Horne v. Department of Agriculture: An Invitation to Reexamine "Ripeness" Doctrine in Takings Litigation

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The U.S. Supreme Court's relatively brief, unanimous decision issued on June 10, 2013, in *Horne v. Department of Agriculture*,[1] has received little notice in comparison with the two other takings cases of the Court's 2012-2013 term, *Arkansas Game & Fish Commission v. United States*,[2] and (especially) *Koontz v. St. Johns Water Management District*.[3] This instant obscurity is not wholly undeserved given the narrowness of the Court's ruling: the federal courts, in the context of reviewing a U.S. Department of Agriculture (USDA) administrative order, have "jurisdiction" to consider a defense based on the Takings Clause to monetary sanctions imposed on a raisin "handler" pursuant to the Agriculture Marketing Agreement Act (AMAA).

In reaching this result, the Court opted for a narrow resolution of the case. The Hornes argued that, in general, property owners should be able to sue for an injunction and other equitable relief (including blocking monetary sanctions) when threatened with an alleged taking, even if they have the option of pursuing a claim for "just compensation" after the fact under the Takings Clause.[4] The linchpin of the Court's ruling in *Horne*, however, is that the Hornes can raise the Takings Clause as a defense to the sanctions because the AMAA is a relatively rare example of a federal statute withdrawing the jurisdiction of the U.S. Court of Federal Claims under the Tucker Act to hear a takings claim seeking just compensation. Thus, the Court left unaddressed the Hornes' broader argument that a property owner should be able to sue under the Takings Clause to block the government from proceeding, or imposing sanctions, when the opportunity to sue for compensation *is* available.

Nonetheless, the Court, perhaps inadvertently, highlighted the significant confusion in current law surrounding the broader argument, setting the stage for future debate and litigation. On the one hand, the Hornes' broad argument was audacious, given the substantial Supreme Court precedent stating that parties contending that government action amounts to a taking generally cannot seek equitable relief to prevent the taking, but must instead sue for just compensation.[5] On the other hand, as shown by the decision in *Horne*, the lower court opinions in this case, the briefing in the Supreme Court, as well as disparate other cases, the basis for this frequently articulated rule is remarkably obscure. Taken together, they reveal three different potential doctrinal foundations for this rule: court subject matter jurisdiction; a special taking ripeness rule; or the limits of the substantive legal protection afforded by the Takings Clause itself.

It is clear that these three different theories are mutually exclusive. If a claim for equitable relief under the Takings Clause is barred under this rule for lack of subject matter jurisdiction, it cannot also fail under this rule because the claim is not ripe or the claimant has failed to state a valid claim for relief. If the takings claim fails because it is not ripe, the court cannot also lack jurisdiction over the claim, and the claim cannot fail as a matter of law. And if the claim fails on the merits, again, neither subject matter jurisdiction nor a lack of ripeness can be the relevant concern. In sum, only one of these labels for the rule can be correct.

The doctrinal confusion is compounded by the fact that these inconsistent labels are sometimes indiscriminately tossed about in two different types of cases: takings suits filed in federal court against the United States based on federal legislative or administrative action; and takings

1. 133 S. Ct. 2053, 43 ELR 20122 (2013).
2. 133 S. Ct. 511, 42 ELR 20247 (2012).
3. 2013 WL 3184628, 43 ELR 20140 (June 25, 2013).
4. U.S. Const. amend. V ("Nor shall private property be taken for public use, without just compensation.").
5. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016, 14 ELR 20539 (1984) (citing Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 697 n.18 (1949)).

suits filed in federal court against local governments based on local government action. The latter category of cases is governed by the well-known case of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*,[6] in which the Court ruled that a claimant seeking financial compensation under the Takings Clause based on local government action does not present a "ripe" claim in federal district court if the claimant has not pursued available state procedures (judicial or otherwise) for obtaining compensation. Often, as illustrated by the opinion in *Horne* itself, courts rely on *Williamson County* and its discussion of ripeness to address questions about whether the U.S. Court of Federal Claims or the federal district court should address a takings claim, even though *Williamson County* focused on the distribution of takings cases between the state and federal court systems. Because the rules that should govern the first issue are not necessarily the same as the rules that should govern the second issue, *Williamson County* may not provide relevant guidance in deciding whether or when a federal district court can hear a takings claim against the federal government. In fact, for reasons discussed below, contrary to the Court's analysis in *Horne*, it appears that the special federalism concerns animating *Williamson County* make that precedent inapposite in takings cases, such as *Horne*, based on federal government action.

The confusion over doctrinal labels is significant because the choice of labels has practical consequences for real-world litigants. For example, if the issue is one of ripeness, this implies that a takings claim may not be ripe in federal court at the moment, but could become ripe in the future once the plaintiff or the defendant has taken steps that ripen the claim. Moreover, the Supreme Court has said that takings ripeness involves "prudential ripeness," meaning that the ripeness objection is subject to waiver.[7] By contrast, an objection that goes to subject matter jurisdiction obviously cannot be cured by the passage of time and is not subject to waiver.

In sum, *Horne* implicitly invites a reexamination of the justifications for the rule that equitable relief is not ordinarily available under the Takings Clause. The thesis of this Article is that the rule is best viewed as resting on the understanding that the Takings Clause provides no legal basis for seeking equitable relief so long as a claimant has the option to seek financial compensation. This theory is grounded in the substantive limitations inherent in the Takings Clause itself; it has nothing to do with either subject matter jurisdiction or ripeness. Adopting this viewpoint requires little heavy lifting because it is supported by the reasoning and language in a lengthy line of Supreme Court precedent stretching back many decades. What it does require, however, is the clearing away of a good deal of confusion, largely attributable to some unfortunate language in *Williamson County*, now compounded by the Court's heavy reliance on *Williamson County* in *Horne*.

It bears emphasis that the *Horne* case itself will have only limited practical importance, because it merely affirms what has long been generally understood: if the courthouse doors are closed to a takings claimant seeking financial compensation, the claimant is free to pursue equitable or other alternative relief. The importance of *Horne* lies in the confusion it perpetuates and compounds over the basis for the heretofore generally well-accepted (if poorly theorized) rule that when the compensation remedy *is* available, a suit seeking alternative relief is foreclosed. Because of the importance of this rule to the coherence and stability of takings doctrine, *Horne* is not so unimportant a case as it might first appear.

This Article proceeds as follows: The first section provides a thumbnail sketch of the U.S. Department of Agriculture (USDA) raisin marketing program at issue in the *Horne* litigation. The second section describes the disposition of the takings argument by USDA, the federal District Court for the Eastern District of California, and the U.S. Court of Appeals for the Ninth Circuit. The third section describes the Supreme Court opinion in *Horne*. Section IV dissects the opinion and offers a critical assessment of the Court's reasoning. Section V explains why grounding the rule that equitable relief is not available under the Takings Clause in the substantive limits of the Takings Clause, rather than in subject matter jurisdiction or ripeness doctrine, provides a more logical explanation for the rule. This section also explores how the ruling in *Williamson County* dealing with takings claims against local governments might be reconceptualized in light of this Article's viewpoint. Section VI presents some predictions on how the Ninth Circuit will resolve the takings claim in *Horne* on remand. Finally, Section VIII offers some concluding thoughts on whether the raisin marketing order under the AMAA actually results in a taking of private property, an issue the Supreme Court obviously did not address and the Ninth Circuit is not likely to reach in this case either. (Readers familiar with the *Horne* case may wish to skip directly to Section IV.)

I. The USDA Raisin Marketing Program

The *Horne* case arose from the implementation of the AMAA of 1937,[8] a piece of New Deal-era legislation designed "to raise the price of agricultural products and to establish an orderly system for marketing them."[9] The Act operates through so-called marketing orders, which limit the market supply of particular agricultural products in order to elevate and stabilize prices.[10] The Act grants authority to the Secretary of Agriculture to promulgate marketing orders, which can only be issued upon approval

6. 473 U.S. 172 (1985).
7. *See* Stop the Beach Renourishment v. Florida Dep't of Env't Prot., 130 S. Ct. 2592, 2610, 40 ELR 20160 (2010) (refusing to consider objection that claim was not ripe because petitioner had failed to pursue available state compensation procedures, on the ground that the objection was not jurisdictional and therefore subject to waiver).
8. 7 U.S.C. §§601 et seq.
9. Block v. Cmty. Nutrition Inst., 467 U.S. 340, 346 (1984).
10. 7 U.S.C. §608c(6).

by (1) "handlers" who handle at least one-half of the volume of the particular product, and (2) either two-thirds of the affected "producers" or by producers who market at least two-thirds of the volume of the particular product.[11]

The Secretary of Agriculture originally promulgated a marketing order for raisins pursuant to the AMAA in 1949.[12] It applies to raisin production in the state of California, the source of virtually all of the raisins produced in the United States. The raisin marketing order established a Raisin Administrative Committee (RAC), the membership of which comes almost entirely from the raisin industry, to oversee implementation of the order.[13]

The order draws a distinction, which has crucial significance in the *Horne* case, between "producers" and "handlers."[14] To state the distinction in simple terms, producers are farmers who grow grapes destined to be turned into raisins; handlers are entities or individuals who process raisins, pack them, and sell them.[15] The marketing order has important practical effects on producers, as discussed below, but by its terms, the order only imposes mandates directly on handlers, not producers.[16] USDA regulations recognize that those engaged in the raisin business can sometimes play the roles of both producer and handler.[17]

The raisin marketing order employs a "reserve pool" approach to regulate raisin sales,[18] pursuant to which the RAC determines in any given year whether to designate a portion of the raisin crop as "free-tonnage" and the rest as "reserve-tonnage."[19] If the RAC decides to establish a reserve, the raisin crop is disposed of through these two separate channels. Producers sell free-tonnage raisins to handlers at market prices, and handlers are free to then sell the raisins in any fashion they choose.[20] Producers also physically deliver reserve pool raisins to handlers, who hold these raisins in segregated bins for the account of the RAC.[21] The RAC controls the distribution of the reserve raisins through outlets that are noncompetitive with the U.S. commercial market, such as school lunch programs or foreign sales. Producers are not paid upon delivery of the reserve raisins to handlers, but they are entitled to share in the eventual net proceeds (if any) from the disposition of the reserve raisins.[22] Thus, both the RAC and producers have property interests in the reserve raisins, but handlers do not. The RAC supplies handlers with bins to store the reserve raisins, and the regulations also provide that "[h]andlers shall be compensated for receiving, storing, fumigating, handling, and inspection of . . . reserve raisins . . . held by them for the account of the [RAC]."[23]

II. The Origins of the *Horne* Case

The *Horne* case arose from an effort by Marvin and Laura Horne, and numerous other allied raisin producers, to escape regulation under the AMAA, which they viewed as based on unwise policy and an unreasonable intrusion into their business affairs.[24] For many decades, starting in the 1960s, the Hornes had produced raisins in accord with the AMAA scheme. But following extensive study and strategizing, around the year 2000, they came up with a new business model involving creation of a new partnership arrangement as well as specially designed labor contracts and equipment leases, all of which they hoped would allow them to produce and sell raisins commercially but escape the requirements of the AMAA. In other words, without having to give up any of the economic benefits of the restriction on raisin supply created by the AMAA, the Hornes hoped to avoid the requirement to place a portion of their crop in reserve. Disagreeing with the Hornes' interpretation of the Act and the applicable regulations, USDA commenced an administrative enforcement proceeding against the Hornes on the theory they were functioning as "handlers" (as well as producers) under the AMAA and had failed to comply with the rules applicable to handlers. USDA sought sanctions against the Hornes based on their violations of various reporting and inspection requirements as well as their failure to hold reserve raisins. The sanctions included a penalty based on the dollar equivalent of the raisins the Hornes had failed to hold in reserve, some of which they had produced themselves and sold in the open market, and some of which had been produced by others.

In exhaustive administrative proceedings and eventual litigation in the federal District Court for the Eastern District of California and the Ninth Circuit, the Hornes litigated the issue of whether they were properly classified as handlers under the AMAA. They ultimately lost on this issue, and there was no debate about whether the Hornes were properly classified as handlers in the case as presented to the U.S. Supreme Court.

At the same time they were litigating whether they were properly classified as handlers, the Hornes defended against the monetary sanctions imposed by USDA by arguing that the reserve requirement resulted in a taking of their property interests in their raisins. For a host of different and shifting reasons, this argument was rejected at each stage of the litigation process. The administrative law judge (ALJ) who initially considered the case rejected the Hornes' takings defense on the view that "handlers no longer have a property right that permits them to market their crop free of regulatory control."[25] The judicial officer who heard the appeal from the ALJ rejected the defense on the ground

11. 7 U.S.C. §608c(8).
12. *See* 7 C.F.R. §989.
13. 7 C.F.R. §989.26.
14. *See* 7 U.S.C. §608c.
15. *See* 7 U.S.C. §608c(1) (defining handlers as "processors, associations of producers, and others engaged in the handling" of commodities subject to the AMAA); *see also* 7 U.S.C. §608c(13)(B) ("No order issued under this chapter shall be applicable to any producer in his capacity as a producer.").
16. *See* 7 U.S.C. §608c(1).
17. *See* 7 U.S.C. §608c(13)(B).
18. *See* 7 U.S.C. §608c(6)(E).
19. 7 C.F.R. §§989.54(d); 989.55.
20. 7 C.F.R. §989.65.
21. 7 C.F.R. §989.66(f).
22. 7 U.S.C. §608c(6)(E); 7 C.F.R. §989.66(h).
23. 7 C.F.R. §989.66(f).
24. 133 S. Ct. 2053, 2058 n.3, 43 ELR 20122 (2013).
25. *Id.* at 2059.

that he lacked the "authority to judge the constitutionality of the various statutes administered by [USDA])."[26]

After failing to obtain relief in the administrative process, the Hornes filed suit in federal court, reprising their constitutional argument. The Hornes did not challenge the reserve requirement as a regulatory taking, but instead confined themselves to a "physical taking" claim. The district court rejected the claim,[27] emphasizing that the government "does not physically invade plaintiffs' land," nor does it "take physical possession of the raisins."[28] The district court confined its analysis to the physical takings issue, leaving the potential regulatory takings claim to the side.

The Ninth Circuit initially affirmed rejection of the physical takings claim.[29] While it acknowledged that the claim had some "understandable appeal," it rejected it based on a set of broad arguments and somewhat inconsistent statements about takings law. It acknowledged at one point that *Lucas v. South Carolina Coastal Council*,[30] suggests that real property and personal property should be treated differently under the Takings Clause, but then also stated that the Takings Clause "guarantees compensation for the taking not only of real property but also of personal property and even intangible property."[31] The court emphasized that the Hornes had entered into the raisin business voluntarily, and said the reserve requirement was "rationally related" to the government's interest in price stability.[32] Finally, the court observed that the reserve requirement involved only a portion of the Hornes' crop and that any burden imposed by the requirement was offset by the program's intended effect of increasing the price of the portion of the Hornes' raisins sold in the open market. Like the district court, the appeals court confined itself to the physical takings claim, leaving the viability of a potential regulatory takings claim to another day.

In response to an application for rehearing challenging the Ninth Circuit's takings analysis, the panel changed direction and, in response to a suggestion raised by counsel for the government, affirmed dismissal of the takings claim on the ground that it lacked "jurisdiction" over the claim.[33] Viewing the Hornes as raising their takings challenge to the reserve requirement in their capacity as producers, not handlers, the panel concluded that the Hornes could pursue a claim for compensation in the U.S. Court of Federal Claims. Therefore, the panel ruled, "we lack jurisdiction to address the merits of the Hornes' takings claim."[34] Citing a prior Ninth Circuit decision, *Bay View, Inc. v. AHTNA, Inc.*,[35] the panel said that, when the opportunity to seek just compensation is available, a takings claim filed in another federal court is "premature."[36] The panel noted that the U.S. Court of Appeals for the Federal Circuit (which exercises appellate jurisdiction over the U.S. Court of Federal Claims) had ruled that the AMAA strips the claims court of Tucker Act jurisdiction over takings claims by handlers,[37] making it appropriate for *handlers* to raise takings arguments based on the AMAA in federal courts other than the claims court. On the other hand, the Ninth Circuit observed, "[n]othing in the AMAA" precludes *producers* from bringing compensation claims in the claims court.[38] Based on its understanding that the Hornes were producers rather than handlers for the purpose of this litigation, the Ninth Circuit ruled that it could not proceed to consider the claim.

III. The *Horne* Case in the Supreme Court

In the Supreme Court, the Hornes presented two alternative arguments, one broad and one narrow. The broad argument was that, even when the option of suing for just compensation in the claims court is available, property owners should generally be able to seek equitable relief to block asserted takings, so long as the traditional prerequisites for granting equitable relief are satisfied. It followed from this argument, they contended, that a property owner should also be able to raise a takings defense to an enforcement action seeking monetary sanctions based on a refusal to comply with a federal mandate that itself would result in a taking. Second, as a fallback, the Hornes made the narrower argument that, regardless of what rules generally govern federal court authority to hear takings claims, in this instance the Hornes raised their takings argument in their capacity as *handlers* rather than *producers* and, therefore, based on the Ninth Circuit's own understanding of the law, the Ninth Circuit should have proceeded to address the Hornes' takings claim.

The Hornes' argument that they were entitled to resist the sanctions under the Takings Clause was based on the idea that a suit to block sanctions is functionally equivalent to seeking equitable relief against a taking. This appears to be correct because the only difference between the two is that equitable relief prevents government from acting, while sanctions punish and deter private interferences with government action. No party or amicus challenged the proposition that they amount to the same thing. The larger issue raised by *Horne* was whether a party can seek to enjoin government action (or block sanctions for violating a government mandate) under the Takings Clause when she has the option to sue for just compensation under the Takings Clause.

In response to the Hornes' arguments, the United States argued that their takings claim was, in substance, a pro-

26. *Id.*
27. Horne v. U.S. Dep't of Agric., 2009 WL 4895362 (E.D. Cal. 2009).
28. *Id.* at *27.
29. Horne v. U.S. Dep't of Agric., http://caselaw.findlaw.com/us-9th-circuit/1575275.html (9th Cir. July 25, 2011).
30. 505 U.S. 1003, 22 ELR 21104 (1992).
31. Horne v. U.S. Dep't of Agric., http://caselaw.findlaw.com/us-9th-circuit/1575275.html (9th Cir. July 25, 2011).
32. *Id.*
33. Horne v. U.S. Dep't of Agric., 673 F.3d 1071 (9th Cir. 2012).
34. *Id.* at 1080.
35. 105 F.3d 1281 (9th Cir. 1997).
36. *Id.* at 1080.
37. *See* 673 F.3d at 1079 (citing Lion Raisins, Inc. v. United States, 416 F.3d 1356, 1370 (Fed. Cir. 2005)).
38. *Id.* at 1080.

ducer claim and therefore the Hornes could and should have pursued their takings claim in the U.S Court of Federal Claims. In addition, although it regarded the question as "close," it argued that the AMAA did not withdraw Tucker Act jurisdiction over such claims. Accordingly, the United States took the position that the Hornes were required to pursue their takings claims in the claims court, and the judgment of the Ninth Circuit should be affirmed.

In a unanimous opinion, authored by Justice Clarence Thomas, the Court reversed the judgment of the Ninth Circuit and ruled that the appeals court has "jurisdiction" to hear the Hornes' takings claim.[39] The Court explicitly did not address the merits of the Hornes' takings claim.

Embracing the Hornes' narrow fallback argument, the Court ruled that the Hornes should be viewed as presenting their takings claim in their capacity as handlers, not producers.[40] Because the Hornes, in their capacity as handlers, are foreclosed from seeking compensation in the claims court (or any other federal court), the Court ruled that they are entitled to present the Takings Clause as a defense in the Ninth Circuit.[41] The Court offered no direct comment on the broader issue raised by the Hornes about the alternative remedies that might be available to takings claimants when suing for just compensation is an option.

The Court reasoned that the Hornes should be viewed as raising the takings issue in their capacity as handlers because USDA imposed the civil penalties, assessments, and reimbursement requirements on the Hornes based on their violations of marketing order requirements directly applicable only to handlers. The Hornes sought to defend against the enforcement action on the ground that they had structured their business in a fashion that allowed them to claim the status of producers only, not handlers. But the Hornes lost that argument. Given that the sanctions were only imposed on the Hornes in their capacity as handlers, the Court reasoned, the Hornes' "takings claim makes sense only as a defense to penalties imposed upon them in their capacity as *handlers*."[42]

The Court then addressed whether the Hornes' handler takings claim was "ripe" in federal district court under the standards of *Williamson County*.[43] In that case, involving a takings claim by a developer against a unit of local government filed in federal district court, the Supreme Court ruled that the claim was not ripe for two reasons. First, the local government had not reached a "final decision" regarding what development it would or would not allow. Second, the takings claimant had not sought compensation through the procedures afforded by the state.

Applying these standards, the Court stated in *Horne* that the finality prong of *Williamson County* was satisfied because the Hornes had been subjected to "a final agency order imposing concrete fines and penalties."[44] In addition, the Court ruled that the claim was ripe under the compensation prong of *Williamson County*. Agreeing with the lower courts that have addressed this issue,[45] the Court ruled that the comprehensiveness of the remedial scheme for handlers created by the AMAA means that the Act withdraws Tucker Act jurisdiction over any takings claims asserted by handlers.[46] Because the Court viewed the Hornes as raising the takings issue in their capacity as handlers, it followed that they were barred from pursuing just compensation in the claims court and, therefore, they were entitled to litigate the takings issue in the Ninth Circuit. In sum, in response to the argument that the Hornes could and should have complied with the marketing order reserve requirement and sought compensation in the claims court for the alleged taking of their raisins, the Court answered that the plaintiffs were presenting their takings claim in their capacity as handlers and in that capacity they were barred from pursuing a claim for just compensation in the claims court. Therefore, they were entitled to make a takings argument in opposition to the sanctions in the Ninth Circuit.

It is implicit in the Court's reasoning that, if the option to sue for compensation had been open in the claims court, and the ripeness issue had been raised in timely fashion, the Ninth Circuit should have dismissed the takings claim based on lack of ripeness. The Court also observed, almost as an aside, that the ripeness rules it was applying were prudential in nature, not jurisdictional.[47]

Having determined the claim was ripe for adjudication, the Court then addressed whether the Hornes in their capacity as handlers could properly raise the takings defense in the USDA administrative enforcement proceeding, and in subsequent federal court litigation to review the order issued as a result of that proceeding. The Court observed that the provision establishing the administrative enforcement process contained no indication that the U.S. Congress intended to bar handlers from raising constitutional defenses before the agency.[48] In addition, the Court said, using language that may sow some mischievous confusion in the future:

> In the case of an administrative enforcement proceeding, when a party raises a constitutional defense to an assessed fine, it would make little sense to require the party to pay the fine in one proceeding and then turn around and sue for recovery of that same money in another proceeding.[49]

Taken at face value, this statement can be read to imply that in any context, even where a party can sue for just compensation, the party has the option of either complying with a government mandate and seeking just compen-

39. 133 S. Ct. 2053.
40. *Id.* at 2060-61.
41. *Id.* at 2062-63.
42. *Id.* at 2061.
43. 473 U.S. 172 (1985).
44. 133 S. Ct. at 2061-62.
45. *See* Horne v. United States Department of Agriculture, 673 F.3d 1071, 1079 (9th Cir. 2012); Lion Raisins, Inc. v. United States, 416 F.3d 1356, 1370 (Fed. Cir. 2005).
46. 133 S. Ct. at 2062.
47. *Id.* at 2062 (citing Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, 130 S. Ct. 2592, 2610 & n.10, 40 ELR 20160 (2010)).
48. *Id.* at 2063.
49. *Id.*

sation, or declining to comply with the mandate, incurring a sanction, and then seeking to block enforcement by raising the Takings Clause as a defense. For the reasons presented below, it would be a mistake to read so much into this offhand statement.

Finally, the Court stated: "We take no position on the merits of petitioners' takings claim."[50] Plainly, as the Court recognized, the case does not involve an actual taking of raisins, because the Hornes refused to reserve their raisins and sold them in the open market. Since the Hornes kept the raisins they produced, the government could not have taken them. But do the Hornes have a viable takings claim based on the monetary sanctions USDA seeks to impose on them for the violations of the marketing order? And does this claim encompass the taking of raisins that allegedly would have occurred if the Hornes had not refused to comply with the marketing order? The Court's opinion suggests that the Court anticipates that the Hornes will seek to support their takings defense to the sanctions by arguing that the reserve requirement is itself a taking. In the Court's words: "Petitioners argue that it would be unconstitutional for the Government to come on their land and confiscate raisins, or to confiscate the proceeds of raisin sales, without paying just compensation; and, that it is therefore unconstitutional to fine petitioners for not complying with the unconstitutional requirement."[51] This type of "piggyback" takings claim would be, to say the least, novel.

The Court also identified other potential complexities to be addressed on remand by observing that a distinction can be drawn with respect to the Hornes' ability to raise the Takings Clause as a defense depending on whether the sanctions related to their failure to reserve raisins they grew themselves or raisins grown by others.[52] Noting the potential significance of the distinction, the Court said that the "the Ninth Circuit can decide in the first instance whether petitioners may raise the takings defense with respect to raisins they never owned."[53]

IV. Analysis

The Court's decision in *Horne* is unquestionably narrow. At bottom, the Court disagreed with the Ninth Circuit about whether the Hornes should be treated as raising the takings issue in their capacity as producers or as handlers. After concluding that the Hornes should be treated as handlers, the Court applied the settled understanding developed by other courts that a handler can raise a takings argument in other federal courts because he cannot pursue a claim for just compensation in the claims court. Given how narrow the case turned out to be, the Court might have done better to dismiss the petition for certiorari as improvidently granted. It is certainly debatable whether this case was worth the Court's time and effort. Nonetheless, the Court proceeded to issue a decision that raises a number of concerns and questions that warrant attention.

As an initial matter, a question can fairly be raised whether the Court was correct in concluding that the Hornes, as handlers, lacked the ability to sue for compensation in the claims court because the claims court had been stripped of jurisdiction—or whether perhaps the Court in *Horne* has altered the standards for determining when Congress has limited the jurisdiction of the claims court. As discussed, the Court ruled that the AMAA stripped the claims court of jurisdiction because it "provides a comprehensive remedial scheme that withdraws the Tucker Act jurisdiction over a handler's takings claim."[54] However, in *Preseault v. ICC*,[55] the leading Supreme Court precedent providing guidance on how to determine whether Congress has stripped the claims court of jurisdiction under the Tucker Act, the Court adopted a strong default rule in favor of preservation of Tucker Act jurisdiction; the Court stated that Tucker Act jurisdiction remains "unless there are unambiguous indications to the contrary,"[56] or stated differently, legislation reflects the "clear and unmistakable congressional intent necessary to withdraw Tucker Act coverage."[57] By failing to articulate and apply this relatively strict test, the Court in *Horne* can be understood to have implicitly abandoned or at least diluted the *Preseault* standard. Some future Supreme Court case will have to sort out whether the standard has actually changed. For the present, it is sufficient to observe that if the Court had ruled that the Hornes could bring their handler takings claim in the claims court, the Court would have had to resolve whether the Hornes could seek to block the sanctions even if they could bring a claim for compensation based on the USDA enforcement order in the claims courts. The Court's resolution of the Tucker Act issue served to forestall consideration of this broader issue.

Second, it might be contended that *Horne*, far from being a narrow decision, implicitly supports the sweeping conclusion that property owners threatened with a government directive they regard as a taking can now routinely resist the mandate and defend against any subsequent enforcement action, including the imposition of monetary penalties, by raising the Takings Clause as a defense. The idea is arguably supported by the Court's statement:

> In the case of an administrative enforcement proceeding, when a party raises a constitutional defense to an assessed fine, it would make little sense to require the party to pay the fine in one proceeding and then turn around and sue for recovery of that same money in another proceeding.[58]

While this interpretation has some superficial plausibility, based on the words of the sentence read in isolation, it should be rejected.

50. *Id.* at 2061 n.5.
51. *Id.* at 2060-61; *see also id.* at 2016 n.4 ("petitioners argue[ ] that they could not be compelled to pay fines for refusing to accede to an unconstitutional taking").
52. *Id.* at 2061 n.5.
53. *Id.*
54. *Id.* at 2062.
55. 494 U.S. 1, 20 ELR 20454 (1990).
56. *Id.* at 13.
57. *Id.* at 14.
58. 133 S. Ct. at 2063.

The statement appears in the section of the Court's opinion that follows the discussion of why the Hornes have no option to pursue compensation in the U.S. Court of Federal Claims and, therefore, are entitled to raise the Takings Clause as a defense to the sanctions in the Ninth Circuit. If the Court intended to adopt the position that the Takings Clause can routinely be raised as a defense in enforcement actions, even if a suit for just compensation is an option, it would have omitted the prior discussion altogether. The fact that the Court felt compelled to explain at some length why the Hornes are barred from pursuing a just compensation claim in order to support the conclusion that they could raise the Takings Clause as a defense to the sanctions suggests that the Court did not mean to indicate that the Takings Clause can be raised as a defense in the general run of enforcement cases.

This reading of this problematic sentence in *Horne* is reinforced by the fact that the basic point the Court is addressing in this portion of the opinion is whether USDA has jurisdiction in the context of an administrative proceeding to consider constitutional issues. The statement that it "would make little sense" to force citizens subject to administrative enforcement proceedings to bring separate suits seeking just compensation is best read as simply supporting the reasonableness of the Court's interpretation of the scope of the issues that can be addressed in the administrative proceeding, *assuming* the claims court remedy is not available.

Finally, it is implausible that the Supreme Court could have made a revolutionary change in the law in such an offhand fashion. The Clean Water Act (CWA)[59] wetlands program, for example, has been the source of not infrequent takings litigation. Such claims have been routinely pursued in the claims court on the theory that denial of a wetlands permit is a taking for public use entitling the claimant to financial compensation.[60] So far as I am aware, no regulated entity under this 40-plus-year-old program has successfully contended that it can seek to defend against sanctions for violating §404 of the CWA by arguing that enforcement of the Act is a taking. *Horne* should not be read to work a transformation of the established practice.

It is also noteworthy that, even if a property owner could raise the takings issue as a defense to an enforcement action, such a defense would frequently fail on the merits. Assume a property owner refuses to submit to a regulatory permitting process, becomes the target of a regulatory enforcement action, and then seeks to block the sanctions on the theory that requiring him to obtain a permit would result in a taking. Such a claim would founder on the well-established principle that unless and until an owner has determined how a regulation applies to him, he has no basis for asserting that the regulation results in a taking. As the Supreme Court has explained:

> A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired.[61]

The most important observation to make about the Court's opinion in *Horne* is that it reflects serious confusion about the basis for the Court's ruling that the Ninth Circuit erred in concluding that it could not proceed to address the merits of the Hornes' takings claim. The Court described the Ninth Circuit as dismissing the takings claim for lack of "jurisdiction," and the Court stated that it was reversing the Ninth Circuit on this point and ruled that the Ninth Circuit "has jurisdiction" to proceed. But the Ninth Circuit's "jurisdictional" ruling rested on an analysis of the *Williamson County* "ripeness" factors and the Supreme Court, in reversing the Ninth Circuit, also focused on whether the Hornes satisfied the ripeness requirements of *Williamson County*. So what is the actual basis of the Court's ruling: subject matter jurisdiction or ripeness? The Court's confusing discussion of this fundamental issue is remarkable because the Court went out of its way, in another part of the opinion, to observe that a ripeness objection to a takings claim does *not* raise a question about the court's jurisdiction.[62]

It seems plain that a lack of subject matter jurisdiction was not, in fact, the central issue in the *Horne* case. Certainly, as a constitutional matter, the takings issue is within the competence of federal courts other than the claims court. It is also within the statutory grant of jurisdiction invoked in this case.[63] Nothing in the general language of this statutory provision suggests that a federal district court lacks jurisdiction to address a takings issue in conjunction with its review of a USDA administrative order.

The Court also addressed, almost as an aside, whether USDA had jurisdiction to consider the constitutional takings issue in the initial administrative enforcement proceeding, but this was not the focus of the Court's review of the Ninth Circuit's jurisdictional ruling.[64] As discussed, the judicial officer in the USDA proceeding ruled that he lacked jurisdiction to consider the Hornes' constitutional argument. But the position of the judicial officer on USDA jurisdiction played no part in the Ninth Circuit's evaluation of whether it had jurisdiction to address the takings issue. The Supreme Court evidently felt compelled to resolve that USDA had jurisdiction over the takings issue in the administrative enforcement proceeding, but the Court did not review any claimed error by the Ninth Circuit on this

59. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
60. *See, e.g.*, Walcek v. United States, 303 F.3d 1349, 33 ELR 20045 (Fed. Cir. 2002); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 24 ELR 21072 (Fed. Cir. 1994).
61. United States v. Riverside Bayview Homes, Inc. 474 U.S. 121, 127, 16 ELR 20086 (1985).
62. 7 U.S.C. §608c(14)(B).
63. *See* 7 U.S.C. §608c(15)(B) ("The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are . . . vested with jurisdiction in equity to review . . . [a USDA] ruling.").
64. The Supreme Court apparently raised this issue on its own after the case arrived at the Supreme Court.

point. Instead, as discussed, the Ninth Circuit ruled that it lacked jurisdiction based on its conclusion that the claim was not ripe, and it is this "jurisdictional" ruling that the Supreme Court reversed in *Horne*.

To be fair to the Supreme Court, it is difficult to discern the actual basis for the Ninth Circuit ruling in *Horne*. The panel's confusing ruling is explained, in part, by its reliance on the prior Ninth Circuit decision in *Bay View, Inc. v. AHTNA, Inc.*[65] That case involved a claim that congressional legislation resulted in a taking by depriving plaintiffs of a cause of action and an argument that the plaintiffs were entitled to seek judicial invalidation of the legislation. The Ninth Circuit rejected the argument on the ground that the plaintiffs were required to pursue a claim for just compensation in the claims court, and since they had that option, they could not pursue injunctive relief in federal district court. Unfortunately, in the course of discussing whether plaintiffs could proceed with their claim for equitable relief, the *Bay View* panel described the defect in the case in three alternative ways: as a lack of "jurisdiction"; a lack of ripeness; and a failure to state a claim upon which relief can be granted.[66] As discussed, not all of these theories can be correct. Small wonder, given the confusion in the Ninth Circuit, that the Supreme Court had difficulty sorting this case out.

Ironically, the Supreme Court apparently would have reached the same result in *Horne* if it had resolved the case on straightforward ripeness grounds. Because, as the Court said, ripeness issues in a takings case involve "prudential" considerations, a ripeness objection is subject to waiver. The objection to Ninth Circuit "jurisdiction" was not raised in *Horne* until the case was in the federal appeals court. Thus, the argument, viewed as raising a ripeness issue, was waived, and the government could have been barred from objecting to the Hornes' prosecution of their takings claim in the Ninth Circuit on that basis. Disposition of the case based on waiver would have made this narrow case even narrower, but the Court's reasoning would at least have been more intelligible.

But, very arguably, neither jurisdiction nor ripeness was really the issue upon which the Court should have focused in *Horne*, as we discuss below.

V. The Availability of Equitable Relief Under the Takings Clause

The crucial issue raised by the *Horne* case is the proper doctrinal foundation (if any) for the frequently stated rule that a takings claimant is barred from suing for equitable relief when a suit seeking just compensation is an available option.[67] The Court's questionable ruling that the claims court has no jurisdiction over takings claims brought by handlers avoided the need to address this issue. Nonetheless, the confusing analysis in *Horne*, which simply mirrors the confusion on this topic in the lower courts, suggests the need for some doctrinal house cleaning.

I submit that the reason equitable relief is generally not available to a property owner claiming that government action results in a taking, when the owner has the option of pursuing a lawsuit seeking just compensation, is that a claim seeking equitable relief fails to state a valid claim under the Takings Clause. It is by now well-established that the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power."[68] It is designed "not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking."[69] Furthermore, it is well-established that compensation need not be paid at the time of the taking; all that is required is the existence of a "'reasonable, certain and adequate provision for obtaining compensation'" at the time of the taking.[70] Thus, if the government has provided an adequate process for obtaining compensation if a taking has occurred, "the governmental action is not unconstitutional."[71]

Straightforward application of these canons of modern takings doctrine leads to the conclusion that a takings claimant who seeks equitable (or other similar relief) fails to state a valid legal claim for relief if there is an opportunity to sue for just compensation. Under those circumstances, there is no basis for asserting that the governmental action is "unconstitutional," and a claimant has no valid ground for suing under the Takings Clause to stop the government from proceeding. Indeed, not only is a claim for equitable relief not authorized under the Takings Clause, such a claim is inconsistent with the premise of the Takings Clause that an exercise of eminent domain is entirely permissible, so long as the taking is for a "public use" and provided the owner can sue to obtain compensation if a taking has occurred. Routinely authorizing suits for equitable relief under the Takings Clause would not merely stretch the Takings Clause, it would break it.

A logical corollary of this understanding of the Takings Clause is that it supports claims for injunctive relief when the opportunity to sue for compensation under the Takings Clause is not available. One possible reading of the Takings Clause is that it is only designed to afford compensation in exchange for a taking; under this reading, if suing for compensation were not an option, no claim of any sort would lie under the Takings Clause. Thus, for example, if Congress never adopted the Tucker Act waiving the sovereign immunity of the United States in takings cases, or

65. 105 F.3d 1281 (9th Cir. 1997).
66. *Id.* at 1285-86.
67. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016, 14 ELR 20539 (1984) (citing Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 697, n.18 (1949)).
68. First English Evangelical Lutheran Church v. Cty. of Los Angeles, 482 U.S. 304, 314, 17 ELR 20787 (1987).
69. *Id.* at 315.
70. Regional Rail Reorganization Act Cases, 419 U.S. 102, 124-25 (1974) (quoting Cherokee Nation v. Southern Kansas R. Co., 135 U.S. 641, 659 (1890)).
71. United States v. Riverside Bayview Homes, 474 U.S. 121, 128, 16 ELR 20086 (1985).

if Congress repealed the waiver of sovereign immunity in takings cases, it might be contended that the Takings Clause would be an effective dead letter. However, for over 60 years explicitly, and arguably for over 100 years implicitly, the Supreme Court has rejected this reading of the Takings Clause.[72] Instead, the Court has said that a suit for injunctive relief will lie under the Takings Clause if no compensatory remedy is available. This position is entirely consistent with the proposed understanding of the Takings Clause sketched out above; an alleged taking for a public use is not unconstitutional, so long as the option to seek compensation is available, but a government action can be challenged as an unconstitutional taking if that option is not available. The outcome in *Horne*, allowing the Hornes to go forward with their lawsuit in the Ninth Circuit, is consistent with this reading of the Takings Clause, even if the Court's muddy analysis obscures the doctrinal basis for this outcome.[73]

The Hornes' argument in the Supreme Court that property owners should have broad discretion to choose to pursue either a claim for financial compensation or a suit for equitable relief was, to put it charitably, farfetched. The argument largely relied on a pastiche of 19th century decisions suggesting that equitable relief could be available in various facts and circumstances, some of which were decided before the availability of the compensation remedy for a taking was clearly established.[74] It also attempted, unsuccessfully, to skirt around the fact that the basic purpose of the Takings Clause (often called the "Just Compensation Clause") is to provide compensation for takings for public use, not to block takings per se. Thankfully, the Supreme Court largely ignored the Hornes' most radical arguments.

The courts have gone astray in confusing the straightforward issue of whether the Takings Clause supports a right-of-action with questions related to ripeness or jurisdiction. The major source of this confusion is the decision in *Williamson County*, in which the Court for the first time squarely characterized the availability of a compensation remedy as creating a ripeness bar to a takings claim. The Court ruled that the claim based on county zoning regulations was not ripe in federal district court, partly because the county had not reached a final decision on the development application, and partly because the claimant had not pursued an inverse condemnation claim seeking compensation in Tennessee. Until the plaintiff utilized the procedures available in Tennessee, the Court ruled, the claim was "premature" in federal court.

In *Horne*, unfortunately, the Supreme Court relied on *Williamson County* to analyze whether the Hornes' takings claim could go forward in the Ninth Circuit. This approach is surprising, in light of the fact that the Hornes expressly acknowledged in their opening brief in the Supreme Court that *Williamson County* was inapposite in this case because it involved a takings claim against local government.[75] Nonetheless, applying *Williamson County*, the Court said that a takings claim is "premature until it is clear that the Government has both taken property and denied compensation."[76] Based on the conclusion that the AMAA barred a suit for compensation in the claims court, the Court ruled that the Hornes had "no alternative" to suing for injunctive relief and therefore the claim was "not premature" in the Ninth Circuit.[77]

Taken together, *Williamson County* and *Horne* produce thoroughly confused legal doctrine. First, there was nothing "premature" about the takings claims in either case, at least if premature is read to mean, as it naturally should, that the claim can become mature (or ripen) at some point in the future. In *Williamson County*, if the plaintiffs had sued in the Tennessee courts, and the Tennessee courts addressed the plaintiffs claim on the merits, that would be the end of the litigation, win or lose, based on standard rules of claim or issue preclusion.[78] Likewise, in *Horne*, the issue was not whether the takings claim was premature, but rather whether the Ninth Circuit (and USDA and the district court before that) were appropriate forums to resolve the claim, given that the AMAA stripped the claims court of Tucker Act jurisdiction over compensation claims by handlers. The use of the word premature suggests that the issue is simply one of timing. Timing had nothing to do with why the claims could not go forward in either case.

The other point highlighted by the Court's reliance on *Williamson County* in *Horne* is that these two cases present a very different choice of forum problems, a complexity the Court ignored. In *Williamson County*, the plaintiff was seeking just compensation regardless of where it had to litigate the claim, and the issue was simply whether it could pursue its claim for compensation in federal court rather than state court. In *Horne*, the issue was different. The Court's starting place in *Horne* was that the AMAA stripped the claims court of jurisdiction over handler

72. *See* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 697, n.17 (1949) (explaining that the claimant in *United States v. Lee*, 106 U.S. 196 (1882), was entitled to seek "specific relief" for an allegedly unconstitutional taking by the United States because, "[a]t that time," there "was no remedy available by which he could have obtained compensation for the taking of his land").

73. There are also recognized exceptions to the general rule that injunctive relief is not available under the Takings Clause when (1) the government action allegedly would produce "potentially uncompensable damages," Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 71 n.15, 8 ELR 20545 (1978), and (2) when the government is allegedly threating to take private property for other than a "public use." Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 241, 14 ELR 20549 (1984). Neither of these other exceptions had any relevance in the *Horne* litigation.

74. *See* Brief for Petitioner, at 27-42, in Horne v. Department of Agriculture, S. Ct. No. 2012-123.

75. *See* Brief for Petitioner, at 40, in Horne v. Department of Agriculture, S. Ct. No. 2012-123. The Court's statement that USDA in its brief "relied largely" on *Williamson County*, *see* 133 S. Ct. at 2061, exaggerates the government's reliance on that precedent. *See also* Brief Amicus Curiae of the International Municipal Lawyers Association, at 5, n.2 ("As petitioners acknowledge, this case does not involve application of *Williamson County* because it does not involve a claim against a state or unit of local government.").

76. 133 S. Ct. at 2062.

77. *Id.*

78. *See* San Remo Hotel, L.P. v. City & Cty. of San Francisco, 545 U.S. 323 (2005).

takings claims for compensation, eliminating any opportunity for the Hornes to sue the United States for just compensation under the Takings Clause. Thus, the issue before the Court in *Horne* was whether, given that the compensation remedy was blocked, the Hornes could seek equitable relief under the Takings Clause in some other forum. The Court in *Horne* made a serious error in assuming that the same analysis should govern these two quite different types of cases.

As a general matter, under current doctrine, parties wishing to raise claims under the Takings Clause based on federal government programs are barred from doing so in federal district court. Instead, they generally must pursue their argument in the form of a suit seeking just compensation in the U.S. Court of Federal Claims. This forum-allocation rule for takings cases involving the federal government flows from several black letter principles. First, claims for compensation under the Takings Clause can only go forward in the claims court because the doctrine of sovereign immunity bars suits for monetary relief against the United States unless the government has waived its immunity; the Tucker Act waives the sovereign immunity of the United States, but only for takings suits filed in the claims court, not the district court.[79] Claimants pursuing takings claims in the claims court are barred from seeking equitable relief in that court because Congress has not granted that court the authority to grant this type of relief (except in very narrow circumstances not relevant here),[80] and, for the reasons discussed, the Takings Clause does not support this form of relief when one can sue for compensation. Finally, the federal district court, in addition to not having jurisdiction to hear claims for compensation, is, as the Supreme Court has frequently said, generally barred from hearing claims for injunctive relief under the Takings Clause.

The question brought to the fore by *Horne* is the appropriate doctrinal basis for the general bar against claims for injunctive claims under the Takings Clause in federal district court. As indicated above, the answer is that a litigant seeking such relief fails to state a valid claim for relief. If a suit for compensation in the claims court is a viable option, the claimant has no valid claim for equitable relief under the Takings Clause in any forum because the claimant has no basis for asserting that the action is "unconstitutional."[81] On the other hand, if a suit for compensation in the claims court is foreclosed, the claimant has a viable claim that the action is unconstitutional and can go forward and attempt to establish the merits of her claim and, if warranted, obtain equitable relief.

The issue is quite different in a *Williamson County*-type case involving a takings claim based on local government action. A party challenging a local government action under the Takings Clause typically can pursue a claim for financial compensation in either the state or federal court system. In general, no immunity doctrine bars such suits in either system. Thus, a plaintiff challenging a local government action under the Takings Clause is not barred from pursuing a takings claim in federal court because she lacks a valid claim for relief. Instead, the *Williamson County* rule channeling takings compensation cases involving local governments into state courts in lieu of federal courts must rest, if its rests on anything, on some other justification.

That justification necessarily must rest on federalism.[82] For example, reliance on the state courts to resolve most takings lawsuits against local governments can be justified on the ground that state courts have greater relevant local knowledge in land use matters, and federal courts should avoid entanglement in quintessentially local disputes.[83] It can also be explained on the theory that an alleged taking by a local government is not "complete" unless and until the state court has declined to award the compensation allegedly due.[84] In other words, government regulators and the state courts are elements of a single state entity, and therefore one cannot say that "the state" has effected a taking until it has been determined that property has been taken and the state courts have refused compensation. Of course, as discussed above, the same judicial proceeding that will resolve whether local government action resulted in a taking will also supply the basis for applying claim or issue preclusion to bar (re)litigation in federal court of the

79. United States v. Mitchell, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction"; "by giving the Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims"); *see* Robert Meltz, *The Impacts of Eastern Enterprises and Possible Legislation on the Jurisdiction and Remedies of the U.S. Court of Federal Claims*, 51 Ala. L. Rev. 1161 ("The CFC's Tucker Act jurisdiction is *exclusive* when the claim is for more than $10,000. It is exclusive not by affirmative statement, but by default—that is, because Congress simply has not granted jurisdiction to other courts for th[is] type of claim[ ]."). *But see* 28 U.S.C. §1346 (conferring concurrent jurisdiction on the U.S. Court of Federal Claims and the federal district courts over takings claims seeking less than $10,000).

80. *See* 28 U.S.C. §1491(a)(1) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim. . . ."). *See also* 28 U.S.C. §1491(A)(2):

> To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States.

81. Within the federal court system, the conclusion that the availability of the option to sue for compensation under the Takings Clause in the claims court precludes a claim for injunctive relief in federal district court can also be explained on narrower grounds based on 5 U.S.C. §704 (2006), the provision of the Administrative Procedure Act expressly excluding judicial review in district court when an "adequate remedy" lies in another court. *See generally* Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 Geo. Wash. L. Rev. 602, 617 (2003).

82. *See* Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 Wm. & Mary L. Rev. 251, 292-95 (2006) (arguing in favor of "delegation" of regulatory takings lawsuits involving local governments to the state courts based on the centrality of the state property law concepts in takings litigation and the desirability of uniform judicial guidance for local land use regulators).

83. *See* San Remo Hotel, 545 U.S. at 347 (observing that "state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations").

84. *See* Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 195 (1985) (presenting this argument in the alternative).

case already resolved in state court. Again, the issue is ultimately not one of timing. Jettisoning the idea that the just compensation prong of *Williamson County* is rooted to the ripeness doctrine does not mean that *Williamson County* must be overthrown, but it certainly means that the foundations of the doctrine need rethinking.

This analysis provides a rationale for why, when both the federal and state courts have jurisdiction to hear a takings claim based on local government action seeking just compensation, the state courts are preferred to a federal forum. But what if a suit for compensation is not an available option in state court?[85] It seems sensible to conclude that in that circumstance, the plaintiff should be permitted to pursue the claim for just compensation in federal court. The federalism considerations support a preference for state courts over federal courts when a suit seeking compensation is available in either court; but they do not justify foreclosing a claim for just compensation in federal court if the state refuses to entertain compensation claims under the Takings Clause. Since a claimant should be permitted to sue for compensation in federal court if that option is blocked in state court, there should be few if any cases in which it would be appropriate to allow plaintiffs to sue for injunctive relief under the Takings Clause based on local government actions.

One additional point: In the past, the U.S. Department of Justice and a plurality of the Supreme Court have argued for an additional ad hoc exception to the so-called ripeness rules governing the distribution of takings cases within the federal court system.[86] Specifically, they suggested that a takings claim based on an alleged taking of money need not go forward in the claims court, but instead can proceed as an action for injunctive relief, because it would be "utterly pointless" to require a claimant to pay money over to the government and for the claimant to have to sue the government under the Takings Clause for its return.[87] This argument is, to say the least, in tension with the idea that there is no valid claim for relief under the Takings Clause if a suit for compensation is an available option. Happily, this difficulty appears to have been at least partly resolved by the Court's implicit reaffirmation in *Koontz*,[88] of the view expressed by five Justices in *Eastern Enterprises v. Apfel*, that imposition of a generalized obligation to pay money to the government (at least outside the context of "monetary exactions") does not constitute a potential taking under the Takings Clause.[89] If the imposition of generalized monetary liability cannot support a viable takings claim, there is no need to worry about what forum selection rules might apply to this specific type of claim.

VI. *Horne* on Remand

How should the Ninth Circuit rule on the takings claim in *Horne* in the aftermath of the Supreme Court decision? As discussed, there are several grounds for disputing the Court's reasoning in this case. But for the purposes of the Ninth Circuit on remand, these academic objections are irrelevant. Following the Court's decision, there is no basis for disputing that the Ninth Circuit has jurisdiction over the claim (if that issue was ever seriously in dispute). In addition, there is no question that the Hornes have a "ripe" takings claim.

The key issue on remand is the nature and scope of the takings claim the Hornes can present. As discussed above, the Hornes will likely attempt to argue on remand that the sanctions constitute a taking at least in part *because* they were imposed based on the Hornes' resistance to the attempted taking of their raisins.[90]

There appear to be two fundamental defects with this "piggy-back" takings theory, which should lead to its rejection. First, accepting the Court's ruling that the Hornes can raise a takings defense to the imposition of monetary sanctions in their capacity as handlers, the Hornes probably cannot include in their takings defense an argument that the reserve requirement results in a taking. The marketing regulatory program and all pertinent takings cases arising from the program recognize the distinction between a producer and a handler. In addition, they recognize that a single entity can sometimes be a producer and sometimes a handler, depending upon the nature of its activities at any given point in time. This distinction, of course, is at the heart of the Court's reasoning in *Horne*; the Hornes are unquestionably producers for some purposes, but because the sanctions were imposed on the Hornes in their capacity as handlers, and not producers, the Court ruled that they can raise a takings defense in the Ninth Circuit, rather than pursue a takings claim in the claims court.

The reserve requirement, however, only affects the Hornes in their capacity as producers, not handlers. As producers, the Hornes own the raisins they produce, and they even retain a property interest in the raisins once they are placed in the reserve bins. As handlers, the Hornes never hold a property interest in the raisins. Thus, if the reserve requirement results in a taking of raisins, it can only result in a taking of the Hornes' property interest in the raisins in their capacity as producers, not handlers. Accordingly, the Hornes can present the claim that the reserve requirement results in a taking of raisins only in their capacity as producers. It follows that the Hornes cannot raise this argument in the Ninth Circuit, where they are only entitled to raise a takings claim in their capacity as handlers.

85. Whether there are still serious obstacles to bringing inverse condemnation claims in some or any state courts more than 25 years after the Supreme Court's landmark decision in *First English Evangelical Lutheran Church v. Cty. of Los Angeles*, 482 U.S. 304, 17 ELR 20787 (1987), is not a question I have explored for the purpose of this Article.

86. *See* Eastern Enterprises v. Apfel, 524 U.S. 498, 520-22 (1998).

87. *Id.* at 521 (quoting Student Loan Marketing Assn. v. Riley, 104 F.3d 397, 401 (Cal. Ct. App.), *cert. denied*, 522 U.S. 913 (1997)).

88. 2013 WL 3184628, **12, 19 (Kagan, J., dissenting) (June 25, 2013).

89. 524 U.S. at 539-47 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 553-58 (Breyer, J., dissenting).

90. Part of the monetary penalties were levied based on violations of reporting and inspection requirements; presumably the Hornes will not be claiming a taking on remand based on this portion of the penalties.

The second problem with this piggy-back argument is that it is based on the mistaken premise that the Hornes, whether regarded as producers or handlers, could claim a right under the Takings Clause to refuse to comply with the marketing order. As discussed above, the Takings Clause does not proscribe a taking for a public use, but merely creates an entitlement to compensation if the government has taken property. As a result, a takings claimant's sole remedy for a taking, assuming some forum is available to award compensation, is a suit for compensation; so long as that remedy is available, the Takings Clause provides no basis for attempting to block the alleged taking. This general principle does not apply, of course, with respect to the alleged taking arising from imposition of the monetary sanctions, because the AMMA strips the Tucker Act of jurisdiction over handler compensation claims. But it surely does apply to the Hornes' takings argument with respect to the reserve raisins. There is no dispute that the Hornes could have sued for whatever just compensation to which they were entitled in the U.S. Court of Federal Claims based on the reserve requirement. Given the availability of that option, they have no claim to a right under the Takings Clause to interfere with the alleged government taking of the raisins. This in turn means that the Hornes cannot legitimately invoke the Takings Clause to resist the imposition of monetary sanctions on the theory that the Hornes had a right under the Takings Clause to resist the alleged taking of their raisins.

Furthermore, as the Court strongly hinted, the Hornes certainly cannot raise a takings defense to the monetary sanctions in relation to the raisins produced by other producers. Even if it were correct that the Hornes could oppose the sanctions under the Takings Clause on the theory that they were legitimately resisting a taking of their raisins, they cannot make that argument with respect to raisins produced by others to which the Hornes never had a claim of ownership, either in their capacity as holders or producers.

Finally, focusing on the alleged taking based on the imposition of the sanctions alone, this claim does not appear promising either. First, as discussed, a plurality of Justices in *Eastern Enterprises* recognized that a government mandate to pay money cannot constitute a taking (as opposed to a due process violation, for example), and both the majority and the dissent in *Koontz* appear to embrace this position. Because the monetary sanctions at issue in *Horne* represent generalized obligations within the meaning of *Eastern Enterprises*, the imposition of the sanctions alone cannot support a takings claim. The second, more specific problem with this potential takings claim is that government seizures of property from lawbreakers for law enforcement purposes are outside the scope of the Takings Clause. As the Supreme Court explained in *Bennis v. Michigan*,[91] a case dealing with a takings challenge to a property forfeiture, "[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of a governmental authority other than the power of eminent domain."[92] Thus, even if the money involved in the monetary sanctions did otherwise qualify as property within the meaning of the Takings Clause, the sanctions are still outside the scope of the Takings Clause because the property was seized for law enforcement purposes.[93]

In sum, there is no basis under the Takings Clause for blocking the sanctions imposed on the Hornes for violating the marketing order. Accordingly, the Ninth Circuit should have no difficulty concluding that it must dismiss the Hornes' takings claim once more on remand.

VII. The Merits of the Takings Claim

The Supreme Court did not address the merits of the takings issues in *Horne*, and for the reasons stated above, it appears unlikely that the Ninth Circuit will see a need to reach the issue either. Nonetheless, the issue is an interesting one and worthy of brief consideration.

On its face, the AMAA is an unusual statute to give rise to a takings claim because, unlike most legislation generating takings claims, it does not primarily regulate economic activity to achieve broad public benefits. Rather, the "primary focus" of this marketing program is to "maximize return to the grower,"[94] the party nominally burdened by the program's requirements. It does not go too far to say that the AMAA authorizes government-sponsored "cartels" for the benefit of producers covered by its marketing programs. It is not accidental that marketing orders under the AMMA can only go into effect with the support of the majority of the producers themselves. Given the character of this Act, it seems both illogical and unreasonable for the Hornes, who have surely received economic benefit from this program, to contend that the AMAA results in a constitutional taking of their property interest in their raisins.

The issue of whether the AMAA and the various marketing orders promulgated under the Act result in a taking has been the subject of a great deal of litigation, all of it leading to the conclusion that no taking occurs. In the seminal omnibus constitutional challenge to the AMAA, the federal district court held that the Act (as applied to milk producers), "takes property without just compensation" and on that basis, among others, upheld a challenge brought by a producer.[95] But, on appeal, the Supreme Court reversed on all issues, without specifically mentioning the Takings Clause.[96] In several more

91. 516 U.S. 442 (1996).

92. *Id.* at 452.

93. Because the Hornes have apparently never paid the fines, they may face the additional argument that they cannot plausibly claim that any money was taken from them. *See* Sansotta v. Town of Nags Head, 2013 WL 3827471 (4th Cir. July 25, 2013) (ruling that property owners cannot claim a deprivation of property based on a fine when they "never actually paid the fine").

94. Horne v. U.S. Dep't of Agric., 2009 WL 4895362, *23 (E.D. Cal. 2009) (quoting Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 San Joaquin Agric. L. Rev. 3, 6 (1995)).

95. United States v. Rock Royal Co-Op., Inc., 26 F. Supp. 534, 550 (1939).

96. United States v. Rock Royal Co-Op,, Inc., 307 U.S. 533 (1939).

recent cases filed in the U.S. Court of Federal Claims, the courts rejected takings claims based on the AMAA, including in cases involving raisins[97] and another case involving almonds.[98] In the *Horne* case itself, both the district court and the court of appeals (in its initial opinion, prior to the rehearing petition) rejected the takings argument on the merits.[99]

While the courts have been consistent in terms of outcome, they have been anything but consistent in terms of reasoning. The modern claims have all proceeded on the theory that marketing orders effect a per se taking because they involve a physical occupation. The courts have rejected the claim by arguing such points as (1) participants in a heavily regulated business can claim no protected property right to be free from regulation,[100] (2) the AMAA involves no actual physical invasion of the private property and therefore does not qualify for per se treatment under the Takings Clause,[101] and (3) producers voluntarily subject themselves to the mandates of the AMAA by voluntarily entering a business governed by the Act, and therefore cannot challenge the Act's mandates as a taking.[102] There are several good arguments for why the AMAA does not result in a taking, but these are probably not among them.

There is no denying that there is a strong argument the AMAA involves a direct appropriation of private property. This argument draws support from the Court's decision earlier this term in *Arkansas Game and Fish Commission v. United States*, in which the Court recognized that when the government "physically takes possession of an interest in property," it has a "categorical duty" to pay compensation.[103] This comports with the intuitively obvious notion that when government seizes private property and treats it as its own, a taking must occur, regardless of whether the seizure is for a limited period or involves only a part of a larger property holding. In this case, the mandate that raisin producers, in order to sell raisins commercially, must turn over a portion of their crop to a handler "for the account" of the RAC amounts to direct seizure of private property. Although the handler is an agent of the RAC, and the RAC is an agent of USDA, the forced reservation of raisins is no less a seizure of private property by the government than if it had been accomplished directly by the Secretary of Agriculture.

This conclusion might be resisted on the basis that, even after a handler takes possession of raisins for the account of the RAC, the producer retains a beneficial interest in any proceeds from the sale of reserve raisins in the secondary market. But since there is no entitlement to any payment, and in some years there has been no payment whatsoever, this modest contingent interest appears too thin a reed upon which to contest that a producer has lost his property interest in reserve raisins to the government.

Far more promising is the fact that the AMAA involves regulation of private property interests in commercial products. In *Lucas v. South Carolina Coastal Council*,[104] the Supreme Court established a per se takings rule for regulations that deny an owner "all economically viable use" of land. But the Court immediately qualified that rule by observing that, when it comes to personal property, "the state's traditionally high degree of control over commercial dealings" should put a property owner on notice "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)."[105] This language has generally been understood to create an exception from *Lucas*' per se rule for regulations destroying the value of commercial products.[106] The tradition of stringent government control over commercial dealings that justifies the exception to the *Lucas* per se rule logically supports a parallel exception to the per se rule for direct appropriations of private property.

The conclusion that a claimed taking of raisins cannot be considered under a per se takings rule leaves open the possibility that a takings claim might still be pursued under the multi-factor *Penn Central* analysis. But such a claim appears doomed to failure, which is probably why, so far as we know, no one has ever brought a *Penn Central* takings claim based on the AMAA. The economic impact of the marketing order on a producer's raisins is fairly modest; it apparently never affects more than one-half of a producer's annual crop in any given year. There is no plausible claim of significant interference with investment-backed expectations, given that the program has been in place for decades and most current producers joined the industry long after the regulatory regime had been established. Finally, the character factor weighs against the claim because the AMAA represents a relatively broad-based government program adjusting the benefits and burdens of economic life.

Finally, even assuming a raisin producer could establish takings liability, the special benefits rule should bar any (or at least any significant) compensation award. Under this well-established rule, a condemnor is entitled to offset the amount of compensation it owes a property owner by any "special benefits" to the remaining property conferred by the taking.[107] The rule of special benefits logically applies in this situation because the AMAA is primarily designed to confer economic benefits on producers by raising the

97. *See* Lion Raisin, Inc. v. United States, 416 F.3d 1356 (Fed. Cir. 2005); Evans v. United States, 74 Fed. Cl. 554 (2006), *aff'd without opinion*, 250 Fed. Appx. 321 (Fed. Cir. 2007), *cert. denied*, 552 U.S. 1187 (2008).
98. Cal-Almond, Inc. v. United States, 30 Fed. Cl. 244 (1994), *aff'd in unpublished opinion*, 73 F.3d 381 (Fed. Cir. 1995), *cert. denied*, 519 U.S. 963 (1996).
99. *See also* Wallace v. Hudson Duncan & Co., 98 F.2d 985 (9th Cir. 1938) (rejecting takings challenge to marketing order for the walnut industry).
100. Horne v. U.S. Dep't of Agric., http://caselaw.findlaw.com/us-9th-circuit/1575275.html (9th Cir. July 25, 2011).
101. *Evans*, 74 Fed. Cl. at 563.
102. Horne v. U.S. Dep't of Agric., http://caselaw.findlaw.com/us-9th-circuit/1575275.html (9th Cir. July 25, 2011).
103. 133 S. Ct. at 518.
104. 505 U.S. 1003, 22 ELR 21104 (1992).
105. *Id.* at 1027-28.
106. Hawkeye Commodity Promotions, Inc. v. Vilsack, 486 F.3d 430, 441 (8th Cir. 2007); Unity Real Estate Co. v. Hudson, 178 F.3d 649, 674 (3d Cir. 1999).
107. *See* 4A-14 Nichols on Eminent Domain §14.03 (Mathew Bender 2013).

market price of raisins. Thus, assuming the program does result in a taking of a producer's property, the amount of just compensation owed should at least be reduced by the value of the special benefits conferred. While the special benefits rule is most frequently applied in direct condemnation cases, there is no logical reason why the rule should not apply in inverse condemnation cases as well, as the Supreme Court has recognized.[108]

VIII. Conclusion

The *Horne* takings case in the 2012-2013 term, though surely destined for obscurity, can usefully serve as the springboard for the development of a more coherent and predictable division of labor in takings cases within the federal court system and between the federal courts and the state courts. The distribution of takings cases between different federal courts will rest on a more secure doctrinal foundation, and litigants will have clearer guidance on how to proceed if the Court acknowledges that the reason a takings claimant generally cannot seek equitable relief under the Takings Clause in federal district court is that such a claim fails to state a valid legal claim if there is an opportunity to seek compensation in the U.S. Court of Federal Claims. At the same time, it would make takings doctrine more coherent, and undo the damage done in *Horne*, if the Court recognized that the doctrinal underpinnings for the rule governing the distribution of takings cases among federal courts are different from the underpinnings for the rule channeling most takings claims against local governments into state courts. The just-compensation prong of *Williamson County* ripeness doctrine, properly reconceived, has nothing to do with ripeness at all and everything to do with federalism. In the meantime, the Hornes are not likely to prevail in their case on remand, thereby preserving the string of unbroken government victories in takings challenges to what Justice Elena Kagan correctly described as one of "the world's most outdated laws."[109]

* * *

Following the completion of this Article, Prof. Michael McConnell submitted a response to my Article that is being published elsewhere in this volume. We obviously disagree about a number of issues, including sometimes about what the issues are. Readers can sort out our respectful disagreements and reach their own conclusions. However, Professor McConnell raises two new issues that merit a brief reply.

First, he lauds the decision in *Horne* and several of the Court's other recent takings decisions because they "cut through" what he calls "the morass of arbitrary, clause-specific rules, complications, and obstacles to relief" under the Takings Clause created by prior Supreme Court precedent. I agree that some of the Court's recent decisions, including to some degree *Horne* but especially the controversial decision in *Koontz*,[110] reflect a willingness to twist or abandon established doctrine in order to achieve desired outcomes and/or suggest new avenues for using the Takings Clause to challenge government action. Unlike Professor McConnell, however, I regard this libertine approach to judicial decisionmaking as an exercise in unwelcome judicial activism. If the different words used in the U.S. Constitution do not justify "clause-specific" rules, why should the Justices even consult the constitutional text, or the original understanding of particular provisions, in deciding constitutional cases? (On a more personal level, why should we law professors even bother to critique the substance of the Court's decisions as if substance mattered?)

Second, Professor McConnell advances a problematic line of argument offered up by the U.S. Solicitor General's Office in *Horne* that the Court did not embrace and upon which I did not comment in my Article. All of us apparently agree that Congress, when it chooses to do so through explicit legislation, can strip the claims court of jurisdiction over takings claims seeking just compensation, thereby allowing property owners to sue to enjoin allegedly unconstitutional takings in federal district court. But the Solicitor General's Office went beyond that to argue that equitable relief should also be available in a takings suit, even in the absence of express congressional direction, whenever a statute "is not properly understood" to contemplate payment of compensation upon a finding of a taking. How is this proper understanding to be arrived at? Apparently, the Court itself, with advice from the Solicitor's General's Office, is supposed to make this judgment. This approach, if embraced by the Court, would fundamentally alter the meaning of the Takings Clause, which is "*not* to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking."[111] If the courts decide that a statute results in a compensable taking, and Congress does not wish to pay compensation going forward, it is up to Congress to decide whether to amend the statute to avoid takings liability; the Court cannot properly step in and thwart the accomplishment of Congress' legislative objectives based on its own (made up) authority.

108. *See* Blanchette v. Connecticut General Ins. Corporations, 419 U.S. 102, 151 & n.38 (1974) (suggesting that special benefits should be considered in inverse condemnation case brought by railroads based on the Regional Rail Reorganization Act).

109. Transcript of Oral Argument at 49, Horne v. Dep't of Agriculture, 2013 WL 2459521 (June 10, 2013) (No. 12-123).

110. 133 S. Ct. 2586, 43 ELR 20140 (2013).

111. First English Evangelical Lutheran Church v. City of Los Angeles, 482 U.S. 304, 315, 17 ELR 20787 (1987) (first emphasis added).