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The Horne Dilemma: Protecting Property's Richness and Frontiers

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ABSTRACT

In a 2015 decision, the Supreme Court concluded that real and personal property should not be treated differently under the Takings Clause and that a government condition requiring raisin growers, in certain years, to reserve a percentage of their crop for the government to manage in noncompetitive venues was a per se physical taking. The decision to treat both real and personal property as equally worthy of protection under the Takings Clause has merit given the weak historical evidence suggesting stronger protection for land and the importance of personal property to income generation and capital development in a modern society. What does not make sense is the Court's continued expansion of its per se physical takings concept to govern many types of property and regulatory settings. Both real and personal property come in many sizes, shapes, and colors. Takings analysis should not ignore differences in the types of property, nor in the complexities of the various property settings.

Under a per se approach, those differences do not matter. Under a per se approach, the Court's physical takings analysis is simplistic and one-dimensional: did the government physically appropriate, seize, or invade private property without payment of just compensation? Generally left out of the equation is any consideration of the public interest or third-party concerns, regardless of their importance or their role in shaping the property interest. Nor does a physical appropriation actually have to occur. The per se physical taking may instead be more conceptual than actual or may involve one right in a bundle of rights, still leaving the property owner with other rights. In its

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drive for clarity and simplicity, the Court thus has posed a serious dilemma for takings jurisprudence: the difficult task of solidifying constitutional protection for all types of property with an all-encompassing, absolute rule that can provide sufficient predictive value for the complex contexts of modern-day property. What the Court's approach overlooks is property's ability to evolve and provide order for emerging resources and new forms of property. What the Court's approach overlooks is the need to develop constitutional principles that reflect property's richness and frontiers.

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INTRODUCTION

In the 2015 decision *Horne v. USDA*,[1] the Supreme Court made two significant rulings. The Court first concluded that real and personal property should not be treated differently under the Takings Clause,[2] reasoning that early practices and precedent did not support such a distinction.[3] Perhaps more significantly, the Court then found the government requirement that raisin growers, in certain years, reserve a percentage of their crop for the government to manage in noncompetitive venues to be a per se physical taking.[4] The Court's reasoning behind the

1. 135 S. Ct. 2419 (2015).
2. U.S. CONST. amend. V.
3. *Horne*, 135 S. Ct. at 2425–28.
4. *Id.* at 2430–31.

latter ruling focused on the control that a government entity had over the regulated raisins and its ability to require the transfer of the raisins.[5] Both conclusions could have far-reaching implications for constitutionally protected property and for the countless government programs regulating property. The rulings also collectively cast serious doubt on the differences between regulatory and physical takings.

The decision to treat both real and personal property as equally worthy of protection under the Takings Clause has merit. Both the practices and the rhetoric of takings cases suggest that personal and real property were protected under the Takings Clause. The historical evidence suggesting stronger constitutional protection of land is weak and reflects a bygone era when land was the main source of wealth. Early practices certainly indicate that the Court found compensable takings for personal as well as real property, at least when the property had value.[6] Some of the traditional rhetoric surrounding the Takings Clause supports a special link between land and the liberty or autonomy interests of the individual owner,[7] but many types of property now help to promote those interests.

The conclusion that personal property is equally deserving, however, does not justify ignoring the differences between real and personal property and between subcategories of property in conducting a takings analysis. The decision to apply the per se physical takings test to the reserve requirement does just that. This decision potentially expands the realm of the per se physical taking to include even some non-trespassory regulatory settings. Based on *Horne*, for example, a condition on entry into a regulated market established to protect price and encourage production could be converted into a physical taking if the government bars access to stored goods in enforcing the condition. Ignoring the wide variation among different types of property overlooks the complexities of context that shape the development of new property interests. Personal property, in particular, covers a wide range of resources and interests that are limited only by human ingenuity and creativity. While real property interests are tied to the land, personal property may be tangible or intangible, newly discovered or created, unable to be occupied except conceptually through the law, perishable or long-lasting, or nonrivalrous despite exclusive rights. Personal property includes tangible goods, pets and livestock, agricultural

5. *Id.* at 2428.

6. Early on, for example, owners of unimproved land did not always receive compensation when their land was condemned by the government. *See* McClenachan v. Curwen, 6 Binn. 509, 513 (Pa. 1802) ("[B]ut as by the law of 1700, although a compensation is directed to be made for the *improved* land of any person, . . . yet as to the woodland or unimproved ground, there is no compensation to be made . . . .").

7. *See* Eduardo Moisès Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 ECOL. L.Q. 227, 246–50 (2004) (evaluating the Court's distinction between real and personal property in takings law).

products, stocks, bank accounts, patents, literary creations, a person's identity or image, first-in-time broadcasts, email, software, business operations, goodwill and stock-in-trade, commercial paper, security interests, proprietary information, and so on. The differences between the types of property relate to the nature of the asset subject to the property interest, to the property uses that have developed in a particular resource, and to the legal regimes defining and managing the interests.

Under a per se approach, these differences do not matter. Under a per se approach, the Court's physical takings analysis is simplistic and one-dimensional: did the government physically appropriate, seize, or invade private property without payment of just compensation? Generally left out of the equation is any consideration of the public interest or third-party concerns, regardless of their importance or their role in shaping emerging property interests.[8] Nor does a physical appropriation actually have to occur after *Horne* (where the property owner kept possession of the raisins). The per se physical taking may instead be more conceptual than actual or may involve one right in a bundle of rights, still leaving the property owner with other rights.[9]

Providing logically consistent legal principles for new or complex contexts is assumed to flow from the simplicity of the Court's per se rule. In its drive for clarity and simplicity, the Court thus has posed a serious dilemma for takings jurisprudence: the difficult task of solidifying constitutional protection for all types of property with an all-encompassing, absolute rule that can provide sufficient predictive value for the complex contexts of modern-day property. Yet, instead of clarity, the Court in *Horne* creates confusion about the logic of its precedent, about the transition between physical and regulatory takings, and about the applicability of a simple, absolute rule to complex forms of property and regulatory settings. What the Court's quest for clarity and simplicity misses is property's ability to evolve and provide order for emerging resources and property forms. What it misses is the need to develop constitutional principles that protect property's richness and frontiers.

I. THE *HORNE* DECISION

The regulatory program challenged in *Horne* was developed under the Agricultural Marketing Agreement Act of 1937.[10] The Act authorized the

8. The Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), defined a categorical or per se taking as "compensable without case-specific inquiry into the public interest advanced in support of the restraint." *Id.* at 1016.

9. *See* Lynda L. Butler, *The Governance Function of Constitutional Property*, 48 U.C. DAVIS L. REV. 1687, 1695–1700, 1757–67 (2015) (comparing the crystallization of modern physical takings analysis with the complexity of traditional physical takings analysis).

10. Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §§ 602–674 (2012).

Secretary of Agriculture to adopt orders to stabilize markets for particular agricultural products by promoting an adequate supply for consumers and a reasonable income for the farmers.[11] One such order established the Raisin Administrative Committee ("RAC") to promote stability in the raisin market by controlling supply and maintaining prices.[12] The means used by the RAC to achieve this goal was a requirement that, in certain years, raisin growers set aside a percentage of their crop for the RAC to manage and control. Described as a "Government entity" by the *Horne* Court,[13] the RAC determined the percentage based on current and past market conditions.[14]

Raisin growers typically ship their crop to raisin handlers, who then physically set aside the raisins to be held in reserve ("reserve raisins"). After segregating the reserve raisins, the handlers pack and sell the remaining raisins ("free-tonnage raisins"), paying the growers only for the free-tonnage raisins. The RAC decides how to dispose of the reserve raisins after considering market conditions for current and prior years and has the power to order handlers to transfer the reserve crop.[15] Authorized disposal options include sale in secondary markets not competitive with free-tonnage raisins (for example, as table grapes for juice or wine production) or in export outlets, direct sale to federal agencies or identified foreign governments, charitable donations, releases to growers agreeing to decrease their production, and by other means.[16] Raisin Administrative Committee sales to handlers must maximize producer returns and

11. 7 U.S.C. §§ 601, 602; *see also* Alan B. Morrison, *Response*, Horne v. Department of Agriculture, GEO. WASH. L. REV. DOCKET (June 22, 2015), http://www.gwlr.org/horne-v-dept-of-agriculture/.

12. 7 C.F.R. § 989.26 (2015). Raisins are especially vulnerable to supply fluctuations and to changing weather.

13. Horne v. USDA, 135 S. Ct. 2419, 2424 (2015). Consisting mainly of growers and handlers, the Raisin Administrative Committee operates under the Secretary of Agriculture and is responsible for such duties as acting as an intermediary between the Secretary and any producer, packer, dehydrator, or bargaining association; investigating compliance; and establishing rules and procedures. 7 C.F.R. §§ 989.26–989.39 (2015); *see also* Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment at 11, Horne v. USDA, 2009 WL 4895362 (E.D. Cal. Dec. 4, 2009) (No. 1:08-CV-01549-LJO-SMS) ("The RAC is an entity created by the Government. Its decision-making body is made up of paid staff, and representatives from raisin packers, raisin growers under contract to raisin packers, and independent raisin growers."). *But see* 7 C.F.R. § 989.39 (2015) (explaining that RAC members and alternates are not to be compensated, with the exception of expenses approved by the committee); *id.* §§ 989.79–989.80 (describing how expenses are paid by levying assessments made onto the handlers).

14. 7 C.F.R. § 989.54 (2015) (discussing trade demand and calculation of preliminary, interim, and final free and reserve percentages by considering such factors as the estimated tonnage held by producers and handlers, quality and modifications of minimum grade standards, world raisin supply and demand, and trends in consumer income).

15. *Id.* § 989.67(a).

16. *Id.* § 989.67(b); *Horne*, 135 S. Ct. at 2430 (quoting Brief for the Respondent at 32, Horne v. USDA, 135 S. Ct. 2419 (2015) (No. 14-275)).

disposition of the reserve raisins.[17] Raisin growers retain the right to receive any net proceeds from the RAC sales after administrative expenses and subsidies for export handlers are deducted.[18]

The economic impact of the reserve requirement has varied from year to year. According to the government, net proceed distributions to producers occurred in forty-two of the forty-nine years of the program's operation.[19] In the years contested by the Hornes, the net proceeds were less than the cost of producing the crop in one year and were nothing in the other year.[20] The percentage of reserve raisins for those years amounted to forty-seven percent in one year and thirty percent in the other.[21]

The challengers in *Horne* are both raisin growers and handlers. In 2002, they refused to set aside the required raisins. When the government sent trucks to their facility to pick up the reserve crop, the Hornes refused entry. The government then assessed a fine of about $480,000 for the market value of the missing raisins, as well as a penalty of over $200,000. The Hornes brought suit, alleging an unconstitutional taking of their property.[22]

The Ninth Circuit ruled for the government, concluding that the reserve requirement did not constitute a taking of the Hornes' property.[23] The court rejected the Hornes' argument that the requirement was a per se physical taking, explaining that the regulatory restriction was more properly analyzed under regulatory takings principles.[24] According to the Ninth Circuit, "the Takings Clause affords less protection to personal than to real property."[25] Further, because the Hornes still retained the right to receive the net proceeds from the sale of the reserve raisins, the requirement did not totally divest the Hornes of their property interests.[26] Looking to the land use exaction context, the Ninth Circuit then applied standards governing conditions imposed in the land use permitting process to the reserve

17. 7 C.F.R § 989.67(d)(1).

18. *Horne*, 135 S. Ct. at 2424; 7 C.F.R. § 989.66(h) (2015).

19. *See Horne*, 135 S. Ct. at 2439 (Sotomayor, J., dissenting) (citing Letter from Donald B. Verrilli, Jr., Solicitor Gen., to Scott S. Harris, Clerk of Court (Apr. 29, 2015)).

20. *Id.* at 2424 (majority opinion).

21. *Id.*

22. *Id.* at 2424–25.

23. Horne v. USDA, 750 F.3d 1128, 1144 (9th Cir. 2014).

24. *Id.* at 1139, 1141.

25. *Id.* at 1139. Relying on the decision in *Lucas*, the Ninth Circuit drew a distinction between real and personal property protections by contrasting the amount of government control exerted over each. *Id*. at 1139–40. The court reasoned that because a State traditionally executed a higher degree of control over commercial dealings and economic concerns, personal property received fewer protections, and indeed, the possibility of losing all economic use of that personal property should even be expected. *Id*. (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027–28 (1992)).

26. *Id.* at 1140.

requirement.[27] Under those standards, the means used—the reserve requirement—benefitted the Hornes by supporting the regulated market, thus protecting the price of free-tonnage raisins, and also was proportionally related to the public interest in market stability.[28] In essence, the Ninth Circuit viewed the reserve requirement as a fee for voluntarily entering and benefitting from a regulated market.

The Supreme Court rejected both the analysis and the conclusion of the Ninth Circuit. Instead of providing less protection for personal property, the Court decided that personal property was equally worthy of constitutional protection. Instead of analyzing the reserve requirement under regulatory takings principles, the Court evaluated the regulatory restriction under the physical takings concept. Instead of balancing benefits and losses to raisin growers from the regulatory program in determining whether a taking existed, the Court simply focused on whether the government action constituted a physical appropriation of the Hornes' property.[29]

Writing for the majority, Chief Justice Roberts first concluded that personal property should receive the same protection as real property from direct physical appropriations. As the Chief Justice explained:

> Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.[30]

He found support in the historical English law tradition of the Magna Carta, which protected crops and other provisions from seizure without compensation.[31] This tradition also was reflected in colonial and early statehood practices, which similarly compensated property owners when government seized their supplies. Indeed, military seizures of privately owned provisions by the English and American armies during the

27. *Id.* at 1141–42.

28. *Id.* at 1143. This analysis applied the standards and principles of the regulatory takings cases dealing with land use exactions, *Nollan* and *Dolan.* The Ninth Circuit likened the Hornes' situation to one involving a use restriction imposed in a land use permitting process. Rather than forcing a seizure of the Hornes' crops, the Secretary imposed a condition on their sale—a condition that only exists once the Hornes voluntarily introduced their crops into the stream of commerce. The Hornes could have just as easily refused to send their raisins into interstate commerce, selected different crops, or chosen not to dry their grapes. *Id.* at 1141–43 (relying on Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994)). The Ninth Circuit relied on three primary similarities to justify its comparison: the presence of a conditional exaction, the conditional grant of a government benefit in exchange, and the choice facing the property owner. *Horne*, 750 F.3d at 1143.

29. Horne v. USDA, 135 S. Ct. 2419, 2427–29 (2015).

30. *Id.* at 2426.

31. *Id.*

Revolutionary War later led to calls for constitutional protection.[32] Further, since the 1800s, the Court's precedent has protected personal property from government seizures without payment of just compensation.[33]

Chief Justice Roberts thus declined to extend the distinction made by the Court in *Lucas v. South Carolina Coastal Council* between real and personal property in evaluating whether a regulatory taking existed.[34] In *Lucas*, the Court stated that the "State's traditionally high degree of control over commercial dealings" involving personal property meant that an owner of personal property should 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."[35] The *Lucas* Court, however, stressed that applying such a limitation to land was "inconsistent with the historical compact" of the Takings Clause.[36] The *Horne* majority refused to extend the different treatment of real and personal property to the direct physical appropriation setting, stressing that *Lucas* was not a physical takings case.[37]

In concluding that the reserve requirement clearly constituted a physical taking, the majority stressed that the requirement involved both the physical surrender of the raisins and the transfer of title to the RAC.[38] Though the reserve raisins sometimes remained in the possession of the handlers, the reserve raisins were always segregated from the free-tonnage raisins and held "for the account" of the government.[39] Further, the RAC could dispose of the reserve raisins "as it wishe[d]."[40] In the majority's view, the reserve requirement thus deprived raisin growers of their "entire 'bundle' of property rights . . .—'the rights to possess, use and dispose of'" the raisins, "with the exception of the speculative hope" of receiving "some residual proceeds."[41]

32. *Id.* In addition to the military seizures, some have theorized that early statehood efforts to reallocate debt from creditors to debtors led to the eventual adoption of the Takings Clause. *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 147–49 (1990).

33. *See, e.g.*, James v. Campbell, 104 U.S. 356, 357–58 (1882) (declaring that a patent conferred an exclusive property interest that could not be appropriated by government without just compensation).

34. *Horne*, 135 S. Ct. at 2427–28 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992)).

35. *Lucas*, 505 U.S. at 1027–28.

36. *Id.* at 1028.

37. *Horne*, 135 S. Ct. at 2427.

38. *Id.* at 2428.

39. *Id.*; *see also* 7 C.F.R. § 989.66 (2015) (stating "reserve tonnage transferred to a handler by the committee shall be held by him for the account of the committee").

40. *Horne*, 135 S. Ct. at 2428.

41. *Id.* (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982)).

The Court also rejected government arguments that the takings inquiry should weigh the economic impact of the regulatory program, balancing the benefits to the growers of voluntarily participating in the regulated market against the growers' loss of control and sometimes net proceeds.[42] According to Chief Justice Roberts, a physical takings analysis does not ask whether economically viable use remains but rather focuses on the physical appropriation of the property.[43] "[A] contingent interest of indeterminate value" does not negate the fact that a physical appropriation has occurred, at least not when "the value of the interest depends on the discretion of the taker."[44] In the majority's view, these arguments "confuse" the per se physical takings inquiry with regulatory takings analysis.[45] While the existence of an economically viable use could prevent a regulatory restriction from being a regulatory taking, it would not save even a partial physical appropriation from being a physical taking.[46] The Court also refused to treat participation in the regulated raisin market as a reason to view the reserve requirement as part of a voluntary exchange. As the Court explained, ordinary, basic uses of property—such as selling an agricultural product in the market—do not qualify as special government benefits that can be used as leverage to secure a "waiver of constitutional protection."[47]

The *Horne* decision raises more questions than it resolves. The Court declared that personal property is as worthy as real property of protection from physical takings, yet it left intact—and without explanation—the different treatment recognized in *Lucas* for regulatory takings. The Court further concluded that the reserve requirement constituted a physical taking, even though simply prohibiting the sale of the reserves would not have been a physical taking but would have had a worse economic impact on growers—a prohibition on sale would have deprived the growers of any proceeds from the reserves, but it would not have required a transfer of control to the RAC. The Court explained that the Constitution "is concerned with means as well as ends."[48] This logic is contrary to the more complex approach of traditional courts to physical takings. The traditional analysis "applied a number of factors to measure how close the government interference was to an actual, direct physical occupation or appropriation . . . includ[ing] entry, practical ouster, loss or destruction of use, intent to repeat, and destruction of value."[49]

42. *Id.* at 2428–29.

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

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 2430–31.

48. *Id.* at 2428.

49. Butler, *supra* note 9, at 1757.

The *Horne* majority also ignored a different approach to physical takings announced in a 2012 decision, as well as some judicial resistance to the expansion of rules-based tests.[50] The 2012 decision, *Arkansas Game & Fish Commission v. United States*,[51] rejected application of the per se rule to government-authorized flooding that was temporary and not necessarily recurring, instead using a "more complex balancing process."[52] That process weighed the nature, duration, and foreseeability of the government invasion with the harm to the landowner, including interference with reasonable, investment-backed expectations.[53] Although the Court in *Arkansas Game & Fish Commission* clarified that a physical taking could arise even when government-induced flooding was temporary, the decision clearly signals that the per se approach is not the only test for physical takings.[54] The Court in *Horne* suggests otherwise, treating the per se approach as the only test that should be applied to government-mandated physical transfers of regulated personal property.

Further, by framing the claim against the regulatory restriction as a per se physical taking, the *Horne* majority blurs the distinction between regulatory and physical takings and enables property owners to circumvent a number of principles that previously made a regulatory takings conclusion more difficult to reach. The per se physical takings approach, for example, gets around the "as a whole" standard that the Court adopted to prevent conceptual severance in a regulatory setting. In *Penn Central Transportation Co. v. New York City*,[55] the Court declared that it would evaluate the impact of a regulatory action by examining the property as a whole and would not treat the regulated interest as a "discrete segment[]."[56] Otherwise, property owners could manipulate the interest they claimed to be taken, narrowing it to just the regulated portion and increasing the likelihood of a *Lucas* taking involving a total wipeout of economically

50. *See* Lynda L. Butler, *The Resilience of Property*, 55 ARIZ. L. REV. 847, 888 (2013) (proposing that the *Nollan* and *Dolan* rules-based expansion has stoked judicial resistance in lower courts and even subsequent Supreme Court decisions due to the difficulty of "applying any single or formulistic vision of constitutional property to the complex and variable situations involving ordinary property").

51. 133 S. Ct. 511 (2012).

52. *Id.* at 521 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 n.12 (1982)).

53. *Id.* at 522–23.

54. For a discussion of potential problems raised by *Arkansas Game & Fish Commission* and a proposed analytical approach distinguishing between the exclusion and governance strategies to property, see Butler, *supra* note 9, at 1714–20.

55. 438 U.S. 104 (1978).

56. *Id.* at 130–31. This approach has been reiterated by subsequent decisions. *See, e.g.*, Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326–27 (2002) (rejecting the temporal severance argument and concluding that a building moratorium did not cause a total economic loss for the period when the moratorium applied).

viable use.[57] If, instead, physical takings analysis is applied to a regulation involving the transfer of a part, the "as a whole" perspective does not matter. As the *Horne* Court explains, even a permanent physical appropriation of just a few inches of land is considered a per se physical taking.[58] Under this analysis, when the property is a fungible product like raisins, a government requirement to physically reserve and transfer just a small amount of raisins—say 1%—would be a physical taking. The fact that the raisin grower still had 99% of her crop would not be considered. Under the Court's analysis, the amount of free-tonnage raisins simply would not matter.

The physical takings approach of the *Horne* decision also allows the Court to ignore the context surrounding the reserve requirement, including the fairness dimension of regulatory takings analysis addressed through such concepts as average reciprocity of advantage and evening out of the benefits and burdens of regulatory life.[59] When a permanent physical appropriation exists, the per se approach focuses entirely on the owner. The benefits to the owner of being in a protected market are irrelevant to determining whether a physical taking exists. The windfalls received, for example, from being in a stable market with price controls would not be part of the physical takings analysis, not even if the price for the ninety-nine percent of the remaining crop were much higher than if the market were not regulated. Protection of certain agricultural markets may require some sort of collective action to overcome the free-rider and transaction cost problems of an unconstrained, free-for-all market. In these situations, the race to get to market would simply be too great to ensure the protection of farmers' income, the sufficiency and safety of the supply, and an adequate number of long-term players. The benefit to the raisin growers then is not simply the higher price but also the collective action that overcomes market failure problems.

Finally, the Court's application of the per se approach to the reserve requirement ignores the complexity and breadth of property. Comparing the seizure of your car to the occupation of your home is too simplistic a

57. In *Lucas*, the Court declared a law causing a total loss of economically viable use to be a per se regulatory taking. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015–17 (1992).

58. 135 S. Ct. 2419, 2429 (2015) (discussing the conclusion in *Loretto*, 458 U.S. at 430, 436, that the installation of a small cable box was a physical taking despite the continued economic viability of the property); *see also Loretto*, 458 U.S. at 436–38 (stating that traditional rules are in place to avoid line-drawing: "constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied," but upon "whether there is a taking in the first instance").

59. In *Pennsylvania Coal Co. v. Mahon*, Justice Holmes noted how a law's "average reciprocity of advantage" had been "recognized as a justification" for the law. 260 U.S. 393, 415 (1922). In *Penn Central Transportation Co. v. New York City*, Justice Brennan contrasted a physical invasion with "interference aris[ing] from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. 104, 124 (1978).

justification for the Court's adoption of a one-dimensional test.[60] This superficially persuasive—but misleading—1:1 comparison overlooks the wide variety of assets falling outside of the real property category, as well as the constant development of new forms of personal property. By classifying the reserve requirement as a per se physical taking, the Court in effect defines the property interest as each individual raisin, despite the requirement's role in maintaining the value of the crop as a whole. A tract of land, however, is fixed in its size; the quantity of acreage is known. If a landowner proposes to subdivide the tract into forty lots but is only allowed to develop twenty, the landowner still owns the same amount of land. He has not lost his tract or even a part of it. Agricultural crops produced for sale, in contrast, are not fixed in number. The yield varies from year to year, just as the amount of subdivided lots varies depending on the circumstances. The grower cannot fix the quantity of crops grown ex ante, making regulatory intervention necessary if a market failure exists. This difference in the variability of the quantity should affect how a property interest and a physical taking are defined.

Because the *Horne* majority applied the per se test to that part of the raisin crop set aside to maintain the market value of the remaining crop, any law requiring the physical separation and possible transfer of personal property would seem to be a per se physical taking. What if a law mandated the surrender of a firearm by its owner even though the owner was not prohibited from possessing the weapon? In 2014, California enacted a law authorizing such action when a judicial officer finds reasonable or sufficient cause to believe that the owner poses an immediate and present danger of injury.[61] Or what if a law authorized local governments to seize the personal property of homeless people when the property was found in public places?[62] Under the *Horne* Court's analysis,

60. *Horne*, 135 S. Ct. at 2426.

61. 2014 Cal. Legis. Serv. 5639–43 (West) (amending CAL. PENAL CODE § 1524). This law was amended in 2015 to add protections for the rights of gun owners against unfair seizures. 2015 Cal. Legis. Serv. 1653–55 (West).

62. *See A Dream Denied: The Criminalization of Homelessness in U.S. Cities*, NAT'L COAL. FOR THE HOMELESS, http://www.nationalhomeless.org/publications/crimreport/constitutional.html (last visited Sept. 8, 2015) (discussing criminalization measures against the homeless and their constitutional implications); Gale Holland, *L.A. City Council OKs Crackdowns on Homeless Encampments*, L.A. TIMES (June 23, 2015), http://www.latimes.com/local/california/la-me-homeless-sweeps-20150624-story.html (discussing crackdowns on homeless encampments); Ilya Somin, *The Takings Clause and Government Destruction of Homeless Persons' Property*, VOLOKH CONSPIRACY (Sept. 6, 2012), http://volokh.com/2012/09/06/the-takings-clause-and-government-destruction-of-homeless-persons-property/ (discussing the Fourth and Fifth Amendment implications of government seizure of homeless persons' property); *see, e.g.*, Lavan v. City of L.A., 693 F.3d 1022, 1032–33 (9th Cir. 2012) (upholding the rule that government must give a property owner notice and a chance to challenge a taking "regardless of whether the property in question is an Escalade or an EDAR, a Cadillac or a cart"); Pottinger v. City of Miami, 810 F. Supp. 1551, 1570 n.30 (S.D. Fla. 1992) (holding city's seizure and destruction of homeless persons' personal property to be a violation of the Fifth Amendment). *But see* Sanchez v. City of

the possibility of a seizure or transfer of possession would trigger the per se physical takings test. The context of the law and the public interests justifying the seizure or transfer could not be considered. Though the *Horne* Court hoped to provide a clearer and more predictable takings test, it instead expanded the application of a test that is divorced from any consideration of context. Not only can the test not handle the many forms of personal property, whether tangible or not, it also cannot handle the complicated legal regimes that accompany and support these property interests. The *Horne* decision thus poses a serious dilemma for takings jurisprudence.

Should the differences between the types of property matter under takings analysis? Which takings tests or principles best capture the breadth and variability of property interests while minimizing problems of inconsistency and unpredictability? These questions will now be addressed.

II. THE PROPERTY PERSPECTIVE

In deciding whether differences between real and personal property matter for purposes of defining constitutionally protected property, it is important to focus on the nature of the differences under property law and then to ask whether these distinctions should have constitutional implications. Are there reasons flowing from the differences that justify or necessitate a more nuanced or context-dependent approach under the Takings Clause? Should a takings test reflect the nature of real and personal property and the possibility of emerging property forms? Should, in other words, a takings test reflect the reach and promise of property—its richness and frontiers?

A. Property's Breadth and Variability

Personal property comes in many different sizes, shapes, and forms. In contrast to land, personal property has a broad reach and potential for evolution. While real property interests are, by definition, tied to permanent, renewable tracts of land having demarcated boundaries, personal property may be tangible or intangible, is typically nonrenewable, and, in the case of many agricultural products, is perishable. Some forms of personal property are intangible and more conceptual than actual, with the boundaries of delineation mainly set through a regulatory regime. The regime and property interests persist because the value of the property far outweighs the cost of enforcing these murky conceptual boundaries,

Fresno, 914 F. Supp. 2d 1079, 1104 (E.D. Cal. 2012) (holding a homeless plaintiff had no federal takings claim when he failed to avail himself of any state procedures for compensation).

justifying the enforcement efforts.[63] Other types of personal property are tangible but fungible—like raisins, making it impossible to identify individual units. Only physical separation can provide a way to distinguish different batches. Personal property that is tangible, fungible, and perishable tends to derive its economic value from sale. Large quantities would only be produced for the market. The greater the sameness, fragility, or intangibility, the more the need for management and regulations to draw legal boundaries, resolve conflicts, and protect public interests.

The common law of property traditionally has treated personal property differently than real property, varying principles, policies, and rules to reflect the nature of the personal property being acquired, used, or disputed. As a general matter, possession-based rules have been more important to personal property as ways to acquire and enforce ownership rights.[64] The title system similarly is less extensive for personal property than for real property. Personal property often lacks the durability of land to justify the costs of establishing a formal title system involving registration or recordation of title documents. For many types of personal property, possession is the common law's preferable source of evidence of ownership.[65] Some more expensive, durable forms—like cars, boats, art, and jewelry—have more formal title systems, but they generally are the exception.[66] For fungible personal property (especially if perishable), commercial transactions require use of either an inconvenient system based on total physical separation or a more complex system providing for the commingling of goods through commercial laws governing warehouse arrangements and transfers of documents of title.[67]

63. Intellectual property interests, for example, may be so valuable that the costs of enforcement are worth the effort. The Google Books litigation demonstrates how extensive those efforts can be. *See* Authors Guild v. Google Inc., 770 F. Supp. 2d 666, 669 (S.D.N.Y. 2011) (concluding that the settlement agreement still goes too far in giving Google significant rights to control copyrighted works without permission), *vacated* 721 F.3d 132 (2d Cir. 2013); *see also* Jonathan Stempel, *Google Defeats Authors in U.S. Book-Scanning Lawsuit*, REUTERS (Nov. 14, 2013), http://www.reuters.com/article/2013/11/14/us-google-books-idUSBRE9AD0TT 20131114 (discussing the Google litigation).

64. *See, e.g.*, JOSEPH WILLIAM SINGER, PROPERTY § 16.2 (3d ed. 2014) (discussing the rule of capture for acquiring ownership of wild animals); *id.* § 16.3 (discussing first possession as a requirement of finder's law, protecting a first possessor over subsequent possessors and third parties, with the exception of the true owner); *id.* (unless embedded in state, federal, or Indian lands, a shipwreck is governed by the law of finds, awarding the finder ownership of the ship and its contents, or, if the ship has not been abandoned, by the law of salvage, which entitles the finder to possession and a reward for salvaged goods, but not title).

65. *See, e.g.*, *id.* § 2.1 (discussing how a presumption of ownership arises from possession of property and exercise of physical control due to the expense and difficulty of proving true ownership).

66. *See* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 901–18 (2d ed. 2012) (discussing various title systems for real and personal property).

67. Article 7 of the U.C.C. governs management of goods for storage and transit, recognizing the use of documents of title by warehousemen and financial institutions in the business of storing

Recording or registration systems designed to give notice to third parties and to establish the priority of various rights-holders are also more extensive for real property than for personal property. Some types of personal property that are exchanged in the marketplace and financed by lending institutions have registration systems for title and secured financial interests.[68] For many forms of personal property, though, no formal system exists.

Enforcement of property rights also differs depending on whether the property is real or personal. Trespass to land, for example, is traditionally handled harshly and swiftly,[69] while trespass to chattel is harder to establish.[70] Legal regimes for both real and personal property tend to become more complex if the asset is highly valued, durable, or able to generate financial capital. Laws regulating oil and gas, for example, began simply, borrowing the rule of capture used for wild animals. Eventually, when the rule of capture promoted a race to drill and capture regardless of demand or ability to store for the future, the laws for oil and gas became much more complicated.[71] Now these laws even allow forced pooling to gain access to oil and gas on a landowner's property against her objections.[72]

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and handling goods for hire, and delivery of goods. U.C.C. §§ 7-101–7-704 (AM. LAW INST. & NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2014). These documents of title include any record "that in the regular course of business or financing is treated as adequately evidencing that the person in possession or control of the record is entitled to receive, control, hold, and dispose of the record and the goods the record covers." U.C.C. § 1-201(16) (AM. LAW INST. & NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2014).

68. Automobiles, for example, have a registration or title system run by the states and are often subject to the interests of secured creditors governed by Article 9 of the U.C.C. *See* MERRILL & SMITH, *supra* note 66, at 913–14 (discussing the interaction of the state's automobile title systems with the U.C.C).

69. *E.g.*, Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 166 (Wis. 1997) (upholding $100,000 in punitive damages for an intentional trespass to land); *see also* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 63 (4th ed. 1971) (describing the law of intentional trespass to land as "exceptionally simple and exceptionally rigorous" (quoting 1 THOMAS ATKINS STREET, THE FOUNDATIONS OF LEGAL LIABILITY 19 (1906))).

70. Trespass to chattel generally requires proof of harm to the owner. RESTATEMENT (SECOND) OF TORTS § 218 cmt. e (AM. LAW INST. 1965). Common law differences between trespass and nuisance also suggest that the *Horne* Court overreached in finding a direct physical invasion—a trespass-like situation. Under the common law, trespass generally involves an intrusion onto land by a tangible object "solid and large enough to physically displace" the landowner. Common law courts have tended to treat invasions by small substances (like gas, sound, and light waves) as nuisances, not trespasses. MERRILL & SMITH, *supra* note 66, at 29.

71. Under the rule of capture, a landowner may drill for oil and gas on his own land and eventually may take oil and gas from the same pool extending under neighboring lands. *See generally* NANCY SAINT-PAUL, 1 SUMMERS OIL AND GAS, OWNERS RIGHTS TO TAKE OIL AND GAS § 3:2 (2010), Westlaw (database updated Nov. 2015). He would have no liability to compensate the adjoining landowner; thus, a landowner has the incentive to drill first and reap the benefits of oil and gas that may originate in adjoining lands. *Id.*

72. *See, e.g.*, Laura Legere, *Forced Pooling Policies Remain Unclear in Pennsylvania's Shale Plays*, PITTSBURGH POST-GAZETTE (Jan. 6, 2015), http://powersource.post-

One important difference between real and personal property is personal property's greater breadth and ability to evolve into new forms, assets, and interests as technological advances occur. The right to broadcast over the airwaves, for example, began informally as customs, practices, and norms developed among broadcasters. When conflicts eventually occurred, courts recognized a property interest of sorts under the common law to protect the first-in-time broadcaster from interference by another broadcaster trying to free-ride on the first user's signal and reputation.[73] Eventually Congress enacted a more complex regulatory regime governing allocation of broadcast rights over the airwaves.[74] Even now, technological advances continue to lead to new forms of electronic transmissions that push the boundaries of our thinking about property rights.[75]

Intellectual property more broadly has experienced tremendous change over the years because of emerging technologies. Intellectual property scholars continue to debate the choice of legal regime, weighing the reliance on use restrictions traditionally favored by the FCC with the alternative of recognizing well defined property rights.[76] In addition to the electromagnetic spectrum, new forms of property are emerging in the Internet and the electric power grid.[77] These new forms differ in significant ways from real property, displaying both significant interdependencies and unpredictable geographic discontinuities or sources of disturbances.[78] One scholar, Christopher Yoo, argues that property theory should focus on these

gazette.com/powersource/policy-powersource/2015/01/06/Forced-pooling-policies-remain-unclear-in-Pennsylvania-s-shale-plays/stories/201412300017 (discussing the forced pooling provisions of a 1961 oil and gas law in the context of hydraulic fracking).

73. *E.g.*, Tribune Co. v. Oak Leaves Broad. Station, Inc. (Ill. Cir. Ct. 1926), *reprinted in* 68 CONG. REC. 215 (1926).

74. Communications Act of 1934, 47 U.S.C. § 151 (2012) (authorizing the creation of the Federal Communications Commission ("FCC") with the purpose of "regulating interstate and foreign commerce in communication by wire and radio"); 47 U.S.C. § 302(a) (2012) (establishing minimum standards to reduce interference with radio reception); 47 U.S.C. § 309 (2012) (establishing a regime under which broadcast stations apply to receive a license from the FCC).

75. The debate over net neutrality, for example, raises fundamental questions about how to approach the Internet—as a commons open generally to all or as a resource to be invested in and developed as private property. *See* James Grimmelmann, *The Internet Is a Semicommons*, 78 FORDHAM L. REV. 2799, 2815–42 (2010) (using economic theory to argue that the Internet should be treated as a semicommons). The recent battle between cable companies and streaming services highlights what is at stake. *See generally* Adam B. VanWagner, *Seeking a Clearer Picture: Assessing the Appropriate Regulatory Framework for Broadband Video Distribution*, 79 FORDHAM L. REV. 2909 (2011); Stephen Battaglio, *Cable Companies Are Scrambling as More Viewers Become Cord-Cutters*, L.A. TIMES (May 7, 2015), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-cable-companies-cord-cutters-20150507-story.html.

76. *See* Christopher S. Yoo, *Beyond Coase: Emerging Technologies and Property Theory*, 160 U. PA. L. REV. 2189 (2012) (explaining the debate from its inception with Ronald Coase to its potential future implications for policy and property theory).

77. *Id.* (discussing the implications of these new forms for property theory).

78. *Id.* at 2204–07.

differences to govern the new forms of property instead of focusing on the normal "bargaining-related transaction costs."[79] Under his approach, technological interdependencies would be "the key determinant of property boundaries."[80] Yoo offers "several lessons for property theory" that underscore the evolving nature of property's frontier.[81]

B. Property's Management Systems

If the nature of property matters, a regulation requiring physical separation of reserve raisins from free-tonnage raisins should not, in isolation, lead to a physical takings finding—at least not when the property is fungible, perishable, and deriving much of its value from the prospect of sale in a regulated market. What else might justify the classification of a reserve requirement like the one in *Horne* as a per se physical taking? In addition to physical separation, the *Horne* majority focused on the transfer of title, concluding, without much explanation, that "[t]itle to the raisins passes to the Raisin Committee."[82] Chief Justice Roberts noted that reserve raisins may, at times, remain on the premises of the handlers, but even then the raisins are held '"for the account' of the Government," which may dispose of the reserves "as it wishes."[83] In the majority's view, the raisin growers lose all of their property rights in the reserve raisins.[84] The growers' interest in net proceeds is at best a "speculative hope."[85]

The Court's analysis unnecessarily limits the nature of the property arrangement managed and supported by the regulatory regime. Instead of viewing the situation as a transfer of all legal and equitable interests to the RAC, the Court could have viewed the arrangement as a transfer of legal title to the RAC for the purpose of managing the supply of reserve raisins, leaving the equitable interests with the raisin growers, much like a beneficiary under a trust. Custody or possession of the reserve raisins generally would remain with the handlers until directed by the RAC to dispose of the raisins. Or the Court could have viewed the transfer as a bailment, much as warehouse arrangements initially are viewed under commercial law until a transfer of title occurs.[86] The equitable or residual

79. *Id.* at 2204.

80. *Id.*

81. *Id.*

82. Horne v. USDA, 135 S. Ct. 2419, 2428 (2015).

83. *Id.* at 2428 (quoting 7 C.F.R. § 989.66(a) (2015) on the RAC's general guidelines on reserve tonnage).

84. *Id.*

85. *Id.*

86. *See* UNIF. LAW COMM'N, *UCC Article 7, Documents of Title (2003) Summary*, http://www.uniformlaws.org/ActSummary.aspx?title=UCC%20Article%207,%20Documents%20of%20Title%20(2003) (last visited Sept. 8, 2015) (discussing changes to Article 7 of the Uniform

interest in the grower would include the right to receive proceeds after authorized and legitimate deductions are taken.[87] Whether the deductions are valid is a separate question. Though recovery of administrative expenses seems reasonable, the subsidies for export handlers are harder to justify without probing the subsidies' relation to the disposal of reserve raisins. The amount of the net proceeds is uncertain, but the regulatory scheme clearly leaves the interest in the proceeds with the growers.

Thus, the Court's characterization of the transfer is important. The transfer of all interests is very different from the transfer of legal title for management purposes. The RAC needs enough power to manage the reserves and achieve its regulatory purpose of stabilizing the raisin market. Achieving this goal not only involves controlling the supply but also overcoming the strategic behavior of growers in an unrestrained market. Any discretion that the RAC has over the reserve raisins should be limited by its regulatory purpose, just as a trustee is limited by the terms of the trust and relevant trust law.[88] The discretion of the RAC is not unlimited, as the Court suggests; both statutory and regulatory law provide constraints to guide oversight. Though the RAC has significant gatekeeping powers, they are not equivalent to the entire range of an owner's powers.

Should the differences in the nature of the property and its management system matter for purposes of defining constitutionally protected property? Unless the text or the history of the Takings Clause suggest otherwise, both real and personal property are equally deserving of protection. That does not mean, however, that takings jurisprudence should ignore the nature of the property interest allegedly taken or its management system and supporting infrastructure. Any approach to constitutionally protected property that is one-dimensional would fail to anticipate property's richness and frontiers. The Court's opinion in *Horne* does just that by applying a test developed for direct physical seizures of tangible property that is ex ante quantifiable and not dependent for its value on a regulated market. Property's forms and management systems are much more complicated and variable.

Because the history and rhetoric of the Takings Clauses are relevant to how different types of property are treated, constitutional protection of property will now be placed within a historical context. This discussion will show that the historical compact relied on by the *Horne* Court is not as clear or certain as the Court suggested.

Commercial Code, which relies on the common law concept of bailments enhanced by the use of warehouse receipts or documents of title to allow transfers in the marketplace).

87. The regulations authorize deductions for administrative expenses and subsidies to export handlers. 7 C.F.R. § 989.66(h) (2015).

88. For a discussion of limitations on the decisions of trustees, see GEORGE GLEASON BOGERT ET AL., BOGERT'S TRUSTS AND TRUSTEES § 551 (2014).

III. THE RHETORIC AND INSTITUTIONAL HISTORY OF THE TAKINGS CLAUSE

Proposed as part of the Bill of Rights amending the Constitution of 1787, the Takings Clause was ratified without much debate or fanfare. Other than the reporting of various versions of the Clause and of brief debates on the danger of majoritarian exploitation, little direct evidence of the Clause's ratification process exists.[89] Although secondary sources of the time, like newspapers and pamphlets, published debates on the need for constitutional protection of property, those sources generally do not reveal information about the ratification process and typically provide only the author's views of property rights and the need for a just compensation provision.[90]

Because the historical records of the proceedings on the ratification of the Takings Clause are nominal, scholars have looked to political debates and institutional practices to develop theories of the meaning and purpose of the Clause. Some have tended to focus on the rhetoric surrounding property rights, examining political debates over property rights occurring during the colonial, revolutionary, and early republican periods.[91] Others have chosen instead to study the institution of property, paying particular attention to the laws affecting property rights, as well as actual practices.[92]

89. *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 402–04 (W.W. Norton & Co. 1987) (discussing the fear of exploitation); 2 THE COMPLETE BILL OF RIGHTS 361–83 (Neil H. Cogan, ed. 1997) (setting forth Madison's proposed bill and the status of the congressional version eventually adopted). For a good discussion of why the Takings Clause poses "a special problem for the historian of original intent," see Harry N. Scheiber, *The "Takings" Clause and the Fifth Amendment: Original Intent and Significance in American Legal Development*, *in* THE BILL OF RIGHTS 233–49 (Eugene W. Hickok, Jr., ed. 1991).

90. *See, e.g.*, Luther Martin, *Genuine Information, No. 8, Jan. 22, 1788*, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 89, at 376; *The Federal Farmer, No. 6, Dec. 25, 1787*, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note, 89 at 375.

91. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967) (analyzing similarities in argument, language, and invocation of Revolutionary figures in Revolutionary-era pamphlets); JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (1990) (explaining the significance of property in the American political system by examining the Federalist victory at the Constitutional Convention of 1787); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 506–07 (1975) (describing Revolutionary literary themes of "a civic and patriot ideal in which the personality was founded in property, perfected in citizenship but perpetually threatened by corruption"); David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding*, 37 AM. J. LEGAL HIST. 464, 467–69, 477–81 (1993) ("on the rhetorical level property rights were described in 'absolutist' terms").

92. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 1–30 (1977) (describing the emergence of an instrumental conception of law); Morton J. Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275, 286 (1973); Schultz, *supra* note 91, at 481–83 (explaining the Revolutionary trend of thinking of property "as an institution and not simply a concept").

The approach taken—rhetorical or institutional—can affect the meaning and reach of the Clause. Scholars taking the rhetorical approach, for example, tend to describe property rights in absolutist terms, relying on the forceful statements of Locke, Blackstone, Madison, and others who viewed property rights as fundamentally important.[93] Scholars following an institutional approach, in contrast, tend to look at how property actually was treated during America's formative era to conclude that property rights were not absolute, but rather subject to economic regulation and other laws adopted to promote the public good.[94]

A. The Rhetorical and Institutional Perspectives

The differences between the rhetorical and institutional perspectives on property developed early in the settlement of America. During the colonial period, the rhetoric of property was very Lockean. Legal and political leaders often described property as fundamental to liberty and as arising from natural law.[95] The laws, regulations, and actual practices in effect at the time, however, suggest that colonists generally accepted the notion that government could limit property rights.[96] Indeed, soon after America was settled, colonial governments began to regulate land use.[97] Colonists apparently understood that the regulation of property was necessary to promote economic development and achieve other important social goals.[98] Despite the strong rhetoric of property, colonists became accustomed to holding property rights subject to the public good.[99] As one commentator observed, "British common law, colonial and early American regulatory policies, and case law all sustained significant limits on property

93. *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 42–50 (3d ed. 2008) POCOCK, *supra* note 91, at 506–07; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 214–19 (1969); Schultz, *supra* note 91, at 466, 481.

94. *See* Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 859–93 (1978); Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 8–9, 14–29 (1977); Schultz, *supra* note 91, at 486–90.

95. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 120 (University of Chicago Press 1979) ("the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals"); ELY, *supra* note 91, at 28–29 ("colonial leaders viewed the security of property as the principal function of government"); JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 87 (Oxford: Fletcher & Sons Ltd. 1976) ("[m]an being born . . . hath by nature a power . . . to preserve his property—that is, his life, liberty, and estate"); Leslie Bender, *The Takings Clause: Principles or Politics?*, 34 BUFF. L. REV. 735, 754–55 (1985) (describing Locke's model of property as appealing to American colonists and as "clearly influenc[ing] the drafting of our American constitution"); Schultz, *supra* note 91, at 473.

96. *See* Schultz, *supra* note 91, at 488.

97. *See* FRED BOSSELMAN, DAVID CALLIES, & JOHN BANTA, THE TAKING ISSUE 82 (1973) (providing an overview of land use regulation in the colonies beginning in 1631).

98. Schultz, *supra* note 91, at 488.

99. *Id.* at 489–90.

rights that contrasted dramatically with the political rhetoric of property during this era."[100] This apparent conflict between rhetoric and practice complicates the task of defining the meaning and scope of the Takings Clause.

Land use regulation in colonial America applied to a wide range of purposes and uses.[101] In addition to regulation of agricultural uses,[102] colonial governments regulated noxious land uses,[103] enclosure of lands,[104] mining,[105] uses of waterfront land,[106] drainage of wetlands,[107] and the location of bakeries, slaughterhouses, stills, and other business operations.[108] Colonial laws also regulated fishing, fowling, and hunting, sometimes even preserving public rights to pursue those uses on privately owned lands.[109] Further, in urban areas, colonial laws often engaged in community planning by adopting public safety regulations,[110] regulating aesthetics and location of uses,[111] imposing clean up obligations on urban landowners,[112] and encouraging the development of land.[113]

Land distribution laws enacted during the colonial period also imposed conditions and restrictions on interests acquired under those laws. To encourage settlement and development, the laws typically imposed clearing, seating, and planting requirements on parties seeking a land patent.[114] Basically, the parties had to clear the land and build a house or otherwise affirmatively use the land before they acquired a land patent.[115] If a party failed to fulfill all the conditions for securing a patent, the party lost

100. *Id.* at 490.

101. *See generally* John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1252–300 (1996).

102. *See* ELY, *supra* note 93, at 18 (describing regulation of both undeveloped and urban land); Hart, *supra* note 101, at 1259–65 (detailing colonial practice of imposing affirmative land use requirements); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 789 (1995) (providing an overview of colonial land use regulations).

103. *See* ELY, *supra* note 93, at 18.

104. Hart, *supra* note 101, at 1263–65.

105. *Id.* at 1265–66.

106. *Id.* at 1266–67.

107. *Id.* at 1268–72.

108. Treanor, *supra* note 102, at 789.

109. LYNDA LEE BUTLER & MARGIT LIVINGSTON, VIRGINIA TIDAL AND COASTAL LAW 225–29 (1988); Hart, *supra* note 101, at 1272.

110. ELY, *supra* note 93, at 18.

111. Hart, *supra* note 101, at 1273–75 (use restrictions), 1275–76 (aesthetic regulations).

112. ELY, *supra* note 93, at 18; Hart, *supra* note 101, at 1280–81.

113. Hart, *supra* note 101, at 1276–79.

114. *See, e.g.*, BUTLER & LIVINGSTON, *supra* note 109, § 8.2.

115. *Id.*; Hart, *supra* note 101, at 1259.

whatever interest had been acquired during the patenting process.[116] Further, if the party failed to meet conditions imposed after the patent was issued, the party might forfeit the title.[117]

During the colonial era, governments often used the power of eminent domain to acquire land for buildings and roads.[118] The colony of Massachusetts, for example, authorized towns to condemn land for highways,[119] South Carolina allowed the appropriation of land for the construction of buildings and roads,[120] and Maryland permitted land to be taken for the construction of tobacco inspection warehouses.[121] Rhode Island authorized the appropriation of private property to construct a pest house,[122] and Virginia allowed iron factories to cut and take timber from the land of adjacent property owners.[123] In many colonies, laws authorized private parties to appropriate land for the construction of watermills.[124]

Whether just compensation was awarded when property was taken for public purposes is the subject of much debate. Some scholars, like Professor James Ely, have argued that the just compensation principle was well established in England at the time of the colonization of America and that colonial governments generally recognized this principle.[125] As support, Ely points to a number of colonial governments that required

116. *See* BUTLER & LIVINGSTON, *supra* note 109, § 8.5, at 283–87 (discussing the nature of the interest acquired before a patent was issued).

117. Hart, *supra* note 101, at 1260–63.

118. *See* BOSSELMAN, CALLIES, & BANTA, *supra* note 97, at 92–93 (describing generally the colonial precursors to the eminent domain clause); ELY, *supra* note 93, at 24 (discussing the colonial practice of eminent domain).

119. *The General Laws and Liberties of the Massachusetts Colony, 1672*, *reprinted in* 2 THE LAWS AND LIBERTIES OF MASSACHUSETTS, 1641–1691, at 290 (Scholarly Resources, Inc. 1976).

120. *The Fundamental Constitutions of Carolina*, *reprinted in* 1 STATUTES AT LARGE OF SOUTH CAROLINA 48 (Thomas Cooper ed., 1836).

121. LAWS OF MARYLAND AT LARGE, WITH PROPER INDEXES ch. 18, § 36 (Thomas Brown ed., 1765); *see also* James W. Ely, Jr., *"That Due Satisfaction May Be Made:" The Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1, 6 (1992).

122. *See* Ely, *supra* note 121, at 5.

123. An Act for Encouraging Adventures in Iron-Works, ch. XLVI, 1748 Va. Laws., *reprinted in* 6 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, ch. XLVI (William Waller Hening ed., 1819) (encouraging adventurers in ironworks); *see also* An Act for Encouraging Adventures in Iron-Works, ch. XII, 1727 Va. Laws., *reprinted in* 4 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, ch. XII (William Waller Hening ed., 1820) (encouraging ironworks by allowing land to be taken for roads and bridges).

124. *See* HORWITZ, *supra* note 92, at 34–35, 260–61 (describing colonial water rights and eminent domain for the purpose of constructing water mills); John F. Hart, *The Maryland Mill Act, 1669–1766: Economic Policy and the Confiscatory Redistribution of Private Property*, 39 AM. J. LEGAL HIST. 1, 1–2 (1995) (discussing how the Maryland Mill Act "provides a powerful counterexample to the thesis that colonial American legislatures conscientiously respected property rights").

125. ELY, *supra* note 93, at 23–25; Ely, *supra* note 121, at 4–13.

payment of compensation for the construction of highways or buildings.[126] Ely concedes that the colonies were not consistent in actually paying compensation but notes that compensation would not need to be paid until improvements were made, and often improvements did not occur.[127] He also notes that the abundance and cheapness of land made payment of compensation for unimproved land less important; undeveloped land usually had insignificant monetary value and was always available.[128]

Professor William Michael Treanor, on the other hand, maintains that the compensation principle was not generally accepted during the colonial era.[129] He explains that republican theory controlled thinking about property rights at this time. Under republican theory, property rights were held subject to the public good.[130] According to Treanor, the most common type of taking for the public good occurred when land was appropriated for the construction of public roads. Yet, "[e]xcept for Massachusetts, no colony appears to have paid compensation when it built a state-owned road across unimproved land."[131] Further, uncompensated takings of personal property seemed fairly common. Virginia, for example, protected its reputation as a tobacco producer by authorizing the uncompensated seizure of tobacco of inferior quality.[132] A provision in Massachusetts's 1641 Body of Liberties, in contrast, provided for compensation but only for the seizure of personal property.[133] Treanor concedes, though, that colonial governments provided compensation when enclosed or improved land was taken.[134]

Morton Horwitz, in *The Transformation of American Law*, agrees with Treanor that the compensation principle "was not widely established in America at the time of the Revolution."[135] He notes that only colonial Massachusetts consistently provided compensation for road construction.[136] Other colonies either limited the compensation to land that was already improved or enclosed or did not regularly provide compensation.[137] Indeed, the courts in a few colonies denied compensation for road construction until

126. Ely, *supra* note 121, at 4–12.

127. *Id.* at 7.

128. ELY, *supra* note 93, at 24; Ely, *supra* note 121, at 11.

129. Treanor, *supra* note 102, at 785–91.

130. *See* William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L. J. 694, 695 (1985).

131. *Id.* at 695 (footnote omitted).

132. Treanor, *supra* note 102, at 787–88.

133. *Id*. at 785.

134. Treanor, *supra* note 130, at 695.

135. HORWITZ, *supra* note 92, at 63.

136. *Id.*

137. *Id.*

the nineteenth century, reasoning that original land grants expressly reserved land for building public roads.[138]

B. The Movement for Reform

The revolutionary period saw increased government infringement of property rights and greater redistribution of wealth. Common practices included the seizure of loyalists' property, the appropriation of debts owed to British merchants, and the imposition of size limitations on the sale of seized land.[139] Many creditors fell victim to the use of depreciated paper money printed to aid debtors.[140] Eventually, as the assault on property became more intense, provisions protecting property rights were incorporated into national laws and state constitutions. The first national law requiring compensation for property taken for public use was the Northwest Ordinance of 1787.[141] Responding to fears that a territorial legislature would rescind earlier land grants, the ordinance provided for full compensation of property taken for public purposes. It declared:

> [N]o man shall be deprived of his liberty or property but by the judgment of his Peers, or the law of the land; and should the public exigencies make it necessary for the common preservation to take any persons property, . . . full compensation shall be made for the same.[142]

States also began adding provisions protecting property to their constitutions. The Pennsylvania Constitution of 1776 declared "acquiring, possessing and protecting property" to be part of the "natural, inherent and unalienable [sic] rights" of all men and provided that "no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives."[143] The Massachusetts Constitution of 1780 went a step further, providing for reasonable compensation.[144] The movement to provide greater constitutional protection of property rights thus gained considerable strength during the revolutionary era.

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138. *Id.* at 64.

139. *See* Treanor, *supra* note 102, at 790 ("[D]ivestment acts and bills of attainder effected the confiscation of loyalist property worth, by one historian's estimates, twenty million dollars . . . .").

140. *See id*.

141. *Id.* at 791.

142. *Northwest Ordinance, Art. 2, reprinted in* THE NORTHWEST ORDINANCE 1787: A BICENTENNIAL HANDBOOK 60 (Robert M. Taylor, Jr. ed., Indiana Historical Society, 1987).

143. THE COMPLETE BILL OF RIGHTS, *supra* note 89, at 373, 639. A compensation provision eventually was added in the 1790 Constitution. *Id.* at 373; *see also* CHRONOLOGY AND DOCUMENTARY HANDBOOK OF THE STATE OF PENNSYLVANIA 89 (Robert I. Vexler & William F. Swindler eds., 1978) (describing a similar provision in Pennsylvania).

144. THE COMPLETE BILL OF RIGHTS, *supra* note 89, at 373. For a discussion of the early state Bill of Rights, see BOSSELMAN, CALLIES, & BANTA, *supra* note 97, at 94–97.

Concerned about the "future security of property,"[145] Madison ultimately stepped forward with an amendment to protect property rights. In a speech to the first Congress in 1789, Madison proposed adoption of a provision that stated, "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation."[146] Congress responded with a different version that eventually was ratified in 1791.[147] The records of the congressional debate over the Bill of Rights do not reveal any reasons for the change in wording.[148] Nor is there any written evidence of significant opposition to either version.[149]

In an essay written shortly after ratification of the Bill of Rights, Madison presented his vision of property and its relationship to the constitutional order. He maintained that government is "instituted to protect property of every sort" and defined a "*just* government" as one "which *impartially* secures to every man, whatever is his *own*."[150] Consistent with this definition, he concluded that property is not secure "where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called."[151] Nor did he believe that a "just security to property" was afforded by the government when, according to Madison, "unequal taxes oppress one species of property and reward another species: where arbitrary taxes invade the domestic sanctuaries of the rich, and excessive taxes grind the faces of the poor."[152] Maintaining the "inviolability of property" required that property could not be "taken *directly* even for public use" without compensation; a government that "*indirectly* violates . . . property" was not, in Madison's view, "a pattern for the United States."[153]

145. ELY, *supra* note 93, at 54.

146. 1 ANNALS OF CONG. 448, 451–52 (1789) (Joseph Gales ed., 1834); THE COMPLETE BILL OF RIGHTS, *supra* note 89, at 361.

147. *See* THE COMPLETE BILL OF RIGHTS, *supra* note 89, at 362 ("No person shall . . . be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation.").

148. *See* Treanor, *supra* note 102, at 791.

149. *See* Ely, *supra* note 121, at 18.

150. 14 THE PAPERS OF JAMES MADISON 266 (Robert A. Rutland et al. eds., Univ. Press of Va., 1983) (quoting NATIONAL GAZETTE, Mar. 29, 1792).

151. *Id.* at 267 (quoting NATIONAL GAZETTE, Mar. 29, 1792).

152. *Id.* (quoting NATIONAL GAZETTE, Mar. 29, 1792).

153. *Id.* at 267–68 (quoting NATIONAL GAZETTE, Mar. 29, 1792).

Early physical takings cases dealt with real and personal property: guns, horses, supplies, wagons, boats, land, and so on.[154] A review of the Court's precedent reveals the nuanced reasoning of those early cases that was used for both real and personal property. Traditional physical takings cases examined the character of the government action, the degree of physicality, the impact of the government action on the use value of the property, the degree of permanence of the invasion, the existence of a conflicting public right, and the strength of the causal link between the government action and the impact.[155] The focus was not just on the existence of a physical invasion or seizure; the analysis was more complex and nuanced. It was not until the 1900s—after the Court developed the regulatory takings doctrine and announced an ad hoc factor or balancing test—that the Court described the physical takings test in the unequivocal and simplistic terms of a per se rule.[156]

IV. PROTECTING THE PROMISE AND REACH OF PROPERTY: SOME CONCLUDING REMARKS

Differences should matter—not in deciding whether types of property are worthy of protection, but rather in developing and applying principles under the regulatory and physical takings concepts. On the surface, the clarity of a simplistic, one-size-fits-all test is appealing. Applying such a crude test, however, will lead to shoehorning, inconsistent results, and little predictive value.[157] The *Horne* Court's own language shows the fallacy of its per se logic. The Court declares that a categorical duty to pay applies to the seizure of an owner's car just as much as to her home, and then applies that approach to each individual raisin of a grower's crop. It did not matter that the reserve requirement was the price of entry into a regulated market set up to protect the value of the grower's crop as a whole. Yet later the Court distinguishes a case involving a requirement that chemical companies disclose trade secrets—which the Court concedes are property—in exchange for a permit to sell hazardous chemicals, reasoning that the companies received a special government benefit in the course of a

154. *See* Butler, *supra* note 9, at 1721–57 (discussing the traditional complexity of physical takings cases).

155. *Id.* at 1722–23, 1740.

156. *See id.* at 1695–709 (discussing the development of the modern per se narrative).

157. Problems of inconsistency, for example, exist with other personal property cases, which decided to apply the more nuanced ad hoc factor test of *Penn Central*, avoiding the more rigid per se approach. *See, e.g.*, Hodel v. Irving, 481 U.S. 704, 714–16 (1987) (applying the ad hoc test, despite the "extraordinary" loss of the right to pass on property at death, to a requirement that title to land located within Indian reservations escheat to the tribe when the landowner died—and still finding a taking); Andrus v. Allard, 444 U.S. 51, 65–66 (1979) (refusing to apply a per se test to a law prohibiting the sale of Eagle feathers and concluding that no taking existed under *Penn Central* analysis despite the loss of the right to earn a profit from sale).

voluntary exchange.[158] Under the per se approach, however, the strength of the public interest and the benefits received by the property owner are not part of the takings calculus. By its own logic, the Court thus demonstrates how context dependent the takings calculus is.

Would, for example, the government's seizure of a car used in the commission of a crime constitute a per se physical taking? Would the answer change if the owner were not involved in the crime or if the seizure of the car was instead due to the driver's failure to pay a traffic ticket? Would the government's destruction of a home be a physical taking if the action was taken to help prevent the spread of a fire? When exactly can a court consider the public interest or the benefits received by the property owner in deciding whether a government seizure or appropriation is a physical taking?

In *Horne*, the property context is not as clear as the Court suggests. Had the government seized all or part of a tract of agricultural land to protect the price of the crop by taking some land out of production, a physical taking clearly would exist. Actual seizure of the land would deprive the landowner of all rights in that land. But a more complex question is presented by a requirement to set aside a portion of a fungible crop in years when the supply from all growers is too bountiful to maintain the price at an economically viable level. Growers enter the regulated market with their eyes wide open, knowing that the size of the crop cannot be controlled ex ante and therefore that some sort of government management of the supply side is needed to protect their enterprise. They enter the regulated market knowing that the reserve requirement reflects market conditions. They benefit from being in a protected market because it adds value to their product by stabilizing price. They, in other words, derive economic value from being in the regulated market precisely because of the value stabilization function of the reserve requirement. The fruit of their labors is not just derived from the growers, as the Court suggests, but also from the government's regulatory program.[159] At the very least, when a property owner cannot control the supply of his fungible, perishable crop, the Court should consider whether the crop owner received reciprocity of advantage from being in a regulated market. In such a context, the Court should ask whether the crop owner came out ahead—despite any loss from the reserve raisins—because of the price received on the competitive market for the free tonnage raisins.

158. Horne v. USDA, 135 S. Ct. 2419, 2430–31 (2015) (discussing Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)).

159. In discussing *Leonard & Leonard v. Earle*, 279 U.S. 392 (1929), the Court distinguished a requirement that oyster packers pay 10% of marketable detached oyster shells, or their monetary equivalent, to the state for the privilege of harvesting the oysters by noting that the oysters did not belong to the packers in their natural environment while the raisins were "the fruit of the growers' labor." *Horne*, 135 S. Ct. at 2431.

Some forms of property rights and arrangements are better managed under a governance strategy and thus analyzed under a more nuanced takings test that allows consideration of the reasons for the management regime. A governance strategy "involves a more complicated and detailed set of rules and norms. Greater specificity of practices and monitoring" of uses may be needed because of the nature of the resources being used or produced and the range of interests in the resources.[160] The *Horne* case identifies one such context—when property rights are protected and supported by a regulatory infrastructure providing value stabilization. A per se approach totally ignores the complexities of this context.

160. Butler, *supra* note 9, at 1693, 1764–68 (defining a governance management strategy and discussing why and when it should be used in takings analysis).