Horne v. United States Department of Agriculture: The Takings Clause and the Administrative State

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Note from the Editor:

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• Brief for the Respondent, *Horne v. United States Department of Agriculture*, No. 14-275, *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV5/14-275_resp.authcheckdam.pdf.

• Andrew W. Schwartz, *No Competing Theory of Constitutional Interpretation Justifies Regulatory Takings Ideology*, 34 Stan. Envtl. L.J. 247, 302-03 (2015), *available at* http://journals.law.stanford.edu/sites/default/files/stanford-environmental-law-journal-selj/print/2015/09/schwartz_article.pdf.

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

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facility one morning in 2002, they denied entry and refused to set aside any raisins for the reserve.[26] 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.[27] 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.[28]

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.[29] 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.[30] 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.[31] 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."[32] So it remanded the Hornes' takings claim to the Ninth Circuit for a determination on the merits.[33]

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*.[34] applies only to real property—not personal property like money, cars, or raisins.[35] 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.[36] 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."[37] 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."[38] 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.[39] 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.[40]

Searching for a test to apply to avoid the result of *Loretto*'s clear instruction,[41] the Ninth Circuit settled on the exactions trilogy of *Nollan v. California Coastal Commission*,[42] *Dolan v. City of Tigard*,[43] and *Koontz v. St. Johns River Water Management District*.[44] 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."[45] *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.[46] Overlooking that doctrinal limitation,[47] 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."[48]

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.[49] According to the panel, the reserve requirement satisfied the nexus requirement because it does what it is intended to do: create "orderly market conditions."[50] 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.[51] 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.[52] 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.[53] The Solicitor General's brief did not attempt to defend the Ninth Circuit's conclusion on this point.[54] In fact, the Deputy Solicitor General who argued the case explicitly disavowed it at oral argument.[55] 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.[56] Their brief also forcefully argued that personal property has been protected by fundamental law dating back 800 years to the Magna Carta.[57]

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."[58] 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.[59] 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 requirement to "relinquish specific, identifiable property as a 'condition' 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, wrote 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 majority 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 "'[l]et 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,[72] is "not a special governmental benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection."[73] 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.[74] But "property rights 'cannot be so easily manipulated.'"[75]

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.[76] The majority reasoned that the government had already determined the fair market value of the raisins when it assessed the fine.[77] 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."[78] 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.[79]

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 physical taking case law).[80] 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."[81] Furthermore, 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.[82] 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 principles that will be extremely helpful for future takings litigants. First, the *Horne I* opinion recognizes that an administrative order imposing penalties may be a cognizable constitutional injury, even when the terms of the order have not yet been enforced.[83] Second, the recent decision recognizes that remedies 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.[84] And third, the Court held that a property owner does not need to surrender his or her property as a prerequisite to seeking judicial

review of an unconstitutional agency order.[85]

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*[86] 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."[87] Such reasoning has led to the creation of the *Williamson County* state-litigation requirement,[88] one of the modern Court's most criticized doctrines.[89] 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 court, asking for compensation after the fact. That gives the government significant leverage in takings cases.

An exchange at oral argument illustrates just how pervasive that assumption has become. Justice Breyer asked the Hornes' attorney, former federal judge Michael McConnell, whether, considering that "the Constitution forbids [only] takings without compensation," the Court shouldn't just remand the case for a just compensation calculation.[90] 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."[91] 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."[92]

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 same 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.[94] 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.[96]

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.[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. 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*.[99] 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.[100] *Horne II* is another example of the third branch's skepticism of administrative agencies.

In *Perez v. Mortgage Bankers Association*,[101] 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."[102] 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.[103] He said that the APA's plain text requires "that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations."[104] Such a reading calls into question not only deference to an agency's interpretation of its own regulations—mandated under *Auer v. Robbins*[105]—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*[106]) 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.[107] And a few months later in *Michigan v. EPA*,[108] he directly attacked the constitutionality of *Chevron* deference on similar grounds.[109]

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.[110] 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.[111] But the majority concluded that this case was simply too important to be left to the discretion of the IRS.[112] The Court made it clear it would not defer to an agency's conclusion in such "extraordinary cases."[113] 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.[114] 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."[115] This time around, Justice Scalia compared the requirement to the central planning economy favored by the Soviet Union.[116] 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.'"[117] 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.[118] In its original form, the doctrine operated as a structural doctrine, limiting state authority over interstate commerce and the national courts.[119] Under that version of the doctrine, the Court struck down conditions requiring that out-of-state companies waive their right to remove lawsuits to federal court, agree to taxes not applicable to other companies, and agree to taxation of out-of-state property and profits.[120] But by the early twentieth century, the doctrine had changed into one that directly protected the substantive rights of individuals against state and federal government by declaring void any condition that compelled a waiver of a right or privilege secured by the Constitution. The Court recognized that:

> [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.[121]

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.[122] 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.[123] 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."[124] For example, in *Agency for International Development v. Alliance for Open Society International, Inc.*,[125] 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.[126] Rather, it can (and in this case, it did) only restrict the funds themselves from being used for the disfavored purpose.[127] 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.[128] 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.[129] 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, "[s]elling 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

waiver of constitutional protection."[130] This result strengthens the unconstitutional conditions doctrine, making it more difficult for agencies to use the permitting process to restrict reasonable uses of property.

D. A Trend in Property Rights

In just the last few terms, the Court has several times rejected a government agency's argument for broader discretion in favor of applying bright-line rules. These cases—including *Horne II*—have uniformly benefitted property owners. As a result, the Court has solidified the protections of the Fifth Amendment and steadily reduced government power to diminish property rights through ad hoc decisionmaking.

In *Arkansas Game & Fish Commission v. United States*, a state agency sued the U.S. Army Corps of Engineers over repeated flooding of its land.[131] Between 1993 and 1999, the Corps deviated from past practice and decreased the rate at which it released water from a dam it constructed.[132] The change was meant to give farmers a longer harvest, but it had the effect of periodically flooding a portion of the Commission's land, used as a wildlife and hunting preserve as well as a timber resource.[133] The Commission claimed it was entitled to damages for repeated temporary takings.[134] In response, 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." Like in *Arkansas Game & Fish*, the Court in *Koontz* rejected an exception that would have undermined constitutional property protections.

Finally, in *Marvin M. Brandt Revocable Trust v. United States*,[145] 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.[146] 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.[147] 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*,[148] the Court had adopted what was then the government's position that the 1875 Act conveyed only easements to the railroads.[149] That case involved rights to drill for oil below the surface of the right of way: the United States claimed that the railway did not own these rights because it had only an easement.[150] 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."[151] The eight-justice majority emphatically rejected what it termed this "self-serving" reading of the Act.[152] 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.[153] 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 Reg'l Planning Agency, 520 U.S. 725, 747–48 (1997) (Scalia, J., concurring in the judgment)).

5 *Id.* at 2432–33.

6 7 U.S.C. §§ 671–74 (2012) (Agricultural Marketing Agreement Act); 7 U.S.C. §§ 601–627 (2012) (Agricultural Adjustment Act).

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

8 Horne v. U.S. Dep't of Agriculture, 133 S. Ct. 2053, 2056–57 (2013) (*Horne I*).

9 7 U.S.C. § 602(4) (2012).

10 *Horne II*, 135 S. Ct. at 2424.

11 *See* 7 C.F.R. pt. 989 (2012)

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

13 7 C.F.R. § 989.26 (2012).

14 Horne v. U.S. Dep't of Agriculture, No. CV–F–08–1549, 2009 WL 4895362, at *2 (E.D. Cal. Dec. 11, 2009).

15 *Horne I*, 133 S. Ct. at 2057.

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

17 *Id.*

18 *Id.* at 2429.

19 *Horne* I, 133 S. Ct. at 2058.

20 *Horne*, 2009 WL 4895362, at *3.

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).

30 Horne v. U.S. Dep't of Agriculture, 673 F.3d 1071, 1079–80 (9th Cir. 2011). The Tucker Act, 28 U.S.C. § 1491 (2012), requires that property owners file takings claims against the federal government seeking payment of just compensation in the Court of Federal Claims.

31 *Horne I*, 133 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.2d 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 434–35. 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 that automatically requires the government to pay just compensation. Regulatory 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).

37 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).

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.

42 483 U.S. 825 (1987).

43 512 U.S. 374 (1994).

44 133 S. Ct. 2586 (2013).

45 *Koontz*, 133 S. Ct. at 2595 (quoting *Nollan*, 483 U.S. at 837, and *Dolan*, 512 U.S. at 391); *see also Lingle*, 544 U.S. at 547 ("[T]hese cases involve a special application of the 'doctrine of unconstitutional conditions,' which provides that 'the government may not require a person to give up a constitutional right-here the right to receive just compensation when property is taken for a public use-in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.'" (quoting *Dolan*, 512 U.S. at 385)).

46 Typically, a government demand that a person waive a constitutional right in exchange for a discretionary benefit constitutes a per se violation of the doctrine. *Koontz* explains, however, that every demand for property in exchange for a land use permit is not a violation; instead, such conditions are subject to heightened scrutiny. *Koontz*, 133 S. Ct. at 2595. It is that distinction that makes *Nollan* and *Dolan* a "special application" of the unconstitutional conditions doctrine. *Id.* The nexus and proportionality tests recognize that there are circumstances where a permit condition compelling the dedication of property to the public will be allowed under the Constitution. Permitting agencies enjoy broad discretion in considering development applications. When properly applied, an agency's permitting authority allows the government 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:

> [L]and-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. Extortionate 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.

47 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 conditioning approval of development on the dedication of property to public use."). 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.

48 *Horne*, 750 F.3d at 1143.

49 Many have noted that *Nollan* and *Dolan* require a cause-and-effect inquiry. Exactions are only constitutional if they remedy a social cost of the property owner's proposed use. *See, e.g.*, Timothy M. Mulvaney, *Proposed Exactions*, 26 J. Land Use & Envtl. L. 277, 281 (2011) (In *Nollan*, "the state did not meet its burden of proving that a condition requiring a beach access pathway bore an 'essential nexus' to the impacts *caused by the development*." (emphasis added)); Pierson Andrews, Nollan *and* Dolan*: Providing a Roadmap for Adopting a Uniform System to Determine Transportation Impact Fees*, 25 BYU J. Pub. L. 143, 146 (2011) ("In *Nollan*, the United States Supreme Court concentrated on the *connection between* the exaction required by the government and *the burden imposed by the new development*." (emphases added)); J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go from Here*, 59 Wash. & Lee L. Rev. 373, 378 (2002) ("*Nollan* . . . established that an 'essential nexus' must exist between a development condition and the amelioration of a legitimate public problem *arising from the development*." (emphasis added)); James E. Holloway & Donald C. Guy, *Land Dedication Conditions and Beyond the Essential Nexus: Determining "Reasonably Related" Impacts of Real Estate Development Under the Takings Clause*, 27 Tex. Tech L. Rev. 73, 96 (1996) ("*Nollan*'s essential nexus test . . . requires the government to establish a more direct, causal connection between land dedication conditions and the impact of real estate development on infrastructure and public facilities."); *see also* Pennell v. City of San Jose, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part) (traditional land-use regulation is valid because there exists "a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy").

50 *Horne*, 750 F.3d at 1143.

51 *Id.* at 1143–44.

52 *Koontz*, 133 S. Ct. at 2591; *id.* at 2595.

53 *Horne II*, 135 S. Ct. at 2425.

54 *See* Brief for Respondent, Horne v. Dep't of Agriculture, 135 S. Ct. 2419 (2015) (No. 14-275), 2015 WL 1478016.

55 Transcript of Oral Argument at 26–27, Horne v. Dep't of Agriculture, 135 S. Ct. 2419 (2015) (No. 14-275).

56 Brief for Petitioner at 31–36, Horne v. Dep't of Agriculture, 135 S. Ct. 2419 (2015) (No 14-275), 2015 WL 881767 ("In holding that the per se taking rule applies only to real property, the Ninth Circuit stands alone.").

57 *Id.* at 36–38 ("Indeed, protection of personalty—and especially of farmers' crops—has been a central concern of takings jurisprudence since the Magna Carta.").

58 *Horne II*, 135 S. Ct. at 2428.

59 Brief for Respondent at 24–28, Horne v. Dep't of Agriculture, 135 S. Ct. 2419 (2015) (No. 14-275), 2015 WL 1478016.

60 *Id.* at 27–28 ("Because reserve raisins are a fungible commodity, useful to their owners only by generating revenue, any interests in lasting possession and control affected by the marketing order cannot reasonably be viewed as 'the most treasured strands in [the] owner's bundle of property rights.'" (quoting *Loretto*, 458 U.S. at 435)).

61 Brief for Petitioner at 42–43, Horne v. Dep't of Agriculture, 135 S. Ct. 2419 (2015) (No 14-275), 2015 WL 881767.

62 *Horne II*, 135 S. Ct. at 2430.

63 Brief for Respondent at 29, Horne v. Dep't of Agriculture, 135 S. Ct. 2419 (2015) (No 14-275), 2015 WL 1478016.

64 Brief for Petitioner at 56, Horne v. Dep't of Agriculture, 135 S. Ct. 2419 (2015) (No 14-275), 2015 WL 881767; *see also id.* at 57 ("The panel's decision ultimately stands for the proposition that the government can take farmers' property as a condition of its grace in allowing them to sell part of their crop. Not since the barons prevailed at Runnymede has that been the law.").

65 *Horne II*, 135 S. Ct. at 2433 (Breyer, J., concurring in part and dissenting in part). Justice Thomas also filed a concurring opinion, noting that he had some doubts as to whether the raisin reserve program even complied with the "public use" requirement of the Fifth Amendment. *Id.* (Thomas, J., concurring).

66 *Id.* at 2428 (majority opinion).

67 *Id.* at 2426.

68 *Id.*

69 *Id.* at 2429 (quoting *Tahoe-Sierra*, 535 U.S. at 323).

70 *Id.* (citing *Suitum*, 520 U.S. at 747–48 (1997) (Scalia, J., concurring in the judgment)).

71 *Id.* at 2430.

72 *See Nollan*, 483 U.S. at 834 n.2.

73 *Horne II*, 135 S. Ct. at 2430–31.

74 *Id.* at 2430.

75 *Id.* (quoting *Loretto*, 458 U.S. at 439 n.17).

76 *Id.* at 2432–33.

77 *Id.* at 2433.

78 *Id.*

79 *Id.* at 2435–36 (Breyer, J., concurring in part and dissenting in part).

80 *Id.* at 2437 (Sotomayor, J., dissenting).

81 *Id.* at 2439.

82 *Id.* at 2440–41.

83 *Horne I*, 133 S. Ct. at 2061–62.

84 *Id.* at 2062–63.

85 *Id.*

86 545 U.S. 469 (2005).

87 Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 (1985).

88 In *Williamson County*, the Court reasoned that takings plaintiffs must be denied just compensation by a state court before their claim for compensation is "ripe" in federal court. *Id.* at 194–95.

89 *See, e.g.*, San Remo Hotel, L.P. v. City & Cnty. of San Francisco, 545 U.S. 323, 349–52 (2005) (Rehnquist, C.J., concurring in the judgment); Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671 (2004); Scott A. Keller, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the* Williamson County *State Litigation Requirement for Regulatory Takings Claims*, 85 Tex. L. Rev. 199, 239 (1996); J. David Breemer, *The Rebirth of Federal Takings Review? The Courts' "Prudential" Answer to* Williamson County*'s Flawed State Litigation Ripeness Requirement*, 30 Touro L. Rev. 319 (2014).

90 Transcript of Oral Argument at 16–17, Horne v. Dep't of Agriculture, 135 S. Ct. 2419 (2015) (No. 14-275).

91 *Id.* at 18.

92 J. David Breemer, *Overcoming* Williamson County*'s Troubling State Procedures Rule: How the* England *Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. Land Use & Envtl. L. 209, 225 (2003).

93 *Williamson Cnty.*, 473 U.S. at 197.

94 *Id.* ("Should the government wish to accomplish the goals of such regulation, it must proceed through the exercise of its eminent domain power, and, of course, pay just compensation for any property taken.").

95 *Id.*

96 *See* Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 Geo. L.J. 555, 571–72 (1997).

97 *See supra* text accompanying n.93.

98 This is one of the many serious flaws of the *Williamson County* ripeness 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.

99 467 U.S. 837 (1984).

100 King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015).

101 135 S. Ct. 1199 (2015).

102 *Id.* at 1203.

103 *Id.* at 1211–12 (Scalia, J., concurring in the judgment).

104 *Id.* at 1211.

105 519 U.S. 452, 461 (1997).

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).

108 135 S. Ct. 2699 (2015).

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)).

110 *See, e.g.*, Chris Walker, *What* King v. Burwell *Means for Administrative Law*, Notice & Comment (June 25, 2015), http://www.yalejreg.com/blog/what-king-v-burwell-means-for-administrative-law-by-chris-walker; Jonathan H. Adler, *In* King v. Burwell*, Chief Justice Roberts Rewrites the PPACA in Order to Save It (Again)*, Volokh Conspiracy (June 25, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/25/in-king-v-burwell-chief-justice-roberts-rewrites-the-ppaca-in-order-to-save-it-again/.

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 124 ("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 Comm'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.")

130 *Horne II*, 135 S. Ct. at 2430–31.

131 133 S. Ct. 511 (2012).

132 *Id.* at 516.

133 *Id.* 515–16.

134 *Id.* at 516.

135 *Id.* at 519.

136 The vote was 8-0; Justice Kagan did not participate.

137 *Id.* at 521.

138 264 U.S. 146 (1924).

139 *Ark. Game & Fish*, 133 S. Ct. at 520.

140 *Id.* (citing, among others, First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., 482 U.S. 304 (1987), United States v. Causby, 328 U.S. 256 (1946), and United States v. Gen. Motors Corp., 323 U.S. 373 (1945)).

141 *Koontz*, 133 S. Ct. at 2593–94.

142 *Id.* at 2595. The dissent explicitly agreed. *See* id. at 2603 (Kagan, J., dissenting).

143 *Id.* at 2603 (majority opinion).

144 *Id.* at 2599.

145 134 S. Ct. 1257 (2014).

146 Id. at 1263.

147 *Id.*

148 315 U.S. 262 (1942).

149 *Brandt*, 134 S. Ct. at 1264 ("The Court adopted the United States' position in full, holding that the 1875 Act 'clearly grants only an easement, and not a fee.'" (quoting *Great Northern*, 315 U.S. at 271)).

150 *Great Northern*, 315 U.S. at 270-71.

151 *Brandt*, 134 S. Ct. at 1266.

152 *Id.*

153 *Horne II*, 135 S. Ct. at 2428.