Horne and the Normalization of Takings Litigation: A Response to Professor Echeverria

by Michael W. McConnell

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The last three Takings Clause decisions in the U.S. Supreme Court[1] have shared a common theme. In each of them, the Court has cut through the morass of arbitrary, clause-specific rules, complications, and obstacles to relief that have accrued over the past few decades. I call this process "normalization"—treating Takings Clause claims as normal constitutional claims, subject to the same procedural, jurisdictional, and remedial principles that apply to other constitutional rights. Twenty years ago, Chief Justice William H. Rehnquist observed that there was "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . . ."[2] In recent cases, the Court seems to be taking that observation to heart. *Horne v. Department of Agriculture*,[3] in which I had the honor to serve as counsel for the Petitioner, is part of that trend. Although its narrow holding pertains only to cases arising under the Agricultural Marketing Agreement Act (AMAA),[4] it likely will have wider ramifications. The logic of the opinion undermines much of the nonsense about "ripeness" that has plagued Takings Clause cases since the mid-1980s. The decision could perhaps pave the way for a restoration of the place of equitable remedies in Takings Clause jurisprudence.

Prof. John Echeverria's Comment elsewhere in this volume[5] provides a lucid and insightful introduction. I shall take his analysis of the *Horne* decision as a starting point, show where (I think) it falls short, and take issue with its too-quick discussion of the ultimate merits.

I. "Jurisdictional" Issues: Where and When to Sue, and for What Relief

Professor Echeverria is rightly scornful of the mishmash of inconsistent and unexplained excuses courts have offered in the past for denying Takings Clause claimants the right to pursue normal constitutional remedies in the normal way in the normal courts at the normal time. The U.S. Court of Appeals for the Ninth Circuit's "confusing ruling" that the Hornes could not bring a takings challenge to an agency order that they hand over either three million pounds of raisins or the monetary equivalent for public use without any guarantee of compensation is, to Echeverria, a prime example of the jurisprudential mess.[6] According to Echeverria, the Ninth Circuit "alternately 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."[7] As he shows, those are inconsistent theories.[8] I will not rehearse his analysis; I merely refer the reader to his splendid discussion.

Echeverria correctly points out that "ripeness," properly understood, has nothing to do with these claims. As the Court stated in *Horne*: "A 'Case' or 'Controversy' exists once the government has taken private property without paying for it."[9] In *Horne* itself, any Takings Clause objection to the order to disgorge raisins or their monetary value ripened as soon as the order became legally binding. Nor is there any lack of subject matter jurisdiction. As a matter of substantive Fifth Amendment

Author's Note: The author was counsel to the petitioners in the case under discussion, Horne v. Dep't of Agric.*, 133 S. Ct. 2053, 43 ELR 20122 (2013). This essay is written solely in an academic capacity.*

1. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 43 ELR 20140 (2013); Horne v. Dep't of Agric., 133 S. Ct. 2053, 43 ELR 20122 (2013); Ark. Game and Fish Comm'n v. United States, 133 S. Ct. 511, 42 ELR 20247 (2012).
2. Dolan v. Tigard, 512 U.S. 374, 392, 24 ELR 21083 (1994).
3. 133 S. Ct. 2053, 43 ELR 20122 (2013).
4. Ch. 296, 50 Stat. 246 (1937) (codified as amended in scattered sections of 7 U.S.C.).
5. John Echeverria, Horne v. Department of Agriculture:: *An Invitation to Reexamine "Ripeness" Doctrine in Takings Litigation*, 43 ELR 10735 ((Sept. 2013).
6. *Id.* at 10742.
7. *Id.*
8. *Id.*
9. Horne v. Dep't of Agric., 133 S. Ct. 2053, 2062, n.6, 43 ELR 20122 (2013).

law, Echeverria proposes a seemingly simple principle: "[I]f the government has provided an adequate process for obtaining compensation if a taking has occurred, 'the governmental action is not unconstitutional.'"[10]

This statement is correct, as far as it goes.[11] But "an adequate process for obtaining compensation" must mean a proceeding in which compensation will be available if there was a taking. It does not, and cannot, refer merely to the right to file an empty lawsuit. There are many statutory schemes under which the government has not agreed to pay compensation—indeed, where the payment of compensation would be inconsistent with the purposes of the statutory program. In those cases, the property owner is entitled to injunctive relief without first running off to the Court of Federal Claims or state equivalent only to find out that compensation is not available.

If the government proposes to take property without paying for it, there are two equally valid ways to avoid a constitutional violation: either prevent the taking or require compensation. Which of these remedies is preferred is a matter of legislative choice, to be ascertained by means of ordinary statutory construction. The mere existence of the Tucker Act does not answer this question; the Tucker Act is a waiver of sovereign immunity, not the cause of action. This was a point of *agreement* between the Hornes and the government in the raisin case. As the government stated in its brief:

> [P]etitioners are correct in their general premise that there is a category of cases in which a takings claim may be cognizable in a suit for equitable relief in district court, notwithstanding the Tucker Act, because the particular statutory provision involved is not properly understood to contemplate the payment of compensation by the United States if it were found to result in a taking.[12]

The government further explained:

> [T]he court should decide whether, in light of the specific statute's language, context, and history, Congress would have intended to pay compensation if the governmental action could be implemented only if accompanied by compensation, or whether Congress would have instead intended to have the legislation enjoined if it were found to constitute a taking.[13]

In the *Horne* case itself, it was all but obvious that the AMAA did not contemplate payment of the fair market value of the raisins the government confiscated under the California Raisin Marketing Order.[14] As the *Horne* decision demonstrates, a claimant may obtain equitable relief in district court without undertaking a futile trip to the Court of Federal Claims (or state equivalent) where the statutory scheme provides no compensation even in the event of a taking.

Even before *Horne*, the Supreme Court reached the merits of takings claims in a number of federal cases arising from district court.[15] These often-neglected decisions establish that the Court of Federal Claims does not have exclusive jurisdiction over cases involving whether there has been a taking. That court has exclusive jurisdiction only over cases seeking money damages as a remedy against the United States. In the parallel state context, the Court similarly has reviewed the merits of equitable actions without requiring that the takings claimant first sue for compensation under available state provisions. These include some of the Court's most famous takings cases.[16] Unfortunately, in these cases, the Court did not usually explain why it was proper for the claimant to seek equitable relief, leading the Ninth Circuit and other courts to wrongly infer that the mere existence of a vehicle for suits for compensation, such as the Tucker Act, precluded an action in district court for equitable relief from an uncompensated taking.

The Ninth Circuit's view that a takings defense is premature until the claimant has brought suit for monetary compensation in the Court of Federal Claims and lost is a misunderstanding both of the principles of ripeness and of the nature of the Tucker Act. The Tucker Act does not provide a cause of action for compensation for a taking. It is a waiver of sovereign immunity for "damages" actions "founded either upon the Constitution, or any Act of Congress . . . ."[17] It makes no sense to say that the constitutional violation does not occur until after the party seeks and is denied compensation in the Court of Federal Claims,

10. Echeverria, *supra* note 5, at 10742 (quoting United States v. Riverside Bayview Homes, 474 U.S. 121, 128, 16 ELR 20086 (1985)).
11. I put aside the argument that, when the government has initiated legal action against a private person at the time and in the forum of the government's own choosing, the individual is entitled to raise any defense he may have to the government's action, without being forced to hie off to a different court. For example, in the run-on-the-mine eminent domain action, the court determines the government's right to title and the individual's right to compensation *in the same action*. 40 U.S.C. §3114b (2006). There is no reason seizures of raisins should be any different. In *Horne*, the Court did not address the petitioners' argument that property owners are entitled to raise the Takings Clause as a defense when the government initiates a proceeding to take property without paying for it. I will not discuss that argument here. Perhaps, it will receive more attention in a later case.
12. Brief for the Respondent at 50, *Horne*, 133 S. Ct. 2053 (No. 12-123).
13. *Id.*
14. The government offered a feeble argument to the contrary, which the Court dismissed without serious discussion, saying that "it would make little sense" for the government to seize raisins or their monetary equivalent in one proceeding and then pay the money back in a second proceeding. *Horne*, 133 S. Ct. at 2063. During oral argument, Justice Stephen Breyer observed that such compensation was "against the whole point of the program," oral argument at 37:22, *Horne*, S. Ct. 2053 (No. 12-123), *available at* http://www.oyez.org/cases/2010-2019/2012/2012_12_123, and Justice Antonin Scalia agreed, saying that a statute operating in this way would be "crazy," *id.* at 40:1.
15. *See, e.g.*, Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) (enjoining enforcement of a federal statute); FCC v. Fla. Power Corp., 480 U.S. 245 (1987) (addressing takings defense to agency action); Kaiser Aetna v. United States, 444 U.S. 164, 10 ELR 20042 (1979) (addressing takings claim raised as defense to U.S. effort to obtain navigational servitude); Duke Power Co. v. Carolina Envtl. Study Grp., 438 U.S. 59, 71 n.15, 8 ELR 20545 (1978) (reviewing declaratory judgment that amount of compensation provided by statute is constitutionally insufficient); Union Bridge Co. v. United States, 204 U.S. 364 (1907) (rejecting merits of takings defense to criminal prosecution for failure to remove obstruction from navigable waterway).
16. *See, e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 8 ELR 20528 (1978); Miller v. Schoene, 276 U.S. 272 (1928); Chicago, Burlington, & Quincy Ry. v. Illinois, 200 U.S. 561 (1906); Smyth v. Ames, 169 U.S. 466 (1898).
17. 28 U.S.C. §1491(a)(1) (2006).

because the claimant cannot sue under the Tucker Act except for a constitutional violation, which must have occurred before he can sue. Instead, the takings claim logically must accrue, as the *Horne* Court explained, "once the government has taken private property without paying for it."[18]

If this is true, it follows—as Professor Echeverria seems to recognize[19]—that *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*,[20] the state takings case on which the Ninth Circuit's decision ultimately rested, cannot be correct, at least on its own terms. *Williamson County* held that a property owner challenging an alleged taking under state law cannot sue for injunctive relief in federal court without first raising the takings claim as a request for monetary compensation in state court, assuming the state has procedures available for the compensation claim. According to the Court:

> [T]aking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act. Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.[21]

As Professor Echeverria explains, "there was nothing 'premature'" about the claim in either *Williamson County* or *Horne*,[22] and the Court's recognition of that fact in *Horne* undermines the rationale for the decision in *Williamson County*. As he argues, the cases presented "choice of forum problems" governed by different legal considerations.[23] Essentially, the *Williamson County* Court committed much the same logical error that the Ninth Circuit did in *Horne*. Although the Supreme Court's opinion in *Horne* did not explicitly cast doubt on *Williamson County*, its logic certainly did.

Professor Echeverria argues that, if *Williamson County* is correct, its "justification necessarily must rest on federalism."[24] This is a point Chief Justice Rehnquist made in *San Remo Hotel, L.P. v. City & Cty. of San Francisco*.[25] The theory is that "state courts have greater relevant local knowledge in land use matters and federal courts should avoid entanglement in quintessentially local disputes."[26] Maybe so. But §1983 establishes the general rule that persons asserting federal constitutional claims against officials acting under color of state law are entitled to bring their cases in federal court. There is no exhaustion requirement. If Takings Clause claimants must go first to state court because of their "local knowledge," the outcomes of their cases will be entitled to res judicata effect, and the claimants will lose their right to the federal forum. That might be a welcome outcome from the states' point of view, but it is not consistent with the "federalism" that governs all other constitutional litigation. Very frequently, constitutional litigation against state and local governments and officials involves "local knowledge"—consider, as examples, First Amendment claims brought by municipal employees when they are disciplined for speaking out in ways that may or may not be relevant to their jobs and claims of "exigent circumstances" for warrantless searches—but we do not allow claims of local knowledge to trump the right to a federal court forum. Perhaps, Congress should create an exception from §1983 for Takings Clause cases, but it is difficult to justify a judge-made exception. If *Williamson County* is wrong about ripeness, then, in my opinion, it should be overruled.

II. The Merits: Was the Hornes' Property Taken for a Public Use Without Just Compensation?

The raisin case is heading back to the Ninth Circuit. Although there is some old precedent against the challenge, Professor Echeverria notes that the various theories under which takings claims against agricultural marketing orders were rejected in the past are not "good arguments" under modern law.[27] In particular, the argument pursued by the government at early stages of the *Horne* litigation—that "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"[28]—is in clear conflict with the Court's decision in *Koontz v. St. Johns River Water Management District*.[29] According to *Koontz*, the government cannot condition permission to engage in a business transaction on surrender of Takings Clause rights. (This follows the trend, already noted, of subjecting takings claims to the same constitutional rules that govern other constitutional rights—in this instance, the unconstitutional conditions doctrine.)

But Professor Echeverria argues, oddly, that, because the special rule for takings that deny an owner "all economically viable use" of land does not apply to personal property, the Hornes' claim should be subjected to "the multi-factor *Penn Central* analysis" and therefore doomed.[30] This seems to be a category mistake. The Hornes are not objecting to the Marketing Order because it diminishes the value of their property. They are objecting to the order because it transfers title to property to the federal government for its own (ostensibly public) use without any right to payment. Even Echeverria concedes that "[t]here is no denying there is a strong argument the AMAA involves a direct appropriation of private property" and that "when the government

18. 133 S. Ct. 2053, 2062, n.6, 43 ELR 20122 (2013).
19. Echeverria, *supra* note 5, at 10743-44.
20. 473 U.S. 172 (1985).
21. *Id.* at 195 (citations omitted).
22. Echeverria, *supra* note 5, at 10743.
23. *Id.*
24. *Id.* at 10744.
25. 545 U.S. 323, 350 (2005) (Rehnquist, C.J., concurring).
26. Echeverria, *supra* note 5, at 10744.
27. *Id.* at 10747.
28. *Id.*
29. 133 S. Ct. 2586, 43 ELR 20140 (2013).
30. Echeverria, *supra* note 5, at 10747.

'physically takes possession of an interest in property' it has a 'categorical duty' to pay compensation."[31] If that is so, the special rule about deprivations of all economically viable use is irrelevant, and so is the personal property exception to that rule, if it exists.

In my judgment, the Hornes' takings claim is straightforward and entirely orthodox. The government demands that "handlers" of raisins reserve a certain percentage of the crop for the government's use (47% in one of the relevant years); the government then uses these raisins and the proceeds from them for such things as school lunches and other nutritional programs, export stimulation programs, and payment of administrative costs. If any money is left, it is given back to the raisin producers. (In one of the two years, producers got exactly $0.00 for their raisins.) This certainly looks like a taking. The Magna Charta provided that "[n]o constable or other royal official shall take corn or other movable goods from any man without immediate payment . . . ."[32] We have not made much progress if agents of the U.S. Department of Agriculture (USDA) are now free to do what King John's minions could not.

The facts in *Horne* make the analysis a bit more complicated, but lead to the same conclusion. After growing raisins for 40 years, increasingly frustrated with the marketing order system, Marvin and Laura Horne devised a new business model that, they believed, would enable them to bring their crop to market without going through the hands of a traditional "handler." Traditional handlers purchase raisins from raisin farmers, process them, and sell them. The Hornes eliminated this middleman. They purchased processing equipment, which they and approximately 60 other independent farmers used to clean, stem, sort, and package raisins. These farmers then sold direct to purchasers without going through a traditional handler. They believed that, without a handler, they were not subject to the expropriation rules of the Marketing Order.

USDA thought otherwise, asserting that under this new business model, the Hornes themselves had become "handlers." The rationale for this claim is found in the written opinion of the judicial officer:

> In simple terms, Mr. Horne and partners, as a matter of law, acquired raisins, as first handlers, when raisins arrived at the processing/packing facility known as Lassen Vineyards. Their arguments that title to the raisins never transferred from the grower to Mr. Horne and partners under California law is unavailing. California law does not control, the Raisin Order does. Under the Raisin Order, the term "acquire" is a term of art that does not encompass an ownership interest but rather physical possession. Mr. Horne and partners obtained physical possession of—thus they "acquired"—raisins when a grower brought raisins to the facility.[33]

In other words, as handlers, the Hornes were held to have "acquired" all the raisins processed at their facility. Because the raisins had already been sold (by growers to consumers), the government imposed on the Hornes, as handlers, a fine comprised of two elements: (1) the dollar value of the raisins processed on the Hornes' equipment; and (2) a civil penalty for noncompliance. Both parts of this fine are violations of the Takings Clause, but for slightly different reasons.

The "dollar equivalent" portion is a taking because when the government demands that a citizen hand over a piece of property or, in the alternative, its value, there has been a taking. In *Village of Norwood v. Baker*,[34] a municipality, unable to seize a strip of land from an owner without paying for it, imposed a special assessment on the owner in the same amount as the compensation. The Court held this was a taking without compensation. The same applies to the Hornes' raisins. This principle was reaffirmed last term in *Koontz*, which held that "when the government commands the relinquishment of funds linked to a specific, identifiable property interest . . . a *per se* takings approach is the proper mode of analysis under the Court's precedent."[35] Even Justice Elena Kagan, dissenting in *Koontz*, acknowledged that a government demand for money under these circumstances can violate the Takings Clause:

> [I]f officials were to impose a fee as a contrivance to take an easement (or other real property right), then a court could indeed apply *Nollan* and *Dolan*. See, *e.g., Norwood v. Baker,* 172 U.S. 269, 19 S. Ct. 187, 43 L. Ed. 443 (1898) (preventing circumvention of the Takings Clause by prohibiting the government from imposing a special assessment for the full value of a property in advance of condemning it).[36]

Here, USDA substituted a fee in the amount of the full value of the raisins and used the proceeds of that fee for the same purposes it would have used the raisins, after selling them. Under *Norwood* and *Koontz*, that is a per se taking.

The civil penalty part of the fine also may be challenged on the general principle that when a person is fined or punished for refusal to comply with an unconstitutional law, he or she can challenge the fine or punishment on the ground that the law being enforced is unconstitutional. If the Hornes had been fined for noncompliance with an anti-picketing ordinance, they could have challenged the fine as a violation of their free speech rights. To be sure, the fine itself is not "speech," just as the civil penalty in *Horne* is not itself a taking. Rather, in both contexts, imposition of a fine as a means of enforcing an unconstitutional law is itself unconstitutional. The Court applied this straightforward logic to the Takings Clause in *Missouri Pacific Railway. v. Nebraska*.[37] The railroad refused to comply with a regulatory order it regarded as a taking and was fined

31. *Id.* at 26 (quoting Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 518, 42 ELR 20247 (2012)).
32. Magna Charta, cl. 28 (1215).
33. Joint Appendix, at 78, *Horne*, 133 S. Ct. 2053 (No. 12-123).
34. 172 U.S. 269 (1898).
35. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2600, 43 ELR 20140 (2013).
36. *Id.* at 2608-09 (Kagan, J., dissenting).
37. 217 U.S. 196 (1910).

$500. In an opinion by Justice Oliver Wendell Holmes, the Court struck down the fine because the underlying order would have been an uncompensated taking. So too with the raisin expropriation order.

There has been some confusion about the nature of the Hornes' claim. As the Supreme Court correctly explained and the facts above make clear, the Hornes are challenging a monetary fine imposed on them in their capacity as supposed handlers. This confusion leads Professor Echeverria to argue that "the Hornes probably cannot include in their takings defense an argument that the reserve requirement results in a taking" because the reserve requirement "only affects the Hornes in their capacity as producers, not handlers."[38] In fact, the entire fine was imposed on the Hornes because of USDA's conclusion that under their new business model, they were "handlers," on the ground that they "acquired" the raisins when they were processed on their equipment. Accordingly, the Hornes have every right to base their defense on the argument that expropriation of reserve raisins is a taking. Thanks to the Supreme Court, they will have their opportunity to make that point before the Ninth Circuit.

38. Echeverria, *supra* note 5, at 10745.