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Notes

HORNE V. DEPARTMENT OF AGRICULTURE: JUST COMPENSATION LEFT TO WITHER ON THE VINE

MICHAEL P. COLLINS, JR.*

Like many agricultural products sold in the United States, the price of raisins fluctuated erratically during the early twentieth century. In response, Congress empowered the United States Department of Agriculture ("USDA") to stabilize raisin prices. Since 1949, the USDA has attempted to stabilize raisin prices through marketing orders which prohibit a certain percentage of the annual raisin crop from being sold on the open market.[1] In *Horne v. Department of Agriculture*,[2] the Supreme Court considered whether one such price control, which required raisin producers to surrender a portion of their crops to the federal government, amounted to a taking under the Fifth Amendment.[3] Ultimately, the Court concluded that the program did in fact amount to a taking, and required the government to pay "just compensation" for the raisins.[4] The Court chose not to remand for further determination of whether the Hornes should be compensated, but instead held that the claimants should be refunded for the fines issued by the federal government following non-compliance with the USDA program.[5]

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* J.D. Candidate, 2017, University of Maryland Francis King Carey School of Law. The author thanks his editors, Michael Cianfichi, Haley Peterson, Laura Merkey, Robert Baker, and Joshua Carback for their thoughtful comments and superior Bluebooking. The author also wishes to thank Professor Michael Pappas for his guidance and mentorship throughout the writing process. The author dedicates this Note to his parents, Michael and Lisa, and his brother, Joseph, for their love, tireless support, and encouragement, and to his grandfather Robert Burns, Jr., whose integrity, humor, and spirit will always inspire the author.

1. Horne v. USDA, 750 F.3d 1128, 1133 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015).

2. 135 S. Ct. 2419 (2015).

3. *Id.* The Fifth Amendment provides, in relevant part, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

4. *Id.* at 2433.

5. *Id.*

When considering just compensation, the Court failed to examine whether the Hornes were compensated, at least partially, through the USDA raisin program.[6] Rather than quickly dismissing the government's claim that the raisin program may not require compensation, the Court should have remanded for a further determination of just compensation.[7] Remanding would have accounted for the fair market value of the raisins without the price support program and the benefits received by the Hornes as a result of the regulatory activities provided by the government.[8] The Court's failure to do so will have far-reaching consequences. Namely, the *Horne* decision will enable future takings claimants to receive more than "just compensation."[9]

I. THE CASE

In 2002, the Hornes, raisin growers in California who grew frustrated with the USDA's attempts at price stabilization, implemented a plan to skirt USDA regulations. They were fined for selling their raisin crop in direct violation of the USDA's price stabilization program. The Hornes then sued to recover the cost of the fines. This Section discusses the origins of the USDA regulations, the actions of the Hornes, and the subsequent legal action against them.

A. The Agricultural Marketing Agreement Act and the Raisin Marketing Order

From 1914 to 1921, raisin prices in the United States increased rapidly, peaking at a price of $235 per ton.[10] This surge in prices led to an increase in production by the nation's raisin producers, which then caused prices to plummet back to normal levels of $40 to $60 per ton.[11] Following this sharp increase in raisin production and the subsequent decline in the price of raisins, the industry sold raisins "at less than parity prices and in some years at prices . . . less than the cost of production."[12] In 1937, Congress passed the Agricultural Marketing Agreement Act ("AMAA") in

6. *Id.* at 2431–33.

7. *See infra* Part IV.A.

8. *See infra* Part IV.A.

9. *See infra* Part IV.B.

10. Horne v. USDA, 750 F.3d 1128, 1133 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015). Two hundred and thirty-five dollars in 1921, when adjusted for inflation, amounts to more than $3100 in 2016. *CPI Inflation Calculator*, BUREAU OF LABOR STATISTICS, http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=235&year1=1921&year2=2016 (last visited Feb. 21, 2016). For reference, the price of raisins in 2015 was $1600 per ton, an increase from 2014. *2015 Announced Natural Seedless Field Price*, RAISIN BARGAINING ASSOCIATION, http://www.raisinbargaining.org/newsletter/ (last visited Feb. 21, 2016).

11. *Horne*, 750 F.3d at 1133.

12. *Id.* (quoting Parker v. Brown, 317 U.S. 341, 364 (1943)).

an attempt to bring consistency and predictability to agricultural markets in the United States. The AMAA authorizes the Secretary of Agriculture to distribute marketing orders regulating the sale and delivery of various agricultural goods for the purpose of price stabilization. In 1949, as a direct response to the market conditions of the early twentieth century, the Department of Agriculture implemented the Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California ("Raisin Marketing Order").[13]

One of the main purposes of the Raisin Marketing Order is to ensure "orderly" market conditions through regulating raisin supply.[14] The Raisin Marketing Order stabilizes raisin prices[15] by establishing annual reserve pools, the size of which is determined according to annual crop yield.[16] The reserve raisins are known as "reserve tonnage" and may not be sold on the open market. This restriction limits the amount of surplus raisins for sale domestically and indirectly controls the price of raisins in the United States.[17] The Raisin Marketing Order established the Raisin Administrative Committee ("RAC"), an industry committee charged with administration of the Raisin Marketing Order.[18] Each year, the RAC recommends the amount of reserve tonnage (raisins which must be held in reserve for the RAC) and free tonnage raisins (raisins which may be sold on the open market) to the Secretary of Agriculture, who then promulgates the percentages.[19] Marketing orders under the AMAA, such as the Raisin Marketing Order, apply only to "handlers," that is, those who pack and process agricultural products for distribution.[20] The orders do not apply to a producer or grower operating "in his capacity as a grower."[21] According to the AMAA, any

13. *Id.*

14. 7 U.S.C. § 602(1) (2012); *Horne*, 750 F.3d at 1133. The Raisin Administrative Committee ("RAC") marketing order remains in effect, however, since 2010–2011, the RAC has not recommended a reserve percentage, meaning that handlers are free to sell all of the raisin crop on the open market.

15. Between 1920 and the Raisin Marketing Order's implementation in 1949, the market surplus for raisins had consistently been thirty to fifty percent. Horne v. USDA, 673 F.3d 1071, 1075 (9th Cir. 2012), *rev'd*, 133 S. Ct. 2053 (2013) (citing Parker v. Brown, 317 U.S. 341, 363–64 (1943)), *rev'd*, 133 S. Ct. 2053 (2013), *remanded to* 750 F.3d 1128 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015).

16. 7 U.S.C. § 608(c)(6)(E) (2012); *Horne*, 673 F.3d at 1075; 7 C.F.R. §§ 989.54(d), 989.65 (2014).

17. *Horne*, 673 F.3d at 1075.

18. 7 C.F.R. §§ 989.35, 989.36 (2014); *Horne*, 673 F.3d at 1075.

19. *Horne*, 673 F.3d at 1075–76.

20. 7 U.S.C. §§ 608(c)(1), 608(c)(13)(B) (2012); *Horne*, 673 F.3d at 1074–75.

21. 7 U.S.C. §§ 608(c)(1), 608(c)(13)(B) (2012); *Horne*, 673 F.3d at 1074–75.

handler failing to comply with the terms of a marketing order is subject to civil forfeiture, as well as to civil and criminal penalties.[22]

As a result of the reserve tonnage requirement, a producer only receives payment from handlers for the free tonnage raisins.[23] The handler may then sell the free tonnage raisins on the domestic raisin market without restrictions.[24] The handlers must set aside reserve tonnage raisins in separate bins for the RAC. The RAC then sells these raisins on export markets or directs that they be distributed on secondary-noncompetitive markets, either by direct sale or by gift to various federal agencies.[25] The proceeds from the reserve tonnage sales are then used to finance the administration of the RAC.[26] Any remaining proceeds are distributed to producers on a pro rata basis.[27] Upon delivery to handlers, producers surrender all property interests in the reserve tonnage raisins, aside from the potential of sharing in the RAC's profits.[28] During the years at issue in this case, however, no profits were distributed from the RAC back to the raisin producers.[29]

B. The Hornes' Raisin Activities

In 1969, Marvin and Laura Horne began farming raisins in the Fresno and Madera Counties of California.[30] In 1999, they registered Raisin Valley Farms ("Raisin Valley") as a California general partnership.[31] The Hornes also own and operate Lassen Vineyards, another general partnership registered in California.[32] Frustrated with what they viewed as an outdated and exploitive regulatory structure, the Hornes implemented a plan to bring their raisins to market without the use of a third-party handler. Instead, the Hornes purchased or leased equipment to handle their own raisin crops. The Hornes then performed the traditional function of a handler with respect to the raisins they produced.[33] Accordingly, Lassen Vineyards handled raisins produced by Raisin Valley and those produced by a collection of sixty other raisin farmers in California. Records filed with the

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22. 7 U.S.C. §§ 608(a)(5)–(6), 608(c)(14)(B) (2012). Section 608(c)(14)(B) authorizes civil penalties up to $1000 per violation with each day that the violation continues constituting a separate violation. 7 U.S.C. § 608(c)(14)(B).

23. 7 C.F.R. § 989.65; *Horne*, 673 F.3d at 1076.

24. *Horne*, 673 F.3d at 1076; 7 C.F.R. § 989.65.

25. 7 C.F.R. §§ 989.65, 989.67, 989.167; *Horne*, 673 F.3d at 1076.

26. 7 C.F.R. §§ 989.65, 989.67, 989.167; *Horne*, 673 F.3d at 1076.

27. 7 U.S.C. § 608(c)(6)(E); 7 C.F.R. § 989.66(h); *Horne*, 673 F.3d 1071 at 1076.

28. *Horne*, 673 F.3d at 1076.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

USDA indicate that Lassen Vineyards "packed-out" more than 1.2 million pounds of raisins during the 2002–2003 crop year and more than 1.9 million pounds in the 2003–2004 crop year.[34] The Hornes anticipated that such an arrangement would not require them to abide by the USDA's marketing order, including the annual reserve requirement.[35]

During the 2002–2003 and 2003–2004 crop years,[36] Lassen Vineyards never acquired title to the raisins of other producers, but instead charged the producers a per-pound fee for packing services.[37] The Hornes then marketed and sold the raisins of the California producers to wholesale customers, while the producers retained full ownership of the raisins.[38] According to this arrangement, the Hornes did not believe that they fell within the definition of a "handler" as outlined by the AMAA. Therefore, the Hornes did not expect that the requirements of the Raisin Marketing Order, most importantly, the requirement to set aside reserve tonnage raisins, would apply to their activities.[39] For the Hornes, the reserve tonnage requirement was 632,427 pounds for the 2002–2003 crop year and 611,159 pounds for the 2003–2004 crop year.[40]

C. Legal Action Against the Hornes

On April 1, 2004, the Administrator of the Agricultural Marketing Service levied an action against the Hornes, alleging numerous violations of the AMAA and failure to comply with the Raisin Marketing Order.[41] The complaint also alleged that the Hornes acted as handlers under the AMAA and violated the AMAA by failing to hold raisins in reserve for the RAC.[42] A hearing on the administrator's complaint took place February 9–11, 2005.[43] Following the hearing, the Administrative Law Judge ("ALJ") issued a decision and order finding that the Hornes acted as handlers of raisins and were therefore subject to the Marketing Order.[44] The ALJ ordered the Hornes to pay $731,500 in civil penalties, $9389.73 in assessments, and an additional $523,037 for the dollar equivalent of the

34. *Id.* at 1077.
35. *Id.* at 1076.
36. The crop year for raisins begins on August 1 and ends on July 31 of the following year. Horne v. USDA, No. CV-F-08-1549 LJO SMS, 2009 WL 4895362, at *2 n.1 (E.D. Cal. Dec. 11, 2009), *aff'd*, 673 F.3d 1071 (9th Cir. 2012), *rev'd*, 133 S. Ct. 2053 (2013), *remanded to* 750 F.3d 1128 (9th Cir. 2014), *rev'd*, 135 S. Ct. (2015).
37. *Horne*, 673 F.3d at 1077.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Horne*, WL 4895362, at *5.
42. *Id.*
43. *Id.*
44. *Id.*

raisins that the Hornes failed to hold in reserve.[45] Subsequently, the Hornes appealed the ALJ's decision. A USDA Judicial Officer found that the Hornes were liable for several violations.[46] Notably, the Judicial Officer concluded that the Hornes were liable for 592 violations for their failure to hold raisins in reserve according to the Raisin Marketing Order.[47] Accordingly, the Judicial Officer ordered the Hornes to pay $483,843.53, the alleged equivalent of the withheld raisins that otherwise would have been set aside for the reserve requirement (632,427 pounds in 2002–2003 and 611,159 pounds in 2003–2004), $202,600 in civil penalties, and $8783.39 in unpaid assessments.[48] The Hornes subsequently filed an action in the United States District Court for the Eastern District of California, seeking judicial review of the USDA's final decision.[49]

On cross-motions for summary judgment, the court granted summary judgment for the government.[50] The district court explained that the ALJ relied on ample evidence to support the fact that the Hornes were handlers according to the AMAA.[51] As handlers, the Hornes were required to submit the mandated reserve percentage of their raisin crop to the RAC.[52] The court rejected the Hornes' argument that they were producers, and therefore, they were exempt from the requirements of the AMAA.[53] While the Hornes may have produced some of the raisins at issue, they also provided all of the handling. Therefore, the court concluded the Hornes operated as handlers under the AMAA.[54]

The Hornes then filed a timely appeal in the United States Court of Appeals for the Ninth Circuit.[55] Before the Ninth Circuit, the Hornes made three arguments: First, they were producers of raisins and therefore not subject to the Raisin Marketing Order's requirements;[56] second, even if subjected to the provisions of the Raisin Marketing Order, the reserve

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45. *Id.*

46. The Judicial Officer found the Hornes liable for twenty violations of 7 C.F.R. § 989.73 (filing inaccurate reports), fifty-eight violations of 7 C.F.R. § 989.52(d) (failing to obtain incoming inspections), two violations of 7 C.F.R. § 989.80 (failing to pay assessments to the RAC), and one violation of 7 C.F.R. § 989.77 (failing to allow the Agricultural Marketing Service to access records). Horne v. USDA, 673 F.3d 1071, 1077 (9th Cir. 2012), *rev'd*, 133 S. Ct. 2053 (2013), *remanded to* 750 F.3d 1128 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015).

47. *Horne*, 673 F.3d at 1077.

48. *Id.* The Judicial Officer found fewer violations and therefore issued a smaller fine.

49. *Id.*

50. *Horne*, WL 4895362, at *28.

51. *Id.* at *11–13.

52. *Id.* at *9.

53. *Id.* at *8–9.

54. *Id.* at *9.

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

56. *Id.*

requirement constituted an uncompensated per se taking in violation of the Fifth Amendment's Takings Clause;[57] and finally, the penalties imposed by the Judicial Officer violated the Eighth Amendment's Excessive Fines Clause.[58] Regarding their first argument, the court deferred to the judgment of the USDA and concluded that the Hornes ought to be considered handlers for purposes of the Raisin Marketing Order.[59] Additionally, the court held that the fines imposed by the Judicial Officer did not violate the Eighth Amendment, reasoning that the Hornes failed to demonstrate that the fines imposed were "grossly disproportional to the gravity of [the] offense."[60] The court also rejected the Hornes' Fifth Amendment takings claim, explaining that the Tucker Act[61] required the Hornes to first bring their takings claim before the Court of Federal Claims.[62] Unfortunately, the court did not consider the substantive issues surrounding the Hornes' takings claim.

The Hornes then filed a petition for writ of certiorari before the Supreme Court of the United States. The Court granted certiorari on the sole issue of whether the Ninth Circuit had jurisdiction to review the Hornes' takings claim.[63] Writing the unanimous opinion of the Court, Justice Clarence Thomas explained that AMAA withdraws Tucker Act jurisdiction over a handler's takings claim. As a result, there was no alternative remedial scheme through which the Hornes must proceed before obtaining their claim under the AMAA.[64] The Court reversed the Ninth Circuit and remanded for a further determination on the Hornes' takings claim.[65]

On remand, the Ninth Circuit considered, and ultimately rejected, the Hornes' takings claims.[66] The court relied on two landmark decisions, *Loretto v. Teleprompter Manhattan CATV Corp.*[67] and *Lucas v. South Carolina Coastal Council*,[68] in holding that the Hornes did not suffer a taking requiring compensation. The court reasoned that the USDA's actions regarding the Hornes' raisins did not constitute a per se taking

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57. *Id.*

58. *Id.*

59. *Id.* at 1078.

60. *Id.* at 1080–82 (quoting United States v. Bajakajian, 524 U.S. 321, 334 (1998)).

61. The Tucker Act vests jurisdiction over takings claims, "founded either upon the Constitution or any Act of Congress or any regulation of an executive department" in the Court of Federal Claims. Horne v. USDA (*Horne I*), 133 S. Ct. 2053, 2062 (2013) (quoting 28 U.S.C. § 1491(a)(1) (2012)), *remanded to* 750 F.3d 1128 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015).

62. *Horne*, 673 F.3d at 1080.

63. 133 S. Ct. 638 (2012).

64. *Id.* at 2062–63.

65. *Id.* at 2064.

66. Horne v. USDA, 750 F.3d 1128 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015).

67. 458 U.S. 419 (1982).

68. 505 U.S. 1003 (1992).

because *Loretto* and *Lucas* hold that per se takings occur only when there is a permanent physical occupation or when the original property owner is deprived of all economic value.[69] The Hornes retained an ownership stake in the raisins (though slight) and benefited from the activities of the RAC. Therefore, the court held the reserve requirement of the Raisin Marketing Order did not effect a taking on the Hornes.[70] Furthermore, the court relied on *Dolan v. City of Tigard*[71] and *Nollan v. California Coastal Commission*[72] to hold that the reserve requirement was akin to a use restriction, similar to a government condition on the grant of a land use permit.

The Hornes appealed once again, and the Supreme Court granted certiorari to answer three questions. First, "[w]hether the government's 'categorical duty' under the Fifth Amendment to pay just compensation 'when it physically takes possession of an interest in property' . . . applies only to real property and not to personal property."[73] Second, "[w]hether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion."[74] And finally, "[w]hether a governmental mandate to relinquish specific, identifiable property as a 'condition' on permission to engage in commerce effects a per se taking."[75]

II. LEGAL BACKGROUND

The Takings Clause of the Fifth Amendment provides, "nor shall private property be taken for public use, without just compensation."[76] Regulatory takings occur when a government action significantly curtails property rights but does not exercise eminent domain authority.[77] The Supreme Court's decisions in *Pennsylvania Coal Co. v. Mahon*[78] and *Penn Central Transportation Co. v. New York City*[79] have served as the foundation of modern Takings Clause jurisprudence.[80] According to the modern doctrine, while the state possesses the power to regulate property,

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69. *Horne*, 750 F.3d at 1139–41.
70. *Id.*
71. 512 U.S. 374 (1994).
72. 483 U.S. 825 (1987).
73. Horne v. USDA (*Horne II*), 135 S. Ct. 2419, 2425 (2015) (citing Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 518 (2012)).
74. *Id.* at 2428.
75. *Id.* at 2430.
76. U.S. CONST. amend. V.
77. *See infra* Part II.A.
78. 260 U.S. 393 (1922).
79. 438 U.S. 104 (1978).
80. *See infra* Part II.A.

when such regulation "goes too far," such action will amount to a taking.[81] Upon determining that a taking has occurred, regulatory or otherwise, courts must consider the amount of compensation due to the property owner.[82] When making a determination of just compensation, the Supreme Court requires consideration of any benefits the property owner incurred as a result of the taking.[83]

A. *The Origins of the United States Supreme Court's Modern Takings Framework—*Mahon*,* Penn Central*, and Subsequent Applications*

Pennsylvania Coal Co. v. Mahon and *Penn Central Transportation Co. v. New York City* constitute the bedrock of modern regulatory takings jurisprudence.[84] Following *Mahon* and *Penn Central*, the Court has articulated two categories as the main divisions of the per se takings: permanent physical occupation[85] and complete deprivation of all economic use.[86]

1. Mahon *and* Penn Central *Tests*

In 1922, in *Pennsylvania Coal Co. v. Mahon*, the Court considered whether a regulation amounted to a taking, and therefore, required just compensation pursuant to the Fifth Amendment.[87] The Court considered whether compensation following a taking of merely a portion of land, for purposes of a public road, should be offset by the benefits bestowed upon the property owner as a direct result of the taking.[88] At that time, the statute eliminated a property interest retained by coal companies in the mining rights beneath residential properties.[89] The Pennsylvania statute completely abrogated any right the coal companies retained in the coal.[90] The Court ruled that the statute in question amounted to a taking, requiring just compensation.[91] Quoting a decision from the Supreme Court of Pennsylvania, the Court stated, "[f]or practical purposes, the right to coal consists in the right to mine it."[92] Justice Holmes stated that, "while

81. *Mahon*, 260 U.S. at 415.
82. *See infra* Part II.B.
83. *See infra* Part II.B.
84. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537–40 (2005).
85. Loretto v. Manhattan Teleprompter CATV Corp., 458 U.S. 419 (1982).
86. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
87. 260 U.S. 393 (1922).
88. *Id.* at 412–13.
89. *Id.*
90. *Id.* at 413.
91. *Id.* at 415.
92. *Id.* at 414 (quoting Commonwealth v. Clearview Coal Co., 100 A. 820, 820 (Pa. 1917)).

property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[93]

While Pennsylvania acknowledged the need to maintain the integrity of residential property, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[94] The *Mahon* Court acknowledged a previous coal case, *Plymouth Coal Co. v. Pennsylvania*,[95] wherein the Court upheld a similar Pennsylvania statute.[96] In *Plymouth Coal*, the Court upheld a Pennsylvania statute requiring that pillars of coal remain in abandoned coal mines so that neighboring mines would not suffer a collapse, which may injure or kill other miners.[97] The distinction in these two outcomes rests in that the prohibition on mining the pillars, aimed to protect the coal miners, and therefore the coal companies themselves.[98]

In *Mahon*, the Court additionally recognized that when a property owner receives "reciprocity of advantage" from the government, no compensation need be issued.[99] Since *Mahon*, the Court continues to consider reciprocity of advantage when determining whether a taking has actually occurred, and further, whether compensation is due. In *Keystone Bituminous Coal Association v. DeBenedictus*,[100] the Court considered whether a coal mining regulation similar to that of *Mahon* amounted to a taking.[101] Justice Stevens explained that the regulation did not amount to a taking since the regulation aimed to support public interests that served the entire community.[102]

The "too far" test articulated in *Mahon* has been supplemented by the standard announced in *Penn Central Transportation Co. v. New York City*. In *Penn Central*, the Court again considered the question of whether a regulation amounted to a taking. In 1976, faced with mounting concerns that historical buildings would be demolished or otherwise altered as the city developed, New York City passed a measure aimed at protecting such

93. *Id.* at 415.

94. *Id.* at 416.

95. 232 U.S. 531 (1914).

96. *Mahon*, 260 U.S. at 415 (citing Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914)).

97. *Plymouth Coal Co.*, 232 U.S. at 539–40.

98. *Mahon*, 260 U.S. at 415.

99. *Id.*

100. 480 U.S. 470 (1987).

101. *Id.* Specifically, the regulation at issue empowered the Pennsylvania Department of Environmental Resources to prevent the mining of coal that could cause ground collapses and building damages. *Id.* at 476.

102. *See id.* at 491 ("The Court's hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of 'reciprocity of advantage' . . . . While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.").

locations.[103] The City required that buildings designated as historic landmarks remain unaltered unless the City issued prior approval.[104] In the event that the City did not approve the building for further development, the development rights could be sold to neighboring buildings not designated as historic landmarks.[105] When the City rejected a development plan from Penn Central Transportation Co. to construct an office building above Grand Central Terminal, Penn Central brought suit alleging that the City regulation amounted to a taking requiring compensation.[106]

The Court upheld the statute, reasoning that among the several factors important in the factual analysis of whether a taking has occurred are the "impact of the regulation on the claimant, and particularly the extent to which the regulation has interfered with *distinct* investment-backed expectations."[107] The Court explained that the property rights have "not been abrogated; they are made transferrable to . . . parcels in the vicinity of the Terminal. . . ."[108] Other government actions may not result in a confiscation of property such that all property rights are destroyed.[109] In some instances, the state may take action that allows for the retention of property ownership while restricting some use of the property.[110]

2. *Per Se Takings—Physical Occupation and Complete Deprivation of Economically Valuable Use*

Following the *Mahon* and *Penn Central* tests, in *Loretto v. Manhattan Teleprompter CATV*,[111] the Supreme Court considered whether a New York law requiring landlords to allow for a television company to install cable components on the property of landlords without compensation violated the Takings Clause.[112] The Court ultimately concluded that the permanent installations amounted to a taking according to the Fifth Amendment and required payment of compensation.[113] The Court recognized, "[p]roperty rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'"[114] When the government permanently and physically occupies property, "it effectively destroys *each* of these rights."[115] Unlike a

103. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 108–09 (1978).
104. *Id.* at 110–11.
105. *Id.* at 113–14.
106. *Id.* at 118–19.
107. *Id.* at 124 (emphasis added) (citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).
108. *Id.* at 137.
109. *Id.* at 124.
110. *Id.*
111. 458 U.S. 419 (1982).
112. *Id.*
113. *Id.*
114. *Id.* at 435 (quoting United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945)).
115. *Id.*

use restriction, such action requires compensation since the owner has no control over the "timing, extent, or nature of the invasion."[116] Under such circumstances, the regulation amounted to a taking.[117]

Additionally, in *Lucas v. South Carolina Coastal Council*,[118] the Court further explained which types of regulatory takings will require compensation.[119] The Court considered whether a regulation prohibiting *any* development of a beachfront property amounted to a taking.[120] The Court held that a regulation that diminishes *all* economic value of a property, amounted to a taking.[121]

B. The Supreme Court Requires Consideration of Benefits Incurred by a Property Owner When Determining Just Compensation

When a court determines that a taking has occurred, the court must then consider the amount of compensation owed. The Takings Clause is designed "not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking."[122] Broadly, the Supreme Court has enforced the Takings Clause as prohibiting the "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[123] Accordingly, when determining just compensation, the Court has required consideration of benefits or value retained by the property owner.[124] Further, given that the date of determination of fair market value for property taken can greatly affect the amount of compensation due, the Court has explained *when* such valuation should take place.[125]

1. Consideration of Benefits when Determining Compensation

In 1896, in *Bauman v. Ross*,[126] the Supreme Court acknowledged the need for courts to consider benefits incurred by a property owner when making a determination of just compensation. Specifically, the Court considered whether compensation following a taking of a portion of

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116. *Id.* at 436.
117. *Id.* at 441.
118. 505 U.S. 1003 (1992).
119. *Id.*
120. *Id.* at 1006–09.
121. *Id.* at 1027.
122. First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles, 482 U.S. 304, 315 (1987).
123. Armstrong v. United States, 364 U.S. 40, 49 (1960).
124. *See infra* Part II.B.1.
125. *See infra* Part II.B.2.
126. 167 U.S. 548 (1897).

property for purposes of a public road could be lessened to offset the benefits which the taking bestowed upon the property owner.[127] The Court ruled that courts should consider benefits incurred by property owners, since to disallow such consideration would not be "just compensation" for the value of the taken property.[128]

Likewise, in 1934, the Court again visited the compensation issue in *Olson v. United States*[129] and reiterated the position of *Bauman*. In *Olson*, the Court considered whether the special uses and adaptability of the property owner's shoreland should be taken into account when determining compensation, after the government obtained a flowage easement.[130] A property owner is entitled, the Court explained, "to be put in as good a position pecuniarily as if his property had not been taken."[131] The Court stated that, while a property owner is entitled to compensation when property is taken, "[h]e must be made whole but is not entitled to more."[132]

Additionally, the *Loretto* Court acknowledged that, in cases of physical occupation, "a court should consider the *extent* of the occupation as one relevant factor in determining the compensation due."[133] The Court explained that, with regard to compensation due to the landlords, a court should consider whether the installation of permanent television cables along the rooftops actually increased the value of the property.[134]

Another way to view the Court's consideration of benefits is the "net harm" rule utilized in *Brown v. Legal Foundation of Washington*.[135] There, the Court considered Washington's Interest on Lawyer Trust Accounts ("IOLTA") program.[136] The Court determined that while the Washington program amounted to a taking, no compensation was due.[137] If the client funds were deposited in private funds, the Court explained, the accounts

127. Bauman v. Ross, 167 U.S. 548, 567–68 (1897).

128. *Id.* at 570 (quoting Chesapeake & Ohio Canal v. Key, 3 Cranch C.C. 599, 601 (1829)).

129. 292 U.S. 246 (1934).

130. Olson v. United States, 292 U.S. 246, 248 (1934).

131. *Id.* at 255.

132. *Id.*

133. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 437 (1982).

134. *Id.* at 437 n.15.

135. 538 U.S. 216 (2003).

136. Washington created the Interest on Lawyers Trust Accounts program, which required lawyers to deposit all funds in interest bearing accounts. For larger funds, lawyers would normally return the interest earned from these accounts to the client. Under IOLTA, lawyers were required to deposit funds too small to feasibly earn interest (after accounting for banking fees) into larger IOLTA accounts. The interest from these IOLTA accounts was then deposited to the Legal Foundation of Washington, with the requirement that the foundation use the funds for law-related charitable and educational programs. Brown v. Legal Found. of Wash., 538 U.S. 216, 223–24 (2003).

137. *Id.* at 235–37.

would not have generated positive *net* interest after accounting for fees and other administrative costs.[138]

2. Determination of Fair Market Value

The date of a fair market value determination can greatly affect the amount of compensation rendered to a property owner. Generally, the Supreme Court has held that takings are to be valued on the date the property is taken.[139] The Court, however, has recognized the difficulty of determining fair market value when some property does not have a ready-made market.

In *United States v. Miller*,[140] the Court recognized the difficulty of defining the word "fair" within the meaning of fair market value when determining compensation after a taking has occurred.[141] Specifically, the Court considered whether the trial court properly excluded testimony regarding the potential *increase* in market value of property due to the government's authorization of, and commitment to, a project which would greatly increase the value of the property.[142] There, the Court stated that such value is to be determined "as of the date of taking."[143] Attempting to define "market value," the Court determined that such a valuation should be determined by "what a willing buyer would pay in cash to a willing seller."[144] Ultimately, the Court concluded that when deciding just compensation, courts need not consider any increase in the value of property following the completion of the government taking.[145]

Subsequently, in *Kimball Laundry Co. v. United States*,[146] the Court again turned to a consideration of when a calculation of just compensation should occur. In 1942, the government condemned the use of a commercial laundry for use by the United States Army through 1946.[147] At a jury trial in 1946, the jury awarded the laundry compensation of $70,000 for each year of the condemnation.[148] On appeal, Kimball Laundry argued that the jury should have considered the difference between the market value of the

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138. *Id.* at 237–40.

139. United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979).

140. 317 U.S. 369 (1943).

141. *Id.* at 374.

142. *Id.* at 372–73.

143. *Id.* at 374 (first citing 2 LEWIS EMINENT DOMAIN § 705 (3d. ed.); then citing Kerr v. S. Park Comm'rs, 117 U.S. 379, 386 (1886); and then citing Shoemaker v. United States, 147 U.S. 282, 304 (1893)).

144. *Id.*

145. *Id.* at 380–81.

146. 338 U.S. 1 (1949).

147. *Id.* at 3.

148. *Id.* at 4. The jury also awarded $43,776.03 for "damage to the plant and machinery beyond ordinary wear and tear." *Id.*

fee on the date of the taking and its market value on the date of its return.[149] The Court rejected this argument, holding that "determination of the value of [the taking] can be approached only on the supposition that free bargaining between [the laundry] and a hypothetical lessee . . . would have taken place . . . ."[150] The Court explained that the proper means of determining compensation rested in determining the "market price" of the property at the time of the taking.[151] The Court also noted that "when the property is of a kind seldom exchanged, it has no 'market price,' . . . [the Court must use] other means of ascertaining value . . . to other potential owners *enjoying the same rights*."[152]

III. THE COURT'S REASONING

In *Horne v. Department of Agriculture*, the Supreme Court, in an 8-1 majority, reversed the judgment of the Ninth Circuit and held that the Horne's raisins were taken without just compensation.[153] The *Horne* Court, in an opinion authored by Chief Justice John Roberts, provided unequivocal answers to all three questions of the certiorari petition. First, the Court held that the Fifth Amendment requires the government to pay compensation when it physically takes possession of personal property.[154] Second, the government may not avoid a duty to pay just compensation for a physical taking merely by reserving to the original property owner a contingent interest in the property, set at the government's discretion.[155] Finally, a governmental mandate requiring the surrender of specific, identifiable property as a condition to engage in commerce constitutes a per se taking.[156]

According to the majority, the reserve requirement of the Raisin Marketing Order was a direct appropriation of property, not a regulatory taking. Therefore, the *Lucas* requirement that a regulatory taking deprive a property owner of all economic value, before the government must provide compensation, did not apply to the Hornes' case.[157] In *Horne*, the RAC actually took title of the raisins and disposed of them as it wished. Chief Justice Roberts carefully explained that the government could prohibit the sale of raisins, without effecting a per se taking.[158] This fact, the Court

149. *Id.* at 6–7.
150. *Id.* at 7.
151. *Id.* at 6–7.
152. *Id.* at 6 (emphasis added).
153. *Horne II*, 135 S. Ct. 2419, 2433 (2015).
154. *Id.* at 2426–28.
155. *Id.* at 2428–30.
156. *Id.* at 2430–32.
157. *Id.* at 2427–28.
158. *Id.* at 2428.

explained, does not excuse a physical appropriation without just compensation, as the Constitution must provide the means to achieve such a goal.[159]

Turning to the second question, the Court reasoned that the Raisin Marketing Order still amounted to a taking, despite the fact that producers retained a contingent property interest in a portion of the value of the property.[160] The Court explained that when there has been a physical appropriation of property, "we do not ask . . . whether it deprives the owner of all economically valuable use."[161] The Court differentiated this case from *Andrus v. Allard*,[162] a case where the Court found no taking after the government prohibited the sale of certain historical artifacts. The majority determined that *Andrus* did not apply since the possessors of the artifacts still retained ownership of the property, whereas the raisin producers physically surrendered the raisins to the RAC.[163]

The *Horne* Court also held that a governmental mandate requiring the surrender of specific, identifiable property as a condition for permission to engage in commerce effects a per se taking.[164] The government argued that the reserve requirement was not a taking since the raisin producers and handlers voluntarily decided to enter into the raisin marketplace.[165] Chief Justice Roberts relied on *Loretto* to counter this argument, explaining that the law at issue in that case still constituted a taking, requiring just compensation even if a landlord could avoid the taking by ceasing to be a landlord.[166] Furthermore, the Court dismissed a comparison to *Ruckelshaus v. Monsanto Co.*,[167] as that case found no taking by the government where the property owners surrendered a license to sell dangerous chemicals.[168] The Court explained that raisins are not dangerous chemicals; they are a healthy snack.[169] The Court also distinguished *Horne* from *Leonard & Leonard v. Earle*,[170] where the Court upheld a Maryland regulation

159. *Id.* (quoting McCulloch v. Maryland, 17 U.S. 316, 421 (1819). "The Constitution, however, is concerned with means as well as ends. The Government has broad powers, but the means it uses to achieve its ends must be 'consist[ent] with the letter and spirit of the constitution.'" *Id.*

160. *Id.* at 2428–30.

161. *Id.* at 2429 (quoting Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 323 (2002)).

162. 444 U.S. 51 (1979).

163. *Horne II*, 135 S. Ct. at 2429.

164. *Id.* at 2430–31.

165. *Id.* at 2430 (citing Brief for Respondent at 32, *Horne II*, 135 S. Ct. 2419 (2015) (No. 14-275).

166. *Id.* (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439 (1982)).

167. 467 U.S. 986 (1984).

168. *Horne II*, 135 S. Ct. at 2430 (citing *Ruckelshaus*, 467 U.S. at 1007).

169. *Id.* at 2431.

170. 279 U.S. 392 (1929).

requiring commercial watermen to surrender ten percent of their oyster catch to the state. In that case, the Court viewed the oyster as *ferae naturae* and harvested from state waters.[171] In *Horne*, the raisins were the result of the Horne's hard work and harvested from private land, not a product of state-owned property.[172]

Finally, the Court concluded that no remand was necessary to determine the amount of compensation due.[173] The Court reasoned that the USDA had already determined that the reserve raisins would have had a market value of $483,843.53, and therefore, the government could not subsequently disavow that valuation.[174]

Justice Breyer, joined by Justice Ginsburg and Justice Kagan, concurred in part and dissented in part with the majority. The concurring portion of the opinion agreed that the Raisin Marketing Order effected a taking on the Hornes.[175] The dissenting portion reasoned that the case should be remanded to the Ninth Circuit in order to determine the level of compensation due to the Hornes. Justice Breyer explained that the reserve requirement increases the value of free tonnage raisins.[176] While the value of the raisins taken may exceed the benefit passed on through the increase in price of free tonnage raisins, the benefit might equal or exceed the value of the raisins taken, in which case, the Raisin Marketing Order does not effect a taking.[177]

Justice Thomas penned a solo concurrence in response to Justice Breyer's concurring and dissenting opinion. Justice Thomas emphasized that the actions of the RAC can scarcely be considered as performing a valuable service for the Hornes.[178] Therefore, there was no need to remand to the Ninth Circuit for a further determination of compensation.[179]

Justice Sotomayor authored a solo dissent, in which she reasoned that the Raisin Marketing Order did not effect a per se taking since the Hornes were not deprived of all of their property rights in the raisins.[180] Justice Sotomayor relied on *Andrus v. Allard* for the proposition that governmental action reducing the value of property or imposing "a significant restriction . . . on one means of disposing" of property is not a per se

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171. *Horne II*, 135 S. Ct. at 2431 (citing *Leonard*, 279 U.S. at 396).

172. *Id.*

173. *Id.* at 2432–33.

174. *Id.* at 2433.

175. *Id.* (Breyer, J., concurring in part and dissenting in part).

176. *Id.* at 2434.

177. *Id.* at 2435 (first citing McCoy v. Union Elevated R. Co., 247 U.S. 354, 366 (1918); and then citing Brown v. Legal Found. of Wash., 538 U.S. 216, 237 (2003)).

178. *Id.* at 2433 (Thomas, J., concurring).

179. *Id.*

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

taking.[181] In order for there to be a per se taking, the government must take *every* property right of the owner.[182] The dissent reasoned that the Raisin Marketing Order did not effectuate a per se taking since the Hornes still retained at least one property interest in the raisins surrendered to the RAC: the right to receive some compensation following the RAC's sale of the raisins.[183] She explained that the majority has blurred the bright line test of *Loretto* and made it harder to determine when government action effects a per se taking.[184] Justice Sotomayor also explained that, according to *Leonard* and *Ruckelshaus*, the government could impose the surrender of some property as a condition to engage in interstate commerce.[185]

IV. ANALYSIS

In *Horne v. Department of Agriculture*,[186] the Court quickly dismissed the claim that the Hornes were compensated, at least to some degree, through the USDA marketing program.[187] Rather than dismissing this argument so abruptly, the Court should have, as urged by Justice Breyer, considered the financial benefits of the raisin marketing program when determining the compensation for the Hornes.[188] Specifically, the Court erred in its analysis of the "fair market value" of the raisins.[189] When determining the award of just compensation for the Hornes, the Court utilized the fair market value of the raisins *with the RAC price support*.[190] Instead, the Court should have remanded for a determination of compensation accounting for the benefits bestowed upon the Hornes by the RAC program. This would have allowed for a determination of (1) the fair market value *without* the RAC price support, and (2) the benefits incurred by the Hornes as a result of the regulatory activities provided by the

181. *Id.* at 2438 (citing Andrus v. Allard, 444 U.S. 51, 65–66 (1979)).

182. *Id.*

183. *Id.* at 2438–39.

184. *Id.* at 2441–42.

185. *Id.* at 2440–41.

186. *Horne II*, 135 S. Ct. 2419 (2015). Among other things, the Court's decision in *Horne* has been criticized by several property scholars. Many concerns with the *Horne* decision relate to the Court's statutory analysis of whether the Hornes were in fact "handlers" and not "producers" of raisins. John D. Echeverria & Michael C. Blumm, Horne v. Department of Agriculture: *Expanding Per Se Takings While Endorsing State Sovereign Ownership of Wildlife*, 75 MD. L. REV. 657 (2016). Further criticism has been levied against the decision with respect to the Court's analysis of whether the RAC program works a taking. Lyndia L. Butler, *The* Horne *Dilemma: Protecting Property's Richness and Frontiers*, 75 MD. L. REV. 787 (2016); Echeverria, *supra*.

187. *Horne II*, 135 S. Ct. at 2431–33.

188. *See infra* Part IV.A.2.

189. *See infra* Part IV.A.1.

190. *Horne II*, 135 S. Ct. at 2440–41 (Sotomayor, J., dissenting).

RAC.[191] Ultimately, the Court's conclusion regarding calculation of fair market value threatens to provide future claimants a means of unjust enrichment.[192] *Horne* will likely permit a court to calculate just compensation *after* a taking, rather than the traditional practice of determining just compensation *before* a taking.[193]

A. The Horne *Court Provided Unfair Compensation to the Hornes*

Compensation plays a vitally important role in the system of takings jurisprudence.[194] As many legal scholars have noted, the rights and protections against takings are only as strong as the enforcement of these protections by the courts.[195] For example, a court may be quick to determine that a government action amounted to a taking, yet without compensation for the taking, such a determination will likely be worthless, in economic terms, to the former property owner.[196] One would have expected the majority in *Horne* to consider the issue of compensation, given the importance such a determination can have on shaping the protection of the Takings Clause. Instead, the *Horne* Court dismissed any consideration of benefits which the RAC price stabilization program bestowed upon the Hornes.[197] The Court should have followed the rule from *United States v. Miller*,[198] setting just compensation at the price a willing buyer would have paid to a willing seller.[199] The Court also failed to acknowledge the rule from *Brown v. Legal Foundation of Washington*[200] requiring that, in the event that there is no net harm to the original property owner, no compensation is due.[201]

1. The Horne *Court Failed to Consider the Price of Raisins Without the RAC Price Support Program, as Required by Precedent*

Following a determination that a taking has occurred, a further determination of fair market value can be especially difficult for courts.

191. *See infra* Part IV.A.
192. *See infra* Part IV.B.
193. *See infra* Part IV.B.
194. KARL NICKERSON LLEWELLYN, THE BRAMBLE BUSH 84 (1960).
195. *Id.*
196. Likewise, the state should view a proper determination of compensation as vitally important. If courts consistently overcompensate property owners, or fail to base such determinations upon economic realities, the state would lose predictability of costs relating to takings and may ultimately be ordered to pay more than "just compensation."
197. *Horne II*, 135 S. Ct. 2419, 2431–33 (2015).
198. 317 U.S. 369 (1943).
199. *Id.* at 374.
200. 538 U.S. 216 (2003).
201. *Id.* at 237.

Specifically, the paradoxical nature of "fair market value" must be acknowledged. In the context of eminent domain cases, a determination of fair market value usually occurs after negotiations for the property fail to reach a compromise.[202] Fair market value refers to a guess at a price, or put another way, a hypothetical consideration of the property's value had the exchange been voluntary rather than compelled.[203] In *Miller*, the Court explained that fair market value means the price that a willing buyer would pay.[204] In *Horne*, the Court did not consider fair market value, presumably because the Hornes found a willing buyer who then purchased the Horne's raisins at the price set by the RAC.[205] At first glance, the Hornes selling their raisins might indicate that the price they charged reflects the fair market value of the property. This superficial conclusion, however, fails to consider the nature of the RAC price stabilization program.

The price stabilization program operates to *increase* and stabilize the price of raisins per ton by limiting supply.[206] The Hornes, however, chose not to follow the RAC's program for price stabilization. The price of raisins that the Hornes received was dependent upon the supply of raisins being limited by the reserve requirements set out by the RAC for the 2002–2003 and 2003–2004 crop years.[207] Therefore, although the Hornes found a willing buyer for their raisins, the price paid by the buyer was fully dependent on the RAC price stabilization program, which the Hornes openly rejected. Without the price stabilization program, the Hornes likely would not have found a buyer at the price they ultimately received. As suggested by Justice Breyer, the Hornes would have received a much lower price for their raisins in the absence of the RAC price support program because, if all raisin farmers could have sold their *entire* crop, supply would have drastically increased.[208] The compensation, which the Court ultimately issued, was not fair market value as explained by *Miller*, since the compensation was not the price a "willing buyer" would have paid.[209] For this reason, the Court should have remanded for a further determination of price per ton for raisins if the price stabilization program were not in place.

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202. THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 1250 (Robert C. Clark et al. eds., 2d ed. 2012).

203. *Id.*

204. *Miller*, 317 U.S. at 374.

205. *Horne II*, 135 S. Ct. 2419, 2431–33 (2015).

206. Horne v. USDA, 673 F.3d 1071, 1075 (9th Cir. 2012), *rev'd*, 133 S. Ct. 2053 (2013), *remanded to* 750 F.3d 1128 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015).

207. *Id.*

208. *Horne II*, 135 S. Ct. at 2434 (2015) (Breyer, J., concurring in part and dissenting in part). It is important to note that this assertion assumes that raisin demand did not also drastically increase.

209. *Miller*, 317 U.S. at 374.

Furthermore, the *Horne* Court's decision to award just compensation runs counter to the Court's earlier decision in *Brown v. Legal Foundation of Washington*.[210] The RAC could have limited the supply of raisins through alternative means. For example, the RAC could have limited the number of raisins harvested each year, or simply limited the amount of raisins ultimately sold on the open market. The Court has previously condoned the state's power to flatly prohibit the sale of agricultural products in the pursuit of price stabilization.[211] While the RAC program went beyond a simple prohibition on the selling of raisins,[212] the set-aside program has the same effect as a bare prohibition—limiting the supply of raisins in an effort to stabilize prices. Had the Hornes followed RAC regulations, this prohibition would have precluded their raisins from purchase by a willing buyer.

In *Brown*, the regulation in question also placed a limit on what could be done with property.[213] When the litigants in *Brown* claimed that the limitation required compensation, the Court considered whether the litigants would have been compensated by the market in the absence of the regulation.[214] The *Brown* Court explained that no compensation was due since, without the regulation, the lawyers would not have earned enough interest on the trust accounts and in the end, might have actually lost money.[215] Just as the *Brown* Court considered whether the litigants would have profited without the IOLTA program, the *Horne* Court should have considered the economic impact of ending the RAC set-aside requirement. Instead, the *Horne* Court simply accepted the Hornes' definition of fair market value as the price of raisins with the price stabilization program in effect.[216]

Temporally, the *Horne* Court's decision to value the raisins *after* a taking runs counter to the Court's previous takings decisions. In *Miller* and

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210. 538 U.S. 216 (2003).

211. *See* Wickard v. Filburn, 317 U.S. 111 (1942) (concluding that production quotas for agricultural products are constitutional given the impact of such regulations on interstate commerce).

212. The RAC utilized a set aside program to stabilize the price of raisins domestically. Through the program, raisin producers reserved a portion of their crop each year for use by the RAC. Producers could not sell any portion of this crop on the open market. *See* text accompanying *supra* notes 14–22.

213. Specifically, the regulation in *Brown* required the deposit of client funds into certain IOLTA trust fund accounts, thereby prohibiting clients from earning interest on their funds. *See supra* note 135.

214. *Brown*, 538 U.S. at 237–40.

215. *Id.*

216. *Horne II*, 135 S. Ct. 2419, 2431–33 (2015). The *Horne* Majority stated: "The Government has already calculated the amount of just compensation in this case, when it fined the Hornes the fair market value of the raisins . . . ." *Id.* at 2433. The Court then reasoned: "The Government cannot now disavow that valuation . . . ." *Id.*

Kimball Laundry Co. v. United States,[217] the Court required the valuation of a taking to be determined *before* the taking occurs.[218] In *Miller* and *Kimball Laundry*, the claimants attempted to receive higher compensation after the government actions *increased* the value of the property.[219] Likewise, in *Miller*, the Court held the compensation due was that which a willing buyer would pay at the time of the taking.[220] The *Kimball* Court rejected this argument and required that the value of the taken property was the value before the taking occurred.[221] The *Horne* Court failed to reach such a conclusion in similar circumstances. The Hornes based their claim on the value of the raisins *after* the RAC program had already increased the price of raisins.[222] Such a decision fails to follow the Court's previous decisions in *Miller* and *Kimball Laundry*, requiring a valuation of compensation *before* or at the time of the taking. The *Horne* decision will impact future takings claims, as it may permit takings claimants to receive higher levels of compensation.[223]

2. *The* Horne *Court Failed to Consider Additional Regulatory Benefits Incurred by the Hornes*

Beyond failing to consider how the RAC price stabilization program impacted the price that the Hornes ultimately received, the *Horne* Court also prevented any consideration of the benefits incurred by the Hornes as a result of the RAC program. The Court held that "general regulatory activity such as enforcement of quality standards can[not] constitute just compensation for a specific physical taking."[224] Instead, the Court should have considered the regulatory benefits incurred by the Hornes as a result of the RAC enforcement.

The Court in *Armstrong v. United States*[225] elaborated on the intention behind the Fifth Amendment's prohibition on the taking of private property without just compensation.[226] Specifically, the Court explained that the starting point for takings claims should be whether the "government [is] forcing some people alone to bear public burdens which, in all fairness and

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217. 338 U.S. 1 (1949).

218. Kimball Laundry Co. v. United States, 338 U.S. 1, 7 (1949); United States v. Miller, 317 U.S. 369, 380–81 (1943).

219. *Id.*

220. *Miller*, 317 U.S. at 380–81.

221. *Kimball Laundry Co.*, 338 U.S. at 6–7.

222. Horne v. USDA, 673 F.3d 1071, 1075–77 (9th Cir. 2012), *rev'd*, 133 S. Ct. 2053 (2013), *remanded to* 750 F.3d 1128 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015).

223. *See infra* Part IV.B.

224. *Horne II*, 135 S. Ct. 2419, 2432 (2015).

225. 364 U.S. 40 (1960).

226. *Id.* at 49.

justice, should be borne by the public as a whole."[227] Right away, the Court's general statement in *Armstrong* should lead one to question the reasoning in *Horne*. Several aspects of the RAC price stabilization program are intended for the protection of raisin farmers, and not those of the general public. The RAC price stabilization program serves as the best example of an exclusive benefit upon the raisin farmers. Without the price stabilization program, the market would be flooded with the entirety of each year's raisin crop. This would lead to lower prices, which would be economically advantageous to the population as a whole.[228] Therefore, the RAC price stabilization program serves to benefit the farmers *themselves*. Additionally, the RAC oversees quality control of raisins sold in the United States. There may be some merit to the argument that society as a whole benefits from the RAC regulation. The quality control program more likely protects the interests of raisin producers, providing peace of mind to consumers that the raisins sold in the United States are suitable for consumption.

In his dissent, Justice Breyer reasons that the majority should have remanded for a further determination of just compensation accounting for these benefits.[229] To bolster his position, Justice Breyer relies on the Court's previous decision in *Bauman v. Ross*.[230] In *Bauman*, the Court considered whether an award of just compensation should be lessened by accounting for the increase in property value after taking a *portion* of the property for the purpose of a building a public roadway.[231] The Court concluded that compensation must be adjusted for the benefits incurred from a taking.[232] In *Horne*, however, the Court failed to acknowledge the need for consideration of these benefits. Just as the claimants in *Bauman* had a portion of their land taken for public use, the Hornes had a portion of their raisin crop taken. The Court parted with *Bauman*, refusing to allow for any consideration of the benefits received by the Hornes. The majority claims that the government and Justice Breyer fail to cite "support for its hypothetical-based approach [regarding benefits incurred by the Hornes]."[233] Ironically, the majority fails to cite any support to reach the conclusion that *Bauman* should not apply.[234] The Court's decision in *Kimball Laundry* noted that intangibles, such as a business's goodwill and "earning power due to effective organization," are often more important

227. *Id.*

228. The conclusion relies on the safe assumption that most of the population does not produce raisins.

229. *Horne II*, 135 S. Ct. at 2433–36 (Breyer, J., concurring and dissenting).

230. *Id.* at 2434.

231. Bauman v. Ross, 167 U.S. 548, 567–68 (1896).

232. *Id.* at 570 (quoting Chesapeake & Ohio Canal v. Key, 3 Cranch C.C. 599, 601 (1829)).

233. *Horne II*, 135 S. Ct. at 2432.

234. *Id.* at 2431–33.

elements than the value of tangible property.[235] If intangibles such as goodwill and effective organization should be considered when determining just compensation, it seems only fair that intangible benefits such as stable raisin prices each year, quality control standards, and promotional activities of the RAC should also be considered. The *Horne* majority simply dismissed reducing just compensation for "general regulatory activity."[236]

The Court's cabined view of the loss suffered by the Hornes highlights the confusion of the majority's analysis. The Court considered only the value of the raisins taken, without any consideration of the rest of the raisin crop, or other benefits incurred by the raisin farmers. In a sense, the Court closed its eyes to the fact that the reserve portion of the crop, the part at issue in *Horne*, was only a *portion* of the raisin crop. This highlights a recurring theme in taking's cases—the denominator problem. The "denominator problem" refers to the issue of considering the "scope of the 'thing' subject to devaluation" following a taking.[237] Keeping with the parlance of the problem's title, the denominator problem can be best understood in the context of a fraction. The numerator, or the top part of the fraction, represents the economic harm to a particular piece of property caused by a taking.[238] The denominator, or the bottom part of the fraction, is the total value of the relevant piece of property, including that which is not subjected to the regulation.[239] In terms of the denominator problem, the *Horne* Court considered the raisin crop subject to the reserve requirement as both the numerator and the denominator. For the majority, the reserve portion of the raisin crop was the beginning, middle, and end of the story. Justice Breyer, however, noted the bigger picture, arguing that the *entire* crop, that is, not just the reserve raisins, were impacted and in some way, assigned a higher economic value as a result of the RAC program.

The consideration of benefits incurred as a result of the taking was even condoned in one case cited by the majority. In *Loretto v. Teleprompter Manhattan CATV Corp.*,[240] the Court concluded that the mandatory installation of television cables along the rooftops of apartment buildings amounted to a taking.[241] The *Loretto* Court acknowledged that when determining compensation, some consideration would need to be given to the possibility that the apartments *increased* in value as a result of

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235. Kimball Laundry Co. v. United States, 338 U.S. 1, 11 (1949) (quoting Galveston Elec. Co. v. Galveston, 258 U.S. 388, 396 (1922)).

236. *Horne II*, 135 S. Ct. at 2432.

237. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192–93 (1967).

238. Walcek v. United States, 49 Fed. Cl. 248, 258–59 (2001).

239. *Id.*

240. 458 U.S. 419 (1982).

241. *Id.* at 441.

the installation of the cables.[242] Despite the *Horne* Court's heavy reliance on *Loretto* in other parts of its analysis, the Court failed to acknowledge *Loretto's* call to adjust compensation.[243]

B. *The* Horne *Decision Will Facilitate Unjust Enrichment of Future Takings Claimants*

The *Horne* Court should have recognized the benefits received by the Hornes as a result of the RAC stabilization program and remanded for a further determination regarding the proper level of just compensation, accounting for these economic benefits. The majority dismissed concerns that, "this case will affect provisions concerning whether a condemning authority may deduct special benefits . . . from the amount of compensation it seeks to pay a landowner suffering a partial taking."[244] Instead, the Court simply stated, "[such cases] do not create a generally applicable exception to the usual compensation rule, based on asserted regulatory benefits of the sort at issue here."[245] There are examples of situations, however, where the *Horne* Court's analysis of just compensation may have a substantial impact on the payment of future takings claimants. Already, courts across the United States have relied on *Horne* as support for ordering increased compensation of takings claimants. Prior to the Court's decision in *Horne*, the rule that just compensation be determined *at the time* a taking occurred served as a well settled principle of takings jurisprudence.[246] Put another way, takings claimants could not, prior to *Horne*, base their claims on the value of the property *after* it is taken and subsequently improved by the condemning authority.

An example from Baltimore, Maryland demonstrates the difference in property valuation. When building Oriole Park at Camden Yards and Ravens Stadium in the 1990s, the Maryland Stadium Authority paid nearly $100 million to purchase the land for the venues from nearly two dozen businesses.[247] Before construction began, the Maryland General Assembly granted the Maryland Stadium Authority the statutory authority to seek condemnation of land for stadium construction.[248] According to the Real Property chapter of the Maryland Code, "the value of the property sought to

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242. *Id.* at 441 n.15.

243. *Horne II*, 135 S. Ct. 2419, 2432 (2015).

244. *Id.*

245. *Id.*

246. United States v. Miller, 317 U.S. 369, 374 (1943) (first citing Kerr v. S. Park Comm'rs, 117 U.S. 379, 386 (1886); then citing Shoemaker v. United States, 147 U.S. 282, 304 (1892); and then citing United States v. Twin City Power Co., 350 U.S. 222, 228 (1956)).

247. Jon Morgan, *Arguing Worth of Ravens Stadium: Cost Efficiency Debated by Economists, Public*, BALT. SUN (Sept. 6, 1998), http://articles.baltimoresun.com/1998-09-06/news/1998249077_1_ravens-downtown-baltimore-federal-hill.

248. MD. CODE ANN., ECON. DEV. § 10-620 (2008).

be condemned and of any adjacent property . . . shall be determined as of the date of the taking . . . ."[249] This legislation permitted the Maryland Stadium Authority to purchase the land as it was valued *before* being used as prime stadium real estate. Now, according to the *Horne* decision, the Maryland Stadium Authority would be required to pay top dollar for prime, future stadium land.[250]

Not even a year after the Court's decision in *Horne*, courts and litigants are beginning to rely on *Horne* in an effort to increase compensation for takings claimants.[251] In *Colonial Chevrolet Co. v. United States*,[252] the United States Court of Federal Claims allowed a suit by car dealers claiming that their dealerships were taken without compensation following the Troubled Asset Relief Program to go forward despite the fact that the dealerships were nearly insolvent at the time of the "taking."[253] By allowing the case to go forward, the Court of Federal Claims condoned the claimants' reliance on *Horne* for the proposition that the court should not "now consider the issue of economic loss as a result of the government's action" after finding that regulatory benefits cannot be considered.[254]

Likewise, on appeal, the litigants cited *Horne* for the holding that courts need not consider hypothetical regulatory benefits.[255] The appellant alleges that the *Horne* decision does not permit a hypothetical analysis of the value of property without the government action resulting in the taking.[256] The initial reliance on *Horne* by the Court of Federal Claims and litigants indicates, at least for this small number of cases, that the compensation holding from *Horne* may stand to unjustly enrich takings claimants.

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249. MD. CODE ANN., REAL PROP. § 12-103 (2015).

250. My thanks to Professor Michael Pappas for suggesting this illustration of the consequences of *Horne*.

251. *See, e.g.*, Colonial Chevrolet Co. v. United States, 123 Fed. Cl. 134, 138, 146 (2015) (noting that the *Horne* Court rejected the government's argument that the Hornes were economically better off due to the impact of the RAC price support program); Charlottesville Div. v. Dominion Transmission, Inc., No. 3:14-cv-00041, 2015 U.S. Dist. LEXIS 132554 at *32 (citing *Horne* for the proposition that the Court, "has established 'an 'ad hoc' factual inquiry,' requiring the consideration of 'factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action'"); Opening Brief of Appellant at 50, Starr Int'l Co. v. United States, Nos. 2015-5103 and -5133 (Fed. Cir. docketed June 26, 2015) (arguing that *Horne* illustrated a correct method of calculating fair market value).

252. 123 Fed. Cl. 134 (2015).

253. *Id.* at 138.

254. *Id.*

255. Opening Brief of Appellant, *supra* note 251.

256. *Id.*

V. CONCLUSION

In *Horne v. Department of Agriculture*, the Supreme Court determined that the RAC raisin marketing program amounted to a taking under the Fifth Amendment.[257] However, the Court ultimately decided not to remand the case for a further determination of just compensation.[258] Failing to remand for further consideration of compensation contradicts the Court's previous decisions requiring an analysis of whether a property owner actually suffered a loss.[259] The Court should have remanded for a further determination of just compensation. First, the Court failed to consider the proper market value for the reserve tonnage raisins, breaking with precedent in failing to consider what a "willing buyer" would have paid for the raisins without the RAC price support program.[260] Second, the Court failed to consider remitting the level of compensation for the Hornes to account for the additional financial benefits from the RAC regulatory programs.[261] Going forward, *Horne* will likely provide future takings claimants undeserved compensation.[262] By allowing a valuation to be measured *after* a taking occurs, *Horne* could enable future takings claimants to argue for a higher valuation, even when the state's actions are the only reason the property has increased in value.[263]

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257. *Horne II*, 135 S. Ct. 2419, 2433 (2015).
258. *Id.* at 2432–33.
259. *See supra* Part IV.
260. *See supra* Part IV.A.1.
261. *See supra* Part IV.A.2.
262. *See supra* Part IV.B.
263. *See supra* Part IV.B.