selling their entire crop. In theory, the size of the raisin reserve is set each year in accordance with expected crop size and market conditions, to maximize the total income of the raisin industry. In other words, it is a cartel. Note, however, that the Raisin Administrative Committee could accomplish its cartel objective without taking possession and control of the reserve raisins. Many agricultural programs operate that way, restricting acreage or crop yield or sales, or the timing or nature of sales, without actually appropriating any of the crop. The raisin program is unusual because, in addition to the sales cap, the government demands physical transfer of the excess raisins, which it then sells or gives away. It is only the latter aspect of the program—the expropriation—that the

[13] For a summary of the literature, as well as a cogent statement of the problem, see Jed Rubenfeld, Usings, 102 Yale L.J. 1077, 1081–97, 1106–10 (1993).

Hornes challenged. They conceded that, if the Department of Agriculture merely told them not to sell the reserve portion of their raisin crop, rendering it worthless, that would be nothing but a regulatory taking—a claim they did not consider worth bringing.

The majority noted that "[t]he Government thinks it 'strange' and the dissent 'baffling' that the Hornes object to the reserve requirement, when they nonetheless concede that 'the government may prohibit the sale of raisins without effecting a per se taking.'"[14] But the majority supplied only half an answer. The Court explained, correctly, that this "distinction flows naturally from the settled difference in our takings jurisprudence between appropriation and regulation."[15] True: when the government *takes* property it has a categorical obligation to pay, but when it imposes *use restrictions*—even very costly ones—it does not. But why would a sensible constitution draw this line, if it is true, as the majority says, that "[a] physical taking of raisins and a regulatory limit on production may have the same economic impact on a grower"?[16] The majority provides no real answer to its question, noting only that the Constitution "is concerned with means as well as ends."[17]

There is an answer. It lies, I think, not with any difference in economic impact on the grower, but with the political and economic incentives of the government. The government has little incentive to impose use restrictions whose costs exceed the regulatory benefits (assuming there is no animus against the property owner). That is certainly no guarantee of wise or efficient regulation, but, overall, one would expect the benefits to exceed the costs, at least roughly. When the government takes the property, however, it now has a thing of value that it can use for its own purposes, or to please constituents and supporters. In the absence of a just compensation requirement, one would expect the government to take from disfavored Class A and give to favored Class B, even if the losses to A exceed the benefits to B.

The raisin program is Exhibit A of this phenomenon. It is highly unlikely, for reasons we will discuss below, that the raisin volume

[14] Horne, 135 S. Ct. at 2428.

[15] *Id.*

[16] *Id.*

[17] *Id.*

controls would be imposed in the absence of the expropriation of the excess raisins. Farmers have already expended labor and capital in producing the raisins, and any requirement that they refrain from selling a portion of the crop would constitute a pure loss. It would make sense to impose a percentage cap on sales only if the price of the remaining raisins increased by prodigious amounts. Indeed, in a year like 2002–2003, when the raisin reserve was 47 percent of the crop, the price of the remaining raisins would have to increase by nearly 90 percent to make the pure volume control profitable.

But in fact the Raisin Administrative Committee takes possession of the excess raisins; they are not a pure loss. The RAC sells them or gives then away at its own discretion. In 2002–2003 it sold the vast majority of the reserve raisins, receiving $118,280,587 in revenues, of which it devoted $53,360,854 to export subsidies. In 2003–2004 the RAC sold its reserve raisins for $111,242,849, spending $99,807,957 on export subsidies.[18] It is obvious that the big winners from the raisin program are the few large firms that engage in the export trade. It will come as no surprise to readers of this journal that a program of economic regulation supposedly enacted in the interest of small raisin farmers in fact works to the benefit of the largest players in the industry.

My conceptual point is that there is a large practical difference between value-destroying use restrictions and takings. When the government actually takes possession of private property, it can exploit the value of that property for what the Fifth Amendment calls "public use" and what, in practice, means politically advantageous uses. There will often be a political constituency for those uses (here, large exporters), even if the costs exceed the benefits. The majority opinion notes that the economic impact on the Hornes of pure volume controls would be the same as the economic impact of the taking. But large special interests do not specially benefit from pure volume controls, making abuse less likely. The constitutional line between takings and use restrictions reflects the reality that government is more likely to invade property rights if it thereby gains control over valuable resources that can be redistributed to its friends.

[18] Supplemental Appendix to the Petition for Writ of Certiorari at 2a, Horne v. Dep't of Agric., 135 S. Ct. 2419 (2015) (No. 14-275) (annual report of the Raisin Admin. Comm.), available at http://object.cato.org/sites/cato.org/files/ articles/raisin-administrative-committee-statement.pdf.

The distinction also rests on a moral difference—often deconstructed and disliked by economists—between harm and benefit. The effect of the distinction is to allow government to prevent property owners from harming others, but not to allow government to require property owners to benefit others. This is not the occasion to delve into the philosophical depths of this important question. Suffice it to say that much of our law, of ordinary moral intuitions about justice, and of constitutional structure, depends on it. I may not drown a stranger in a pond, but I do not have to fish him out if I was not responsible for his being there. The Takings Clause seems to follow the same intuition.

The majority quite properly did not extend its reasoning to Takings Clause problems beyond *The Raisin Case* itself, but its emphatic insistence on the line between "appropriations" and "use restrictions" hints at a fundamental reformulation of the jurisprudence of "regulatory takings." That jurisprudence is utterly vacuous and has been so from its inception. The first regulatory takings case, *Pennsylvania Coal Co. v. Mahon*, unhelpfully stated that a use restriction becomes a Taking when it "goes too far."[19] More recently, the Court's balancing test for regulatory takings, the *Penn Central* test, provides no meaningful criteria whatsoever. But if the majority is correct in *Horne*, there is a path out of the morass. A regulation in the form of a use restriction should be deemed a taking if the government thereby exploits (or in Fifth Amendment language "uses") the resource for its own affirmative purposes, but not if it simply prevents its use by the owner. Thus, a regulation effectively shutting down a coal-fired plant is not a "taking," but a regulation requiring the owner of an historic building to maintain its historic character for the pleasure and edification of society might be. If the government orders raisin growers to destroy part of their crop, this is not a taking; but if the government orders raisin growers to transfer part of their crop to the government, for sale or other disposition, it is.[20] Professor Rubenfeld enunciates the "test" this way: "If the state's interest in taking or regulating something would be equally well served by destroying the thing altogether (putting aside any independent considerations

[19] 260 U.S. 393, 415 (1923).

[20] This suggestion closely resembles the position advocated by Professor Rubenfeld. See *supra* note 3. Readers curious about how to apply this line of reasoning should consult his article.

that might make such destruction undesirable to the state for other reasons), no use-value of the thing is being exploited."[21]

Interestingly, the line between physical and regulatory takings is assailed from both "sides" of the issue. Some, like Justice Sotomayor, wish to relegate all or almost all takings—even actual appropriations, like the one here—to the tender mercies of *Penn Central* balancing. Others, like Professor Richard Epstein, who calls the difference between physical and regulatory takings "an indefensible intellectual distinction," wish to extend the rigorous protections of just compensation to the wide expanses of improvident regulation.[22] I would speculate that Justice Sotomayor is more prescient on this matter than Professor Epstein: that erasure of the distinction would be more likely to water down existing protections for property than to expand judicial review of the substance of economic regulation. But the common ground between Sotomayor and Epstein highlights that the Takings Clause, as interpreted by the majority, occupies a middle ground that protects private property from confiscation but does not augur a return to the substantive-due-process solicitude for economic liberty of the *Lochner* sort.[23]

II. Protections for Personal Property

The Raisin Case is most likely to be remembered—and cited—for the proposition that the Takings Clause protects personal property (such as raisins) no less than it protects real property (land). Surprisingly, the Court had never squarely addressed that question before, perhaps because no one ever doubted that the Takings Clause applies fully to personal property. The Court has applied the Clause (in its "per se" form) in the past to such personal property as patents, steamboats, machinery, and money,[24] but it did so casually, without explanation, until *Horne*. In *Horne*, the Ninth Circuit panel held that

[21] Rubenfeld, *supra* note 3, at 1116.

[22] Richard Epstein, Raisin' A Raw Deal, Defining Ideas, Hoover Institution (July 6, 2015), http://www.hoover.org/research/raisin-raw-deal.

[23] Lochner v. New York, 198 U.S. 45 (1905). I appreciate that many readers of this journal may not find that an ominous possibility, but if we are to build consensus for stronger protections for property rights, our coalition must be broader than *Lochner* advocates.

[24] See Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) (money); United States v. General Motors Corp., 323 U.S. 373 (1945) (machinery); United States

"per se" takings rules (which I prefer to call actual takings) do not apply to personal property. (To its credit, the government did not suggest this line of argument to the court of appeals and disdained to defend it before the Supreme Court.) That surprising holding attracted much of the attention the case received from the bar, and may have been the reason the Court granted the petition for certiorari.

That the Takings Clause applies fully to personal property may be the takeaway holding of *The Raisin Case*, but it raises little in the way of intellectual interest. Of course the Takings Clause applies fully to personal property. Nothing in the text, history, or logic of the clause suggests otherwise. As the majority wrote: "The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home."[25] There was no dissent on this point.

Indeed, as the majority observed, protection of personal property—and especially of farmers' crops—has been a central concern of takings jurisprudence since the Magna Carta. One provision of that fountainhead of Anglo-American constitutionalism provided that "[n]o constable or other of Our bailiffs shall take corn or other chattels of any man without immediate payment, unless the seller voluntarily consents to postponement of payment."[26] In the colonial era, Section 8 of the Massachusetts Body of Liberties (1641) protected personal property alone from uncompensated takings. As an historical matter, uncompensated takings of personal property such as horses, vehicles, food, blankets, and supplies by the army likely were the animating events that led to the Takings Clause. Henry St. George Tucker, author of the first treatise on the United States Constitution, observed that the Takings Clause was "probably" enacted in response to "the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatever."[27] As early as 1778, John Jay, later the first

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v. Russell, 80 U.S. 623 (1871) (steamboats); United States v. Palmer, 128 U.S. 262 (1888) (patents)

[25] Horne, 135 S. Ct. at 2426.

[26] Magna Carta, § 28 (1215), reprinted in A.E. Dick Howard, Magna Carta: Text and Commentary 43 (1964).

[27] 1 St. George Tucker, Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia 305–06 (1803).

chief justice of the United States, wrote an essay decrying the practice by military quartermasters in New York of impressing "horses, teems [sic], and carriages" without the protections of the law.[28] Many questions surrounding the law of private property are controversial, but it is hard to see under what point of view it could be permissible for the government to take your chattels without payment but not your land.

The sole support for the Ninth Circuit's holding was language in *Lucas* that suggested—without holding, for the case did not actually involve the issue—that personal property might not be included in the special rule that use restrictions that render property economically worthless are treated as per se takings.[29] Once again, the analytical confusion wrought by *Lucas* takes its toll. *Lucas* is not a case about an actual taking. It is a case about a use restriction that effectively destroyed all of the land's economic value. The intuition behind *Lucas* is that a regulation that destroys all economic value of land must necessarily "go too far." That intuition is less likely to hold water in the case of personal property; many regulations render specific forms of personal property valueless. But as the majority recognized, none of this has any bearing when the government actually takes possession. When the government takes personal property and uses it (or sells the property and uses the proceeds), it must pay.

III. "Voluntary" Transactions and Unconstitutional Conditions

The most sweeping of the government's arguments in support of the raisin program was that raisin growers "voluntarily" choose to participate in the program in exchange for the "benefit" of selling their remaining raisins in interstate commerce. If they do not like the reserve requirement, said the government, they can plant different crops or use their grapes to make wine instead of raisins. The majority responded acerbically: "'Let them sell wine' is probably not much more comforting to the raisin growers than similar retorts have been to others throughout history."[30]

[28] John Jay, A Freeholder, A Hint to the Legislature of the State of New York (1778), reprinted in 5 The Founders' Constitution 312–13 (Philip B. Kurland & Ralph Lerner, eds., 1987).

[29] Horne v. Dep't of Agric., 750 F.3d 1128, 1139–40 (9th Cir. 2014) (citing Lucas, 505 U.S. at 1027-28).

[30] Horne, 135 S. Ct. at 2430.

It is sometimes true that a person can be required to waive exercise of a constitutional right in exchange for a government benefit. But if being allowed to engage in business is a "benefit," not much would remain of constitutional rights. During the middle decades of the last century, the Court—led by its liberals, and especially Justice William Brennan—developed a line of analysis called "unconstitutional conditions" doctrine to define and limit the scope of the government's power to condition benefits on the waiver of constitutional rights.[31] The doctrine is not always clear and it is not always applied consistently.[32] A simple summary is that the government may not require a person to waive a constitutional right in exchange for a generally available public benefit unless that waiver is closely related ("germane") to the reason the benefit is being granted.

The Court has gradually, sometimes haltingly, extended these principles to virtually all constitutional rights. One of the first was freedom of speech. Justice Brennan expressed the logic of the doctrine in *Speiser v. Randall*, a case involving the grant of certain tax benefits to veterans only to those willing to take a loyalty oath:

> To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or "bounty," its denial may not infringe speech.[33]

The doctrine was extended to the Takings Clause (though without mentioning its name) in *Loretto v. Teleprompter Manhattan CATV Corp.*[34] The government had argued that it could require property owners to permit installation of cable TV boxes without compensation for the intrusion, as a condition of permission to rent the

[31] See Richard A. Epstein, The Supreme Court 1987 Term: Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv. L. Rev. 4 (1988); Seth F. Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293 (1984); Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413 (1989).

[32] See, e.g., Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010) (allowing state university to require waiver of freedom of association as a condition to being allowed to use an otherwise open speech forum).

[33] 357 U.S. 513, 518 (1958).

[34] 458 U.S. 419 (1982).

apartments. Justice Thurgood Marshall's opinion for the Court rejected this argument, explaining:

> It is true that the landlord could avoid the requirements of § 828 by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. Teleprompter's broad "use-dependency" argument proves too much. For example, it would allow the government to require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices. The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated.[35]

The argument applies equally to the raisin program. The right of raisin growers to sell their product cannot be conditioned on forcing them to give a portion of their crop to the government.

Unfortunately, there is a precedent that at least seems to go the other way: *Ruckleshaus v. Monsanto Corp.*[36] That case involved an Environmental Protection Agency requirement that certain pesticide manufacturers disclose health and safety information, including trade secrets, which then were made public. It is possible that this requirement could have been upheld on other grounds, but the Court did so on the ground that Monsanto had waived its property right in exchange for a "valuable Government benefit"—namely, the permission to sell the pesticides.[37] More broadly, the Court wrote that the disclosure requirement was the price the company had to pay for "'the advantage of living and doing business in a civilized community.'"[38] The Court made no mention of the unconstitutional conditions doctrine, no mention of *Loretto*, no attempt to distinguish contrary cases, and no attempt to identify limits to this argument.

[35] *Id.* at 439 n.17.

[36] 467 U.S. 986 (1984).

[37] *Id.* at 1007.

[38] *Id.* (quoting Andrus v. Allard, 444 U.S. 51, 67 (1979)).

It would probably be preferable if the Court in *Horne* had simply stated that *Monsanto* was wrongly decided, or at least wrongly reasoned. But that is not the way constitutional law usually works. Faced with an erroneous precedent, the Court more commonly distinguishes it, sometimes on spurious grounds, effectively limiting the precedent to its facts. To some extent, the Court had already done that to *Monsanto*. In *Nollan v. California Coastal Commission*,[39] an important and careful application of unconstitutional conditions doctrine to the Takings Clause, the Court had held that "the right to build on one's own property . . . cannot remotely be described as a 'government benefit,'" and so does not allow the government to demand property as part of the bargain.[40] This is an important point: it is not a "benefit" for the government simply to refrain from forbidding a person to do something he would otherwise be free to do. Raisin farmers have the right to sell raisins, and the government is doing them no favors when it gets out of the way.

Not content with *Nollan*'s limitation of the reach of the decision, Chief Justice Roberts went on to distinguish *Monsanto* on the ground that selling pesticides is dangerous to public health, while "[r]aisins . . . are a healthy snack."[41] Justice Sotomayor's dissent may be right that this ground of distinction does not "hold up"—that "nothing in *Monsanto* . . . turned on the dangerousness of the commodity at issue."[42] But that is a product of the alarmingly sweeping language of the *Monsanto* opinion. In fact, the regulatory action in *Monsanto* might have been justifiable under the doctrine, frequently applied in land use permitting, that property owners can sometimes be required to disgorge property when this serves to mitigate the damage their actions would otherwise inflict on the public. They might, for example, have to pay for improvements to

[39] 483 U.S. 825 (1987).

[40] *Id.* at 833 n.2.

[41] Horne, 135 S. Ct. at 2431.

[42] *Id.* at 2441 n.2 (Sotomayor, J., dissenting). Justice Sotomayor was on far weaker ground in relying on *Andrus v. Allard*, 444 U.S. 51 (1979), which upheld a bar on the sale of eagle feathers, rendering them economically (but not culturally or religiously) valueless. *Andrus* was a mere use restriction; the government neither took possession of the feathers nor appropriated any aspect of their value. In *Monsanto*, the government and the public made use of the company's trade secrets.

sewers or roads, or dedicate open space to the public, if a development would strain existing infrastructure.[43]

It has been suggested that this principle covers the raisin program, on the theory that the sale of raisins somehow "harms" other members of the raisin industry by depressing prices. I personally believe this strains the idea of "harm" beyond its breaking point. But even if it is a "harm", the argument might justify capping the number of raisins a grower may sell, but it provides no justification for the further requirement that the growers transfer those raisins, without compensation, to the government. Those transfers do nothing to benefit growers, apart from any remittances they might generate.

IV. The Question of Offsetting Benefits

Justice Stephen Breyer, joined by Justices Ruth Bader Ginsburg and Elena Kagan, dissented in part, on the theory that a remand is necessary to determine whether the benefit to the Hornes of higher raisin prices caused by the reserve requirement might constitute just compensation. The majority rejected this suggestion, largely on the ground that the government "has already calculated the amount of just compensation in this case, when it fined the Hornes the fair market value of the raisins: $483,843.53. The Government cannot now disavow that valuation . . . ."[44] The proper remedy, the majority held, is to reverse the decision upholding the fine. That seems to be an adequate response, but Justice Breyer's partial dissent invites further reflection, both about the nature of Takings remedies and about the economics of the raisin program.

There is a more fundamental reason why the proper remedy in *The Raisin Case* was simply to reverse the fine: there was no taking, not yet, and therefore no legal basis for doing the just compensation calculations that the partial dissent contemplated. The *Horne* litigation was neither an eminent domain proceeding nor an inverse condemnation proceeding; rather, it was an injunctive action to prevent an unconstitutional taking before it occurred. The raisin program is unconstitutional not (as the partial dissent would have it) because

[43] See Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013), and Dolan v. City of Tigard, 512 U.S. 374 (1994), for explanations of these cases and their constitutional limits.

[44] Horne, 135 S. Ct. at 2433 (citation omitted).

compensation was inadequate, but because the statutory scheme did not contemplate compensation in the first place. The Agricultural Marketing Agreement Act, the exclusive legal avenue by which the Hornes could challenge the order to turn over their raisins, refers to the district court as exercising "jurisdiction in equity"—and an equity court does not have authority to calculate or award damages.[45]

As Professor Thomas Merrill explains in his recent article, *Anticipatory Remedies for Takings*, there is nothing wrong in principle with injunctive or declaratory actions to prevent takings where the legislature has made no provision for compensation.[46] Indeed, although the Court has not noted the fact or explained what it is doing, there have been numerous cases in recent years enjoining takings where there was no legal provision for just compensation.[47] *The Raisin Case* was such a case. It may help to resurrect the original understanding of remedies under the Fifth Amendment, which prevailed until the early 20th century. When the government proposes to effectuate a taking and the legislature has provided for compensation, the remedy is for the property owner to sue for compensation; but if the government proposes to effectuate a taking and the legislature has not provided for compensation; (implicitly or explicitly—a question of statutory interpretation), the proper remedy is to sue for an injunction or declaration that the uncompensated taking is unconstitutional.[48]

The economic reasoning of the partial dissent also warrants comment. It rests on the speculation that the raisin reserve must necessarily have benefitted raisin growers like the Hornes (albeit at the expense of consumers). Why else would the program exist?

There are both empirical and theoretical reasons to doubt that the raisin reserve program actually raises the price of raisins over the long run. The only serious academic study of the consequences of the program—a study cited by the government in its brief—concluded

[45] 7 U.S.C. § 608c(15)(B) (2015).

[46] Thomas M. Merrill, Anticipatory Remedies for Takings, 128 Harv. L. Rev. 1630 (2015).

[47] See Joshua D. Hawley, The Beginning of the End? *Horne v. Department of Agriculture* and the Future of *Williamson County*, 2012–2013 Cato Sup. Ct. Rev. 245, 256 n.58 (2013) (collecting cases).

[48] See Robert Brauneis, The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law, 52 Vand. L. Rev. 57 (1999).

that "grower net return . . . averaged zero under the volume control program, suggesting that profits were not above normal" relative to an unregulated market, though prices were less variable.[49] Even the Department of Agriculture's estimates of the effects of the reserve turn out to predict that growers are made worse off. Take the 2003–2004 crop year as an example. That year, the field price for raisins was $810 per ton.[50] The department's econometric model estimated that the price would have been $63 per ton less without the reserve, or $747 per ton.[51] Using that figure, a producer of 1,000 tons of raisins could have sold them in an unregulated market for $747,000, from which should be deducted the state mandatory advertising fee of almost $5 per ton. Under the marketing order, however, the producer could sell only 70% of his crop, yielding $567,000. He received nothing for his reserve raisins that year, meaning he was worse off by $175,000. This is according to the government's own numbers.

What is the explanation? Why wouldn't a cartel dominated by the industry benefit the industry? There are at least three reasons why the raisin reserve program was not well designed to increase the incomes of raisin farmers. First, if the volume controls actually have the effect of maintaining above-market prices, hence supra-competitive profits to growers, this would simply attract more producers into the industry, dissipating any benefits over the long run. Even in the shorter run, volume controls calculated as a percentage of crops already grown—in contrast to volume controls based on reducing acreage or production levels—have the perverse effect of stimulating production while discouraging marketing. If you grow more raisins, you may sell proportionately more raisins. Second, it is likely that the Raisin Administrative Committee's own sales and give-aways have a depressive effect on prices. Third, given that raisins grown abroad may be imported into the United States without being subject to the volume controls, it is likely that volume controls hurt American farmers while driving up world prices, to the benefit of foreign growers. In a world market, it is not possible to enrich

[49] Ben C. French & Carole Frank Nuckton, An Empirical Analysis of Economic Performance Under the Marketing Order for Raisins, 73 Am. J. Agric. Econ. 581, 592 (1991).

[50] Petition for Writ of Certiorari at 41a, Horne, 135 S. Ct. 2419 (No. 14-275).

[51] Brief for the Respondent at 10, Horne, 135 S. Ct. 2419 (No. 14-275).

American growers by restricting their sales, when Turkish and other competitors can pick up the slack.

Again, one may wonder why the Raisin Administrative Committee, which is elected by members of the industry (then formally appointed by the secretary of agriculture) would continue a program that likely hurts its constituents. The most likely answer is that *exporters* benefit from the export subsidies that are financed by sale of the reserve raisins. The raisin industry is highly concentrated, with one large cooperative commanding a plurality of the seats on the RAC. Since that cooperative is the largest exporter, it seems probable that this is the explanation for the political support for the raisin reserve. Interestingly, though, for the last five years the RAC has set the reserve at zero, and the cooperative has petitioned to cancel it altogether.[52] Apparently, even with the export subsidies, the raisin program has come to be a loser for even the large players who previously were its supporters.

No one would expect Supreme Court justices to research the empirical evidence or to engage in economic analysis of the program, but it is somewhat disappointing that Breyer's partial dissent, written by the justice most versed in economic regulation and its perversities, showed so little skepticism about the government lawyers' claim that the raisin reserve program, on balance, benefitted growers like the Hornes. Very likely, it did not.

V. Conclusion

The Raisin Case made little new law. It affirmed that the Takings Clause protects personal as well as real property, but this had not genuinely been in doubt. It reaffirmed application of the unconstitutional conditions doctrine to takings, which is important—but not a change. And it gave new emphasis to the crisp distinction between actual governmental appropriations of property and mere use restrictions. All too many takings cases in the past avoided clear lines and pushed in the direction of vague and muddy standards, which work to the advantage of government. If the Court applies the logic of this distinction rigorously to other issues arising under the

[52] Sun-Maid Sends Initiative to Eliminate the Raisin Reserve, Am. Vineyard, Jan. 2015, at 19.

Takings Clause, it could clear up much of the confusion that plagues this area of the law.

The decision, however, has a significance that is more than the sum of its individual holdings. The great obstacle to enforcement of the Takings Clause has been the willingness—nay, in some cases, the seeming eagerness—of courts to blur lines, magnify technicalities, and construct procedural and doctrinal roadblocks to recovery. The lower court decisions in this case illustrate the point: the panel published an initial decision based on the idea that the taking was a voluntary transaction; on petition for rehearing *en banc* the panel substituted a decision that the issue was not ripe and there was no jurisdiction; and then on remand it discovered two new reasons why this straightforward example of a classic taking of property could be relegated to what it called the "doctrinal thicket of the Supreme Court's regulatory takings jurisprudence."[53] A decade ago, the case would have died on the vine. That the Supreme Court twice granted petitions to review, once on jurisdiction and once on the merits, and concluded there had been a taking in a short, clear, commonsensical, and almost unanimous opinion, suggests that the tide has turned. Twenty years ago, Chief Justice William Rehnquist observed that there was "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation."[54] *The Raisin Case* suggests that Rehnquist's admonition is bearing fruit.

[53] Horne, 750 F.3d at 1138.

[54] Dolan, 512 U.S. at 392.