HORNE v. UNITED STATES DEPARTMENT OF AGRICULTURE: THE TAKINGS CLAUSE AND THE ADMINISTRATIVE STATE
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Note from the Editor:
This article discusses and praises Horne v. United States Department of Agriculture, a recent Supreme Court decision. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the authors. Generally, the Federalist Society refrains from publishing pieces that advocate for or against particular policies. When we do so, as here, we will offer links to other perspectives on the issue, including ones in opposition to the arguments put forth in the article. We also invite responses from our readers. To join the debate, please e-mail us at info@fedsoc.org.


INTRODUCTION
The U.S. Supreme Court’s recent decision in Horne v. United States Department of Agriculture (Horne II) was a significant victory for property rights advocates, and an even more significant victory for opponents of the administrative state.1 In an 8-1 decision, the Court held that a government program that seeks to control market prices by seizing a portion of a farmer’s crop violates the Takings Clause of the Fifth Amendment.2 In broad terms, the Court reaffirmed that personal property and real property enjoy the same protected status under the Fifth Amendment.3 It clarified that when the government adopts a regulation that authorizes it to physically appropriate personal property, the regulation effects a taking—the fact that the owner might derive some ancillary benefit from the regulation is irrelevant to the question of whether a taking occurred.4 Importantly, the Court also allowed property owners to challenge the imposition of such a regulation before the government takes their property, instead of having to seek compensation for it later.5 The decision is particularly notable in that it continued the Roberts Court’s trend toward a pragmatic and limited-government interpretation of the Takings Clause.

I. BACKGROUND
The Agricultural Marketing Agreement Act of 1937 (“AMAA”),6 a product of New Deal-era thinking, was passed “with the objective of helping farmers obtain a fair value for their agricultural products.”7 Congress at that time believed that excess competition was to blame for the low prices many commodities fetched on the open market,8 so it undertook to “avoid unreasonable fluctuations in supplies and prices” of certain agricultural goods.9 To accomplish its goal, the AMAA “authorizes the Secretary of Agriculture to promulgate ‘marketing orders’ to help maintain stable markets for particular agricultural products”—in other words, the secretary was authorized to prop up demand for agricultural products by throttling the supply.10 One such marketing order regulates the California raisin market.11

The raisin marketing order created the Raisin Administrative Committee (“RAC”), an unelected group of 47 people—35 of whom represent raisin producers, 10 of whom represent raisin “handlers,”12 and one each who represent cooperative bargaining associations and the general public.13 The RAC is an agent of the federal government.14 As the Supreme Court explained, each year the RAC “reviews crop yield, inventories, and shipments” and recommends to the Secretary whether or not there should be a “reserve pool” of raisins—that is, raisins transferred to the government and kept off the open market.15 Raisin handlers are then required to transfer the demanded amount of raisins to the RAC.16 The amount varies yearly, and has been as high as 47 percent of inventory in 2002.17 In return, the raisin handlers receive a contingent interest in a percentage of the proceeds generated by the reserve, which in some years amounts to nothing.18

Marvin and Laura Horne had been farming raisins in the Central Valley of California since 1969.19 Mr. Horne once even served as an alternate member of the RAC.20 But over the years, they became disillusioned with a regulatory scheme that they thought was unconstitutional and sought a way to avoid it.21 Because the marketing order regulates only raisin handlers, “the Hornes devised a plan to bring their raisins to market without going through a traditional handler.”22 They entered into a partnership with Mrs. Horne’s parents and “contracted with more than 60 other raisin growers to clean, stem, sort, and, in some cases, box and stack their raisins for a fee.”23 The operation was substantial—cumulatively, it produced more than 3 million pounds of raisins during the 2002-03 and 2003-04 crop years.24

Despite the Hornes’ best efforts, the Department of Agriculture declared that they were raisin handlers and thus subject to the marketing order.25 The Hornes refused to comply with the order. When government trucks showed up at their
facility one morning in 2002, they denied entry and refused to set aside any raisins for the reserve. As a result, the government assessed almost $700,000 in fines and penalties against the Hornes—$480,000 for the value of the raisins and over $200,000 for not complying with the order to turn them over. Rather than pay the fines, the Hornes defended themselves against the government’s attempt to enforce the fines and penalties, arguing that the demand that they surrender their raisins to the government was an unconstitutional attempt to take their personal property without compensation.

Their challenge was just the beginning of what would turn out to be a protracted legal battle that included two successful appeals to the Supreme Court of the United States. The proceedings started poorly for the challengers. The Hornes lost the enforcement action and lost again on administrative appeal before a federal district court. Then the Ninth Circuit held that it lacked jurisdiction to even consider the Hornes’ takings arguments, explaining that the Hornes would have to pay the fines or surrender the demanded raisins, then sue in the Federal Court of Claims under the Tucker Act before any court could consider whether the marketing order violated the Takings Clause. But the Supreme Court unanimously reversed that decision, holding that because the AMAA authorized district courts to determine whether an enforcement action was lawful, the takings defense was properly before the court. As the Court explained, “when a party raises a constitutional defense to an assessed fine, it would make little sense to require the party to pay the fine in one proceeding and then turn around and sue for recovery of that same money in another proceeding.” So it remanded the Hornes’ takings claim to the Ninth Circuit for a determination on the merits.

On remand, the Ninth Circuit produced one of the worst property rights decisions in recent memory. First, contrary to decisions of the Supreme Court and several circuit courts, the Ninth Circuit held that the per se physical takings rule announced in Loretto v. Teleprompter Manhattan CATV Corp. applies only to real property—not personal property like money, cars, or raisins. Because of this threshold conclusion, the court opted to subject the marketing order to the type of complex balancing test that is ordinarily employed in regulatory takings cases (as opposed to physical takings cases) to determine when a law goes too far in diminishing the value of property. This analysis essentially ignored the Supreme Court’s instruction to apply a bright-line rule when the government physically appropriates an owner’s property. Balancing tests are wholly inappropriate in physical invasion cases. As the Court explained in Loretto, the right to exclude others from your property is “perhaps the most fundamental of all property interests.” Accordingly, a physical occupation of property, no matter how small, is a taking “without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.” Inquiries into the degree to which the property is diminished by the government’s actions or the purposes served are irrelevant to whether a physical taking occurred. If the government exercises physical control over private property, it is obligated to compensate a property owner—even where it takes only a portion of the owner’s property.

Searching for a test to apply to avoid the result of Loretto’s clear instruction, the Ninth Circuit settled on the exactions trilogy of Nollan v. California Coastal Commission, Dolan v. City of Tigard, and Koontz v. St. Johns River Water Management District. Together, those cases hold that government agencies cannot condition permission to use one’s property on the relinquishment of a property interest unless there is “a ‘nexus’ and ‘rough proportionality’ between the property that the government demands and the social costs of the applicant’s proposal.” Nollan, Dolan, and Koontz, however, involve a “special application of the doctrine of unconstitutional conditions,” and apply tests specifically designed to scrutinize conditions placed on land-use permit decisions. Overlooking that doctrinal limitation, the Ninth Circuit reasoned that the exactions test should apply because the raisin reserve requirement operated like a permit condition on the right to sell raisins. After all, the Ninth Circuit noted that, just like a land-use permit, the Hornes could have “avoid[ed] the reserve requirement of the Marketing Order by . . . planting different crops, including other types of raisins, not subject to this Marketing Order or selling their grapes without drying them into raisins.”

The Court of Appeals then proceeded to apply an unrecognizable version of the exactions test. It transformed the robust Nollan/Dolan cause-and-effect test into a mere rational-basis, means-ends inquiry. According to the panel, the reserve requirement satisfied the nexus requirement because it does what it is intended to do: create “orderly market conditions.” And it satisfied the proportionality requirement because the order only demanded that percentage of raisins the RAC determined were necessary to achieve the committee’s goals. In reaching its conclusions, the Ninth Circuit failed to acknowledge that Nollan and Dolan do not simply ask whether an exaction advances a particular government goal—the tests include an important causation element that requires the government to show that the regulated property use directly causes the problem an exaction addresses and, if so, that the exaction is proportionate to that impact. Therefore, not only did the Ninth Circuit treat personal property as inferior to real property, but it effectively nullified the exactions cases in order to uphold the reserve requirement.

Perhaps because the Ninth Circuit’s decision was such an outlier, the Supreme Court granted certiorari once again.

II. The Parties’ Arguments

The Court granted certiorari on three discrete questions. The first was whether the “categorical duty” to pay compensation for a physical taking applies to personal property as well as real property. The Solicitor General’s brief did not attempt to defend the Ninth Circuit’s conclusion on this point. In fact, the Deputy Solicitor General who argued the case explicitly disavowed it at oral argument. The Hornes’ brief catalogued the long history of cases in the Supreme Court and the lower courts treating personal and real property as equal under the Takings Clause. Their brief also forcefully argued that personal property has been protected by fundamental law dating back 800 years to the Magna Carta.

The second question asked the Court whether the government can avoid the duty to pay just compensation for a per se taking “by reserving to the property owner a contingent
interest in a portion of the value of the property, set at the
government’s discretion.” The Solicitor General’s brief did
not address this question head-on. Rather, it argued that the
contingent proceeds prevented the application of Loretto’s per
se test in the first instance.99 Because raisins are a fungible good,
the government contended that so long as the Hornes retained
some interest in the proceeds, there could be no taking.60 But
the Hornes pointed out that even if the proceeds were relevant,
their value was speculative and often amounted to nothing.61 In
their view, the marketing order offered illusory compensation
by taking raisins in return for whatever the RAC might view
as appropriate in that particular year.

The final question for the Court was whether a require-
tment to “relinquish specific, identifiable property as a ‘condi-
tion’ on permission to engage in commerce effects a per se
taking.”62 On this point, the government strongly defended the
Ninth Circuit’s conclusion that the raisin reserve program was
a constitutional “exaction” under Nollan and Dolan. It made
the sweeping claim that “[t]he government may condition the
benefits provided by an orderly market on handlers’ compliance
with the reserve requirement.”63 In other words, the government
may take property so long as it is doing so to create an “orderly
market” that will, in the government’s judgment, benefit the
property owners. The Hornes rephrased that argument in
their brief, saying that “[U]nder the Ninth Circuit’s theory,
the government can extract whatever property concessions it
wants by effecting takings as a condition on the ‘government
benefit’ of not being forbidden to do anything the government
has power to forbid.”64

III. The Decision

On June 22, 2015, the Supreme Court gave the Hornes
a total victory, ruling in their favor on all three questions.
Eight justices, led by Chief Justice Roberts, agreed that the
raisin reserve was a taking; only Justice Sotomayor dissented.
But Justice Breyer, joined by Justices Kagan and Ginsburg,
ruled separately to say he would have remanded the case for
a calculation of damages/offset rather than excuse the Hornes
from paying the fines altogether.65 Writing for the majority,
Chief Justice Roberts called the
raisin reserve requirement a “clear physical taking.”66 He easily
dismissed the Ninth Circuit’s distinction between real and
personal property, noting that the Takings Clause “protects ‘private
property’ without any distinction between different types.”67 As
the Hornes had suggested in their brief, “[t]he principle reflected
in the Clause goes back at least 800 years to Magna Carta, which
specifically protected agricultural crops from uncompensated
takings.”68 Eight justices therefore agreed that Loretto’s per se
rule was the correct analytical framework to apply.

The same eight justices also rejected the government’s
argument that providing a contingent interest in the proceeds
from the seized property can avoid takings liability. The major-
ity recognized that the government conflated the standards for
physical and regulatory takings, noting that “when there has
been a physical appropriation, ‘we do not ask … whether it
deprives the owner of all economically valuable use’ of the item
taken.”69 Instead, the fact that the government has permanently
occupied private property is enough to effect a taking. No
contingent interest in the proceeds can change that; at most,
anything left over would count towards just compensation, not
the question of liability.70

The majority also rejected the government’s exactions
argument. In response to the government’s suggestion that
the Hornes could do something else with their raisins to avoid
regulation, the Chief Justice wrote that “[w]ith them sell wine’
is probably not much more comforting to the raisin growers
than similar retorts have been to others throughout history.”71
Rather, the right to sell raisins, like the right to build a house
on one’s property, is “not a special governmental benefit that
the Government may hold hostage, to be ransomed by the
waiver of constitutional protection.”72 As the Court explained,
this argument would allow the government to characterize
many things as benefits and circumvent the requirement to
pay compensation for physical takings.73 But “property rights
cannot be so easily manipulated.”74

On the question of the proper remedy, the Court was
more closely divided. The Chief Justice, writing for a five-justice
majority including Justices Kennedy, Alito, Scalia, and Thomas,
invalidated the fines and penalties altogether.75 The majority
reasoned that the government had already determined the fair
market value of the raisins when it assessed the fine.76 Therefore,
it concluded that there was “no need for a remand; the Hornes
should simply be relieved of the obligation to pay the fine and
associated civil penalty they were assessed when they resisted the
Government’s effort to take their raisins.”77 Justice Breyer, joined
by Justices Kagan and Ginsburg, disagreed. They would have
remanded for a determination of compensation, offsetting the
benefits created by the marketing order’s reserve requirement.78

In dissent, Justice Sotomayor argued that the majority
misunderstood Loretto. In her view, the per se physical takings
rule applies only when the government takes “each and every
property right” from the property owner (an understanding
neither supported by Loretto nor the Court’s body of physi-
cal taking case law).79 Because the Hornes retained, at least in
theory, “the right to receive some money for [the raisins’]
disposition,” they had not lost “every property right.”80 Further-
more, she adopted the government’s (and the Ninth Circuit’s)
argument that a government agency may condition the right to
sell a good on the open market on a “voluntary” agreement to
give up property rights.81 As a result, she would have affirmed
the Ninth Circuit’s judgment.

IV. The Implications of Horne

The Supreme Court’s Horne decisions hold promise for
advocates of property rights and limited government. Most
immediately, the decisions embraced three common sense prin-
ciples that will be extremely helpful for future takings litigants.
First, the Horne I opinion recognizes that an administrate
order imposing penalties may be a cognizable constitutional
injury, even when the terms of the order have not yet been
enforced.82 Second, the recent decision recognizes that rem-
edies available under the Takings Clause are not limited to just
compensation—in some circumstances, an order invalidating
a government action may be the appropriate remedy.83 And
third, the Court held that a property owner does not need to
surrender his or her property as a prerequisite to seeking judicial
Horne II provides more precedent supporting the recently reinvigorated unconstitutional conditions doctrine. But, perhaps more important to the big picture, the Horne decisions continue a trend of the Roberts Court—support for clear, administrable rules that benefit property owners at odds with powerful government agencies. That is in stark contrast with the final term before the Chief Justice joined the Court, which included the infamous Kelo v. City of New London decision upholding a forced transfer of a private home to a corporation.

A. The Possibility of Injunctive Relief Against a Taking

For years, government attorneys have wielded the Supreme Court’s frequent statement that “[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.”95 Such reasoning has led to the creation of the Williamson County state-litigation requirement, one of the modern Court’s most criticized doctrines.96 It has also, in conjunction with the Kelo decision, which severely limited the Constitution’s Public Use Clause, fostered an assumption that a taking can never be improper in the first instance. Therefore, the burden is always on property owners to contest a taking in a condemnation proceeding.94 In a due process claim, however, the government bears the standard to meet.98 If a government agency has a statutory means to pay compensation once a court determines that a taking has occurred, invalidation is unlikely to be an available remedy. According to the Supreme Court’s frequent statement that “[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation,” the Court shouldn’t just remand whether, considering that “the Constitution forbids [only] takings without compensation,” the court shouldn’t just remand the case for a just compensation calculation. Mr. McConnell responded that, “in cases where there’s . . . a taking, and the program does not contemplate compensation, the standard judicial remedy for that is to . . . invalidate the taking.”99 In other words, “a takings violation occurred when it was clear that there was no compensation at the time of the excessive governmental action; it was this absence that called for the remedy of invalidation.”100

But the Supreme Court has moved away from that position. In modern times it has become axiomatic that the remedy for a taking that “goes too far” is just compensation, and the only way to invalidate such a law is through the Due Process Clause. For example, after finding a takings claim unripe, the Williamson County Court considered a due process challenge to the zoning decision.93 The Court explained that the essence of a regulatory taking is a government action that goes so far that it cannot be constitutionally accomplished without a condemnation proceeding. In a due process claim, however, the remedy “is not just compensation, but invalidation of the regulation, and if authorized and appropriate, actual damages.”95

As a result, plaintiffs must generally show that a regulation bears no rational relationship to a legitimate government objective to be entitled to invalidation. This is a much more difficult standard to meet. Horne II pokes a small hole in that orthodoxy. The Court invalidated the fines and penalties in large part because it was clear that the government had already determined the value of the raisins, so there was no mechanism to provide for compensation. Because the government thought it could seize the raisins without committing a taking, it felt comfortable setting up a scheme of penalties to enforce the regulations. Thus, this is precisely the type of program Mr. McConnell had in mind that “does not contemplate compensation.”97 It is a significant development that a majority of the Supreme Court essentially adopted that argument and disavowed the need for a remand. However, it is not likely that this approach will spread to more typical takings cases. So long as the rationale of Williamson County still controls, the Court will likely continue to view inverse condemnation as within the “contemplation” of compensation. If a government agency has a statutory means to pay compensation once a court determines that a taking has occurred, invalidation is unlikely to be an available remedy. But Horne II does at least represent a small step in favor of property owners in this area.

B. More Evidence of Skepticism About the Administrative State

This term was not a particularly good one for supporters of the so-called fourth branch of government, the ever-expanding administrative state. Earlier in the year, several justices expressed severe doubts about the federal courts’ ongoing practice of deferring to administrative agencies under Chevron U.S.A. Inc. v. Natural Resources Defense Council. And in one of the biggest cases of the term, the Court refused to defer to the IRS’ interpretation of the Affordable Care Act provision providing federal tax subsidies for those purchasing health insurance on ACA exchanges. Horne II is another example of the third branch’s skepticism of administrative agencies.

In Perez v. Mortgage Bankers Association, the Court unanimously reversed the D.C. Circuit and held that agencies do not have to go through notice-and-comment rulemaking under the Administrative Procedure Act when they announce a new interpretation of a regulation that “deviates significantly from one the agency has previously adopted.” While they joined in the result, three justices used the occasion to state their concerns with the regime of agency deference, particularly the practice of deferring to agency rules interpreting their own regulations. Justice Scalia argued that the APA’s exemption for so-called “interpretive rules” was meant to be quite narrow, but “judge-made doctrines of deference” have significantly expanded the power of agencies to make binding law. He said that the APA’s plain text requires “that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations.” Such a reading calls into question not only deference to an agency’s interpretation of its own regulations—mandated under Auer v. Robbins—but also Chevron itself. Justice Alito even came close to asking someone to bring a case challenging the constitutionality of so-called Auer (or Seminole Rock) deference.

Twice this term, Justice Thomas stated his view that Chevron and Auer deference are violations of the separation of powers. In Perez, he called Seminole Rock/Auer deference a “deviation” from general principles of separation of powers, reasoning that it is a transfer of power from the judiciary to executive agencies and prevents judges from exercising their duty to independently determine the meaning of regulations. And a few months later in Michigan v. EPA, he directly attacked the constitutionality of Chevron deference on similar grounds.

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Although Justice Thomas’ views of the administrative state have long been well known, this time they added to a growing chorus urging reconsideration of long-held views on agency deference.

In King v. Burwell, the Chief Justice surprised many when he rejected the government’s argument for Chevron deference. The government had argued that the IRS rule allowing insurance purchasers to claim tax credits whether they purchased insurance on a federal or state-run exchange was a reasonable interpretation of the Affordable Care Act and thus entitled to deference. But the majority concluded that this case was simply too important to be left to the discretion of the IRS. The Court made it clear it would not defer to an agency’s conclusion in such “extraordinary cases.” Instead, if Congress wanted to delegate such an important power to an agency, it should have done so expressly. As others have acknowledged, the “extraordinary cases” doctrine is a significant limit on and departure from traditional Chevron deference. It illustrates that the Court will still require Congress to make the really important and difficult policy choices itself.

Among all these cases, Horne II was perhaps the strongest rebuke to the administrative state this term. In both Horne oral arguments, justices expressed significant doubts about the policy behind the raisin reserve requirement. The first time, Justice Kagan elicited laughter when she remarked that, on remand, the Ninth Circuit would have to “figure out whether this marketing order is a taking or it’s just the world’s most outdated law.” This time around, Justice Scalia compared the requirement to the central planning economy favored by the Soviet Union. And the Chief Justice’s opinion recognized that, much to the chagrin of would-be central planners at the Department of Agriculture, raisins “are private property—the fruit of the growers’ labor—not ‘public things subject to the absolute control of the state.’” Hard as the fourth branch might try to regulate markets, it cannot do so by seizing private property. After nearly 80 years, the federal raisin reserve is a casualty of both the Court’s stronger protection of property rights and its increasing skepticism of administrative agencies.

C. A Reinvigorated Unconstitutional Conditions Doctrine

Perhaps related to its skepticism toward the administrative state, the Court has increasingly relied on the doctrine of unconstitutional conditions in recent years. The doctrine was long a staple of the Supreme Court’s jurisprudence until it all but disappeared over the past several decades. The judicial doctrine first appeared in the mid-nineteenth century in response to a wave of state laws that had placed severely restrictive conditions on out-of-state companies seeking permission to do business in the state. In its original form, the doctrine operated as a shield from government “deals” that would strip individuals of their constitutionally protected rights. As others have acknowledged, the “extraordinary cases” doctrine is a significant limit on and departure from traditional Chevron deference. It illustrates that the Court will still require Congress to make the really important and difficult policy choices itself.

The Court’s reliance on the doctrine waned until the late 1950s through the 1970s. During that period, the doctrine was frequently invoked to strike down laws that conditioned the receipt of government benefits upon the waiver of individual rights, such as rights to free speech, free exercise of religion, travel, and equal protection of the laws. In its modern formulation, the doctrine provides that government may not grant an individual a benefit or permit on the condition that he surrender a constitutional right. Thus, the modern doctrine operates as a shield from government “deals” that would strip individuals of their constitutionally protected rights.

In the past few years, the Court has repeatedly relied on the doctrine to “vindicate[] the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.” For example, in Agency for International Development v. Alliance for Open Society International, Inc., the Court struck down a federal law requiring organizations to have a policy of opposing prostitution and sex trafficking to qualify for certain appropriations to be used in the fight against HIV/AIDS. The majority explained that Congress cannot condition a grant of federal funds for a specific purpose on the relinquishment of all speech rights on a topic. Rather, it can (and in this case, it did) only restrict the funds themselves from being used for the disfavored purpose. In this way, the unconstitutional conditions doctrine prevents the government from controlling speech by dangling too-good-to-refuse funding programs in front of organizations.

Koontz, following up on Nollan and Dolan, applied that principle in the context of land-use permitting. It extended Nollan and Dolan to prevent government agencies from holding the benefits of a building permit hostage to force property owners to contribute to unrelated government projects. This limitation on government power exists even though, as with the federal money in Agency for International Development, the government is under no obligation to grant a permit in most situations. But despite the power to deny the permit outright, the Koontz Court recognized that the government cannot use that power as leverage to require a permit applicant to pay for a city project unless it satisfies the requirements of Nollan and Dolan.

In Horne II, the Department of Agriculture made the novel argument that it could take a significant portion of a grower’s raisin crop in return for the privilege of selling the remaining raisins on the open market. By rejecting this formulation of the unconstitutional conditions doctrine, the Court further strengthened it. In a part of the opinion joined by eight justices, the Chief Justice clarified that Nollan and its progeny recognize that, like building a home, “selling produce in interstate commerce, although certainly subject to reasonable government regulation, is . . . not a special governmental benefit that the Government may hold hostage, to be ransomed by the

[T]he power of the state […] is not unlimited; and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.

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Easement's value.”144 In fact, this would have entirely obliterated surrendering an easement or making a payment equal to the damages for repeated temporary takings.134 In response, the government’s argument correct, agencies could easily avoid limitations of Nollan and Dolan described above, the Florida agency argued that the constitutional protections against exactions because the Corps deviated from past practice and decreased the rate at which it released water from a dam it constructed.132 The Corps argued that even though government-induced flooding could be a taking, an exception for “temporary flooding” should be recognized.135

A unanimous Court rejected the Corps’ argument.136 Justice Ginsburg found no support in any case or principle of takings law for the proposition that flooding cases are different from run-of-the-mill government intrusions on private property.137 The Corps had relied on a sentence from the 1924 case of Sanguinetti v. United States,138 which it took to mean that only permanent flooding was compensable under the Takings Clause.139 But the Court carefully reasoned that, even assuming the sentence was precedential, subsequent cases had eroded it and made clear that all temporary takings are compensable.140 It thus rejected a government attempt to limit the application of the Takings Clause using a meaningless distinction.

The same happened the next term in Koontz. There, as described above, the Florida agency argued that the Nollan and Dolan rules limiting government power to exact property in exchange for a permit did not apply when: (1) the permit was ultimately denied, and (2) the agency demanded money instead of real property in return for the permit.141 All nine justices rejected the first exception to Nollan and Dolan. The majority recognized that “[a] contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of Nollan and Dolan simply by phrasing its demands for property as conditions precedent to permit approval.”142 Five justices also rejected, for similar reasons, the agency’s argument that exactions of money should be treated differently than those of real property.143 The majority reasoned that, were the government’s argument correct, agencies could easily avoid Nollan and Dolan by “offering” “the owner a choice of either surrendering an easement or making a payment equal to the easement’s value.”144 In fact, this would have entirely obliterated the constitutional protections against exactions because the government could then just condemn the easement it wanted in the first place, using the money it exacted as “compensation.”

Finally, in Marvin M. Brandt Revocable Trust v. United States,146 the federal government and a Wyoming landowner disputed ownership of an abandoned railroad right of way. In the government’s view, when the right of way—granted by Congress under an 1875 Act that was meant to encourage railroad development in the West—was abandoned, it should have reverted back to the government’s ownership.147 The landowner argued that the right of way was a mere easement that, under common law property rules, should have been extinguished after the railroad abandoned it, leaving him with free and clear title.148 Once again, the Supreme Court sided with the property owner and declined to create an exception to the common law for railway rights-of-way.

In Great Northern Railway Co. v. United States,149 the Court had adopted what was then the government’s position that the 1875 Act conveyed only easements to the railroads.150 That case involved rights to drill for oil below the surface of the right of way: the United States claimed that the railroad did not own these rights because it had only an easement.151 Despite the Court’s clear agreement that the Act granted only an easement, the government in Brandt attempted to avoid the effect of this clear rule. It urged the Court to read Great Northern narrowly and hold “that the right of way is not an easement for purposes of what happens when the railroad stops using it.”152 The eight-justice majority emphatically rejected what it termed this “self-serving” reading of the Act.153 Once again, the Court sided with a clear, established rule for the benefit of property owners.

Horne II is the latest evidence of this trend. Rather than apply any of the complex regulatory takings tests that the Court has developed, the Court simply observed that the reserve requirement was a physical taking of raisins.154 Furthermore, it declined the government’s and Justice Breyer’s invitations to remand the case and allow the lower courts to determine the regulatory scheme’s ancillary benefits. The Roberts Court has sided with property owners in a major case each of the past four terms and has done so while emphasizing simple and understandable rules. It is safe to say that the Court’s property-rights jurisprudence has changed course in the years since its decision in Kelo.

CONCLUSION

The Supreme Court’s decision in Horne II is the latest in a recent line of cases that have endorsed clear rules protecting property rights. While the case did not announce any novel rules of law, it did illustrate that property owners may in some circumstances be able to halt a taking before it occurs. More broadly, Horne II fits into the general theme of skepticism about the actions of administrative agencies evinced in many cases this term. It remains to be seen whether these factors will spur challenges to other administrative regimes in the near future.
Endnotes

1 135 S. Ct. 2419 (2015).

2 Id. at 2428.

3 Id. at 2425–27.

4 Id. at 2429 (“[O]nce there is a taking, as in the case of a physical appropriation, any payment from the Government in connection with that action goes, at most, to the question of just compensation.” (citing Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 747–48 (1997) (Scalia, J., concurring in the judgment))).

5 Id. at 2432–33.


7 Lion Raisins, Inc. v. United States, 416 F.3d 1356, 1358 (Fed. Cir. 2005).


10 *Id. *at 2424.


12 A “handler” is “(a) any processor or packer; (b) any person who places . . . raisins in the current of commerce from within [California] to any point outside thereof; (c) any person who delivers off-grade raisins . . . into any eligible non-normal outlet; or (d) any person who blends raisins [subject to certain exceptions].” Horne I, 133 S. Ct. at 2057 (quoting 7 C.F.R. § 989.15 (2012)).


15 *Id.* at 2057.

16 Horne II, 135 S. Ct. at 2424.

17 Id.

18 Id. at 2429.

19 Horne II, 135 S. Ct. at 2058.


21 Mr. Horne wrote to the Secretary of Agriculture in 2002, voicing his displeasure about the reserve requirement. He wrote: “[W]e are growers that will pack and market our raisins. We reserve our rights under the Constitution of the United States . . . [T]he Marketing Order Regulating Raisins has become a tool for grower bankruptcy, poverty, and involuntary servitude. The Marketing Order Regulating Raisins is a complete failure for growers, handlers, and the USDA . . . [W]e will not relinquish ownership of our crop. We put forth the money and effort to grow it, not the Raisin Administrative Committee. This is America, not a communist state.” Horne I, 133 S. Ct. at 2058 n.3.

22 Id. at 2058.

23 Id.

24 Id. at 2058–59.

25 Id. at 2059.

26 Horne II, 135 S. Ct. at 2424.

27 Id. at 2425.

28 Horne I, 133 S. Ct. at 2059.

29 The district court agreed with the Court of Federal Claims in Evans v. United States, 74 Fed. Cl. 554 (2006), that the raisin reserve requirement was essentially a reasonable admissions toll to the raisin market, and the only property interest the Hornes could possibly have was in the proceeds from the reserve raisins. Horne, 2009 WL 4895362, at *25–27 (citing Evans, 74 Fed. Cl. at 563–64).


31 Horne II, 135 S. Ct. at 2063.

32 Id.

33 Id. at 2064.

34 458 U.S. 419 (1982).

35 Horne v. U.S. Dep’t of Agriculture, 750 F.3d 1128, 1139–41 (9th Cir. 2014). The Ninth Circuit’s conclusion was particularly stunning given that, earlier in the same year, the U.S. Supreme Court held that a demand for money—personal property—is subject to the same per se rules as a demand for land in Koontz v. St. Johns River Water Management District, 133 S. Ct. 2586, 2600 (2013). See also Brown v. Legal Found. of Wash., 538 U.S. 216, 235 (2003) (applying per se rule to a taking of interest from an IOLTA account, noting that “the transfer of the interest . . . here seems more akin to the occupation of a small amount of rooftop space in Loretto”); United States v. Gen. Motors Corp., 323 U.S. 373, 377–78 (1945) (analyzing the property rights protected by the Fifth Amendment as a group of rights citizens possess in a “physical thing”); Nixon v. United States, 978 F.2d 1269, 1285 (D.C. Cir. 1992) (“[T]he Government’s inference that the per se doctrine must be limited to real property is without basis in the law” because “[o]ne may be just as permanently and completely dispossessed of personal property as of real property.”). Many other circuits have reached the same conclusion. See Cerajeski v. Zoeller, 735 F.3d 577, 580 (7th Cir. 2013) (bank account interest); Anderson v. Spear, 356 F.3d 651, 669–70 (6th Cir. 2004) (surplus political contributions); Porter v. United States, 473 F.3d 1329, 1335 (5th Cir. 1973) (Lee Harvey Oswald’s personal papers); United States v. Corbin, 423 F.2d 821 828–29 (10th Cir. 1970) (fish).

36 Loretto, 458 U.S. at 443–35. The standards for determining whether an invasion of property rights violates the Constitution generally vary depending on whether it occurs through a physical or regulatory imposition. Government actions tantamount to a physical invasion or occupation, like those that take possession of private property, are subject to a strict, per se test. Restrictions on property that deny a property owner all economically beneficial use of property are also subject to a per se test. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017–19 (1992). Lesser regulatory impositions are subject to the multi-factor test of Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978).


38 Loretto, 458 U.S. at 451.

39 Id. at 426.

40 Id. at 421–22, 441.

41 The Hornes deliberately chose not to address the general regulatory takings test set out in Penn Central, because the marketing order would almost certainly satisfy that test. Horne, 750 F.3d 1138.


44 133 S. Ct. 2586 (2013).
Many have noted that the doctrine of unconstitutional conditions will apply to invalidate a condition on land use, such as in *Dolan* and *Horne II*. This does not mean, however, that every demand for property outside the special context of exactions—land-use decisions conditioned to demand that the owner mitigate for any negative impacts caused by a proposed development. But that same discretion can result in demands for dedications of property so onerous that, outside the exactions context, they would be deemed takings. Such unfettered power exposes landowners to the type of unlawful coercion that the unconstitutional conditions doctrine protects against. As the Court recognized:land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner’s deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. Exortorionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.

*Koontz*, 133 S. Ct. at 2594-95. *Nollan* and *Dolan* address the realities of the permitting process by “allowing the government to condition approval of a permit on the dedication of property to the public so long as there is a ‘nexus’ and ‘rough proportionality’ between the property that the government demands and the social costs of the applicant’s proposal.” *Id.* at 2595.

The Court has made clear that these are land-use condition tests, not general takings standards. See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999) (”[W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioned to demand development on the dedication of property to public use.” *Id.*). This does not mean, however, that every condition that seeks to exact property is a *Nollan/Dolan* issue—often, as was the case in *Horne II*, the less forgiving doctrine of unconstitutional conditions will apply to invalidate a condition on other use of property without regard to the nexus and proportionality standards.
really doctrine: it assumes that a taking doesn’t really happen until an inverse condemnation claim is rejected by a state court. Rather than presume that the government must go through eminent domain to take property, courts allow the taking and then force property owners to prove they should be compensated. This removes much of the government’s incentive to use formal condemnation proceedings in many cases. And it ignores the fact that “[t]here is nothing in . . . the language of the Fifth Amendment that requires municipal nonpayment [of compensation] to be certified by a state court before it is complete.” Berger & Kanner, supra note 91, at 694.

102 Id. at 1203.
103 Id. at 1211–12 (Scalia, J., concurring in the judgment).
104 Id. at 1211.
106 After Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945), which predates the APA.
107 Perez, 135 S. Ct. at 1217–20 (Thomas, J., concurring in the judgment).
109 Id. at 2712 (Thomas, J., concurring) (“Interpreting federal statutes—including ambiguous ones administered by an agency—calls for that exercise of independent judgment.” (quoting Perez, 135 S. Ct. at 1219 (Thomas, J., concurring in the judgment))); id. (Chevron deference “wrests from Courts the ultimate interpretative authority to ‘say what the law is,’ and hands it over to the Executive.” (citation omitted) (quoting Marbury v. Madison, 1 Cranch. 137, 177 (1803)).
111 King, 135 S. Ct. at 2488.
112 Id. at 2488–89.
113 Id.
114 Walker, supra note 112 (“[A] good sign that a court is departing from traditional administrative law principles is if it cites Justice O’Connor’s opinion in [FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)].”); Adler, supra note 114 (“If there’s any consolation in the Chief Justice’s opinion, it is that it seems to try to revive the Chief Justice’s dissent in [City of Arlington v. FCC, 133 S. Ct. 1863 (2013)] which sought to constrain the application of Chevron deference.”).
115 Transcript of Oral Argument at 49, Horne v. Dep’t of Agriculture, 133 S. Ct. 2053 (No. 12-123).
116 Transcript of Oral Argument at 26–27, Horne v. Dep’t of Agriculture, 135 S. Ct. 2419 (No. 14-275) (“Central planning was thought to work very well in 1937, and Russia tried it for a long time.”).
117 Horne II, 135 S. Ct. at 2431 (quoting Leonard v. Earle, 141 A.2d 714, 716 (Md. 1928)).
118 See Doyle v. Continental Ins. Co., 94 U.S. 535, 543 (1876) (Bradley, J., dissenting) (“Though a State may have the power, if it sees fit to subject
its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so."

119 Lafayette Ins. Co v. French, 59 U.S. (18 How.) 404, 407 (1855) ("This consent [to do business as a foreign corporation] may be accompanied by such condition as Ohio may think fit to impose; . . . provided they are not repugnant to the constitution or laws of the United States.").

120 See Terral v. Burke Const. Co, 257 U.S. 529, 532 (1922) ("The principle established by the more recent decisions of this court is that a state may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not."); Western Union Telegraph Co. v. Kansas ex rel. Coleman, 216 U.S. 1 (1910) (striking down a tax on out-of-state property as a condition of doing business in Kansas).

121 Frost & Frost Trucking Co v. Railroad Com'n, 271 U.S. 583, 593-94 (1926) (invalidating state law that required trucking company to dedicate personal property to public uses as a condition for permission to use highways).

122 See, e.g., Perry v. Sindermann, 408 U.S. 593 (1972) (refusal to renew professor's employment contract in retaliation for professor's critical testimony regarding the university's board of regents violated unconstitutional conditions doctrine); Sherbert v. Verner, 374 U.S. 398 (1963) (denial of unemployment benefits held unconstitutional where government required person to "violate a cardinal principle of her religious faith"); Speiser v. Randall, 357 U.S. 513 (1958) (denial of tax exemption for applicants' refusal to take loyalty oath violated unconstitutional conditions doctrine); see also James Burling & Graham Owen, The Implications of Lingle on Inclusionary Zoning and other Legislative and Monetary Exactions, 28 Stan. Envtl. L.J. 397, 407 (2009) (The unconstitutional conditions doctrine has been invoked in a wide range of cases in which "government has traded with people for their right to free speech, their right to freedom of religion, their right to be free from unreasonable searches, their right to equal protection, and their right to due process of law.").

123 Richard A. Epstein, Bargaining with the State 5 (1993) (The doctrine holds that even if the government has absolute discretion to grant or deny any individual a privilege or benefit—such as a land-use permit, "it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of that person's constitutional rights."); Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413 (1989); Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960).

124 Koontz, 133 S. Ct. at 2594.

125 133 S. Ct. 2321 (2013).

126 Id. at 2328.

127 Id. at 2330 ("By demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern, the condition by its very nature affects 'protected conduct outside the scope of the federally funded program.'" (quoting Rust v. Sullivan, 500 U.S. 173, 197 (1991))).

128 Koontz, 133 S. Ct. at 2595.

129 Id. at 2596 ("Nor does it make a difference . . . that the government might have been able to deny petitioner's application outright without giving him the option of securing a permit by agreeing to spend money to improve public lands.").


131 133 S. Ct. 511 (2012).

132 Id. at 516.

133 Id. 515–16.

134 Id. at 516.