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THE UNFINISHED BUSINESS OF HORNE
V. DEPARTMENT OF AGRICULTURE

Richard A. Epstein*

INTRODUCTION

It is always tempting in looking at Supreme Court cases to think
of them narrowly, chiefly in light of the fact patterns that they
examine. But that minimalist approach is intellectually risky
because it runs the risk of focusing on one discrete part of legal
document in isolation from the larger whole of which it is a part.1
What is often missing is a keen awareness of the need to integrate
cases with one another in service of a general theory that is faithful
to both the text and structure of the Constitution. In this instance,

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remarks that I gave at the Conference on Horne, organized by the New York
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1 For an example of that approach, see Stephen S. Schwartz, Horne v. USDA: An
the Takings Clause is at issue. The Clause states: "[N]or shall private property be taken for public use, without just compensation." The facts of any particular case should serve as a springboard to discuss the full range of relevant doctrinal issues. That analysis works well when the precedents are in good order. The new case need only be fitted into the preexisting framework. But the process is quite different whenever the existing pattern of case law is in a sad state of disarray. Now each new piece to the puzzle only reveals the gaps, overlaps, and inconsistencies in the existing construct. At this point a total reexamination is typically in order.

It is widely agreed that takings law is something of a muddle. But there is far less agreement on what to do in order to set it right. There are those who think that because the effort to create islands of per se takings in a sea of rational basis law is doomed to failure, the government should therefore be given broad sway over all matters of economic regulation, taxation, and control. On that view, even the modest effort to defend the per se takings rule—which in any event is overstated—for permanent physical takings is a mistake, and the entire area should be governed by the three part takings test developed in Penn Central Transportation Co. v. City of New York. Yet it is equally possible—in my view necessary—to insist on coherence but run it in the opposite direction, so that all regulatory takings are treated under the more rigorous framework on the same basis as physical takings. What that means in this context is that the rational basis test is out. What it does not mean is that all regulations of property and contract are per se unconstitutional.

2 U.S. CONST. amend. V.
Instead, the government can win if it either has some strong police power justification for limiting or shutting down private activity or by showing that the comprehensive scheme in question affords compensation, typically in-kind, for the parties whose right to use or dispose of property is limited in some substantial way. Both of these points of analysis eliminate the middle ground by showing the huge chasm between progressive and classical liberal theory on the desirability of strong (but not absolute) property rights.

Unfortunately, Chief Justice John Roberts, who wrote the majority opinion in *Horne v. Department of Agriculture*, did not use the occasion to rethink the law. Instead, a born litigator, he followed his deep incrementalist instincts by trying to displace as little of the furniture of takings law as possible while requiring the government to pay compensation for the raisins that it hauled off at the crack of dawn from the Hornes. Ultimately, his effort to rationalize the outcome of *Horne II* within the existing case law falls apart, but in instructive ways that reveal the deep internal fissures within current takings law. It is also instructive to note that the two other opinions in the case, written by Justice Breyer and Justice Sotomayor, only add further layers of complexity to the case. The overriding conclusion to be drawn from these marginal adjustments to the tangled field of takings doctrine is that more than mid-course corrections are needed to put this area of law on an even keel. Yet there are important doctrinal threads in *Horne*, which, if exploited and developed, could lead to the long overdue fundamental rethinking of this troubled area.

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Part I of this article addresses the background situation of the Horne cases. The remaining parts then explore in sequence the particular questions that were canvassed in Horne II. Part II addresses the role of the distinction between real and personal property in takings law. Part III then turns to the prima facie case of a taking. Part IV briefly assesses the issue of public use in takings cases. Part V then looks at the issue of just compensation, considering the role of both explicit and implicit-in-kind compensation in takings cases. Part VI examines the troubled distinction between physical and regulatory takings with special reference to the landlord-tenant context. Part VII looks at the peculiar role that a reserved contingent interest plays both in Horne II and in rent control and stabilization cases. Part VIII considers the role of unconstitutional conditions in Horne II and real estate takings cases. Part IX generalizes the argument and defends the case for using a unified theory for covering all takings, regulations and taxes by a unified theory as the only way to eliminate textual confusion and institutional jumble that comes out of modern takings law. A short conclusion follows.

I. BACKGROUND

The Horne litigation is unusual in that it involved two separate trips to the Supreme Court, each of which resulted in a defeat for the government. The underlying transaction took place under the mysterious confines of the Agricultural Marketing Agreement Act ("AMAA") of 1937, passed at the height of the New Deal. The explicit justification for the AMAA was commonplace at the time: the glut of agricultural products coming onto the market meant that government had a useful role to play in what was euphemistically

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8 See supra note 7. For a more detailed account, see Michael W. McConnell, The Raisin Case, CATO SUP. CT. REV. 313 (2015).
called the “stabilization” of commodity prices. Markets, of course, are able to stabilize prices through the interplay of supply and demand. When quantities get high, then prices go down. If they sink too low, then some of the least efficient producers exit the market until prices rise to their appropriate level, i.e., where all of the remaining producers are able to make money. As the market stabilizes, other farmers and producers redeploy their resources to their next best use. In the short run, they could shift to other crops. In the long run, they could exit the industry entirely.

These market adjustments do bring about serious individual dislocations, but it is a mistake to assume that such dislocations take place only if the government stoutly refuses to intervene. Indeed, once the government does intervene a new and more durable set of distortions are put into place, as funds from somewhere else, raised by tax dollars, must be found to prop up prices for all existing producers by eliminating substantial fractions of the overall output. The artificially higher prices translate into reduced consumer welfare, which is important in any overall social calculation of the strengths and weaknesses of the existing practices. In the long run, it becomes impossible to eliminate the excess supply, so that an exit of some firms from the industry, and an expansion of others, takes place. The high concentration of small growers in the 1930s is not an accurate reflection of the market today given the rise of modern agribusiness. But those legal rules stubbornly persist.

The New Deal framework flatly precludes this form of market stabilization in the context of the raisin market. Instead, its view of

10 Karen Bradshaw, Using Takings to Undo Givings, 10 N.Y.U. J.L. & LIBERTY 649, 650 (2016) (“Since passage of early Farm Bill Legislation in the 1930’s, the industrial economics of agriculture have changed profoundly. Agribusiness has shifted from millions of small farmers to a smaller number of growers, and sometimes consolidated oligopolies.”).
stabilization aims for high prices that necessitate the removal of raisins from the supply distribution network. In _Horne_, the needed reductions in outputs necessary to reach the target price were imposed under a 1949 California Raisin Market Order that established a "Raisin Administrative Committee" (RAC). That body was dominated by the 35 producer representatives and augmented by ten representatives of the handlers, i.e., typically processors and distributors, but not growers. Two additional representatives, one for the cooperative associations and one lonely voice for the public, completed the roster. By design, the RAC stacked the deck in favor of the growers on the dubious New Deal view that only industry members had the knowledge and incentives to set the right prices for a long-term sustainable market without risk of exit.

To work its magic, the RAC routinely assembles the data and generates a recommendation for the amount of reserve tonnage needed to sustain the higher prices. These cuts are then duly allocated down to the individual farm. These were not small adjustments. They equaled 47 percent of output for 2002-2003, and 30 percent of output for 2003-2004. Consistent with the overarching plan, these raisins may be sold overseas or distributed without cost to local noncompetitive markets, such as with school lunches. Both of these options were designed to deal with surpluses without lowering market prices. In the event that the RAC accounts contained some surplus cash at the end of the year, these funds were returned pro rata to the growers.

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11 _Horne I_, 133 S. Ct. at 2057.
12 _Id._
13 _Id._
14 _Id._
15 _Horne II_, 135 S. Ct. at 2424.
16 _Id._
17 _Id._
The Hornes objected in principle to the program. They claimed that they were entitled to sell all the raisins that they produced as free tonnage. The Hornes engaged in a nifty self-dealing transaction in order to pretend that they were not handlers, and thus not subject to the restraints of the AMAA. But once that façade was punctured, the central issue in the case was joined. The government came one day to collect the reserve raisins at 8:00 AM, only to be sent back empty-handed by the Hornes. At this point, the government shifted gears and obtained an administrative determination that the Hornes were subject to civil penalties in the amount of $202,600 and $483,843.53 for the two years, equal to the fair market value of the raisins that they were unwilling to turn over as reserve tonnage plus a civil penalty for disobedience.

In the initial proceeding, the government took the position that it could impose the fine without allowing the grower to inject his taking defense in the same action. To use the language of contract, the government treated the two claims as independent, so that the government collection of the fine could go forward, forcing the Hornes to mount a separate action in the Federal Court of Claims to vindicate their takings claim. In Horne I, Justice Thomas rejected this argument on unassailable grounds. There is no need to bifurcate this litigation when all the elements needed to raise the defense are present on the record of the initial case. The situation is a direct parallel to the law of conditions in the law of contract, where the accepted view is that two covenants that are given to each other as quid pro quos are dependent. A breach of one, therefore, provides a defense against any suit brought for the breach of the other.

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18 Id.
19 Horne I, 133 S. Ct. at 2058.
20 Horne II, 135 S. Ct. at 2424.
21 Id. at 2425.
22 This claim was vindicated in the court below. See Horne v. U.S. Dep’t of Agric., 673 F.3d 1071, 1080 (9th Cir. 2012).
23 Horne I, 133 S. Ct. at 2063-64.
paradigm case for these purposes was Kingston v. Preston,24 which held that a seller who agrees to part with a business in a credit sale need not transfer the business over if the potential buyer has not come up with the security stipulated in the agreement. Clearly the ex ante efficiency of the arrangement precludes forcing the seller to bear this huge uncompensated credit risk. Simultaneity in the performance of these two interdependent promises is the norm.

The same logic applies in Horne I. To be sure, there was no risk that the government could not pay the takings claim if required to do so in the Federal Court of Claims. But there was an enormous risk of added expense, delay, and procedural entanglements from forcing the Hornes to bring a second lawsuit when all the relevant issues could be resolved at once. The federal rules normally encourage the resolution of defenses—there was no counterclaim in this case—as part of the original suit.25 It was rather sad that the government took the opposite position, and even sadder that the Ninth Circuit embraced it.26 The government’s view that the claim was not yet ripe for adjudication was fanciful at best. There was no fact that was not known at the time that the government sought damages and civil penalties.

The trial of the case in Horne II took place on admitted facts; so the only question for the Supreme Court was whether the transaction as a whole should be regarded as a compensable taking. That inquiry, in turn, generates the specific questions identified above.

25 See, e.g., FED. R. CIV. P. 13(a) (establishing the rule for compulsory counterclaims).
26 Horne v. U.S. Dep’t of Agric., 750 F.3d 1128 (9th Cir. 2014).
II. CONSTITUTIONAL PROTECTIONS FOR REAL AND PERSONAL PROPERTY

In one sense the dispute in Horne II was set up by the highly improbable claim of the Ninth Circuit that "the Takings Clause affords less protection to personal than to real property," which in practice would have left it only the protection of the vague balancing tests under Penn Central where property owners almost invariably lose. The Chief Justice rejected the point by reciting the basic holding of Loretto v. Teleprompter Manhattan CATV Corp.: "We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."

At this point, note the two deep weaknesses in this canonical formulation. This so-called per se rule cannot be a rule that invariably applies to all cases, for otherwise, when the government takes property to foreclose on a tax lien, it has to remit the fair market value of the property to the party on whose property the lien was attached. This manufactured requirement to compensate for the value of the seized item obviously defeats the purposes of the lien. It is important, therefore, that the per se taking rule be jettisoned, as it is not accurate to claim that every seizure of property by the government demands compensation. However, I think it is also incorrect to follow Professor McConnell's suggestion that the term "actual taking" eliminates the conceptual problem. The use of that term does not give any signal that physical takings may sometimes be justifiable without need for compensation. Nor does it explain why regulatory takings are not actual takings, albeit takings of a partial interest in land, namely a restrictive covenant.

27 Id. at 1140.
30 McConnell, supra note 8, at 314.
for the benefit of either the immediate neighbors or the public at large.\textsuperscript{31} It may well be, and indeed is the case, that the range of possible justifications for regulatory takings is broader than those available for occupations: it is permissible to shut down a nuisance, but not necessarily to take the land on which it occurs. And, so too, the probability of implicit in-kind compensation is far broader in regulatory contexts than in physical occupation cases.\textsuperscript{32}

The confusion only gets deeper because there is no explanation as to why the physical taking has to be permanent in order to be compensable. This point is of serious relevance in \textit{Horne} because some of the money collected from the resale of raisins by the government was placed in a fund from which payments back to plan participants could be made at the end of the year.\textsuperscript{33} So the transaction is not a complete, outright taking. The correct way to take this bauble into account is to reduce the amount of the compensation owing at the outset by the expected value of the return payment, or, in the alternative, by letting the government keep that return payment by paying full value for the raisins in advance.

By deviating from the simple rule—the more you take the more you pay—\textit{Loretto} introduces yet a second mistake in the takings law, which can rear its ugly head in a complex institutional setting. It is not surprising that in \textit{Horne II} the Chief Justice dutifully goes back to the Magna Carta to find texts that indicate that the taking of corn or carts from private parties generates a duty of compensation, which is surely correct.\textsuperscript{34} But in these traditional cases, the issue of return in-kind benefit from the government action cannot arise. It

\textsuperscript{32} \textit{EPSTEIN, supra note 6}, at 195-15.
\textsuperscript{33} \textit{Horne I}, 133 S. Ct. at 2058.
\textsuperscript{34} \textit{Horne II}, 135 S. Ct. at 2426.
has long been decided that the general benefit that each person gets solely from the government’s use of his private assets, a benefit equally felt by both the taking victim and all other citizens, is not compensation for what is taken. If all such equal and diffuse benefits counted as compensation, the constitutional just compensation test would be satisfied in a pro forma fashion whenever all members of the public derived some general benefit from the government’s disposition of the taken property. Precedent after precedent indicates that the government must pay compensation when, for example, it requisitions private property for military purposes when ordinary markets are not available to complete the purchase.\(^{35}\) And it is surely the case that the right to exclude the use of one’s property by others that is granted by patents is covered by the Takings Clause, even though the government is under no obligation to create a patent system or issue any particular patent in the first place.\(^{36}\) In the same vein, it is established that trade secrets—created in all cases by private behavior only—are also a form of private property that has constitutional protection.\(^{37}\) The first leg of Horne I’s journey through the history of takings law is thus completed with some unnecessary historical diversions wrought by the decision in the Ninth Circuit. The pesky little reversionary interest in the leftover proceeds is dismissed as a “speculative hope that some residual proceeds” may be paid back.\(^{38}\) But in this regard, the Chief Justice equivocates on the term “hope.” He makes it appear as though the reversionary interest is just an expectation that is not enforceable, much like the heir who expects to receive property from an ancestor but lacks the legal ability to prevent the ancestor from leaving it to someone else.

\(^{35}\) See, e.g., United States v. Russell, 80 U.S. 623 (1871).


\(^{37}\) See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001-02 (1984) (holding that trade secrets are assignable, and may constitute the corpus of a trust).

\(^{38}\) Horne I, 135 S. Ct. at 2428.
But in *Horne II*, the so-called "hope" is actually an enforceable legal right to receive that money should it become owing. It is much the same as the wife who has the right to her dower interest, even though it is contingent on her surviving her husband. By excluding this enforceable reversionary interest from the takings calculus, the Chief Justice thus makes his case easier than it should be.

III. **Takings: The Prima Facie Case**

Once it is agreed that full-fledged property is involved, the next question is whether it was taken. If not, the case ends. If the property was taken, then the question is whether there exists, in the language of pleading, an affirmative defense. Establishing a prima facie takings case in *Horne* raises one small complication: did the government take the grapes? In a sense, the answer is no, because the government only fined the Hornes for their failure to turn over these raisins. But clearly the government could only impose that fine if the Hornes had done something wrong in refusing to turn over the raisins without compensation; otherwise every constitutional prohibition could be circumvented by first announcing the imposition of a fine on a constitutionally protected behavior, and then collecting that fine to assure compliance. So the government fine counts as a taking, absent an underlying justification for taking the raisins in the first place. This is the issue that the Hornes wanted to tee up.

With the *prima facie* case established, what of the defenses? Here, the typical police power defenses are not relevant because there is no issue of health and safety. After all, these raisins were indistinguishable from those free raisins that the government
allowed to go to market.\textsuperscript{39} Hence, the only remaining questions deal with public use and just compensation. I take these up in order.

\textbf{IV. PUBLIC USE}

At this point the case turns on defenses. What should the Hornes be able to say in their defense? The initial query is whether they should be entitled to shut down the raisin program on the ground that it intends to benefit only a small fraction of the population at the expense of the public at large, and thus cannot qualify as a taking for public use, even under the expansive doctrine of \textit{Kelo v. City of New London}.\textsuperscript{40} Recall that Justice Stevens's opinion in \textit{Kelo} required that a taking for public use have at least some public deliberation as to how a proposed land use program advanced the public good.\textsuperscript{41} Justice Thomas thus draws blood when he writes in \textit{Horne II}: "It is far from clear that the Raisin Administrative Committee's conduct meets that [\textit{Kelo}] standard. It takes the raisins of citizens and, among other things, gives them away or sells them to exporters, foreign importers, and foreign governments."\textsuperscript{42}

\textbf{V. JUST COMPENSATION}

The just compensation question raises far greater complications. The initial point is that no cash compensation is provided, so everything turns on whether the government has provided implicit in-kind compensation for the raisins taken. The Chief Justice tried to finagle the question by pointing to the shenanigans in \textit{Horne I} without addressing the return-benefit question on which the entire

\textsuperscript{39} The standard police power quartet was "health, morals, safety, and [the] general welfare of the community." Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 392 (1926).
\textsuperscript{40} 545 U.S. 469 (2005).
\textsuperscript{41} \textit{Id.} at 484.
\textsuperscript{42} \textit{Horne II}, 135 S. Ct. at 2433 (Thomas, J., concurring).

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case hinges. His sleight of hand has the practical consequences of eliminating the reserve program, without giving the government a clean shot at defending its position on the offsetting benefit issue. One telltale sign on this point is that the regulations in question were by the farmers and for the farmers, so that in the aggregate it is highly unlikely that their economic effect cuts against the farmers as a class. Hence, as Justice Breyer argues in his partial dissent, the compensation came from the increased value of the retained grapes, all of which was attributed to the artificial scarcity created by the marketing orders.\(^43\) Justice Breyer thus rightly relied on \textit{Bauman v. Ross}\(^44\) for the proposition that the direct benefits from the scheme should be allowed to offset the economic burdens imposed by the law.\(^45\) As discussed in the earlier case of \textit{Monongahela v. United States},\(^46\) it is of course a wholly different proposition to say that a person whose property is devoted to public use, without any special return benefit, should have his compensation reduced because he, like other members of society, gains from the public taking.\(^47\)

\(^43\) \textit{Id.} at 2433-34 (Breyer, J., dissenting).
\(^44\) \textit{Id.} at 581-582: We, of course, exclude the indirect and general benefits which result to the public as a whole, and therefore to the individual as one of the public; for he pays in taxation for his share of such general benefits. But if the proposed road or other improvement inure to the direct and special benefit of the individual out of whose property a part is taken, he receives something which none else of the public receive, and it is just that this should be taken into account in determining what is compensation.
\(^45\) \textit{Id.} at 326 stated the correlative proposition: [The just compensation requirement] excludes the taking into account as an element in the compensation any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated, and leaves it to stand as a declaration that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner.
Taken as a whole, the statutory scheme has all the earmarks of a cartel backed and supported by the government. But as is the case with all government programs, the distribution of benefits among its members, and to third parties are always hard to pin down given the multiple political forces at play. Thus McConnell also notes:

But in fact the Raisin Administrative Committee takes possession of the excess raisins; they are not a pure loss. The RAC sells them or gives them away at its own discretion. In 2002-2003 it sold the vast majority of the reserve raisins, receiving $118,280,587 in revenues, of which it devoted $53,360,854 to export subsidies. In 2003-2004 the RAC sold its reserve raisins for $111,242,849, spending $99,807,957 on export subsidies.48

The point here is important because it indicates that at least some of the benefits of the reserve program were diverted from the farmers to third parties in separate programs. Those dollars therefore do not count as a return benefit. But so long as the program was organized by the farmers, it is fair to at least inquire whether the price increases created by these production limits supply the growers with the needed return benefits that compensate for the loss of raisins. To answer this complex question, the case might have been remanded to sort through the tangle of price effects to determine what benefits the affected producers enjoyed. In my view, as developed later, when the use of revenues from one program to support a second independent program

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Theoretically one goal of takings law is to equalize surplus across all individuals, so as to stabilize government actions. That cannot be done if general social benefits count against the party whose property is taken when those same benefits are enjoyed for free by everyone else. See for discussion, Epstein, Takings at 3-6, where the tale of two pies contemplates pro rata division of surplus. For a fuller discussion, see Richard A. Epstein, Bargaining with the State 98-103 (1993).

48 McConnell, supra note 8, at 320.
redistributes benefits from A to B, that device in general is a taking that should be struck down absent any strong police power justification. 49 Those justifications do not exist here.

But in today's world of constitutional make-believe, those words were never uttered in either the briefs or the opinions. It was only after the litigation that Professor Michael McConnell, who argued the case for the Hornes, fessed up to the obvious: the whole scheme was a cartel.50

In principle, a cartel should expose producers to treble damage actions if done by their own devices. If the cartel takes revenues, government sponsorship only makes matters worse, not better. In principle, the interference with advantageous relationships should allow some action, either against the government for setting up the cartel, or against the members for forming it.51 But the proper claimants are not the producers. Instead, the aggrieved party should be the consumers who do not purchase directly from the growers or handlers. Unfortunately, in Block v. Community Nutrition Institute,52 a milk marketing order case, the Court shut the door on consumer standing, leaving the only parties hurt by the order powerless to challenge its validity.53 There was no explanation in

49 Horne I, 135 S. Ct. at 2428.
50 McConnell, supra note 8, at 318 ("In theory, the size of the raisin reserve is set each year in accordance with expected crop size and market conditions, to maximize the total income of the raisin industry. In other words, it is a cartel."). For discussion of the point, see Dean Lueck, The Curious Case of Horne v. Department of Agriculture: Good Law, Bad Economics?, 10 N.Y.U. J.L. & LIBERTY 608 (2016).
51 See, e.g., EPSTEIN, TORTS § 21.6 (1999).
53 Id. at 346. The Court stated:

The remainder of the statutory scheme, however, makes equally clear Congress' intention to limit the classes entitled to participate in the development of market orders. The Act contemplates a cooperative venture among the Secretary, handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them. Handlers and
Block why the consumers were treated as having identical interests with the handlers. It is therefore odd to think that there is some theory of virtual representation at work in the case, given the likely conflict of interest between these parties. More specifically, the consumers who are hurt by artificially increased prices suffer a harm that is wholly distinct from any harm to members of the insider groups that designed the policy in the first place. Block seems wrong on the grounds that as a matter of antitrust law, the first person outside the inner circle should be able to challenge its cartel status under the standing rule announced in Illinois Brick v. Illinois. But now standing—for people who have clearly lost—becomes the source of their complaint.

VI. PHYSICAL V. REGULATORY TAKINGS

Once the Chief Justice ignores the cartel question, Horne II sails into choppier waters because the Court now has to explain why the Hornes can prevail, even though they concede that "the government may prohibit the sale of raisins without effecting a per se taking." At this point, the Chief Justice takes refuge in the worst feature of the current law by noting that these two different routes to the same government end arise because "of the settled difference in our takings jurisprudence between appropriation and regulation."

Settled the distinction may be, but it is also incoherent. One of the basic principles of constitutional law is the anti-circumvention principle, whereby the government cannot evade its constitutional responsibilities by changing strategy without changing the producers—but not consumers—are entitled to participate in the adoption and retention of market orders.

55 Horne II, 135 S. Ct. at 2428.
56 Id.
substance or effect of its actions.\textsuperscript{57} Here, shutting down the growing of crops surely is an interference with the ordinary use of property. If one neighbor imposed that restriction on his neighbor, he would be enjoined from going further and forced to pay damages for past losses. The state may escape the injunction if the taking is for a public use, but it cannot escape the duty to compensate, assuming for a moment that this cartel arrangement—which hurts the public at large—meets the public use standard. The correct view, therefore, does not posit some mythical distinction between the expropriation and the regulation, but treats the two as close substitutes to be governed by the same position. The current law does this only to the most limited extent, namely in the case where there is a total loss of all use of property. This entire structure creates a sharp discontinuity between that small class of regulations and the remainder by not once indicating where that boundary line should be. It is just not sufficient for the Chief Justice to pooh-pooh the analytical difficulties, or to cite \textit{McCulloch v. Maryland}\textsuperscript{58} to the effect that both means and ends matter. Worse still, he cites the famous line of Justice Holmes from \textit{Pennsylvania Coal v. Mahon},\textsuperscript{59} "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way,"\textsuperscript{60} which cuts the exact opposite way. More specifically, Justice Holmes is correct insofar as he insists that that the government cannot avoid compensation for a taking of a partial interest in land through the regulatory process. \textit{Horne} presented a genuine opportunity to review this critical distinction, and the Chief Justice ran away from the challenge.


\textsuperscript{58} 17 U.S. 316 (1819).

\textsuperscript{59} 260 U.S. 393 (1922).

\textsuperscript{60} Id. at 416.
Professor McConnell calls the professed unwillingness of the Chief Justice to get this issue under control as a "quibble." McConnell then tries to salvage the wreckage in Chief Justice Roberts' opinion by offering a political economy account of the difference between the outright taking and the regulatory use restriction that seeks to prop up the distinction:

The constitutional line between takings and use restrictions reflects the reality that government is more likely to invade property rights if it thereby gains control over valuable resources that can be redistributed to its friends.

The distinction also rests on a moral difference—often deconstructed and disliked by economists—between harm and benefit. The effect of the distinction is to allow government to prevent property owners from harming others, but not to allow government to require property owners to benefit others.  

... The government has little incentive to impose use restrictions whose costs exceed the regulatory benefits (assuming there is no animus against the property owner). That is certainly no guarantee of wise or efficient regulation, but, overall, one would expect the benefits to exceed the costs, at least roughly.

Yet this purported ground for distinction ignores the fact that the government can gain as much control over resources by regulation as it can by occupation, which is why regulation is an all too effective substitute for taking. Thus, the typical zoning ordinance, which prevents one person from developing his land

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61 McConnell, supra note 8, at 318.
62 Id. at 320-21.
63 Id. at 319.
while his neighbor across the street can develop hers, is a transfer of wealth from one party to the other. The value of the first plot goes down by the zoning restriction, and the value of the second goes up because of the legally imposed restriction on competition. This result will not happen if both parties are subject to the identical restrictions. Therefore, if the impact is proportionate and the only parties who vote on the regulation are those who are subject to the rule, we can expect positive sum games. But if the parties are in disparate positions, the losers will vote against a proposition, which, if adopted, will result in a wealth transfer from one group to another.

McConnell treats this special case as though it is the norm when he notes that the government has "little incentive" to impose inefficient regulation, which is only true when the only parties involved are benefitted equally. Just happy outcome happens for members of the raisin cartel who receive pro rata treatment. But that proposition is manifestly false in a large number of cases where the benefits and burdens do not match up. In those cases, the ability to transfer wealth on a large scale through regulation is in fact easier than it is through occupation because the government does not have to conduct a parcel-by-parcel condemnation paid for out of public revenues. Skewed zoning laws are a lot easier to impose than outright takings: just think of the furious public response to Kelo. If anything, therefore, the political risks of misguided regulation are greater than the parallel risks from occupation. It follows that there is no reason to tolerate the current distinction, as it only adds on an extra layer of confusion in trying to maintain the line between them. Did the government take the air rights in Penn Central, or did it only forbid the owner of the parcel from using them? It is all irrelevant. The right question is only to determine the net size of the loss, the

64 Id.
pro rata treatment applied to the raisin cartel, which is why on balance the Hornes benefited.

This basic point is orthogonal to the critical distinction between harms inflicted and benefits conferred, which is essential to keep the law on an even keel. In this regard, Justice Scalia’s unfortunate speculations in *Lucas v. South Carolina Coastal Council*\(^65\) are the counsel of intellectual despair. The law of restitution does not allow me to sue everyone in the world whom I have not killed for conferring a benefit on them nor does it allow everyone in the world to sue me because I have not given them money that they would rather have.\(^66\) Instead, everyone starts from a neutral baseline in which only a tiny fraction of actions give rise to claims for either restitution or tort. Hence, actionable benefits are conferred only by providing property or supplying services to others. Actionable harms are inflicted only by causing individuals physical injury or interfering by force or fraud with their potential advantageous relations. It is the worst kind of constitutional skepticism to muddy the constitutional waters by doubting a distinction that has worked well in the private law since it was first formulated in Roman times.\(^67\)

Nor is there any reason to back off on the ground that, as McConnell puts it, “that erasure of the distinction would be more likely to water down existing protections for real property than to expand judicial review of the substance of economic regulation.”\(^68\) It is hard to see how that could happen when the compensation

\(^{65}\) 505 U.S. 1003, 1023-1025 (1993) ("[T]he distinction between ‘harm preventing’ and ‘benefit-conferring’ regulation is often in the eye of the beholder.").


\(^{67}\) See, e.g., Gaius, Institutes, Bk. III, 91 (discussing restitution); *see also*, Bk. III, 182 et seq. (articulating the Roman law of delict).

\(^{68}\) McConnell, *supra* note 8, at 321.
awarded under the *per se* rule in *Loretto* was wrongly set at $1.00.69 In *Loretto*, the plaintiff landlord’s harm was not the trivial occupation of her space by Teleprompter, but the legislative abrogation of her existing contractual right to five percent of Teleprompter’s rentals, which the property owner cannot recoup from her tenants who now receive exactly the same service at exactly the same rent after the transfer to Teleprompter.

Nor is there any reason why a similarly disguised transfer of wealth should be tolerated in other contexts. No zoning scheme, for example, that provides pro rata net benefits will ever run afoul of the Takings Clause. Those that do should be attacked as a form of disguised transfer of property rights meriting serious countermeasures. The great difficulty today is that all forms of property protection against the ravages of the political system are now par for the course. A strong theoretical commitment of the kind that the McConnell argument abjures could help turn popular opinion.

VII. RESERVED CONTINGENT INTERESTS

Chief Justice Roberts’s opinion takes on a better hue in addressing the question of whether the reserved contingent interest in the reserve tonnage excuses the government from the duty to compensate. Again, the tragic point here is that this question has to be asked at all. There are two ways to look at this issue, mentioned above. The first is that the government pays less because it offsets the expected value of that interest from the total amount owed. Or second, it pays full value for the property and then gets to keep that extra interest. In neither case does it matter that the growers do not get back the dollars tied to their own raisins any more than it

69 See *Loretto v. Teleprompter Manhattan CATV Corp.*, 446 N.E.2d 428 (N.Y. 1983) (finding that $1 in compensation was the correct award on remand from the Supreme Court’s determination that a taking had occurred).
matters that a bank depositor cannot claim the precise bills that he places in his account. It is quite sufficient that the revenues are pooled.

What is not acceptable, however, is the proposition that so long as the property holder has some residual interest in the property originally taken, the government need not pay for the rest of the interests that it takes and retains. Yet Justice Sotomayor takes just that position in her dissent with the astonishing proposition that "the retention of even one property right that is not destroyed is sufficient to defeat a claim of a per se taking under Loretto." The effect of her cramped reading of Loretto means that the government can always avoid the per se compensation rule by announcing that the owner is entitled to recover the property on the occurrence of any remote event—for example, the very unlikely event of the Chicago Cubs winning the World Series three years in a row. That open invitation to strategic evasion is intolerable in any regime of limited government.

Indeed, that one maneuver, if accepted, would reduce the law of physical takings to the same flaccid standards applicable in regulatory takings cases, a proposition which is equally counterintuitive. Regulatory takings law asks the question of the relative deprivation from the original baseline, holding that so long as a large enough fraction is retained, it does not matter how much property was taken. That rule would never be applied in any other context, and it should not be applied to regulations that impose restrictive covenants over property owners.

The Chief Justice therefore is right to reject this possibility. He is not right, however, to restrict that insight to physical takings, when it applies with equal force to all takings. No one can deny the fact that some taking has been effectuated just because some remnant is left behind. The government could not take eleven out of twelve

70 Horne II, 133 S. Ct. at 2438 (Sotomayor, J., dissenting).
apples and then claim that no compensation is owed because one apple was left behind in the barrel. Why this point has to be debated at this late date is a mystery. Nor should the Chief Justice buy into the twisted logic of *Andrus v. Allard*, 71 which lets the government strip the owner of the right to sell his property so long as it leaves him the right to give it away or to continue its present use. The want of a physical invasion does not undercut the fact that the resulting loss in value is not caused by random market fluctuation but through explicit government command. It is as though the government announced that it took the right to purchase the eagle feathers for $1, so that compensation is not owed for the loss.

The point has special force with respect to *Yee v. Village of Escondido*, 72 which received only cursory treatment in *Horne II*: "We held the ordinance did not effect a taking under *Loretto*, even when it was considered in conjunction with other state laws regarding eviction that effectively permitted tenants to remain at will, because it only regulated the terms of market participation." 73

The actual situation is in fact far different. By way of background, *Yee* rejected a constitutional challenge to Santa Barbara's local rent control ordinance passed under the authority of California's Mobile Home Residence Law. The findings in that law were that it "is necessary that the owners of mobilehomes occupied within mobilehome parks be provided with the unique protection from actual or constructive eviction afforded by the provisions of this chapter." 74 Of course, the only people that can be evicted, either actually or constructively, are the tenants in possession. The statute thus on its face acknowledges that the mobile home occupants are

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73 *Horne II*, 133 S. Ct. at 2441.
74 Id. at 524.
holdover tenants, who retain possession of their landlord’s property.

Unfortunately, Justice O’Connor refused to acknowledge the obvious when she denied that the case was one of physical occupation subject to the per se compensation rule in Loretto. “On their face, the state and local laws at issue here merely regulate petitioners’ use of their land by regulating the relationship between landlord and tenant.”75 After this quote Justice O’Connor cites the sentence quoted above from Loretto. But her logic here amounts to little more than a play on the word “use.” The typical land use restriction determines what uses the admitted owner of the property activities can undertake with the property over which he retains possession. In Yee’s opportunistic reformulation, the restriction on use determines who can make use of the property, by banning the owner from possession and by authorizing the tenant to remain on the property just like an ordinary lessee in possession. According to Yee, the permissible challenges in question should be brought under a regulatory takings framework. It should be no surprise that the outcome would be a reprise of Penn Central. Indeed, just that regulatory takings challenge was rejected some years later in the Ninth Circuit in Guggenheim v. City of Goleta.76 So long as costs are covered under the public utility model of regulation put into place, all the appreciation in the value of the underlying property may be transferred to the tenant, which was in fact the outcome come once the rent control program was put into place.

Properly understood, the outcome in Yee is inconsistent with Horne II given its cavalier treatment of the question of compensation. Horne II makes it impossible for the government to deny that there is a taking solely because one stick is left in the

75 Yee, 519 U.S. at 528 (emphasis in original).
76 638 F.3d 1111 (9th Cir. 2009) (en banc).
bundle of rights. This dubious strategy for calculating just compensation is now foreclosed, however, by Horne II. Chief Justice Roberts addresses just this question, stating, "'Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion.' The answer is no." 7

In dealing with this question he notes:

The Government and dissent argue that raisins are fungible goods whose only value is in the revenue from their sale. According to the Government, the raisin marketing order leaves that interest with the raisin growers: After selling reserve raisins and deducting expenses and subsidies for exporters, the Raisin Committee returns any net proceeds to the growers. The Government contends that because growers are entitled to these net proceeds, they retain the most important property interest in the reserve raisins, so there is no taking in the first place. 78

To which he gives the proper response:

The fact that the growers retain a contingent interest of indeterminate value does not mean there has been no physical taking, particularly since the value of the interest depends on the discretion of the taker, and may be worthless, as it was for one of the two years at issue here. 79

The same analysis applies exactly to the paltry sticks that the landlord receives under the Santa Barbara ordinance. The retention of one stick does not negate the taking. Rather the retained sticks

77 Horne II, 135 S. Ct. at 2428.
78 Id. at 2428-29 (internal citation omitted).
79 Id. at 2429 (emphasis added).
should go on the other side of the ledger as part of the down payment on compensation. The amount owed depends on the combined operation of California’s Mobile Home Residency Law and Santa Barbara’s local mobile home rent control ordinances.\textsuperscript{80} Under the first, the property owner (or “park owner”) may terminate the mobile home owner’s tenancy for nonpayment of rent, for a violation of the law or park rules, or to “change the use of his land.”\textsuperscript{81} But he cannot require removal of the mobile home when that home is sold—at an enormous premium to reflect the embedded value of the renewal rights—to another private party, nor can he charge any fee on transfer. The California law does not restrict the ability of the park owner to set rents, but that option is removed separately by Proposition K of Santa Barbara that set rents back to the 1986 level.\textsuperscript{82} Thereafter, an allowable rental increase must be approved by the Santa Barbara Council based on a mix of factors relating to the cost of running the premises, which are wholly unrelated to its market value.\textsuperscript{83} In order to make good on the option to reclaim the property, the landlord must forfeit all interim rentals on the property during the period when it is idle. Yet, owing to the multiple hurdles imposed by the zoning process, it is wildly improbable that the park owner will obtain in timely fashion the

\begin{footnotesize}
\bibitem{Yee} Yee, 503 U.S. at 524-25.
\bibitem{Id} Id. at 524.
\bibitem{Id2} Id. at 527.
\bibitem{Yee2} Yee, 503 U.S. at 524-25:

The council must approve any increases it determines to be “just, fair and reasonable,” after considering the following nonexclusive list of factors: (1) changes in the Consumer Price Index; (2) the rent charged for comparable mobile home pads in Escondido; (3) the length of time since the last rent increase; (4) the cost of any capital improvements related to the pad or pads at issue; (5) changes in property taxes; (6) changes in any rent paid by the park owner for the land; (7) changes in utility charges; (8) changes in operating and maintenance expenses; (9) the need for repairs other than for ordinary wear and tear; (10) the amount and quality of services provided to the affected tenant; and (11) any lawful existing lease. Ordinance § 4(g), App. 11-12.
\end{footnotesize}
full set of permits, and licenses needed to redevelop the premises in an economically profitable way. There is no way that the value of this bundle of rights is "a full and perfect equivalent" for the value of the right to regain undisturbed possession of the property at the end of the lease. Indeed, as these options have never once been successfully exercised, their value must be close to zero. The landlord takes the risk of any downturn in value. The tenant keeps all the upside above and beyond the few allowable cost increases. The manifest economic distortions are, if anything, far more intrusive from the cartel imposition under Yee. The ordinance draftsman understood perfectly that this miniscule sop to the landlord could insulate the mobile home scheme from constitutional scrutiny. Just that ploy worked once in Yee. After Horne II it should work no longer.

VIII. UNCONSTITUTIONAL CONDITIONS

The final point elaborated in Horne deals with the elusive doctrine of unconstitutional conditions. Rightly understood, that doctrine addresses one recurrent question: what conditions may the government attach to its permits, licenses, and grants, which are issued in the exercise of its monopoly power? Everyone accepts some version of this doctrine. The government may have the power to exclude certain classes of driver from the public highways, but it

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84 Monongahela, 148 U.S. at 325:

The just compensation clause "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."

85 For a complete analysis, see Richard A. Epstein, Bargaining with the State 5 (1993) ("Stated in its canonical form, this doctrine holds that even if the state has absolute discretion to grant or deny any individual a privilege or benefit, it cannot grant that privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of that person's constitutional rights.")).
cannot grant them admission to the road on the condition that they waive either their Fourth Amendment protections against unreasonable searches and seizure, or their First Amendment rights to the free exercise of religion or freedom of speech. But by the same token, the government can demand that they waive any right to refuse to take a breathalyzer test when pulled over for drunk driving or consent to litigate an accident in the state where it occurs.  

In the modern welfare state, the imposition of conditions on private behavior is a routine matter to which the unconstitutional conditions doctrine may apply. The problem was set up in *Horne II* in this fashion by the following passage from the Eastern District of California: “In essence, [petitioners] are paying an admissions fee or toll—admittedly a steep one—for marketing raisins. The government does not force plaintiffs to grow raisins or to market the raisins; rather, it directs that if they grow and market raisins, then passing title to their reserve tonnage raisins to the RAC is the admissions ticket.”  

This sloppy logic has breathtaking implications. The government could demand that every person pay an admission fee or toll to sell any property at any time in any market, wholly independent of any marketing order. Thus, the owner who wants to sell his house at market value could be told that he is allowed to do so only if he turns over half the proceeds to the state. After all, he does not have to sell the house, but can keep it. This massive interference with voluntary transactions is essentially unlimited. The only reason why the interference makes sense in *Horne II* is that there is a return benefit to the Hornes from the restriction in terms of the increased value of the residual crops. So it is not just a case of having a “voluntary choice.” It is the case of receiving full, in-kind compensation for the property that was

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86 Opinion of the Justices, 147 N.E. 681 (Mass. 1925).
taken. But this notion that transactions are voluntary because one can decline to enter them legitimates every mafia man who says that you can sell your merchandise so long as you give him 10 percent of the gross. After all, you are always free to go out of business.

The incoherence of this approach stems from the fact that sooner or later someone has to decide what fraction of the total gain must be left to the owner before the transaction is called coercive. But this question of degree is always out of place. The thief that says, "Give me $5 dollars or I will shoot you," cannot excuse his criminal action by noting that he was willing to leave his victim with $45. The fact of coercion comes from the act of forcing a party to choose between two things that he has a right to do. The wrongfulness of coercion lies not in the impermissibility of the outcome, but of the forced choice that leads to it. Normally, anyone has the right to sell or keep property as he or she sees fit. But under the false-choice regime, the sell side is impaired. What then happens if the government says, "By the way, we now impose a storage tax on you if you don't sell your property"? Clearly a taking, one hopes. The simple point is that the government action must either be justified in that it prevents some wrong, or compensated by some in-kind benefit.

The Chief Justice is right to note that the government cannot hide behind the proposition that the exaction is just fine because of the grower's voluntary participation in the market. But it is no answer to say, "Grow another crop," when that crop too could be subject to the same marketing restrictions, assuming that it could be sold for a profit in the first place. The Chief Justice is also right to note that Loretto prevents that escape valve from the per se rule. He thus quotes this passage with great effect:

For example, [Teleprompter's position] would allow the government to require a landlord to devote a substantial portion of his to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space. It
would even allow the government to requisition a certain number of apartments as permanent government offices.88

After all, the rental property could always be taken off the market. But as is too often his wont, the Chief Justice is not prepared to face up to the difficulties in the current law. Thus his reaction to the harder case presented by Ruckelshaus v. Monsanto, Co., 89 which involved the question of government regulation involving legitimate purposes of health and safety:

Selling produce in interstate commerce, although certainly subject to reasonable government regulation, is similarly not a special governmental benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection. Raisins are not dangerous pesticides; they are a healthy snack. A case about conditioning the sale of hazardous substances on disclosure of health, safety, and environmental information related to those hazards is hardly on point.90

The point is too glib for its own good, for in Monsanto the court held that even though trade secrets were private property protected by the Takings Clause, the government could condition their license on the willingness of Monsanto to share its trade secrets with other parties, or, at the very least, allow the government to use information gleaned from Monsanto's operation to evaluate the application of competitive firms. The "let them eat cake" answer offered by Justice Blackmun was that Monsanto was free to abandon the American market and to sell their goods overseas if they found the conditions too onerous.91 But clearly that condition

88 Horne II, 135 S. Ct. at 2430 (quoting Loretto, 458 U.S. at 439 n.17).
90 Horne II, 135 S. Ct. at 2430-31.
91 Ruckelshaus, 467 U.S. at 1007-08.
is unconstitutional because the access to foreign markets depends on what happens in those countries, all of whom could exclude Monsanto's products if they chose to do so on the same rationale as used in Monsanto: sell the product somewhere else.

The correct analysis of the situation, therefore, is that the doctrine of unconstitutional conditions only allows the government to ask for information about matters, which, if they occurred, would justify either removing the product from the market or requiring its seller to pay damages under the common-law police power. The good sense here is that waiting too far down the process could easily result in irreparable harm. The only question in these cases is whether the conditions imposed in the ex ante state of the world are so onerous and irrelevant that they amount to a de facto ban. But the one thing that the government can never legitimately do is alter the balance of competition between two rival sellers by giving one the information that it obtains by force from the other. On this view, there is no reason at all to subject the reserve raisins to any inspections above and beyond those already in place for the marketable raisins, so that this condition is wholly illicit. Once that point is made clear, then the scope of this doctrine should expand in other contexts in which there are no police power justifications for what the state demands. One illustration, that is honored today more in breach than in performance, is the insistence that landlords set aside certain units for affordable housing on the ground that a greater balance of available units is needed in the market place.92 Assume that the end is legitimate, but the means are not. Those units should be paid for out of general revenues, not particular charges.93

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Justice Sotomayor's dissent in *Horne II* seeks to limit the potential application of the case by insisting that it only applies to *per se* takings, and not to regulatory ones. She writes:

The Court points out that, in a footnote in *Loretto v. Teleprompter Manhattan CATV Corp.*, we suggested that it did not matter for takings purposes whether a property owner could avoid an intrusion on her property rights by using her property differently. But in *Yee v. Escondido*, we clarified that, where a law does not on its face effect a *per se* taking, the voluntariness of a particular use of property or of entry into a particular market is quite relevant. In other words, only when a law requires the forfeiture of all rights in property does it effect a *per se* taking regardless of whether the law could be avoided by a different use of the property.94

But that rear guard action does not work. The first point is that the purported ground for distinction rests on the dubious claim that *Yee* could only be viewed as a regulatory taking, even though the *raison d'être* of the statute was to allow the tenant to remain in possession after the expiration of the lease—which has to be a physical taking to which the doctrine applies.95 The second point is that if, as is the case, there is no coherent line to separate the physical from the regulatory takings, then it follows that the doctrine of unconstitutional conditions has to apply with equal force in both settings, notwithstanding the dubious effort to limit it only to physical takings. Recall that the public choice dynamics behind government regulation works with either equal or, indeed, greater force in the regulatory takings context, given that the

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94 *Horne II*, 135 S. Ct. at 2441 n.3 (Sotomayor, J., dissenting) (internal citations omitted).
government regulation can have greater sweep without forcing local property owners off their own land. In addition, the criticism of the so-called voluntary surrender of rights is every bit as strong in the one context as it is in the other. There is no discernible difference from the state saying that it shall let you increase the size of your new building from six to twelve stories, but only if you pay us $100,000 for the permit, than there is from it saying that it will issue the permit to build from zero to six stories for payment of the same sum. The total prohibition of new construction is treated as a per se taking under Lucas v. South Carolina Coastal Council, precisely because there is no difference between that result and the state requiring a landowner to pay $100,000 to enter his own land, money which the government then uses to condemn a lateral easement in front of the property. This second condemnation scenario runs into the prohibition against unconstitutional conditions in Nollan v. California Coastal Commission. No coherent development is possible unless these jarring discontinuities in the current law are brought to a merciful end.

IX. TOWARD A UNIFIED THEORY FOR TAKINGS, REGULATIONS AND TAXES

The three opinions in Horne II indicate the very different approaches that can be taken towards takings law in the context of the decided cases. But lurking behind this debate is the more difficult question of just how far the takings analysis extends to basic matters of regulation and taxation that are not discussed in the opinion. The implicit norm that drives all nine justices of the Supreme Court is that the takings portion of the literature can to

some extent be cabined off to deal with individual cases and not general programs. That line is hard to draw because, although the Hornes presented only their particular grievance, the position of all raisin growers was necessarily implicated by the decision. It is therefore impossible to treat *Horne II* as a case where one party is singled out for special treatment. At this point, the question is to ask whether it is sound for all the justices to shy away from developing a uniform theory that allows *Horne II* to be integrated into the overall body of the law.

This compartmentalized approach has a long constitutional heritage, and indeed the central feature of modern law is an insistence that it is possible to break takings, taxation, and regulation into three watertight categories, each governed by its own set of rules.\(^9\) Under this approach, for example, there is no overlap between taxation and takings, so that the latter are not covered by the former. The Takings Clause only applies to cases where individual firms are singled out for special treatment, but not the case where an industry receives that kind of treatment. One historical illustration that supports this position is the Whisky Tax of January 27, 1791, an excise tax on domestic and imported alcohol which was aimed at reducing the national debt recently taken over from the states.\(^10\) The tax proved hugely unpopular and generated a whisky rebellion among western farmers that collapsed only after a heavy show of force. The logic behind this tax was two-

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\(^9\) Needless to say I have attacked this separation in Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 95 (1985): "All regulations, all taxes, and all modifications of liability rules are takings of private property prima facie compensable by the state." Note that I add in liability to cover such cases as statutes of limitation, of workers' compensation, and retroactive imposition of liability. *Id.* at 242-59. Note, too, the use of the words prima facie, which invite both affirmative police power justifications and the recognition of implicit-in-kind compensation through general regulation. *Id.* at Chs. 9-11, 14. These are not meant to be narrow exceptions, but extensive elements of a comprehensive system.

On the one hand, it was a clever way to raise revenue, and on the other it was defended as a means to regulate the consumption of alcohol. The first of these is an economic justification. The second comes much closer to the moral head of the police power, where the tax would surely be justified if the government would have been justified in banning alcohol outright under the same circumstances.

It is worth noting that as of the date of its passage, the Whiskey Tax posed no special constitutional problem. Article I, Section 8, Clause 1 gave explicit authorization for the use of excise taxes to pay of the debts of the United States, which is exactly what this tax did. In essence, the original design put very substantial limitations on the purposes for which tax revenues of all kinds could be expended, but placed no limitation on the sources for any individual tax. It is clear that the internal limitations on the power to tax contained in Article I, Section 8, Clause 1 were largely eliminated by the time of the New Deal and remain moribund today.

102 Id.
103 U.S. CONST. art. I, § 8, cl. 1: “The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.”
104 See, e.g., Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (internal quotation marks and citations omitted) (“Congress has broad authority to construct or adjust spending programs to meet its contemporary understanding of the general Welfare. Courts owe a large measure of respect to Congress’ characterization of the grant programs it establishes.”). On the other side, the per curiam conservative opinion took the same basic position: “The power to make any expenditure that furthers the general welfare is obviously very broad, and shortly after Butler was decided the Court gave Congress wide leeway to decide whether an expenditure qualifies.” Id. at 2658. Both these statements are accurate reflections of the current law. But both are subject to serious textual and structural objections. See, for discussion, Epstein, supra note 57, at 193-203.
For these purposes, however, the key question is not the internal limits on the taxation power found in Article I, Section 8, Clause 1. Rather, it is the extent to which this power of taxation was restricted by the passage of the Bill of Rights, which applies to all exercises of power by the government, including those done pursuant to the taxing power. For example, there is no doubt that the basic prohibition of the First Amendment has been read to impose serious limitations on the power of the federal government and, after incorporation, the states to levy taxes. Thus in line with the general principles of classical liberalism, *Minnesota Star & Tribune v. Minnesota Commissioner of Revenue*\(^{105}\) held that the government could not single out newspapers for special taxes. Justice O'Connor correctly insisted that Minnesota could reach any revenue target through a flat tax that had none of the dangers posed by selective taxation on the press.\(^{106}\) *Minnesota Star* also rejected distinctions within the class of newspapers that exempted smaller newspapers from the taxes imposed on larger ones, again out of the fear of factional abuse.\(^{107}\) First Amendment protection is not limited to firms singled out for special treatment. But it is equally clear that a general sales tax that covers many other businesses will survive any constitutional scrutiny because the broad scope helps


\(^{106}\) Id. at 586:

Standing alone, however, [the state interest in raising revenue] cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press.

\(^{107}\) Id. at 592 ("[W]e think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme."). For applications, see *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 223 (1987) (striking down, on First Amendment grounds, a "state sales tax scheme that taxes general interest magazines, but exempts newspapers and religious, professional, trade, and sports journals...").
counteract the risks of abuse. Even with the inevitable complexities in marginal cases, this same speech regime could be applied to takings more generally. That approach would, for instance, strike down the Affordable Care Act’s excise tax specifically targeted at medical devices that helps fund expenditures under the Affordable Care Act. This tax has proved so disruptive that it was subject to a two-year moratorium between January 1, 2016 and December 31, 2017, after which there will be more ad hoc developments.

Of course the modern view does not endorse that unified approach, but insists that the only abuse worth worrying about is the “singling out” of a given firm or person for special treatment. Saul Levmore takes that position when he writes:

I have suggested elsewhere that when the government threatens to intervene in a way that will burden many citizens, these citizens need to look to the political process rather than to takings law for any relief, but that when the government singles out a private party, in the sense that the government's aims could have been achieved in many ways but the means chosen placed losses on an individual or on persons who are not part of an existing or easily organized political coalition, then we can expect to find a compensable taking. Thus, most taxes and rent control schemes are not compensable takings because they are the products of political exchanges; taxpayers and landlords are left to

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110 The canonical citation for this proposition is Armstrong v. United States, 364 U.S. 40, 49 (1960): The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.
protect themselves in the political arena. In contrast, individuals who are subjected to "spot zoning" are often politically unprotected, because they are burdened in a way that makes it unlikely that they can find political allies, and takings law will often protect them from majoritarian exploitation.\textsuperscript{111}

There is little difference between myself and Levmore on the singling out cases where compensation is awarded in theory. The isolation of one person to bear the burden imposed by diffuse gains is reason enough to conclude that an implicit transfer has taken place. But Levmore and I arrive at this conclusion on quite different grounds. The first point is that Levmore is indifferent to finding any textual warrant for his approach. He does not go through the task of identifying the property interest taken by government intervention, the limitations imposed by the public use requirement—which should be substantial when property ends up in private hands—or matters of just compensation and the police power. His sole emphasis is on the \textit{ex ante} political vulnerability of the target.

My approach differs on both counts. Textually, rent control is a transfer of a term interest in property to the tenant at a price below its fair market value, without any public use or police power justification. In making the judgment on the taking, I think that it is immaterial whether one or another group had the wherewithal to defend itself through the political process. The question is whether it should be put to that cost, with the consequent uncertainty and dislocation that this factional struggle generates. To avoid that inquiry, I look exclusively to the \textit{ex post} wealth transfer achieved by the government action.

What is true about rent control is true about all other issues of land use regulation. Thus his equivocation on "spot zoning" cases rests on the view that sometimes, but not always, these players are political isolated. But in practice, it is very difficult to know how that plays out. For example, in *Penn Central*, Justice Rehnquist made much of the spot-zoning ordinance at the level of administration, which Justice Brennan rejected because the entire scheme had city wide application. Yet if we know that the imposition of the landmark preservation ordinance provided an uncompensated takings of air rights, why go through the political rigmarole to determine just how the political alliances were stacked?

The point becomes still more troublesome with respect to rent control and taxation, even when the groups selected out are strong enough to put up a fight within the political process. But other considerations indicate that the class conflicts are often more dangerous than the individual ones because they unleash the larger and more dangerous power of political coalitions. The battles over a rent control ordinance thus pit all landlords subject to the ordinance against all sitting tenants, who would abandon the price control

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112 *Penn Central*, 438 U.S. at 139-40:

Only in the most superficial sense of the word can this case be said to involve "zoning." Typical zoning restrictions may, it is true, so limit the prospective uses of a piece of property as to diminish the value of that property in the abstract because it may not be used for the forbidden purposes. But any such abstract decrease in value will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties.

Note that in this case, the reciprocal benefit is presumed, not proved, and there is not even a claim that it is equal to the value lost. Therefore, this benefit is clearly less than the required amount of implicit in-kind compensation.

113 *Id.* at 132:

In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city, and as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan.
piece of the statute in an instant were it not for the decisive fact that the benefits all accrue to sitting tenants, even if they impose heavy costs on new tenants coming into the community, assuming that they can find accommodations in this highly restricted market. But if the Takings Clause is concerned about transfers from A to B, it should be more concerned about similar transfers from a large class of A’s to a large class of B’s, when there is little or no overlap between the groups. This is one reason why Yee and similar cases are so dangerous; the element of reciprocity that drives implicit in-kind compensation is just not present.

Levmore rightly notes that the same framework that applies to rent control also applies to taxes, even as he concludes that it applies to “most” such taxes without giving a test for which taxes fall outside the ambit of the rules. There are three reasons to think that political action is not a sufficient remedy. First, often the wrong side wins and often for all the wrong reasons. It is easy for political deliberation to rally the supporters of rent control and special taxes that benefit the electorate at large. They are insiders who vote in large numbers. Landlords, even if local, are surely outnumbered. Second, even if the right side wins, the entire process is larded with uncertainty about the outcome in the particular case and the anticipated influence that it will have on future cases. Uncertainty is a cost, and it is one that never disappears because even after the one issue is resolved, a second, third, and then a fourth issue inevitably arise. Third, there are public and private administrative costs to deciding these battles. Once the system is put into place, there are further ongoing administrative costs to administer it in a climate where the losers think the rules are illegitimate because of the way that they were imposed by self-interested majorities. Hence the battles tended to be pitched and bitter. Politics is a curse, not a remedy.

At this point we should thus reserve the political remedy for cases in which the competitive market does not provide a real alternative, such as in the case of standard public goods that are by nature available to all. To be sure, politics offers relatively few easy cases where all persons are benefited and are burdened, much less
in exactly the same proportions. Even streetlights may not provide equal benefits to all persons. But the notion that public (i.e. indivisible) goods are always uniform in value is exploded by every political struggle over whether to recognize a foreign nation, wage war, supply defense, or build infrastructure. These decisions, by their very nature, affect all citizens. Individual solutions, therefore, are just not possible. In these cases, one relies on deliberation because there is no way people can go their separate ways. It is this distinction that marks the area in which judicial protection of property rights becomes impossible. But the normative side of standard public choice theory thus reinforces the view of strong judicial intervention in evident cases of political failure whether we are dealing with the individual case or a single line of business. The same set of concerns is apparent in any effort to draw a sharp line between possessory and regulatory takings. After all *Penn Central* itself is best understood as a taking of a property interest in air rights that is fully protected under state law.

The effort to create a trichotomy fails because of the inability for anyone to draw boundaries between takings, taxes, and regulations, or to explain why the dangers of faction are limited only to a small class of physical occupations caught by the current narrow reading of the *Loretto* rule. Notwithstanding the well-acknowledged doctrinal malaise and its negative social consequences, all Supreme Court justices on both sides of the political divide write as though there is some deep internal logic that justifies keeping the categories alive. It is depressing that the Chief Justice does not articulate the clear implications that follow from his decision on such critical issues as the precarious status of the regulatory takings law and the latent incoherence in the unconstitutional conditions doctrine. Sadder still is Justice Sotomayor’s claim that so long as a single stick remains in the bundle of property rights, it is as if nothing has been taken at all. The one bright point in the case is the candid acknowledgment of Justice Breyer that the return benefit from the cartel undercuts the claim that the physical taking in *Horne* was wholly uncompensated. But here too, Justice Breyer was not prepared to pull the switch and take on the implications of his logic
in cases like *Yee* and the full range of unconstitutional conditions cases.

**CONCLUSION**

By now it should be clear that most of the artificial distinctions and unsatisfactory twists and turns in *Horne* come from its failure to embrace a systematic approach to the general takings question. So the real institutional mystery here is this: why the deep reliance on half measures that don't work? Part of the reason comes from the inveterate habit of Supreme Court justices to take some minimalist strategy as if they could break off one part of a larger whole. But that solution results in a makeshift body of doctrine that no one in the end defends. There is, I fear, a deeper reason that cuts in the opposite direction. My sense is that the justices are well aware of the radical consequences that would flow from the explicit adoption of a the full-fledged takings theory of the sort that I adopted in my *Takings* book, where I made the modest claim that, on strict interpretivist grounds, the New Deal is unconstitutional under the Takings Clause. 114 Nothing from the intellectual twists and turns of the past 31 years have led me to revise that judgment. It is not that all the decisions have come out the wrong way. Clearly, *Horne II* reached the right result. But it is precisely the eager avoidance of any clear theory that leaves everything up in the air. There is indeed much unfinished business after *Horne*.

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114 See generally Epstein, supra note 6, at 281-282 (concluding most of the New Deal is unconstitutional under a proper reading of the Takings Clause).