Horne v. Department of Agriculture: Expanding Per Se Takings While Endorsing State Sovereign Ownership of Wildlife

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In Horne v. Department of Agriculture (Horne II), the Supreme Court relieved Marvin and Laura Horne of the obligation to pay financial penalties for violating the rules governing the Department of Agriculture’s raisin marketing program, reasoning that enforcement of the rules would have resulted in a per se “taking” of the Horne’s property interests in raisins under the Fifth Amendment.¹ Widely viewed as a strange, slightly comedic legal controversy,² the implications of the Horne case extend far beyond the world of raisins. In particular, the case raises important question about how the Takings Clause applies, in general, to personal property -- from patents to cigarettes to drugs to firearms. In our view, the Court majority badly mishandled most of the issues in the case, given the record before the Court, applicable precedent, and established takings principles. However, as we explain below, the Court’s analysis is so confused and confusing that it remains to be seen how much change or damage to established takings doctrine will flow from the decision.

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At the same time, the Court’s decision contains a remarkable silver lining from the point of view of government regulators responsible for defending wildlife regulations: a ringing affirmation of the venerable but sometimes misunderstood doctrine of sovereign ownership of wildlife. The biggest surprise coming out of this apparently pro-property rights decision is that regulators now have a powerful defense against claims that the federal Endangered Species Act and other similar federal or state laws result in compensable takings.

This Article proceeds as follows. The first section describes the basic elements of the raisin marketing program and the convoluted course of this litigation. As shall become apparent, laying out these details is necessary in order to explain how badly the Court went astray. The second section identifies the major mistakes the Court made in deciding this case. These include (1) failing to recognize that the Hornes, in their capacity as raisin “handlers,” held no property interest in any raisins, and consequently that their takings argument failed at the threshold; (2) failing to honor the common sense distinction between personal and real property under the Takings Clause previously recognized by the Court; (3) failing to consider the substantial offsetting benefits conferred on the Hornes by the raisin marketing program for the purpose of determining whether the Hornes were threatened with an unconstitutional taking “without just compensation;” and (4) failing to recognize (assuming the takings argument were otherwise viable) that the merits of the argument should have been assessed under the standards of Nollan v. California Coastal Commission\(^3\) and Dolan v City of Tigard\(^4\).

\(^3\) 483 U.S. 825 (1987).

\(^4\) 512 U.S. 374 (1994).
One procedural oddity of this case is worth explicating at the outset. A takings claim against the United States is typically litigated by filing a claim for just compensation in the U.S. Court of Federal Claims, followed by a potential appeal to the U.S. Court of Appeals for the Federal Circuit, and then followed by possible review on a writ of certiorari in the U.S. Supreme Court. In this case, however, following extensive administrative proceedings, the takings issue was litigated in federal district in California, followed by an appeal to the U.S. Court of Appeals for the Ninth Circuit, and then on to the U.S. Supreme Court. The Department of Agriculture initiated the litigation as an enforcement proceeding to impose monetary penalties on the Hornes for failing to comply with the rules governing the raisin marketing program. The Hornes presented various defenses to imposition of the penalties, including that they would have suffered a taking of private property without just compensation if they had complied with the program. In most cases, following the traditional allocation of court jurisdiction in takings cases, the Hornes would have been blocked from raising this defense because their proper remedy for an alleged taking would have been a suit for just compensation in the U.S. Court of Federal Claims. However, in its initial decision in this case (Horne I), the Supreme Court ruled that the

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5 See, e.g., Arkansas Game & Fish Comm’n v. United States, 133 S. Ct. 511 (2012) (a case initially filed under the Tucker Act, 28 U.S.C. § 1491, which provides “The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.”). But see 28 U.S.C. § 1346(a)(2) (granting the district courts jurisdiction concurrent with the claims court over monetary claims against the United States not exceeding $10, 000).

unusual statutory provisions governing judicial review of enforcement proceedings arising from this type of agriculture marketing program grant the district court jurisdiction to consider constitutional (including takings) defenses to a penalty, impliedly repealing the ordinarily exclusive jurisdiction of the claims court over takings issues, and authorizing the Hornes to raise the takings argument in defense to the penalties in federal district court.

The upshot is that, when the Court took up the Horne case for a second time in 2015, there was no dispute the lower courts hearing this case had properly exercised jurisdiction over the takings issue. Clearly, the Hornes had not suffered an actual taking of any property interest in raisins because they had defied the rules the enforcement of which, they alleged, would have resulted in a taking. But the Supreme Court could still address the merits of the takings question by asking whether there would have been a taking of the Hornes’ property without just compensation if the Hornes had followed the program rules. While clear enough in theory, the

with property rights per se, but rather to secure compensation in the event of . . . a taking.”) (emphasis in original) (quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984)).

See 7 U.S.C. § 608c (15)(A)–(B) (“Any handler subject to an order may file a petition with the Secretary of Agriculture . . . . The District Courts of the United States in any district in which such handler is an inhabitant . . . are hereby vested with jurisdiction . . . .”).

Horne I, 133 S.Ct. at 2063 (“Under the AMAA's comprehensive remedial scheme, handlers may challenge the content, applicability, and enforcement of marketing orders. Pursuant to § 608c(15)(A)–(B), a handler may file with the Secretary a direct challenge to a marketing order and its applicability to him. We have held that “any handler” subject to a marketing order must raise any challenges to the order, including constitutional challenges, in administrative proceedings. See United States v. Ruzicka, 329 U.S. 287, 294, (1946). Once the Secretary issues a ruling, the federal district court where the “handler is an inhabitant, or has his principal place of business” is “vested with jurisdiction ... to review [the] ruling.” § 608c(15)(B). These statutory provisions afford handlers a ready avenue to bring takings claim against the USDA. We thus conclude that the AMAA withdraws Tucker Act jurisdiction over petitioners' takings claim. Petitioners (as handlers) have no alternative remedy, and their takings claim was not “premature” when presented to the Ninth Circuit.”)
peculiar procedural posture of the takings issue undoubtedly contributed to the Court’s confusions about this case, as discussed below.

The third section of this Article focuses on the case’s major silver lining, the Court’s surprising reaffirmation of the doctrine of sovereign ownership of wildlife. The Hornes’ convoluted arguments and the Court’s misguided reasoning help explain why the Court’s conservative majority found itself in the odd position of having to affirm this venerable doctrine in order to pave the way for the Hornes’ victory in the case. Nonetheless, the Court’s reaffirmation of the doctrine is very real and will likely serve as a powerful precedent insulating federal and state wildlife regulation from successful takings claims. We contend that the *Horne* decision’s long-term significance lies in the Court’s reaffirmation of state sovereign ownership of wildlife, not in the decision’s problematic expansion of the Court’s *per se* taking rule to certain kinds of personality.

**I. The Raisin Marketing Program and the *Horne* Litigation**

Congress adopted the Agricultural Marketing Agreement Act of 1937\(^9\) in response to painful economic conditions in rural America brought about by low and fluctuating commodity prices.\(^{10}\) The Act authorizes the issuance of so-called “marketing orders” to stabilize prices. Under the Raisin Marketing Order,\(^{11}\) adopted in 1949, in years when high raisin production threatens to depress market prices, a Raisin Administrative Committee (RAC) has authority to enforce a

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\(^{10}\) This description of the Department of Agriculture’s raisin marketing program is largely drawn from the Supreme Court’s two decisions in this case. See *Horne v. Department of Agriculture*, 133 S.Ct. 2053 (2013) (*Horne I*); *Horne v. Department of Agriculture*, 135 S.Ct. 1039 (2015) (*Horne II*).

\(^{11}\) 7 C.F.R. § 989.1-801 (1949).
“reserve requirement” requiring growers to set aside a portion of their crop for “the account of” the RAC. The RAC disposes of the raisins placed in reserve by donating them or selling them in noncompetitive markets. The basic economic principle underlying the program is that constraining the market supply of raisins given any particular level of market demand will tend to drive prices up, to the benefit of raisins growers.  

The RAC is legally an arm of the United States, but is comprised largely of members of the raisin industry. The RAC came into existence pursuant to the Act only after a vote by members of the raisin industry supporting the creation of the committee. The marketing program draws an important distinction between raisin “producers” (who grow raisins), and raisin “handlers” (who process and pack raisins); under the regulations, a single individual can, at different times, wear each of these hats. Raisin handlers are responsible for physically holding raisins in reserve and are potentially subject to sanctions for failing to comply with the marketing program regulations. Raisin producers, after physically handing over their raisins to handlers, retain an interest in any net proceeds from the RAC’s disposition of the raisins, less the RAC’s administrative expenses. Unlike handlers, producers are not directly subject to regulation under the marketing program.

The Hornes, raisin farmers with a decidedly libertarian bent, objected to the longstanding raisin marketing program as an unreasonable intrusion into their business affairs. In an attempt

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13 As the Court explained in *Horne I*:

“The Hornes wrote the Secretary and to the RAC in 2002 setting out their grievances: ‘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 . . .
to evade the program’s rules, and in particular to avoid having to comply with the reserve requirement, the Hornes developed a new business model they believed would allow them (and some of their like-minded neighbors) to grow, process, and sell raisins without being subject to the regulations governing handlers. The Hornes’ principle legal strategy was to structure their business operations so that, in the course of processing raisins, they did not become the legal owners of any raisins. The Department’s regulations define a handler required to set aside raisins in reserve as someone who “acquires” raisins. The Hornes believed that if they did not become the legal owners of the raisins they processed they would not “acquire” raisins within the meaning of the regulations. In other words, although the Hornes took physical possession of the raisins, they believed that because they were providing processing services on a fee basis for the actual owners they could not be deemed handlers. In accord with this scheme, the Hornes proceeded

[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.”

133 S.Ct. at 2057 n.2.

14 7 CFR § 989.15 (defining a “handler” as any “processor or packer” of raisins); 7 C.F.R. § 989.13 (defining a processor as “any person who receives or acquires” raisins). The Hornes also contended that they were not “handlers” because they did not meet the definition of a “packer.” See 7 C.F.R. § 989.14 (defining a “packer” as “any person who, within the area, stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins”). This latter contention was rejected at every step of the administrative and judicial review process. See, e.g., Decision and Order of Administrative Law Judge, in In re. Marvin Horne et al, Pet. App. at 48a

15 E.g., Decision and Opinion By Department of Agriculture Judicial Officer, Pet. App. at 58a (“Marvin R. Horne and the other respondents dispute that they are handlers claiming they never obtained raisins through purchase or transfer of ownership to any business entities that Mr. Horne and his partners operate. Mr. Horne and his partners argue that they did not acquire raisins within the meaning of the Raisin Order.”) (emphasis in original).

16 E.g. Horne v. United States Department of Agriculture, Order on Cross Motions for Summary Judgment , No, CV-F—08-154 (December 11, 2009), Pet. App. at 131a
to process raisins they grew themselves and raisins that were grown by other producers without complying with the reserve requirement. The Hornes then sold their entire their crop on the open market, and the other raisin producers for whom they provided processing services sold the entirety of their crops on the open market as well. As a result of this scheme, the Hornes (and their confederates) reaped a larger financial return from their raisin crops in certain years than other growers who complied with the regulations and dutifully allowed a portion of their crops to be placed in reserve.17

The Department responded to the Hornes’ actions by initiating an administrative proceeding to impose penalties on them based on the dollar value of the raisins the Hornes failed to turn over to the RAC as well for violations of various other rules applicable to handlers. The Hornes’ defenses against the sanctions failed at every step in the administrative process and on subsequent review in the federal courts -- until the Supreme Court. In accord with their novel business plan, the Hornes’ principal argument at the outset and throughout most of the litigation was that they did not own the raisins and, therefore, they were not “handlers” and could not be charged with violating the rules applicable to handlers. The Hornes also argued, beginning at later stages of the litigation, that if they had complied with the reserve requirement it would have constituted a taking under the Takings Clause.

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17 See Decision and Order of Administrative Law Judge, in In re. Marvin Horne et al, Pet App. at 46a-47a (“[B]y avoiding the requirements of the Raisin Order . . ., respondents obtained an unfair competitive advantage over everyone in the raisin industry who complied with the raisin order and its regulations. That is what this proceeding is really about.”
When the case finally reached the U.S. Court of Appeals for the Ninth Circuit, the court initially issued a decision rejecting all of the Hornes’ defenses.\(^{18}\) Accepting the position of the Department on the statutory issue, the court said it did not matter that the Hornes were not the legal owners of raisins; to become handlers who had “acquired” raisins it was sufficient that they took physical custody of the raisins and there was no doubt the Hornes gained physical custody of the raisins in order to process them. The court also rejected the taking argument; one of the Ninth Circuit’s rationales was that the Hornes could properly be compelled to comply with the reserve requirement because they had voluntarily decided to enter the raisin business.\(^{19}\)

In response to a petition for rehearing filed by the Hornes objecting to the court’s voluntariness theory,\(^{20}\) the same panel of Ninth Circuit judges issued a new, superseding opinion.\(^{21}\) The panel’s second decision again rejected the handler argument using the same reasoning as in the initial decision. But the panel took an entirely new tack on the takings issue, abandoning the

\(^{18}\) See *Horne v. Department of Agriculture*, Pet App. at 192a-219a. The Ninth Circuit’s July 25, 2011 decision, which was superseded by an amended opinion issued by the same panel on March 12, 2012, is available neither in print nor electronically in the West reporting system.

\(^{19}\) Id. at 208a (“Far from compelling a physical taking of the Hornes’ tangible property, the Raisin Marketing Order applies to the Hornes only insofar as they voluntarily chose to send their raisins into the stream of interstate commerce.”).

\(^{20}\) See *Petition for Certiorari* at 3-4, 2012 WL 3058322 (July 25, 2102) (“A panel of the Ninth Circuit initially affirmed the judgment of the District Court on the merits. The panel reasoned that the regulatory scheme's requirement that petitioners forfeit a substantial portion of their raisin crop to the government was not a taking for which just compensation is due because the regulation “applies to [petitioners] only insofar as they voluntarily choose to send their raisins into the stream of interstate commerce.”). After petitioners filed a rehearing petition pointing out that the panel opinion was inconsistent with *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982), the panel abruptly changed course and held . . . that the court lacked jurisdiction over the takings issue.”)

\(^{21}\) See *Horne v. United States Department of the Interior*, 673 F.3d 1071 (9th Cir. 2012).
voluntariness theory and adopting the view that the court had no business addressing the merits of the takings argument in the first place. The panel ruled that the federal district court (and the Ninth Circuit on appeal) lacked jurisdiction to consider the takings argument as a defense in an enforcement action because the Hornes could and should have pursued their takings argument by filing a lawsuit for just compensation in the U.S. Court of Federal Claims.

The Hornes, now represented by expert Supreme Court counsel,22 filed a petition for certiorari in the Supreme Court focused on the Ninth Circuit’s disposition of the takings issue. The Court proceeded to grant the petition, and reversed the Ninth Circuit.23 The Court, in an opinion by Justice Clarence Thomas, ruled that, under the judicial review provisions applicable to agricultural marketing programs discussed above,24 the district court had jurisdiction to address constitutional (including takings) challenges raised by raisin handlers. The Court then determined that because the Department had brought this enforcement action against the Hornes on the theory they were handlers, and the Department had succeeded on that argument, the Hornes necessarily were raising their takings defense to the penalties in their capacity as handlers.25 Based on this analysis, the Court determined that the Hornes, in their capacity as handlers, were entitled to a

22 Michael McConnell, Of Counsel with the firm of Kirkland & Ellis, also teaches at Stanford Law School and formerly served as a judge on the U.S. Court of Appeals for the Tenth Circuit. See Stanford Law School, Michael W. McConnell, http://law.stanford.edu/ directory/michael-w-mcconnell (last visited September 27, 2015).


24 See supra note 7.

25 Id. at 2061 (“It is undisputed that the Marketing Order imposes duties on petitioners only in their capacity as handlers. As a result, any defense raised against those duties is necessarily raised in that same capacity.”)
resolution of the merits of their takings argument in the Ninth Circuit, and reversed and remanded the case for further proceedings.26

On remand, the same panel of Ninth Circuit judges again rejected the takings argument on the merits, but on different grounds than in the superseded 2011 decision.27 The panel surveyed the potentially applicable takings theories, first stating that a direct appropriation theory did not apply: “the Hornes cannot – and do not – argue they suffered this sort of ‘paradigmatic taking.’”28 The panel also rejected a categorical claim under Loretto v. Teleprompter Manhattan CATV Corp.,29 reasoning that the marketing regulations applied to personal property rather than real property, and in any event the Hornes would not have been deprived of all the economic value of their property because they retained an interest in the net proceeds of raisin sales by the RAC.30

After rejecting these alternative theories, the Ninth Circuit settled on applying the Nollan/Dolan standards to assess the merits of the Hornes’ takings argument, reasoning that the reserve requirement represented the same kind of “condition” on conducting a business as the land development exactions at issue in Nollan and Dolan.31 The panel had no difficulty concluding the application of the reserve requirement to the Hornes satisfied the Nollan/Dolan standards. As to

26 Id. at 2063-64. The Court did not dispute that, if the Hornes had raised the takings issue in their capacity as raisin producers (as opposed to handlers), they would have had to seek relief in the claims court. See id. at 2067 n.7.

27 See Horne v. United States Department of the Interior, 750 F.3d 1128 (9th Cir. 2014).

28 Id. at 1138.

29 458 U.S. 419 (1982) (finding that cable television wire on a New York City apartment worked an unconstitutional taking as a permanent physical occupation).

30 750 F.3d at 1139-41.

31 Id. at 1143.
the *Nollan* “nexus” test, the panel said, “by reserving a dynamic percentage of raisins annually such that the domestic raisin supply remains relatively constant, the marketing program furthers the end advanced: obtaining orderly market conditions.”32 As to the *Dolan* “rough proportionality” test, the panel said the reserve requirement was not simply in “rough proportion” but was in ”more or less actual proportion” to the goal of achieving market stability: “By annually modifying the ‘extent’ . . . of the reserve requirement to keep pace with changing market conditions, the RAC ensures its program does not overly burden the producer’s ability to compete while reducing to the producer’s benefit the potential instability of this particular market.”33

The Hornes once again sought review in the Supreme Court and, pulling off a rare coup, persuaded the Court to grant a petition for *certiorari* a second time in the same case.34 The Court, in an opinion this time by Chief Justice John Roberts, reversed the Ninth Circuit again.35 First, the Court decided that the case involved a physical appropriation and that a *per se* takings rule governed appropriations involving either real property or personal property, such as raisins.36 Second, the Court ruled that the Hornes’ retention of an interest in net proceeds from the RAC’s sale of raisins did not preclude application of a *per se* rule.37 Third, addressing the final question raised by the petition, the Court answered “yes” (“at least in this case”) to the question: “Whether

32 *Id.*

33 *Id.*


36 *Id.* at 2425-28.

37 *Id.* at 2428-31.
a governmental mandate to relinquish specific identifiable property as a ‘condition’ on permission to engage in commerce effects a per se taking.”

The Court declined to accept the Department’s position that it should reject the takings argument because a taking violates the Constitution only if there is no compensation and the Hornes were free to seek just compensation in the claims court. Likewise, the Court rejected the government’s argument that the case should be remanded to determine whether or not the Hornes were entitled to any compensation, given that the economic burden caused by the alleged taking likely would have been offset, perhaps in its entirety, by the benefit the Hornes received from higher market prices for raisins due to the reserve requirement. Based on all of these conclusions, the Court ruled that the Hornes should be relieved of the obligation to pay the penalties imposed on them.

38 Id. at 2430–31.

39 Id. at 2431.

40 Id. at 2431-33. One issue the Court might have been addressed in Horne II -- but did not -- was whether property owners can routinely challenge government regulations as takings in lawsuits seeking to enjoin the government from acting (or, what amounts to the same thing, by defying the law and resisting resulting penalties by contending that enforcement of the law would have resulted in a taking). The Hornes urged the Court to adopt a broad view of the remedies available under the Takings Clause, see Brief for Petitioner at 27-31, 2015 WL 881767 (U.S. March 2, 2015) and several of the Hornes’ amici also urged the Court to embrace this position. See, e.g., Brief Amicus Curiae of the State of Texas 6, 2015 WL 1048421 (U.S. March 9, 2015). In Horne II there was no debate the Hornes were entitled to raise the takings issue as a defense to the sanctions, given the ruling in Horne I that, in this relatively rare instance, the Hornes, qua handlers, were barred from pursuing ordinary compensatory relief. The Court presumably avoided addressing the remedy issue raised by the Hornes and their amici because it was unnecessary for the Court to do so to resolve this case. The merits of this remedy issue are debated in Thomas Merrill, Anticipatory Remedies for Takings, 128 Harv. L. Rev. 1630 (2015) and John Echeverria, Eschewing Anticipatory Remedies for Takings: A Reply to Professor Merrill, 128 Harv. L. Rev. F. 202 (2015).
Justice Clarence Thomas filed a concurring opinion, joining the Court’s opinion “in full,” but contending that a claim for just compensation likely would have failed because the alleged taking of raisins by the marketing program would not have involved a taking for “public use.” Justice Breyer, joined by Justices and Kagan and Ginsburg, argued for remanding the case to determine whether the benefits of the raisin marketing program exceeded the economic burden on the Hornes, such that they would not have been entitled to any compensation and, therefore, could not oppose the sanctions on the ground that they were threatened with a taking “without just compensation.” In solitary dissent, Justice Sonia Sotomayor argued for affirming the Ninth Circuit, essentially embracing the lower court’s reasoning that the marketing order did not threaten to deprive the Hornes of all of their property interests in the raisins. In addition, embracing the argument abandoned by the Ninth Circuit four years earlier, she contended that the government could require the giving up of property rights as a condition of a voluntary entry into a regulated market without effecting a taking.

II. The Supreme Court’s Errors in Horne

For four separate and independent reasons the Supreme Court should have rejected the conclusion that the Hornes were threatened with a per se taking and therefore were entitled to avoid the penalties imposed on them for breaking the law. The Court should either have affirmed

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41 Id. at 2433.
42 Id. at 2433-36.
43 Id. at 2438–40.
44 Id. 2440-42.
the Ninth Circuit or adopted Justice Breyer’s suggestion and remanded the case for additional proceedings. In this section, we examine each of the Court’s errors in turn.45

A. The Lack of Property

First, the Hornes, as petitioners before the Supreme Court in *Horne II*, were not, and never had been, the owners of the raisins at issue, a defect which should have been fatal to their case. Yet the Court concluded that the Hornes did “own” the raisins, including both the raisins they had grown themselves and those grown by other producers; in the Court’s words, “[t]hey own the raisins they grew and are handling for themselves, and they own the raisins they handle for other growers.”46 This conclusion was patently erroneous based on the record in the case and the long

45 The Department made several arguments before the Supreme Court that were probably ill-advised, which we are not inclined to defend. First, the Department argued that the reserve requirement did not result in a *per se* taking because raisin growers retained the right to any net proceeds left over after the RAC had disposed of the raisins and covered its administrative expenses. Brief for Respondent at 24 to 28 (available at https://a.next.westlaw.com/Document/I9af9cbdfd98011e4a807ad48145ed9f1/View/FullText.html?listSource=RelatedInfo&list=Filings&rank=4&docFamilyGuid=I9af9cbe0d98011e4a807ad48145ed9f1&originatingContext=filings&transitionType=FilingsItem&contextData=%28sc.Search%29%sk=3.zWJod5). A partial monetary return after a taking has already occurred can properly count towards the compensation due for the taking, but represents an improbable ground for seeking to defeat the claim altogether. By contrast, an integrated regulatory program, such as a transferable development rights scheme, which simultaneously restricts the use of some parcels and grants a claimant the right to develop others at higher density, strikes us as quite different and more easily defended. *See e.g., Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 74-42 (1997) (recognizing that TDR’s an an appropriate consideration in assessing the economic effect of a regulatory restriction).

Second, the Department argued that the raisin marketing program could not be a taking because raisin producers were free to seek just compensation for any taking in suit filed in the U.S. Court of Federal Claims. But in *Horne I* the Supreme Court ruled that this suit involved a challenge to the raisin marketing program brought by petitioners in their capacity as raisin “handlers” and only as raisin handlers. *See Horne v. Department of Agriculture*, 133 S.Ct. 2053 (2013). Given that prior ruling, it seems unexceptional for the Court to have concluded in *Horne II* that this suit brought the Hornes as handlers could not be defeated by pointing to litigation options available to the Hornes as raisin producers. *See* 135 S.Ct. at 2431.

course of the litigation leading up to the Court’s decision. By successfully persuading the Court to embrace this mistaken position, counsel for the Hornes seriously misled the Court.

In *Horne II*, given the proceedings in the case to that point, the ownership issue presented a very narrow question: whether the Hornes, in their capacity as raisin “handlers,” had an ownership interest in raisins sufficient to support a takings argument. If the raisin marketing program did not result in a taking of a property interest held by the Hornes *qua* handlers, they should have been barred from raising the takings argument as a defense to the sanctions imposed on them for failing to comply with the regulations. The Takings Clause proscribes the taking of “private property” for public use without just compensation; if a takings litigant can point to no property entitlement, her case is dead in the water.47 Because the Hornes as handlers did not own the raisins at issue, they should have lost in the Supreme Court.

To understand the ownership issue in *Horne II*, recall that in *Horne I*, the Supreme Court reversed the Ninth Circuit’s rejection of the Hornes’ takings argument for lack of jurisdiction. The Ninth Circuit had assumed the Hornes were pursing their takings argument in their capacity as raisin “producers;”48 based on that understanding, the Ninth Circuit ruled that the Hornes could have pursued the takings issue via a suit for compensation under the Takings Clause in the U.S. Court of Federal Claims.49 Because they had the option to sue in the claims court, the Ninth Circuit decided, the Hornes were barred from raising their takings argument in district court (or on appeal in the Ninth Circuit).50


48 *Horne v. United States Department of Agriculture*, 673 F.3d 1071, 1080 (9th Cir. 2011)

49 *Id.*

50 *Id.*
As discussed above, in *Horne I* the Supreme Court reversed that ruling. The Court did not disagree with the Ninth Circuit’s premise that, if the Hornes had been pursuing the takings issue as producers, they would have been required to pursue their takings argument in the claims court. Instead, the Court ruled that the Hornes were presenting their takings argument not as producers, but in the capacity of handlers, and as handlers the Hornes could raise their takings argument as a defense to the penalties in federal district court. Accordingly, the Supreme Court said that the Ninth Circuit erred in ruling that the Hornes (qua handlers) could not present their takings argument in this case. In sum, following *Horne I*, it was crystal clear the Hornes were litigating the takings issue only in their capacity as handlers.

It also was clear -- or should have been -- that, because the Hornes were pursuing their case as handlers, their takings argument was doomed to failure. The Hornes, qua handlers, never owned any raisins, and therefore could not claim they had been threatened with a taking of any property interest in raisins. On the one hand, if the Hornes had played by the Department’s rules and embraced their status as handlers, they could not have claimed a taking of any “reserve” raisins held by them qua handlers. When handlers take possession of raisins, title to the raisins


52 See supra note 23.

53 Before the Ninth Court on remand following the ruling in *Horne I*, the Hornes implicitly acknowledged their quandary by presenting various strained arguments for why they still could proceed with their lawsuit, including that they had standing to prosecute their takings arguments as “bailees.” See Supplemental Brief of Appellees at 5. None of the authorities the Hornes cited in support of this imaginative theory actually support the theory. See *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1572 n.32 (Fed. Cir. 1994) (merely referring to bailment as an illustration of the “diversity” of property interests); *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340(Fed. Cir. 2013) (not addressing bailment)
automatically transfers to “the account” of the Raisin Administrative Committee, meaning that the United States, not the handlers, owns the reserve raisins. Although producers might allege a taking as a result of the reserve requirement and the resulting transfer of ownership of raisins from them to the RAC, a handler could not claim ownership of the reserve raisins or a taking of any property in the raisins as a result of the reserve requirement. At the same time, producers could continue to claim some remaining interest in the reserve raisins held by the RAC because they had a right to any net proceeds from sales of the raisins by the RAC. But, in sum, the Hornes, at least in their capacity as handlers, would never have had any ownership interest in the raisins.

On the other hand, under the novel business model adopted by the Hornes, they also were not owners of any of the reserve raisins. As discussed above, the Hornes’ legal strategy for evading the regulations applicable to handlers was to avoid becoming the legal owners of the raisins they were processing. The Hornes believed that if they did not become owners of any raisins, they would not “acquire” raisins within the meaning of the marketing program regulations and, therefore, would not fall under the definition of a handler. If they were not handlers under

54 See Horne v. Department of Agriculture, 2009 WL 4895362 * 24 (D. ED Cal., December 11, 2009) (“Title to the “reserve tonnage” portion of the producer's raisins automatically transfers to the RAC for sale in secondary, non-competitive markets.”). See also Horne v. Department of Agriculture, 135 S.Ct. 2419, 2424 (2105) (“The Raisin Committee acquires title to the reserve raisins that have been set aside . . . ”).

55 Id.

56 See supra notes 14-16 and accompanying text.

57 E.g., Decision and Opinion By Department of Agriculture Judicial Officer, Pet. App. at 58a (“Marvin R. Horne and the other respondents dispute that they are handlers claiming they never obtained raisins through purchase or transfer of ownership to any business entities that Mr. Horne and his partners operate. Mr. Horne and his partners argue that they did not acquire raisins within the meaning of the Raisin Order.”) (emphasis in original).
the regulations, they would not be exposed to sanctions for failing to comply with the regulatory requirements applicable to handlers, including the reserve requirement.

For most of this long-running dispute, up to and including the appeal to the Ninth Circuit, the main issue in the case was whether the Hornes were “handlers” within the meaning of the regulations.\(^{58}\) To support their position that they were not handlers, the Hornes contended, vociferously and repeatedly, that they were not the legal owners of the raisins.\(^{59}\) The Hornes’ legal argument that they were not handlers failed, and the Hornes abandoned it before taking their case to the Supreme Court. But at no stage in the long history of the litigation did any party, administrative officer, or court question the factual accuracy of the Hornes’ assertion that they were not the owners of any raisins.

The Hornes’ consistently-held position – at least until they reached the Supreme Court – that they were not the owners of the raisins had the virtue of being entirely consistent with the realities of the business model they followed. The Hornes negotiated contracts with other growers under which the growers remained the owners of their raisins, and the Hornes simply provided processing services on a fee basis.\(^{60}\) There is no basis for questioning the validity or enforceability

\(^{58}\) See Horne v. U.S. Department of Agriculture, 673 F.3d 1071, 1078 (9th Cir. 2011).


\(^{60}\) Plaintiffs’ Memorandum of Points and Authorities in Support of Plaintiff’s Motion for Summary Judgment, Horne v. United States Department of Agriculture, 2009 WL 8730669 (E.D., Cal., Aug. 28, 2009) (explaining the Hornes’ contractual arrangements with other growers and that the growers “maintain[ed] right, title, ownership and control of the raisins until they [were] sold to the consumer market).
of these contractual arrangements. The same conclusion applies, although for a slightly different reason, to the raisins processed by the Hornes that they grew themselves. Of course, the Hornes owned the raisins they grew in their capacity as raisin producers. But that does not answer the question whether the Hornes were the owners of the raisins they produced when they took on the functions of handler. As the Supreme Court emphasized in *Horne I*, a single individual or firm can be both a producer and a handler and determining which hat the individual or firm is wearing in a particular context can make all the difference in resolving a disputed legal question. So far as we know, there is nothing in the record to suggest that the Hornes *qua* producers transferred ownership of the raisins they grew to the Hornes *qua* handlers. Such a move would have been exceedingly unlikely because it would have undercut the Hornes’ main argument throughout the litigation that they were not handlers because they did not own any raisins.

Before the Supreme Court in *Horne II*, the Hornes made an about-face on the ownership question. By that time, their “we-are-not-a-handler” statutory argument had fallen by the wayside, eliminating all incentive for the Hornes to continue to argue that they did not own any raisins. In addition, in *Horne I* the Court had clarified that the Hornes could proceed only with their takings argument in their capacity as handlers. With the case recast in this fashion, the Hornes’ previous insistence that they were not the owners of the raisins became fatal to what remained of their case. In a brazen display of chutzpah, the Hornes’ new counsel abandoned all memory of their prior position on the ownership issue and asserted a new, opposite position: that the Hornes, in their

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61 *Horne v. Department of Agriculture*, 133 S.Ct. 2053 (2013) (concluding that the Hornes’ takings argument was ripe in the Ninth Circuit because the Hornes were making the argument in their “capacity” as handlers rather than in their “capacity” as producers).
capacity as handlers, were in fact the owners of the raisins. During oral argument, Hornes’ counsel asserted, in artfully vague and misleading fashion, the following:

“[A]s handlers the Hornes actually assumed the full financial responsibility for the raisins that were not turned over to the Department of Agriculture. The producers in this case were fully paid for their raisins. This is factual finding to be found in the judicial officer’s opinion at 66a of the appendix to the petition. The Hornes paid the producers for their raisins. According to the judicial officer, those raisins became part of the inventory of the Hornes . . . . [W]hen the Raisin Administrative Committee . . . came after the raisins, it was the Hornes and the Hornes only who bore the economic burden of this taking.”

Chief Justice John Roberts, speaking for the Court, relied on this passage from the oral argument as his sole support for the conclusion that the Hornes, in their capacity as handlers, “owned” raisins.

The Chief Justice might reasonably be faulted for relying on counsel’s vague statements during oral argument to support such a crucial factual premise for the Court’s decision. Importantly, both the Department of Agriculture and one of its amici had pointed out to the Court that the Hornes qua handlers could not properly claim ownership of any raisins. Nonetheless, it is understandable that the Chief Justice may have been misled by counsel’s argument, since the quote above strongly suggests, if it does not say so explicitly, that the Hornes acquired ownership


63 See supra note 40 and accompanying text.

64 Brief for the Respondent 52, (“[H]andlers have no property interest in reserve raisins and face no economic burden from compliance with the marketing order. To be sure, handlers who flout the reserve requirement, as petitioners did, become subject to civil sanctions, 7 C.F.R. 989.166(c) - but petitioners' asserted takings defense to those penalties rests on the novel proposition that a fine for violation of the reserve requirement cannot lawfully be imposed against handlers because that requirement effects a taking of someone else's property.”); Brief of Amicus Curiae International Municipal Layers Association in Support of Respondent 6-11.
of other growers’ raisins in exchange for payments by the Hornes to these other growers. The reference to “inventory” is likewise misleading because it suggests that the Hornes became owners of the raisins. In fact, in the cited page of the administrative decision, the Judicial Officer merely observed that in some instances the Hornes accepted payment from raisin buyers, and then either passed that money on to the growers or deducted that sum from the amount growers owed the Hornes for processing their raisins.65 These transactions in no way suggest that the Hornes became owners of the raisins, and they are entirely consistent with the Hornes’ business model of providing processing services to others who were the actual owners of the raisins. Equally important, other passages in the Judicial Officer’s opinion clearly indicate that the Hornes denied ownership of the raisins, and the Judicial Officer accepted these assertions as correct.66

It also was misleading for counsel to suggest that it was the Hornes “who bore the burden of this taking.” In terms of actual raisins, neither the Hornes nor any of their confederate growers could possibly allege to have suffered a taking: after determining not to allow any of their raisins to be held in reserve, they sold all of their crops at fair market prices. With respect to the monetary sanctions, it is certainly correct that the Hornes were assessed financial penalties for violating the Department’s regulations applicable to handlers. But bearing a financial penalty for violating a federal regulation is not the same thing as being subjected to a taking of private property.

At the end of the day, it is hard to avoid the conclusion that the Supreme Court completely dropped the ball on the ownership issue. The Court decided the case on the premise that the Hornes

65 Decision and Order of Administrative Law Judge, in In re. Marvin Horne et al, Pet App. at 66a

66 Id. at 58a, 83a, 84a
qua handlers owned the raisins at issue, when in fact they did not. Whether the Court was bamboozled on this issue, or simply chose to uncritically embrace counsel’s ruse, is hard to say.

One potential response to this critique is that it is technical in nature, because it boils down to an argument that handlers are powerless to raise a takings challenge to the raisin marketing program, and that only raisin producers can raise the takings issue, by filing a claim for just compensation in the claims court. If the Hornes or some other producer had proceeded in the proper fashion by filing suit, qua producers, in the claims court, and if the case had reached the Supreme Court through a different appellate route, the Supreme Court might have reached many of the same conclusions that it did in *Horne II*, including that takings claims based on seizures of personal property, such as raisins, are governed by a *per se* rule. So, no harm no foul? Actually, we think not. The Court has an obligation to pay attention to the facts in the case before it and to follow the rule of law. When the Court cuts a corner to reach other, arguably more important issues, it undermines the institution and the credibility of its rulings on those other issues.

B. Personal Versus Real Property

The Supreme Court also should have rejected the Hornes’ takings argument because it rested on the theory that government appropriations or seizures of personal property are governed by a categorical or *per se* takings rule. Under a *per se* approach, government actions are invariably takings, without regard to the various factors normally considered in takings analysis.67 The Ninth Circuit refused to recognize a *per se* rule for interferences with the Hornes’ possessory interests in

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67 *See generally Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 536-40 (2015) (explicating the *per se* takings tests and how they fit into the Court’s takings jurisprudence).
personal property. But the Supreme Court reversed, despite the fact that this ruling violated common sense and the overwhelming weight of precedent.

First, the Court’s new per se rule appears nonsensical because there are numerous examples of seizures of personal property that cannot plausibly be called takings. Some examples include seizures of adulterated drugs by the Food and Drug Administration, loss of personal private property through civil or criminal forfeiture actions, removal of unwholesome foods from store shelves by local health officials, or the taking away of abused or otherwise mistreated animals from their owners by local animal control officers. In 2014, California Governor Jerry Brown signed into law a measure that authorizes the removal of firearms and ammunition from persons determined to be dangerous to themselves and others. Surely that statute would not work a compensable taking.

68 See Horne v. United States Department of the Interior, 750 F.3d 1128 (9th Cir. 2014).

69 21 U.S.C. § 334 (authorizing FDA seizure of “[a]ny article of food, drug, or cosmetic that is adulterated or misbranded”).

70 Bennis v. Michigan, 516 U.S. 442 (1996) (rejecting claim that seizure of automobile pursuant to Michigan forfeiture statute represented a taking; “[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain”).

71 N. Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306, 308 (1908) (allowing the seizure, without prior judicial process, of forty-seven barrels of poultry from a Chicago food storage warehouse after city inspectors determined they were “putrid, decayed, poisonous, or infected in such a manner as to render it unsafe or unwholesome for human food.”)

72 See, e.g., Miss. Code Ann. § 97-41-2(1) (“All courts in the State of Mississippi may order the seizure of an animal by a law enforcement agency, for its care and protection upon a finding of probable cause to believe said animal is being cruelly treated, neglected or abandoned.”).

73 See, e.g., California Penal Code § 18120(b)(1) (“Upon issuance of a gun violence restraining order issued pursuant to this division, the court shall order the restrained person to surrender to the local law enforcement agency all firearms and ammunition in the restrained person’s custody or control, or which the restrained person possesses or owns”), see also Patrick McGreey,
It is possible that the Court in the future the Court will recognize exceptions to its new *per se* rule, or otherwise cabin its scope. But *Horne II* suggests no exceptions or qualifications to this new *per se* rule. In other cases, the Court has said that so-called “background principles” of federal or state law may limit the scope of *per se* rules. But as discussed below, it is not obvious how previously recognized background principles defenses can sensibly be applied to the context of personal property, or how new background principles might be devised for personal property takings cases. For the moment, the Court has adopted a new *per se* rule for personal property that, on its face, is both sweeping in scope and utterly implausible.

Second, the Court’s new *per se* rule is inconsistent with the Court’s prior indications that the Court’s *per se* takings rules apply differently to personal property than to real property. In *Lucas v South Carolina Coastal Council*, in which the Court held that regulatory restrictions that eliminate all economically viable uses of land constitute *per se* takings, the Court articulated a distinct rule for regulations that destroy the economic value of personal property: “[I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale).” The Ninth Circuit, logically enough, relied on this reasoning of *Lucas* to support its conclusion that, even if an appropriation

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of realty should be treated as a *per se* taking, a *per se* rule should not apply to appropriations of interests in personal property.\(^{76}\)

The Court rejected this reading of *Lucas*, stating that regulatory restrictions on property use are distinguishable from appropriations. It observed that in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, the Court recognized a “longstanding distinction” between regulatory takings and physical takings, suggesting that even though the *Lucas per se* regulatory takings rule does not apply to personal property a *per se* rule may apply to appropriations of personal property.\(^{77}\) Regardless of what *Lucas* had to say about applying a *per se* rule to personal property in the regulatory takings context, the Court concluded, without citation, “people still do not expect their property, real or personal property, to be actually occupied or taken away.”\(^{78}\)

This reasoning is problematic on multiple counts: It is correct that regulatory restrictions on property use and appropriations of property represent distinct types of government actions. But there is no reason to think the distinction should matter for the purpose of deciding whether *per se* analysis extends to personal property. Just as it traditionally exercises a “high degree of control over commercial dealings” in personal property in the regulatory context,\(^{79}\) the government also commonly seizes personal property for public purposes, as discussed above.\(^{80}\) This suggests the

\(^{76}\) The Ninth Circuit also discussed *Loretto v. Manhattan CATV Teleprompter*, 458 U.S. 419 (1982), and concluded that the *per se* rule for permanent physical occupations discussed in that case was exclusively focused on land.


\(^{78}\) 135 S.Ct. at 2427.

\(^{79}\) *Lucas*, 505 U.S. at 1026.

\(^{80}\) *See supra* notes 69-73 and accompanying text.
need for an across the board exception from per se analysis for personal property. Moreover, in Lucas Justice Scalia justified the per se rule announced in that case by observing “that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation.”\(^8^1\) If the two types of takings are equivalent, it makes sense to recognize a personal property exception for both types of takings.

The Court’s reliance on the passage from Tahoe-Sierra was unwarranted because in that case the Court was addressing how to apply the parcel as a whole rule to a development moratorium, and in the cited passage simply observed that the Court had a “longstanding” practice of applying the parcel rule differently in regulatory takings cases than in physical takings cases. Nothing in Tahoe-Sierra addresses or is even relevant to the issue of whether a per se takings rule should apply to personal property. The Court’s final observation— that people “do not expect” either their real or personal property to be seized—is simply judicial ipse dixit. Some may agree; but others will not. There is nothing in the Constitution that privileges a judge’s assessment of people’s expectations over those of the people’s elected representatives in this context.\(^8^2\)

The Court’s other reasons for applying a per se rule to raisins and other personal property are no more convincing. The Court asserted that this result was supported by the text of the

\(^8^1\) 505 U.S. 1017. Cf. Lingle v. Chevron USA Inc., 544 U.S. at 539 (stating that all of the Court’s various takings tests “share a common touchstone, “ that is “[e]ach aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.”).

\(^8^2\) In fairness, the same objection about a free-wheeling judiciary can be made in relation to the Court’s statement in Lucas that, as a result of the State's traditionally high degree of control over commercial transactions, an owner of personal property (at least if it is used for sale or manufacture for sale) “ought to be aware” of the possibility that new regulation might even render his property economically worthless. But the analysis in Lucas at least has the virtue of largely leaving policy choices about social and economic regulation to the people’s elected representatives.
Takings Clause because it protects “private property” without distinguishing between personal property and real property. The argument misses the point because there is no dispute that interests in personal property constitute property within the meaning of the Takings Clause. The issue is what constitutes a “taking” in the context of government action affecting personal property. There is no disputing that the Supreme Court’s takings cases have adopted diverse tests and standards for determining whether government action constitutes a “taking.” The issue in *Horne* was whether there should be a different standard for evaluating alleged takings of personal property than alleged takings of real property.

Second, the Court asserted that “history” supported its position, pointing to such diverse sources as the Magna Carta and the Massachusetts Bay Colony’s Body of Liberties. But these sources merely show that personal property deserves protection under the Takings Clause (which no one disputes), and that government action impairing a personal property interest can result in a

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83 The *Horne* Court largely elided the distinction between “appropriations” and “physical occupations,” treating them as variations on the generic category of “physical takings.” But these labels appear to identify distinctive types of government action: an appropriation involves a seizure, for the benefit of the government or some third property, of their physical property itself or of title to the property; an occupation involves physical entry onto property, for example as a result of flooding or trespass. Occupations appear to involve land exclusively while appropriations can involve both real and personal property. Other Court opinions more clearly distinguish between appropriations and physical occupations. See *Arkansas Game and Fish Commission v. United States*, (initially observing that “[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner,” but then turning to the issue of whether temporary physical occupations constitute takings); see also *Lingle*,544 U.S. at 537 (“The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property.”) (emphasis added). The Supreme Court precedents arguably support the conclusion that temporary appropriations may be subject to a *per se* rule. See, e.g., *Kimball Laundry v. United States*, 338 U.S. 1 (1949), *United States v. General Motors*, 323 U.S. 373 (1945), whereas temporary physical occupations are not. See *Arkansas Game and Fish Commission*, supra.
taking (which no one disputes). These venerable authorities do not speak to the issue of whether takings claims involving personal property should be evaluated using a per se test. The Court’s historical analysis is hopelessly anachronistic because the distinction between per se and non-per se takings analysis did not even begin to emerge until the end of the 20th century.

Finally, the Court claimed that “precedent” supports its embrace of a per se rule, but it does not. While dictum in one 19th century case cited by the Court suggests that appropriations of least certain kinds of personal property should be deemed equivalent to appropriations of land, the Court’s other authorities merely confirm that personal property is protected by the Takings Clause. This ambiguity in the precedents is understandable given that the Court had not recognized the distinction between per se and non-per se analysis at the time. On the other hand, more modern cases, decided after the recognition of this distinction, point away from applying a

\[\text{\color{#000000}84} \text{ See William Michael Treavor, The Original Understanding of the takings Clause and the Political Process, 95 Colum. L. Rev. 782, 837 (1995) (“The liberal end of the clause established a rule of law barring the federal government from physically taking real or chattel property, including slaves, without compensation.”)}\]

\[\text{\color{#000000}85} \text{ The Court first explicitly articulated a categorical or per se takings test in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). The Court took this step in response to the New York Court of Appeals’ rejection of Mrs. Loretto’s takings claim based on the multi-factor Penn Central analysis articulated just four years earlier in the Penn Central case. See Loretto v. Teleprompter Manhattan CATV Corp. 53 N.Y.2d 124, 145 (1981) (evaluating the takings claim based on an inquiry into “the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations”); see also Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).}\]

\[\text{\color{#000000}86} \text{ See James v. Campbell, 104 U.S. 356 (1882) (rejecting claim that government appropriated patent rights)}\]

\[\text{\color{#000000}87} \text{ For example, the Horne II Court explained that the Takings Clause was apparently adopted in response to appropriations of their personal property during the Revolutionary War, a proposition that is surely correct, see 135 S. Ct. at 2426, but that hardly establishes that appropriations of personal property in general should be governed by a per se takings rule.}\]
per se test to personal property. Thus, in *Bennis v. Michigan*, the Court rejected a takings challenge based on the seizure of an automobile pursuant to the Michigan Forfeiture Law, a result plainly inconsistent with the notion that a government seizure of personal property is invariably a taking. In *Webb’s Fabulous Pharmacies v. Beckwith*, the Court ruled that a government appropriation of the interest accruing in an interpleader fund was a taking, but reached this conclusion only after observing that “[n]o police power justification is offered for the deprivation”—indicating that consideration of the purpose of an appropriation of personal property can lead to the conclusion that a seizure is not a taking. This precedent too is inconsistent with a sweeping *per se* rule for appropriations of personal property. The Court in *Horne* simply ignored both *Bennis* and *Webb’s*, even though they were arguably the recent Court precedent (apart from *Lucas*) most directly relevant to the issue before the Court.

In sum, the new *per se* rule established in *Horne II* is disappointing from many perspectives. The Court’s ruling lacked support in either the text of the Constitution, history or relevant precedent, and the decision threatens to upend important government law enforcement functions at all levels of the federal system. Yet the Court’s opinion exhibited no awareness of the potential ramifications of the new *per se* rule. It is possible that this is a *per se* rule for this case.

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89 The Court also overlooked the decision in *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 235 (2003), in which the Court assumed – but only for the sake of argument – that a requirement that interest earned on bank accounts be transferred to Washington Legal Foundation was “akin” to a *per se* taking, but then rejected the takings claim on the merits. The defendants had vigorously contested whether a *per se* takings test should apply in this case. See Brief for Respondents Legal Foundation of Washington and Its President, at 24-33, 2002 WL 31387472 (Oct. 18, 2002). Not surprisingly, given the availability of an alternative basis for rejecting the takings claim, the Court studiously avoided resolving whether a *per se* theory governed this alleged appropriation of personal property. In *Horne*, a mere twelve years later, the Court cavalierly treated the application of a *per se* test to personal property as almost a foregone conclusion.
only, and the Court will quickly back away from its ruling on a different set of facts. Equally remarkable was the Court’s failure to identify possible exceptions or limitations on its new *per se* rule, contrary the Court’s more careful approach in both *Loretto* and *Lucas*. It is possible that the Court intends in the future to devise some background principles exceptions to temper the apparent severity of its new *per se* rule. But it is difficult to discern the likely doctrinal basis for such a move. The nuisance exception recognized in *Lucas*, which of course involved the use of land, was based on the notion that no one can claim a right to use land in a fashion that unreasonably interferes with others’ use of their land. It does not seem likely that this important but relatively specific qualification on property rights in land can be transferred to personal property. The Court may eventually find some way to craft needed exceptions to its *per se* rule, but it is hard to see how the Court will pull it off. In the meantime, we will likely have to suffer the consequences from the Court’s adoption of this new blanket *per se* rule.

C Offsetting Benefits.

The third error committed by the Court was its refusal to permit the Department to try to uphold its sanctions by demonstrating that, if the marketing program would have effected a taking, it would not have been a taking “without compensation,” because the benefits of the program would have exceeded any economic burden on the Hornes. All of the parties in the case properly understood that the validity of the penalties assessed against the Hornes rose or fell based on whether the marketing order would have resulted in an unconstitutional taking under the Takings

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90 See Restatement (Second) of Torts § 826 (1929) (defining a nuisance as “an intentional invasion of another's interest in the use and enjoyment of land”).
Clause. A taking is unconstitutional only if it uncompensated, and a taking must be compensated only if the claimant can show that she suffered some economic loss as a result of the taking. If a claimant can demonstrate no entitlement to just compensation, even if it is undisputed that a taking has occurred, there has been no violation of the Takings Clause.

The Department contended that the Hornes failed to demonstrate that they would have suffered any net economic loss under the program, pointing out that the raisin reserve requirement was designed primarily to benefit raisin growers by restricting the market supply of raisins, thereby keeping prices elevated. It was well within the realm of possibility that the positive effects of the marketing order on the prices the Hornes received from selling non-reserve raisins would have exceeded the adverse economic effects of the reserve requirement. Because the Hornes had not demonstrated that they would suffered a net adverse economic effect, the government contended that they had not suffered a taking without compensation.

Justice Breyer, in dissent, joined by Justices Ginsburg and Kagan, found this argument compelling. Invoking the traditional rule concerning offsetting benefits, he observed that the amount of compensation due for a taking under the Takings Clause generally must be calculated by subtracting from the compensation due any offsetting benefits conferred by the government action that caused the takings. A classic application of this rule is when the government takes a right-of-way for a road, and the amount due for the right-of-way is reduced by the enhancement in

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91 See First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 314 (1987). (the Takings Clause “does not prohibit the taking of private property, but instead places a condition on the exercise of that power” payment of just compensation.)


93 135 S.Ct. at 2434.
the value of the balance of the property due to the enhanced access provided by the new road.\textsuperscript{94}

While conceding that this rule has been commonly applied in the context of direct condemnations, Breyer maintained that logically the same rule should apply in inverse condemnation actions.\textsuperscript{95}

Recognizing that the lower courts had yet to come to grips with this issue in this case, he argued for a remand to consider whether any compensation would have been due had the Hornes complied with the regulations.\textsuperscript{96}

The Court majority disagreed. Without disputing the general principle of offsetting benefits, Chief Justice Roberts maintained that the rule did not apply in the context of regulatory benefits: “Cases of that sort [involving offsetting benefits] can raise complicated questions involving the exercise of eminent domain power, but they do not create a generally applicable exception to the usual compensation rule, based on the asserted regulatory benefits of the sort at issue.”\textsuperscript{97}

The Chief Justice offered no analysis and cited no precedent to support this bald statement. Understandably so, because the reasoning appears indefensible. The doctrine of inverse condemnation (including but not limited to regulatory takings) is built on the understanding that a unified set of principles govern takings law, and that the basic rules governing takings cases are the same regardless of whether the government initiates a condemnation action or a court finds

\begin{quote}
\textsuperscript{94} Id. quoting \textit{Bauman v. Ross}, 167 U.S. 548, 574 (1897) (“[W]hen part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered.”)

\textsuperscript{95} 135 S.Ct. at 2435.

\textsuperscript{96} Id. at 2436.

\textsuperscript{97} Id. at 2432.
\end{quote}
a taking in an inverse condemnation action initiated by a property owner. This equivalence is, after all, at the foundation of the Court’s landmark ruling in *First English Evangelical Lutheran Church v. City of Los Angeles*, which resolved that the appropriate remedy for a regulatory taking is an award just compensation.\(^{98}\) As the *First English* Court stated, “While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceeding.”\(^{99}\) In short, there is no basis for thinking that the offsetting benefits rule should apply in one kind of takings case and not in another, and the Court’s basic teachings about takings law suggest just the opposite.\(^{100}\)

The Chief Justice proceeded to announce that, “in any event,” this case provided “no occasion” to actually resolve how the offsetting benefits rule should apply in this context because “[t]he Government has already calculated the amount of just compensation in this case when it fined the Hornes the fair market value of the raisins.”\(^{101}\) But this analysis begs the question. The applicable regulations state that if a handler fails to comply with the reserve requirement, the handler “shall compensate the RAC for the amount of the loss resulting from his failure to so deliver.”\(^{102}\) In other words, if a handler fails to deliver some quantity of raisins to the RAC, the handler must pay the dollar equivalent of the raisins improperly withheld; this calculation ensures


\(^{99}\) Id. at 316.

\(^{100}\) As Justice Breyer pointed out it, “I am [not] aware of any precedent that would distinguish between how the Baumann doctrine applies to the reserve requirement itself and how it applies to other types of partial takings.” 135 S.Ct. at 2436.

\(^{101}\) 135 S.Ct. at 2433.

\(^{102}\) 7 C.F.R. § 989.166 (c).
that the handler is not unjustly enriched by a violation and the RAC is made whole for the violation. There is no *a priori* reason to think that the amount of this administrative penalty, designed to secure compliance with the marketing program, is necessarily the measure of the “just compensation” that could be claimed by a handler under the Takings Clause if he had complied with the regulations. For the reasons discussed concerning the offsetting benefits rule, there is a substantial argument that the amount due in compensation under the Takings Clause would have been discounted by the benefits received, if not wiped out. By pointing to the government’s calculation of the penalty amount as if it were self-evidently an accurate calculation of just compensation under the Takings Clause, the *Horne II* majority simply assumed the answer to its own question.

D. **Failure to Apply the Nollan/Dolan Analysis**

The *Horne* Court’s most baffling ruling concerned the third question in the petition for *certiorari*: “Whether a governmental mandate to relinquish a specific, identifiable property as a ‘condition’ on permission to engage in commerce effects a *per se* taking.” Importantly, on remand to the Ninth Circuit, the government did not make the argument that the government can freely take private property as a condition of allowing a party to engage in interstate commerce, and the lower court did not adopt this position, meaning that the Supreme Court had no business addressing the question. As discussed above, the Ninth Circuit did adopt this position in 2011. But in response to the Hornes’ petition for rehearing, the Ninth Circuit

103 *See supra* notes 89 -96 and accompanying text.

104 *See Supplemental Brief for Appellee, Horne v. United States Department of Agriculture* 2013 WL 4540196 (9th Cir. Aug 13, 2103)
rescinded its opinion. A party who has succeeded in persuading a lower court to withdraw a position obviously cannot legitimately file a petition for *certiorari* asking the Supreme Court to address the merit of the position. In sum, in the context of their petition for *certiorari* in *Horne II*, counsel for the Hornes concocted an issue that simply did not then exist in the case. Unfortunately, in its opposition to the petition, the Department of Agriculture raised no objection to the petitioners’ effort to interject this issue. As a result, when the Court granted the petition for *certiorari*, it granted the petition *in toto*, without excluding this issue from consideration. At the merits stage, the Department found itself in the unenviable position of defending the government side of an issue that the Ninth Circuit had not embraced below.

The Court answered the question posed in the affirmative, despite the fact that its precedents unambiguously supported a negative answer. In *Nollan v. California Coastal Commission*, the Department found itself in the unenviable position of defending the government side of an issue that the Ninth Circuit had not embraced below.

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105 See supra note ___ and accompanying text.

106 “Ordinarily,” the Supreme Court “do[es] not decide in the first instance issues not decided below.” *Zivotofsky v. Clinton*, 132 S.Ct. 1421, 1430 (2012), quoting *National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 470 (1999). It logically follows from this basic principle governing the Supreme Court’s *certiorari* jurisdiction that if a lower court initially decides to address an issue, and then explicitly decides not to address the issue, the issue is not appropriate for review in the Supreme Court. This is especially true in a case such as this where the petitioner succeeds in persuading the court below to rescind its opinion addressing the issue.


109 *Horne v. Department of Agriculture*, 135 S.Ct. 1039 (U.S. Jan. 16, 2015). The other two issues raised in the petition for *certiorari*, whether a *per se* rule governs a takings claims based on an alleged governmental seizure of an interest in personal property, and whether application of a *per se* rule was barred by the fact that the Hornes were entitled to the net proceeds from the RAC’s sale of reserve rains, were addressed by the Ninth Circuit and were properly raise by the petition for *certiorari*.
Commission\textsuperscript{110} and Dolan v City of Tigard,\textsuperscript{111} the Court ruled that when the government grants permission to engage in particular activity on the condition that a person surrender some property interest, the forced exaction of the property may or may not be a taking depending on the circumstances. An exaction is a taking if there is no nexus between the government’s regulatory objectives and the purpose of the exaction,\textsuperscript{112} or if the burden imposed by the exaction is not roughly proportional to the public harms threatened by the regulated activity.\textsuperscript{113} On the other hand, an exaction is not a taking if the “essential nexus” and “rough proportionality” tests are satisfied. Thus, applying the Nollan/Dolan analysis, the answer to the question whether “a governmental mandate to relinquish a specific, identifiable property” as a condition of obtaining permission to engage in a particular business will result in a taking should have been: “It depends.” Consequently, the correct answer to the question presented in the petition – whether such a mandate results in a \textit{per se} taking, that is, whether it \textit{invariably} results in a taking – should have been “no.” Unfortunately, the Court’s answer to the question in the petition was “yes.”\textsuperscript{114} But, as discussed below, it is hard to know how seriously to take the Court’s answer.

The Department of Agriculture should have addressed the question by arguing that a \textit{per se} takings test did not apply (and therefore the answer to the question posed in the petition was “no”), that (at most\textsuperscript{115}) the Hornes were entitled to the benefit of the relatively stringent

\textsuperscript{110}483 U.S. 825 (1987).
\textsuperscript{111}512 U.S. 374 (1994).
\textsuperscript{112}483 U.S. at 837.
\textsuperscript{113}512 U.S. at 391.
\textsuperscript{114}135 S.Ct. at 2430.
\textsuperscript{115}We suggest “at most” because application of the Nollan/Dolan analysis would have been appropriate only if a direct appropriation of raisins, outside of the context of the raisin marketing
Nollan/Dolan standards, and the Department should have prevailed under those standards, as the Ninth Circuit had concluded below.\(^{116}\) Instead, the Department’s primary argument on the merits, relying on the Court’s 1984 decision in Ruckelshaus v. Monsanto Co.,\(^ {117}\) was that the marketing program, far from effecting a per se taking, worked no taking at all as a matter of law. The Monsanto Court rejected a takings claim based on a regulation requiring pesticide manufacturers to hand over their trade secrets on health and safety issues as a condition of receiving an EPA license to sell pesticides. The Court found that receiving a license to sell a pesticide represented the grant of governmental “privilege,”\(^ {118}\) and ruled that “a voluntary” exchange of property interests in trade secrets “for the economic advantages of a registration can hardly be called a taking.”\(^ {119}\) In Horne the Department argued that just as there was no taking in requiring Monsanto to turn over trade secret data to the government as a condition of obtaining an EPA license, there was no taking in requiring the Hornes to turn over a portion of their raisin crop as a condition of gaining permission to sell raisins in interstate commerce.

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program, would necessarily have resulted in taking. See Nollan v. California Coastal Commission, 483 U.S. 825, 831-34 (1987) (justifying the demanding “essential nexus” standard on the premise that a direct mandate to the Nollans to allow the public to pass across their beach “unquestionably” would have been a taking); Dolan v. City of Tigard, 512 U.S. 374 (1994) (applying the same reasoning to justify applying “rough proportionality” test to an exaction involving a bike path and greenway. For the reason discussed above, see supra notes at ___ and accompanying text, we do not think that premise necessarily applies in this case; certainly it was incorrect to resolve the issue by applying per se rule and without examining the actual facts and circumstances. However, even if the premise were correct, the Court still should have allowed the Department to attempt to defend its regulations under the Nollan/Dolan standards, rather than resolving the issue by fiat using a per se rule.

\(^{116}\) Horne v. United States Department of the Interior, 750 F.3d 1128, 1143 (9th Cir. 2014).


\(^{118}\) Id. at 1007.

\(^{119}\) Id.
The Supreme Court made short work of this argument, principally because the Court’s intervening *Nollan* decision had already reduced the *Monsanto* precedent to the size of a pea. *Monsanto, Nollan,* and *Dolan* all involve the same basic fact pattern: the government grants an authorization (a license to use pesticides in *Monsanto;* permission to develop land in *Nollan* and *Dolan*), in exchange for citizens giving up some property interest to the government (trade secrets in *Monsanto,* and easements in land in the other cases). In *Nollan,* decided three years after *Monsanto,* the California Coastal Commission defended against the takings claim by invoking *Monsanto,* arguing that exacting an easement as a condition of a development permit was the equivalent of exacting trade secrets as a condition of an EPA license. The *Nollan* Court rejected this argument, distinguishing *Monsanto* on the ground “the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a ‘governmental benefit.’” As a result, the Court said, “the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary ‘exchange,’ that we found to have occurred in *Monsanto.*” Following *Nollan* (and then *Dolan*), the *Monsanto* precedent was little more than a legal oddity, and the essential nexus and rough proportionality tests represented the new, relatively more exacting standards for evaluating takings challenges to government exactions.

In *Horne,* in response to the Department’s attempt to defeat the takings claim by invoking *Monsanto,* the Court applied the same narrow reading of *Monsanto* it had adopted in *Nollan.* In fact, the *Horne* Court interpreted *Monsanto* even more narrowly.

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120 *Nollan,* 483 U.S., at 834 n. 2.

121 *Id.*
explained, involved a voluntary exchange of property interests for a “valuable Government benefit . . . – a license to sell dangerous chemicals.” By contrast, the alleged taking in Horne could not “reasonably be characterized as part of a similar voluntary exchange.” Just as the use of land at issue in Nollan and Dolan was not a government benefit “on the same order as a permit to sell hazardous chemicals,” the Horne Court reasoned, “[s]elling produce . . . is similarly not a special governmental benefit that the Government may hold hostage to be ransomed by the waiver of constitutional protection.” Summing up, the Court quipped, “Raisins are not a dangerous pesticide; they are a healthy snack.” 122 By emphasizing that Monsanto involved not only the grant of a benefit, but the benefit of selling a “dangerous” product (a point the Monsanto Court had not emphasized), Horne further narrowed the circumstances in which Monsanto might be a useful precedent in the future. 123

The glaring gap in the Court’s reasoning in Horne was that, if Monsanto was not the controlling precedent and did not defeat the takings claim (a conclusion that was hard to dispute, at least after Nollan), it did not logically follow that a per se takings rule applied. In Nollan the Court rejected the government’s position, based on Monsanto, that it could defeat a takings claim

122 Id. at 2431.

123 In addition, in light of the Court’s effort in Koontz v. St Johns River Water Management District, 133 S.Ct. 2586 (2013), to position the Court’s exactions cases within the larger context of unconstitutional conditions doctrine, it is difficult to know whether there is anything left of Monsanto at all. Unconstitutional conditions, as generally understood, proscribe the denial of a government “benefit” because a citizen refused to give up a constitutional right. See Perry v. Sindermann, 408 U.S. 593 (1972). Given this basic understanding of the unconstitutional conditions doctrine, it is far from clear why it matters than the license in issue in Monsanto could be characterize as a “benefit.” But cf. John Echeverria, The Costs of Koontz, 39 Vermont L. Rev. 573 (2015 (contending that, contrary to the Court’s apparent reasoning in Koontz, Nollan and Dolan are based on a different conception of unconstitutional conditions than that involved in cases involving First Amendment issues).
by treating the grant of an easement as a voluntary exchange for a land use permit. But the *Nollan* Court said the government could still defeat the takings claim by showing an essential nexus between the government’s regulatory purposes and the purpose of the easement. Under the reasoning of *Nollan*, which the Court purported to follow in *Horne*, if selling raisins is not a “privilege” in the same sense that developing land is not a privilege, that did not mean that the Hornes could claim the benefit of a *per se* rule. It only meant (at most) that in order to defeat the takings claim, the Department would have to defend the reserve requirement under the *Nollan* and *Dolan* standards. The Ninth Circuit already had concluded that *Nollan* and *Dolan* did apply in this case, and that the reserve requirement did not result in a taking under those standards. But the Supreme Court simply ignored the Ninth Circuit’s application of the *Nollan/Dolan* standards, applying a *per se* takings test instead.

*Horne’s* analysis can be interpreted to toss the Court’s exactions doctrine into a new kind of disarray. In some narrow category of cases still governed by *Monsanto*, the government can apparently seek to defend an exaction, without having to demonstrate compliance with the *Nollan/Dolan* standards, by demonstrating that the government’s grant of regulatory permission represents the conferral of a “privilege.” In that circumstance, the government can legitimately exact some property interest in voluntary exchange for the conferral of the privilege without offending the Takings Clause. In other cases, involving permits for the use of land, for example, the government can also impose exactions without triggering the Takings Clause, but only if it can satisfy the *Nollan/Dolan* standards. Finally, *Horne II* suggests that there might be a third category of exactions—involving neither the granting of a privilege nor the granting of permission to use

124 *Horne v. United States Department of the Interior*, 750 F.3d 1128, 1143 (9th Cir. 2014).
land—where the demand for an exaction as a condition of allowing some activity, such as selling some non-dangerous product (like raisins) in interstate commerce, can be challenged directly as per se taking without reference to the Nollan/Dolan standards. It seems implausible, however, given the importance the Court has attached to rights in land in other takings cases,\footnote{See Lucas v. South Carolina Coastal Council, 505 U.S. 1002, 1028 (1992) (referring, in the context of land use regulation, to “the historical compact recorded in the Takings Clause that has become part of our constitutional culture”).} that the Court intends to grant the government less latitude under the Takings Clause in imposing conditions on the use of land than in imposing conditions on the conduct of ordinary business affairs. The more sensible explanation is that the Court simply goofed in Horne II by failing to recognize that the government was at least entitled to the opportunity to try to defeat the takings challenge based on Nollan and Dolan. For the reasons discussed above, counsel’s too-clever-by-half advocacy helps explain how the Court managed to go so far astray.\footnote{See supra note \number{126} and accompanying text.}

A hint that the Court itself may not take its decision very seriously is offered by its carefully worded response to the question posed in the petition: “The answer,” the Court said, “at least in this case, is yes.”\footnote{135 S. Ct. at 2431.} Perhaps the underscored language indicates that its new per se rule may apply in the Horne case only, much like its view of the Equal Protection Clause in Bush v. Gore, which was good for only that day.\footnote{Bush v. Gore, 531 U.S. 98, 109 (2000) (“Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”)}

\section*{III. \textit{Horne’s} Reaffirmation of State Sovereign Ownership of Wildlife}

\footnote{See supra note \number{126} and accompanying text.}
Notwithstanding the Court’s several pro property rights rulings in *Horne II*, the case contains a significant, surprising silver lining for government regulators: a ringing reaffirmation of the doctrine of sovereign public ownership of wildlife.\(^\text{129}\)

A. Reaffirmation of the Sovereign Ownership Doctrine

The 1929 decision in *Leonard & Leonard v. Earle*,\(^\text{130}\) presented a conundrum for the Court in *Horne II*. In that nearly ninety-year old case the Supreme Court ruled that there was no taking when Maryland required oysters packers, as a condition of receiving a business license, to hand over a portion of their emptied oyster shells to the state for use as a substrate to propagate more Chesapeake Bay oysters.\(^\text{131}\) Like the reserve raisin requirement in *Horne*, this condition apparently amounted to a direct seizure of private property from individual owners. Also as in *Horne*, the seizure aimed to benefit members of the regulated industry. Thus, *Leonard* was on all fours with

\(^{129}\) Another silver lining for the government side in *Horne II* is the Court’s implicit endorsement of an expansive view of the “public use” requirement of the Takings Clause. Since the Court’s decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), there has been much scholarly debate about whether the *Kelo* Court correctly ruled that a seizure of private property for transfer to another private party to achieve some public purpose can satisfy the public use requirement. See generally Ilya Somin, The Grasping Hand: *Kelo v. City of New London* and the Limits of Eminent Domain (2015). In *Horne II* the Court implicitly reaffirmed *Kelo*’s broad reading of the public use requirement by ruling that the raisin marketing program, which authorizes government transfers of reserve rains to various private parties, constituted a taking “for public use.” *Horne v. Department of Agriculture*, 135 S.Ct. 2419, 2431 (2015). Justice Thomas, in a concurring opinion, underscored the significance of *Horne II* for the public use debate by observing that the premise that the raisin marketing program served a public was inconsistent with his view, expressed in a solitary dissenting opinion in *Kelo*, that the public use requirement should be interpreted to mean that “the government may take property only if it actually uses or gives the public a legal right to use the property.” *Id.* at 2433, quoting *Kelo*, 545 U.S. at 521 (Thomas, J., dissenting).

\(^{130}\) 279 U.S. 392 (1929).

\(^{131}\) *Id.* at 396.
the *Horne* case and appeared to be a strong and somewhat startling\(^{132}\) precedent in support of the government’s defense.

The Court could have avoided *Leonard’s* no taking rule by explaining that *Leonard*, like *Monsanto*, had been superseded by the Court’s later decisions in *Nollan* and *Dolan*. Like *Nollan* and *Dolan*, *Leonard* concerned whether the government could, as condition of offering some benefit (a license to pack oysters or local land use permission), require the property owner to hand over some property (empty oyster shells or a public easement) to the government. The Court might have reasoned that, in light of *Nollan* and *Dolan*, the government could no longer justify an exaction of oyster shells as a voluntary exchange for the benefit of receiving a license to engage in oyster packing. Under this approach, the Court would have said that such an exaction could be defended against a takings claim only if the government could show that the exaction met the essential nexus and rough proportionality. The problem with that line of argument, from the Hornes’ standpoint, is that it might have led to the conclusion that, just as the Ninth Circuit had ruled, the Hornes had never been threatened with a taking because the reserve requirement satisfied the *Nollan/Dolan* standards. Accordingly, from a strategic standpoint, it is understandable that the Hornes did not point the Court in that direction and the Court did not take that path on its own.

\(^{132}\) The Department of Agriculture cited the *Leonard* case only once in its merits brief, see Brief for Respondent at 26, 2015 WL 1478016 (April 1, 2015), and did not discuss the decision at any length or highlight its significance for the *Horne* case. Thus, it came as something of a surprise during the oral argument when Justices Sonia Sotomayor and Elena Kagan closely questioned counsel for both sides about the *Leonard* case. See *Horne*, Oral Arg. Tr, at 7, 8, 9, 47, 48, 49 Justice Samuel Alito questioned why the Department had not highlighted the case more prominently in its brief. Id. at 46 (“I take it that you don’t think that the *Leonard* case has a very important bearing on this case because you cite it one time in your brief, it’s a passing reference, on the issue of fungible goods.”).
But the petitioners were in an equally difficult quandary if they accepted *Leonard* as binding precedent and ignored *Nollan* and *Dolan*. *Leonard*, on its face, supported applying the voluntary exchange analysis followed in *Monsanto* outside the domain of dangerous pesticides. The oysters at issue in *Leonard* were plainly benign, just as benign as the raisins in *Horne*. So, given the Court’s clear rejection of the oyster packer’s takings claim, *Leonard* suggested that the Court should reject the takings argument in *Horne* as well. In other words, in order to avoid the logical conclusion that *Leonard* required rejection of the Hornes’ takings claim, the petitioners had to distinguish *Leonard*. Enter the doctrine of sovereign public ownership of wildlife.

Chief Justice Robert, embracing the Hornes’ argument, thought that the doctrine of sovereign ownership of wildlife made the *Leonard* decision “readily distinguishable” from the *Horne* case. The oyster exaction was not an unconstitutional taking because the oysters, “unlike raisins,” were state-owned *ferae naturae*. The Chief Justice quoted from the Maryland court’s decision in *Leonard* to the effect that “[n]o individual ha[d] any property rights in them other than such as the state may permit him to acquire.” Thus, “[t]he oyster packers did not simply seek to sell their property, they sought to appropriate the State’s.” Consequently, the real issue in *Leonard*, the Court concluded, was not just compensation for the packers, but “reasonable and fair compensation” to the state for the harvest of publicly owned oysters.

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133 *Horne*, 129 S.Ct. at 2431.

134 *Id.* *See also id.*, quoting *Leonard*, 279 U.S. at 396 (observing that “the [oyster] packers ‘did not deny the power of the State to declare their business a privilege,’ and the power of the State to impose a 'privilege tax' which was not questioned by counsel.’”).

135 *Id.* (quoting *Leonard v. Earle*, 155 Md. 252, 258, 141 A.714, 716 (1928)).

136 *Id.*
Chief Justice Roberts saw the distinction between oysters and raisons quite clearly: “Raisins are not like oysters: they are private property—the fruit of the growers' labor—not ‘public things subject to the absolute control of the State[.]”138 Thus, while the public character of the oysters foreclosed Leonard’s taking claim in the case of the oyster exaction, the labor that the Hornes invested in their raisin crop warranted compensation for that exaction.

Ironically, the enduring significance of *Horne II* may lie not so much in its uncertain expansion of the *per se* takings rule to personalty as in the contrast the Court drew between private property—raisins—and public property, like oysters. The Court’s recognition of the public character of wildlife was a ringing endorsement of the state ownership doctrine, which should serve to insulate regulations protecting wildlife from takings claims in the future.

B. The Implications of Reaffirming Sovereign Ownership

Sovereign ownership of wildlife, a doctrine inherited from English law,139 has long been recognized in American jurisprudence.140 During the post-Civil War era, many states invoked the doctrine in an effort to curb the “market hunting” that was extirpating bird species like the

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137 *Id.* (noting that the Maryland Court of Appeals saw the issue as a question of “a reasonable and fair compensation” from the packers to “the state, as owner of the oysters.”) 155 Md. at 259, 141 A. at 717 (internal quotation marks omitted).

138 *Id.* (quoting the Maryland Court of Appeals decision in *Leonard*, 158 Md. at 258, 141 A., at 716).


140 *See* FREYFOGLE & GOBLE *supra* note 134, at 25 (“By the end of the the nineteenth century, ownership trust language . . . regularly appeared in American judicial rulings.”).
passenger pigeon. The U.S. Supreme Court upheld those efforts resoundingly in its 1896 decision of *Geer v. Connecticut*, which approved a state law forbidding the post-season out-of-state transport of game legally harvested—on the ground that the state owned the wild game, and thus had plenary authority to establish harvest and post-harvest regulations. Today, virtually all states claim sovereign ownership of wildlife held in trust for the public.

The state wildlife ownership doctrine is in fact about as settled a principle as exists in natural resources law. Its origins lie in the English Crown’s claim of ownership of wildlife, and the American states succeeded to the Crown’s prerogatives after the Revolution. Unlike in feudal England, the states initially adopted a free-wheeling rule of capture providing for subsistence hunters. But in the 19th century, most states—many relying on the sovereign

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141 F. Wayne King, *The Wildlife Trade*, in *WILDLIFE AND AMERICA* 253-54 (Howard Brokaw ed., 1978) (discussing the inadequacy of individual state laws to curb the hunting and extinction of pigeons and other animals).

142 *Geer v. Connecticut*, 161 U.S. 519, 564 (1896) (wildlife trust implies a legislative duty “to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future for the people of the state”).


144 See *BEAN & ROWLAND*, supra note 134, at 10-11 (discussing the development of the state ownership doctrine)

145 See *FREYFOGLE & GOBLE*, supra note 134, at 22 (“The legal rule in medieval England was that game species was owned by the Crown, not by landowners . . . .”).

146 See *Martin v. Waddell’s Lessee*, 41 U.S. (16 Pet.) 367, 418 (1842) (“[W]hen the people of New Jersey took possession of the reins of government and took into their own hands the powers of sovereignty, the prerogatives and regalities which belonged either to the Crown or the parliament became immediately and rightfully vested in the state.”).

147 Epitomizing the rule of capture is the famous case of *Pierson v. Post*, 3 Cai. R. 175, 2 Am. Dec. 264 (1805), which has introduced generations of students to their study of property law. The rule of capture was strong enough in early America to override the landowner’s right to
ownership doctrine—turned to controlling harvests to preserve game from extirpation. These sovereign ownership claims were universally upheld by state courts, and, as discussed, by the Supreme Court in its 1896 *Geer* decision.

Sovereign ownership of wildlife means that challenges to state wildlife regulations under the Takings Clause will generally fail. The state ownership principle is the quintessential “background principle” of state property law that serves to insulate state regulation from successful takings claims. The doctrine provides insulation against takings claims because the public nature of wildlife means that no landowner can claim a property interest sufficient to trigger the Constitution’s proscription against taking private property for public use without paying just

exclude. See, e.g., *Mc’Conico v. Singleton*, 2 Mill Const. 244, 9 S.C.L 244 (S.C. Const. App. 1818) (upholding a hunter’s right to enter privately owned unenclosed lands to search for and harvest wild game).


See, e.g., *Phelps v. Racey*, 60 N.Y. 10, 14 (1875) (explaining that game preservation can be determined by the legislatures of the states and the court does not review this discretion); *Magner v. People*, 97 Ill. 320, 336 (1881) (holding that a game restriction statute does not violate the commerce clause of the constitution); *Nickerson v. Brackett*, 10 Mass. 212, 216 (1813) (“[T]he privilege of fishing . . . [is] liable to be regulated, restrained, and limited, by the legislature.”); *Gentile v. State*, 29 Ind. 409, 417 (1868) (upholding a state’s ability to regulate fish because “fish are *ferae naturae*, and as far as any right of property in them can exist, it is in the public, or is common to all”).


*See, e.g.,* *Alford v. Finch*, 155 So.2d 790 (Fla. 1963) (declining to enforce state regulation limiting hunting on private land); *Allen v. McClellan*, 405 P.2d 405 (N.M. 1965) (same)

compensation.\textsuperscript{153} The Supreme Court established the background principles defense a quarter-century ago as an “antecedent inquiry” in takings cases.\textsuperscript{154} Numerous ensuing lower court decisions have applied the background principles defense.\textsuperscript{155}

Notwithstanding the venerable pedigree of the sovereign ownership doctrine, a series of Supreme Court decisions over the course of the twentieth century had cast something of cloud over the doctrine. For example, in Missouri v. Holland, the Court rejected the argument that the Migratory Bird Treaty Act invaded the states’ exclusive authority to manage wildlife, commenting that to attack the constitutionality of the act based on sovereign ownership of wildlife was “to lean upon a slender reed.”\textsuperscript{156} And in Toomer v. Witsell, the Court struck down a South Carolina statute imposing exorbitant fees on nonresident fishermen as inconsistent with the Privileges and

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\item \textsuperscript{153} U.S. CONST. AMEND. V. State ownership of wildlife also equips the states with the authority and perhaps the duty to collect damages for injuries to wildlife and should authorize the public to challenge state failure to carry out its wildlife trust duties. See Echeverria & Lurman, supra note 156, at 342, 354-56.
\item \textsuperscript{154} Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992). The Lucas decision established a categorical per se takings principle for regulations wiping out all economic value but excepting regulations that merely codified background principles of property and nuisance law. Id. at 1029. Although Lucas concerned a regulation apparently producing such an economic wipeout, the background principles defense has been used by courts in other takings contexts. See, e.g., Northwest Louisiana Fish & Game Comm’n v. United States, 574 F.3d 1386 (Fed. Cir. 2009) (ruling that federal navigational servitude barred physical takings claim based on government-caused flooding); John R. Sand, 60 Fed. Cl. 230, 235 (2004), vacated on other grounds, 457 F.3d 1345 (Fed. Cir. 2006), aff’d, 552 U.S. 130 (2008) (recognizing that background principles of nuisance and property law can bar physical takings claim based on environmental remediation activities)
\item \textsuperscript{155} See Michael C. Blumm & Lucas Ritchie, Lucas’s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses, 29 HARV. ENVTL. L. REV. 321, 341-64 (2005). (providing an exhaustive compilation of cases applying background principles to defeat takings claims).
\item \textsuperscript{156} 252 U.S. 416, 434 (1920).
\end{itemize}
Immunities Clause; the Court specifically rejected the state’s defense based on sovereign ownership, observing that “the whole ownership theory . . . is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.”  

Finally, in 1979, in *Hughes v. Oklahoma*, involving a Commerce Clause challenge to a statute virtually identical to the statute at issue in *Geer*, the Court expressly overruled *Geer*, and in the process dismissed the sovereign ownership doctrine as a “19th century fiction.”

Taken together, these statements from the nation’s highest court seemed to relegate the public ownership doctrine to the dustbin of history. As some courts and commentators have recognized, however, the Court’s rhetoric seems to go too far. In the first place, all of the cases discussed above involved conflicts between federal law and state law, and could have been resolved on Supremacy Clause grounds without disparaging the state’s wildlife laws. Second, within our constitutional structure, the U.S. Supreme Court lacks the authority to review and

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159 See, e.g., *State v. Fertster*, 841 P.2d 467, 470 (Mont. 1992) (affirming the convictions of several individuals for killing game without a license, rejecting the argument that *Hughes* “effectively preclude[d]” the state from relying on its ownership of wild game to regulate hunting); *Sheperd v. State*, 897 P.2d 33, 40 (Alaska 1995) (ruling that the state ownership doctrine retains vitality absent a “conflict with paramount federal interests”).

jettison substantive state law rules with which the justices disagree.\textsuperscript{161} In sum, the Supreme Court’s cavalier dismissal of sovereign ownership seemed, upon analysis, implausible; as Oliver Houck pithily made the point, “the Supreme Court “did not, and could not, overrule principles dating back to Roman law that wild animals are the common property of the citizen of a state.”\textsuperscript{162} Notwithstanding the logic of this position, the Court’s caustic choice of the word “fiction” caused some to question the continuing vitality of the doctrine.

Horne \textit{II} makes clear that the epithet “legal fiction” now can be disregarded, at least on the context of takings analysis. State ownership of wildlife may be a fiction in the narrow sense that the state’s ownership lacks some of the attributes of proprietary ownership, like possessory and alienation rights. But the states do not have or claim proprietary ownership; instead, they claim sovereign ownership, that is, the capability to control the taking of and secure the conservation of wildlife. \textit{Horne II} is a resounding affirmation of state sovereign authority to control all private actions affecting wildlife, including the imposition of measures necessary to conserve wildlife.

The implications of the \textit{Horne} Court’s reaffirmation of the state ownership of wildlife doctrine are potentially far-reaching. Frist, the decision implicitly recognized the longstanding understanding that states may define wildlife as public property;\textsuperscript{163} therefore, they may control the

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\item \textsuperscript{161} See, e.g., G. Merle Bergman, \textit{Reappraisal of Federal Question Jurisdiction}, 46 Mich. L. Rev. 17, 25-26 (1947) (discussing the limitations of the Supreme Court jurisdiction as it applies to state laws).
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acquisition of all private rights in wildlife,¹⁶⁴ the regulation of which has not been preempted by the federal government.¹⁶⁵ Second, Horne II made clear that regulation of private actions affecting resources owned by the states in their sovereign capacity cannot give rise to viable takings claims under the Takings Clause.¹⁶⁶ Third, although the Leonard case involved harvest regulations, the logic of the Horne Court’s endorsement of the sovereign ownership doctrine extends to takings claims based on destruction or adverse modification of habitat upon which species depend for their survival¹⁶⁷ – the chief cause of species jeopardy in the United State today.¹⁶⁸

A fourth implication of Horne’s recognition of state sovereign ownership concerns the encouragement it may give to states to more forcefully assert their right to collect damages from


¹⁶⁵ See, e.g., Gutierrez v. Mobil Oil Corp., 798 F. Supp. 1280, 1281 (W.D. Tex. 1992) (holding that the Clean Air Act did not preempt state common law claims against a stationary source); Kleppe v. New Mexico, 426 U.S. 529, 546 (1976) (upholding the constitutionality of the Wild Free-Roaming Horses and Burros Act); United States v. Massachusetts, 493 F.3d 1, 7 (1st Cir. 2007) (discussing the preemption analysis in terms of maritime laws).

¹⁶⁶ Horne, 135 S.Ct. at 2431.

¹⁶⁷ Certainly state courts have traditionally interpreted the scope of the doctrine of sovereign ownership of wildlife to extend to habitat protection. See, e.g., Columbia Fishermen’s Protection Protective Union v. City of St. Helens, 87 P.2d 195, 198-99 (Or. 1939) (upholding, based on the public ownership doctrine, a suit to restrain pollution of the Willamette and Columbia Rivers in order to protect public fisheries; observing that the state’s authority based on public ownership doctrine “extends not only to the [direct] taking of its fish, but also over the waters inhabited by the fish,” and that states’ “care of the fish would be of no avail if it had not power to protect the waters from pollution”); Barrett v State, 116 N.E. 99, 100 (N.Y. 1917) (ruling that the public ownership doctrine justified not only the protection of beavers themselves but of their “dams, houses, homes or abiding places of same”)

those who injure the state’s wildlife from actions that pollute or destroy wildlife habitat. Finally, Horne may persuade state courts to give full effect to the trust that sovereign ownership implies by granting the citizen beneficiaries of that trust standing to challenge judicially state actions that fail to carry out the trust responsibility. A trust imposed upon the state without a means of public enforcement is a chimera.

**Conclusion**

The Horne case was full of surprises. The Court’s interest in twice deciding a case about the government’s role in raisin marketing was startling. Perhaps the reason for the Court’s enduring interest in the case was the Court’s belief that raisin growers, producers of a benign “healthy snack;” needed judicial protection from economically irrational government overreaching, even if the marketing program was designed to benefit the raisin growers themselves. The Court obviously thought this New Deal program was anachronistic, so it effectively scrapped it, since Congress seemed to lack the will to do so.

Perhaps the Court thought it was simply performing the function of updating the law, something common law judges have done for centuries. But overturning statutes is not quite the same as updating common law, the former requiring a good deal more judicial activism. The kind

169 In re of Steuart Transp. Co., 495 F.Supp. 38, 40 (“Under the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public’s interest in natural wildlife resources. Such right does not derive from the ownership of the resources but from a duty owing to the people.”); State Dep’t of Fisheries v. Gillette, 621 P.2d 764, 767 (Wash. Ct. App. 1980) (“Representing the people of the state-the owners of the [spawning grounds that were] destroyed . . . the Department of Fisheries thus has a right of action for damages. In addition, the state, through the Department, has the fiduciary obligation of any trustee to seek damages for injury to the object of its trust.”).

170 Horne, 135 S.Ct. at 2431.

171 See supra note 12 and accompanying text.
of judicial activism the *Horne* Court encouraged may portend a new era of close substantive scrutiny of statutes based on the policy preferences of a few judges. Some judges are sensitive to the widespread criticism the Court endured during the *Lochner*-era of judicial policymaking in the early twentieth century. Those judges who are not so concerned may see in *Horne* as a license to retire outdated government-subsidy programs one day, and overturn government police powers like zoning and environmental law the next.

Another surprise in *Horne*—and the silver lining of the case for state governments—is its express ratification of the state sovereign ownership of wildlife doctrine. A public property right recognized in virtually every state—and now expressly endorsed by the Supreme Court—state sovereign ownership of wildlife implies a trust duty to protect the public’s property interest. State courts are now free interpret their wildlife laws with the assurance that the U.S. Supreme Court has recognized the state sovereign ownership doctrine as a defense against takings claims. Given recent pronouncements from the Court about the importance of state sovereignty, we

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172 *See, e.g.*, David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHIC. L. REV. 373, 373 (2003) (discussing *Lochner v. New York*, 198 U.S. 45 (1905), as an “anti-precedent,” the symbol for an era in which the Supreme Court invalidated nearly 200 social welfare and regulatory measures, like laws setting minimum wages, recognizing union activities, and establishing pensions for workers). For withering criticism by a well-known Legal Realist, see JEROME FRANK, LAW AND THE MODERN MIND (1930) (debunking judicial objectivity, a cornerstone assumption of *Lochner* era case law that emphasized dichotomies like “manufacturing” versus “commerce” and “direct” versus “indirect effects).

173 *See* Blumm & Paulsen, *supra* note 143, at 1437, 1488-1504 (collecting 47 state claims of sovereign ownership or claims of the existence of a wildlife trust).

174 *Horne*, 135 S.Ct. at 2431 (“The oysters, unlike raisins, were ‘ferae naturae’ that belonged to the State under state law, and ‘[n]o individual ha[d] any property rights in them other than such as the state may permit him to acquire.’”) (citations omitted).

think that the *Horne* Court meant what it expressly said about state sovereign ownership of wildlife, and that will be *Horne*’s chief legacy to takings law doctrine in the years ahead.

(discussing the importance of state sovereignty in the context of water rights); *Massachusetts v. EPA*, 549 U.S. 497, 519-20 (2007) (recognizing the states’ sovereign interest in submerged lands affected by climate change in granting standing to the state of Massachusetts to challenge EPA’s rejection of a petition to regulate carbon emissions under the Clean Air Act).