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## Taking Stock: Why the Supreme Court's Decision to Apply the Market-Value Standard in *Horne II* Further Complicates the Just Compensation Requirement

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# Taking Stock: Why the Supreme Court's Decision to Apply the Market-Value Standard in *Horne II* Further Complicates the Just Compensation Requirement

## **Abstract**

The Fifth Amendment's Takings Clause does not prevent the federal (or a state) government from taking private property. It merely sets as a condition that the government pay the owner "just compensation" for the taking. Precisely what constitutes just compensation, however, is a tricky matter. One method for determining just compensation is the "market-value" method, which requires the government to pay the owner the property's market value. But where a taking is only partial, that is, where the government takes only a portion of private property, the property that remains with the owner may see an increase or decrease in its value. A line of Supreme Court cases suggests that these incidental benefits (or harms) should be set off from the ultimate amount the government pays.

In *Horne v. Department of Agriculture*, the Supreme Court adhered to the market-value method even though the regulation at issue required that raisin growers turn over only a portion of their raisin crop each year. Indeed, the program was specifically designed to stabilize prices and afford raisin farmers myriad market benefits. While adhering to the market-value standard provided the Court with a measure of expediency, this Note argues that the Court's decision may spell trouble for future regulation. If regulators cannot consider incidental economic benefits to private property owners in determining costs, the government may be forced to pay artificially inflated prices for regulations that involve takings. Such a result would make regulation overall more costly, or worse, discourage it entirely.

## **Keywords**

"takings clause" "fifth amendment"

# Taking Stock: Why the Supreme Court’s Decision to Apply the Market-Value Standard in *Horne II* Further Complicates the Just Compensation Requirement

GREG SEIDNER\*

## ABSTRACT

*The Fifth Amendment’s Takings Clause does not prevent the federal (or a state) government from taking private property. It merely sets as a condition that the government pay the owner “just compensation” for the taking. Precisely what constitutes just compensation, however, is a tricky matter. One method for determining just compensation is the “market-value” method, which, unsurprisingly, requires the government to pay the owner the property’s market value. But where a taking is only partial, that is, where the government takes only a portion of an individual’s property, the property that remains with the owner may see an increase or decrease in its value. A line of Supreme Court cases suggests that this incidental benefit (or harm) should be quantified and set off from the ultimate amount the government pays.*

*In Horne v. Department of Agriculture, the Supreme Court adhered to the market-value method even though the regulation at issue required that California raisin growers turn over only a portion of their raisin crop each year. What is more, the program was specifically designed to stabilize prices and afford raisin farmers myriad benefits. While adhering to the market-value standard provided the Court with a measure of expediency, this Note argues that the Court’s decision may spell trouble for future regulation. If regulators cannot consider incidental economic effects in determining regulatory costs, the government may be forced to pay artificially inflated prices for regulations that involve takings. Such a result could make regulation overall more costly, or worse, discourage it entirely.*

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## INTRODUCTION

The characterization of a large federal government as bumbling and inept is far from novel. Indeed, dissatisfaction with the post-New Deal bureaucracy has been a rallying point of political commentary for decades, if not for the better part of a century.<sup>1</sup> Commentators often generalize, lumping politicians and constituents into categories defined by “big government” or “small government.” As with any generalization, these descriptors are in no way exhaustive, as segments of traditional political ideologies are continuously branching off, reforming, and reinventing themselves.<sup>2</sup> Still, the debate over the role (and particularly the size) of the federal government remains fervent across the board. This debate has led to an increased focus on the perceived overreach of numerous federal regulatory programs.<sup>3</sup>

Ideological division and debate is not limited to the political sphere. The current Supreme Court bench is viewed by some as one of the most ideologically divided Courts in history.<sup>4</sup> In fact, the Roberts Court has seen the highest percentage of 5-to-4 decisions (around 21%) than any other Court

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<sup>1</sup> See Cass Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 421–22 (1987).

<sup>2</sup> The Tea Party, to name one of the more notable examples, enjoyed unexpected success during the 2010 midterm elections as the Republican party regained control of the House of Representatives. Paul Harris & Ewen MacAskill, *US midterm election results herald new political era as Republicans take House*, THE GUARDIAN (Nov. 3, 2010), <http://www.theguardian.com/world/2010/nov/03/us-midterm-election-results-tea-party> [<https://perma.cc/HL2Y-LMK3>].

<sup>3</sup> See *id.* (discussing the priorities of the then-incoming Republican majority in the house, including its plans to aggressively attack President Obama’s landmark healthcare reform).

<sup>4</sup> See, e.g., David Paul Kuhn, *The Incredible Polarization and Politicization of the Supreme Court*, THE ATLANTIC (Jun. 29, 2012), <http://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/> [<https://perma.cc/TBZ2-859P>].

before it.<sup>5</sup> Often times, this division coalesces around the scope of the federal government's regulatory powers over individuals and the states.<sup>6</sup>

Admittedly, the case from the Court's 2014–15 term that this Note will treat in depth, *Horne v. Department of Agriculture (Horne II)*,<sup>7</sup> does not readily present as such an ideologically divisive case. In *Horne II*,<sup>8</sup> the Supreme Court considered the constitutionality of a Department of Agriculture ("USDA") marketing order mandating that California raisin growers set aside a portion of their crop for the federal government every year, free of charge. The Agricultural Marketing Agreements Act of 1937 ("AMAA")<sup>9</sup> gives the USDA the authority to issue such marketing orders to maintain a balanced and orderly market. After obtaining title to growers' raisins, an administrative committee (composed of other raisin growers, raisin handlers, and one layperson) disposes of the raisins as it sees fit to effectuate the purposes of the marketing order, that is, to maintain a level market, secure stable prices, and ensure growing, inspection, and product-quality standards.

In 2002, the Hornes, raisin growers and handlers, refused to set aside the required reserve portion and the government levied a fine of over \$680,000 against them. The Hornes challenged the marketing order as a violation of the Takings Clause, which prohibits the federal government from taking private property for public use without just compensation.<sup>10</sup> The district court found that no taking had occurred, and the Court of Appeals agreed, also holding that the marketing order itself did not constitute an impermissible regulatory taking.<sup>11</sup>

The Hornes appealed, and the Supreme Court divided 8-to-1 in reversing the lower court's decision and holding that the raisin reserve program was

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<sup>5</sup> *Id.*; see also Lucas Rodriguez, *The Troubling Partisanship of the Supreme Court*, STAN. POL. J. (Jan. 7, 2016), <https://stanfordpolitics.com/the-troubling-partisanship-of-the-supreme-court-da9fd5a900ac#.q8udw2wr9> [<https://perma.cc/YHT8-S38Q>].

<sup>6</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015) (5-to-4; holding that the Fourteenth Amendment required states to license same-sex marriages and recognize out-of-state same-sex marriages); *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015) (5-to-4; concerning facially the propriety of Oklahoma's three-drug lethal injection cocktail, but perhaps more realistically addressing the death penalty in general).

<sup>7</sup> 135 S. Ct. 2419 (2015).

<sup>8</sup> The general facts of *Horne II* touched on in this Introduction are discussed in greater detail *infra* at Part II. The AMAA and the California Raisin Marketing Order.

<sup>9</sup> Agricultural Marketing Agreements Act, ch. 296, 50 Stat. 246 (1937).

<sup>10</sup> *Horne II*, 135 S. Ct. at 2424–25 (laying out the facts giving rise to the Hornes cause of action); see also U.S. CONST. amend. V.

<sup>11</sup> See *infra* Part III. *Horne II* & (Un)Just Compensation for a more detailed description of *Horne II*'s procedural history.

indeed a taking requiring just compensation.<sup>12</sup> Yet the issue of whether the Court should remand to the Ninth Circuit to consider whether participation in the marketing program offered any quantifiable incidental benefit, and if that benefit should be set-off against the value of the taken raisins, divided the Court along ideological lines. The majority held that there was no quantifiable incidental benefit to participating in the program and determined that the “market value” standard for just compensation should be used to set compensation levels.<sup>13</sup> Since the government had already calculated the market value of the raisins in assessing its fine against the Hornes, the Court held that there was no reason for a new calculation.<sup>14</sup> Instead, it simply relieved the Hornes of their obligation to pay.<sup>15</sup>

The majority’s brief treatment of this argument makes the issue seem unimportant. Proceeding no further than the majority opinion, a reader might view *Horne II* as little more than the Court’s conservative bloc pruning what had become (in its view) an overreaching and antiquated New Deal-era agricultural program. But the concurring opinion in *Horne II* reveals a more complicated, nuanced picture. This Note argues that the concurrence more accurately perceives the importance of the issue, which is vital to the future of federal Takings Clause jurisprudence.

Part I outlines a brief history of the pertinent aspects of the Court’s takings jurisprudence. The Takings Clause has been particularly troublesome for the Court, in large part due to a dearth of historical information on the colonial-era understanding of government takings. This uncertainty has led to varying suppositions concerning the extent to which the Takings Clause was intended to constrain the government, and the debate persists to this day.<sup>16</sup> Part I also introduces the issue of just compensation, and the two methods of determining compensation with which *Horne II* struggled.<sup>17</sup>

Part II describes the Raisin Marketing Order’s history in more depth, and analyzes the AMAA and the USDA’s subsequent regulations from a purposive standpoint. The regulatory scheme was born, arguably in substantial part, from a desire to benefit the American consumer through establishing growing and quality standards, as well as the American farmer by stabilizing the market for and prices of agricultural commodities.<sup>18</sup>

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<sup>12</sup> *Horne II*, 135 S. Ct. at 2433 (Breyer, J., concurring in part). Justices Kagan and Ginsburg joined Justice Breyer in his partial concurrence, while Justices Scalia, Kennedy, Alito, and Thomas joined the Chief Justice’s majority opinion.

<sup>13</sup> *Id.* at 2432.

<sup>14</sup> *Id.* at 2433.

<sup>15</sup> *Id.*

<sup>16</sup> See *infra* Part I.A

<sup>17</sup> See *infra* Part I.B.

<sup>18</sup> See *infra* Part II. The AMAA and the California Raisin Marketing Order.

Part III discusses the *Horne II* opinion in detail, focusing primarily on just compensation. The majority briefly treated this issue at the close of the opinion and retreated to a formalistic position on how to calculate compensation, that is, looking only to the raisins' market value. But this Note argues that modern courts are capable of a more accurate valuation. By neglecting to consider the benefits that the marketing order afforded to the individual growers and handlers when calculating just compensation—especially in circumstances where such benefits are readily ascertainable—the Court struck an unjust balance between private and public interests. Justice Breyer's concurring opinion recognized this nuanced position, but did not fully expound on why the position was of such importance.<sup>19</sup>

This Note will do just that, albeit briefly. The final section of Part III hypothesizes as to the future of Takings Clause jurisprudence in the wake of *Horne II*. It offers an example of why the Court's decision to strictly (and perhaps blindly) adhere to a formalistic standard of just compensation may spell serious trouble for future government action.<sup>20</sup>

## I. TAKINGS JURISPRUDENCE: AN INTRODUCTION

The text of the Constitution does not forbid the federal government from taking private property; it merely creates as a condition to a taking that the government must compensate the property owner.<sup>21</sup> Of course, as is often the case, a simple turn of constitutional phrasing never yields proportionately simple jurisprudence. The body of Takings Clause law has ballooned and evolved over time, but it generally coalesces into two categories: (1) paradigmatic *per se* takings, wherein the government physically appropriates or dispossesses an individual of his or her property;<sup>22</sup> and (2) regulatory takings, wherein a regulation or law has the effect of dispossessing a property owner of his or her property or its economic value.<sup>23</sup> This Part describes generally the origins and treatments of these two categories of takings, and then discusses the issue of just compensation.

### A. *Physical Takings*

When a layperson considers governmental takings (which this author is certain the average individual does on a regular basis), he or she probably imagines the doctrine of eminent domain. This doctrine allows the

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<sup>19</sup> See *infra* part III.B.

<sup>20</sup> See *infra* part III.C.

<sup>21</sup> *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005) (quoting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987)); see also U.S. CONST. amend. V.

<sup>22</sup> *Lingle*, 544 U.S. at 538.

<sup>23</sup> *Id.*

government (state or federal) to take private property without the owner's consent.<sup>24</sup> This power, as with all takings, is conditioned on the government providing the owner with just compensation.<sup>25</sup> With regards to eminent domain, the government is also restricted to taking private property for a "public purpose."<sup>26</sup>

The requirement that the government provide just compensation in order to exercise its taking power, as an equitable matter, makes sense. On one hand, the power of the government to appropriate private property for public use—potentially against the will of the private property owner—makes us uneasy; on the other, a private individual's interests should not be allowed to unilaterally obstruct the government when the government acts on the public's behalf and for the public's benefit.<sup>27</sup>

The earliest instances of governmental takings involved the direct appropriation of physical property.<sup>28</sup> But eminent domain was only the beginning. Soon, the Supreme Court was addressing not only the permanent appropriation of private property, but also temporary "physical invasion[s] . . . and [the] *practical* ouster" of property owners.<sup>29</sup> As an example of this latter variety, the Supreme Court held in *United States v. Causby*<sup>30</sup> that frequent flights directly over a landowner's property constituted a taking.<sup>31</sup> Though the owner was not permanently deprived of his or her property, the government had constructively achieved the same result. Accordingly, this grouping of both permanent occupations and recurring invasions is deemed "categorical" or "*per se*," as no justification of public purpose allows the government to avoid paying the property owner.<sup>32</sup>

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<sup>24</sup> *Rex Realty Co. v. City of Cedar Rapids*, 322 F.3d 526, 528 (8th Cir. 2003).

<sup>25</sup> *Id.* at 529

<sup>26</sup> *Mt. San Jacinto Cmty. Coll. Dist. v. Superior Court*, 151 P.3d 1166, 1175 (Cal. 2007). The Supreme Court has pulled essentially all of the Public Use Clause's teeth, however. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) ("[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.").

<sup>27</sup> For a thorough discussion of the concerns behind governmental takings before and after enactment of the Fifth Amendment's Takings Clause, see generally William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 785–92 (1995).

<sup>28</sup> See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) ("Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules."); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992); see also Treanor, *supra* note 27, at 785–92.

<sup>29</sup> *Transp. Co. v. Chicago*, 99 U.S. 635, 642 (1879) (emphasis added).

<sup>30</sup> 328 U.S. 256 (1946).

<sup>31</sup> *Id.* at 261.

<sup>32</sup> *Tahoe-Sierra Pres. Council*, 535 U.S. at 322; *Lucas*, 505 U.S. at 1014–16.



### B. Regulatory Takings

The second category of takings, regulatory takings, first arose in *Pennsylvania Coal Co. v. Mahon*.<sup>33</sup> There, Justice Holmes recognized that “[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>34</sup> Put another way, “government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such ‘regulatory takings’ may be compensable.”<sup>35</sup> Clearly, the terms “direct appropriation” and “ouster” help tie regulatory takings to their physical brethren. But instead of the airplane flying overhead that deprives the property owner of the use and enjoyment of her land (as in *Causby*, for example) it is the effect of a law or regulation that does so.

Because of the intangible nature of regulatory takings, determining whether one has occurred requires an “ad hoc” approach that weighs all relevant facts.<sup>36</sup> This is perhaps the most important distinguishing feature between physical takings and regulatory takings: if the regulation does not “go too far,” then there has not been a taking that requires just compensation.<sup>37</sup> The rationale behind this is practical in nature. Property-use regulations are so prevalent that if each instance were considered a compensable, categorical taking, the government would wind up paying property owners hand over fist.<sup>38</sup> Accordingly, a court reviewing an alleged regulatory taking weighs the extent to which the regulation has invaded the property owner’s interests against the government’s inherent right to set limits and conditions on private actors’ behavior,<sup>39</sup> affording “[t]he greatest weight . . . to the judgment of the Legislature.”<sup>40</sup>

There are, however, certain examples of regulatory takings for which the Court has categorically stated that compensation is due; indeed, these regulatory intrusions are so invasive as to qualify as *per se* takings.<sup>41</sup>

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<sup>33</sup> 260 U.S. 393 (1922).

<sup>34</sup> *Id.* at 415.

<sup>35</sup> *Lingle*, 544 U.S. at 538.

<sup>36</sup> *Penn. Cent. Transp. Co. v. City of New York (Penn Central)*, 438 U.S. 104, 124 (1978).

<sup>37</sup> *Tahoe-Sierra Pres. Council*, 535 U.S. at 323.

<sup>38</sup> *Id.*

<sup>39</sup> *See Penn. Coal Co.*, 260 U.S. at 413 (“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power.”); *see also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1006–07 (1992) (noting an even broader ability to regulate when the property at issue is personal property, “by reason of the State’s traditionally high degree of control over commercial dealings”).

<sup>40</sup> *Penn. Coal Co.*, 260 U.S. at 413.

<sup>41</sup> *See Horne II*, 135 S. Ct. at 2427 (discussing in particular *Loretto* and *Lucas*).

Perhaps the most famous of these categorical regulatory takings occurred in *Lucas v. Southern Carolina Coastal Council*. In *Lucas*, the plaintiff bought two beachfront properties in South Carolina.<sup>42</sup> Soon thereafter, the state enacted a Beachfront Management Act, which prevented the plaintiff from erecting permanent habitable structures on his land.<sup>43</sup> Justice Scalia, writing for the majority, held that where a regulation deprives a property owner of “all economically beneficial use” of her land, the regulation constitutes a *per se*, or categorical, taking.<sup>44</sup> The only way South Carolina could save its sweeping regulation of the whole state’s coastline from constituting a taking would be to show that building habitable dwellings on the coast constituted a public nuisance at common law.<sup>45</sup>

Another example of where the Court has found government regulation to effect a taking *per se* was in *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>46</sup> In *Loretto*, a New York state statute required that a landlord permit cable television companies to install cable equipment on his or her property.<sup>47</sup> The defendant cable television company had installed cable equipment on the property while it was under a previous owner’s management.<sup>48</sup> Once the plaintiff discovered the equipment after acquiring the property, she brought suit against the company under the Takings Clause.<sup>49</sup> The Supreme Court held that the statute worked as an unconstitutional taking in that it required landlords to suffer a permanent physical occupation of their property, albeit an occupation of a very small area.<sup>50</sup> The Court’s reasoning was hybrid in nature: it examined the statute as a regulatory taking under *Penn Central*<sup>51</sup> and yet also noted the physical nature of the defendant’s occupation pursuant to the statute.<sup>52</sup> The Court nonetheless purported to reaffirm only the traditional rule that “permanent physical occupation of property is a taking,” and that a state may yet regulate as to building codes, just not where such regulation requires a property holder to suffer a physical taking.<sup>53</sup>

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<sup>42</sup> *Lucas*, 505 U.S. at 1006–07.

<sup>43</sup> *Id.* at 1007.

<sup>44</sup> *Id.* at 1027.

<sup>45</sup> *See id.* at 1031.

<sup>46</sup> 458 U.S. 419 (1982).

<sup>47</sup> *Id.* at 423.

<sup>48</sup> *Id.* at 421–22.

<sup>49</sup> *Id.* at 424.

<sup>50</sup> *Id.* at 438.

<sup>51</sup> *Id.* at 425–27.

<sup>52</sup> *Id.* at 438 (“Teleprompter’s cable installation on appellant’s building constitutes a taking under the traditional [permanent occupation] test. The installation involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building . . .”).

<sup>53</sup> *See id.* at 426–27.

Some prominent commentators question the tenability of regulatory takings altogether.<sup>54</sup> William Treanor, for instance, noted that while Justice Holmes position on regulatory takings in *Pennsylvania Coal* is appealing at first blush, it finds no basis in the “text, original understanding, [or] early interpretations of the Takings Clause.”<sup>55</sup> Justice Blackmun argued likewise in his dissenting opinion in *Lucas*, stating that “James Madison, the author of the Takings Clause, apparently intended it to apply only to direct, physical takings of property by the Federal Government.”<sup>56</sup> Further, though contemporary accounts from the Taking Clause’s passage are in “short supply,” the clause would have originally been intended to prevent arbitrary government action, not protect value.<sup>57</sup> Textual foundation aside, what is clear is that the ad hoc analysis applied to alleged regulatory takings affords judges considerable leeway in determining if compensation is due.<sup>58</sup>

### C. Just Compensation

Once a court finds that a taking has occurred, the next step is determining what measure of compensation is owed to the property owner.<sup>59</sup> As a textual matter, the Constitution says nothing of how to determine compensation, and it certainly does not equate “compensation” with “value.”<sup>60</sup> Naturally, the presence of an undefined term in the Constitution has bred confusion. *Olson v. United States*,<sup>61</sup> an early Supreme Court Takings Clause case, succinctly stated that the compensation due for a governmental taking is “the market value of the property at the time of the taking contemporaneously paid in

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<sup>54</sup> See generally Treanor, *supra* note 27, at 803.

<sup>55</sup> *Id.*

<sup>56</sup> *Lucas*, 505 U.S. at 1057 n.23 (Blackmun, J., dissenting) (citing William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 711 (1985)); but see Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis “Goes Too Far”*, 49 AM. U. L. REV. 181, 242 (1999) (arguing that, due to the sparseness of historical information and conflicting contemporary understandings, the Takings Clause can and should be interpreted to cover as much ground as the text allows, and regulatory takings certainly fall within this ambit).

<sup>57</sup> *Lucas*, 505 U.S. at 1057 n.23 (quoting Joseph L. Sax, *Takings and the Police Power*, 74 YALE L. J. 36, 58–60 (1964)).

<sup>58</sup> See *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (noting that “[s]ince *Mahon* we have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking”).

<sup>59</sup> See U.S. CONST. amend. V.

<sup>60</sup> See *id.*; *Bauman v. Ross*, 167 U.S. 548, 570 (1897) (“[T]he constitution does not require that value should be paid, but that compensation should be given.”).

<sup>61</sup> 292 U.S. 246 (1934).

money.”<sup>62</sup> The rationale behind the “market-value” method is simple: the property owner “is entitled to be put in as good a position pecuniarily as if his property had not been taken . . . . He must be made whole but is not entitled to more.”<sup>63</sup> But what precisely it means to be “made whole” is not so evident.

At minimum, being made “whole” implies a determination of what has been taken. But in certain circumstances, this irreducible minimum will be insufficient. Where the taking is only partial, that is, where the taker leaves behind some property, the market-value method unravels.<sup>64</sup> The remaining property’s value will be affected not simply by the loss, but by other factors, such as what incidental effects the taking might have had the remaining property.<sup>65</sup> In circumstances where the taking *increases* the remaining property’s value, offering full reimbursement for the market value of the taken portion will afford the owner a windfall. Conversely, if by taking a portion of property the government *reduces* the value of what remains, offering only the property’s market value will undercompensate the owner.

In *Bauman v. Ross*, the Supreme Court recognized this predicament, and introduced a “set-off” method of valuation.<sup>66</sup> *Bauman* held that “when part only of a parcel of land is taken . . . the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered.”<sup>67</sup> The Supreme Court would go on to apply this principle numerous times, setting off non-monetary or incidental benefits against the total market value of the property taken.<sup>68</sup>

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<sup>62</sup> *Id.* at 255.

<sup>63</sup> *Id.*

<sup>64</sup> See *Bauman*, 167 U.S. at 569–70; see also Tim Kowal, *The Restitutionary Approach to Just Compensation*, 9 CHAP. L. REV. 453, 471 (2006) (discussing instances where simply assessing the damage done to the aggrieved property owner is insufficient to calculate appropriate compensation).

<sup>65</sup> See e.g., *United States v. Miller*, 317 U.S. 369, 376–77 (1943) (stating that, in certain instances where condemnation of property raises the value of adjacent property, such benefit should be factored into compensation); *Borough of Harvey Cedars v. Karan*, 70 A.3d 524, 526–27 (N.J. 2013) (holding that the storm protection afforded by the construction of a beachfront dune must be considered in calculating just compensation for nearby property owners); see also *Horne II*, 135 S. Ct. at 2434–35 (Breyer, J., concurring in part) (enumerating many other cases in which the Court has assessed incidental benefits done to property owners through the taking itself in determining just compensation).

<sup>66</sup> *Bauman*, 167 U.S. at 569–70. This note will refer to the method established in *Bauman* as the “*Bauman* doctrine.”

<sup>67</sup> *Id.* at 574.

<sup>68</sup> See *Horne II*, at 2434–35 (Breyer, J., concurring in part) (listing numerous examples of Supreme Court precedent including *United States v. Spontenbarger*, 308 U.S. 256, 266–67 (1939) (“[I]f governmental activities inflict slight damage upon

## II. THE AMAA AND THE CALIFORNIA RAISIN MARKETING ORDER

Marketing orders originated in various forms in the decades before the Dust Bowl period.<sup>69</sup> The AMAA codified the practice of and procedure for implementing and structuring these orders.<sup>70</sup> The AMAA was not Congress' first attempt at stabilizing agricultural markets and commodity prices. In 1929 Congress passed the Agricultural Marketing Act,<sup>71</sup> appropriating \$500 million to the Federal Farm Board with instructions to achieve these goals.<sup>72</sup> Unfortunately, the stock market spiraled downwards only a few months later and agricultural commodity prices went with it.<sup>73</sup> Congress regrouped and passed the Agricultural Adjustments Act of 1933.<sup>74</sup> The Agricultural Adjustment Act was broad in scope, and in its initial publication went as far as to make a "Declaration of Emergency," which stated in pertinent part:

That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure . . .<sup>75</sup>

The Supreme Court held the Agricultural Adjustment Act unconstitutional in 1936,<sup>76</sup> but Congress was undeterred. Congress passed the AMAA in 1937, picking up where the Agricultural Marketing Act left off, and amended its initial declaration of policy to state more modest goals. Nonetheless, the original intentions of Congress remain clear: to create and maintain "orderly

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land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty. Such activities in substance take nothing from the landowner.")).

<sup>69</sup> Stacie L. Melikian, *California Raisins: Compliance with the Federal Marketing Order and Uruguay Round Agreement on Agriculture*, 5 SAN JOAQUIN AGRIC. L. REV. 89, 90 (2006).

<sup>70</sup> See 7 U.S.C. §§ 601–674. The irony of the Act's title has not been lost on commentators, given that the purpose of the act is to authorize mandatory marketing orders, rather than voluntary "Agreements." Harold F. Breimyer, *Agricultural Philosophies and Policies in the New Deal*, 68 MINN. L. REV. 333, 344 (1983).

<sup>71</sup> Agricultural Marketing Act, ch. 24, 46 Stat. 11 (1929).

<sup>72</sup> Breimyer, *supra* note 70, at 339.

<sup>73</sup> *Id.*

<sup>74</sup> See Agricultural Adjustment Act of 1933, ch. 25, 43 Stat. 31 (1933).

<sup>75</sup> *Id.*

<sup>76</sup> *U.S. v. Butler*, 297 U.S. 1, 68 (1936) (finding that Congress' use of its power to tax and spend in order to regulate the agricultural industry was impermissible).

marketing conditions for agricultural commodities in interstate commerce . . .” so as to “avoid unreasonable fluctuations in supplies and prices.”<sup>77</sup>

The AMAA singled out numerous agricultural commodities as specific regulatory targets, including California raisins.<sup>78</sup> Based on the statute’s language, these commodities are regulated in this fashion in order to create and maintain “orderly marketing conditions for agricultural commodities in interstate commerce . . .” and to “establish minimum standards of quality, maturity, grading, and inspection requirements.”<sup>79</sup> Pursuant to this statutory authority, the Secretary of Agriculture (the “Secretary”) promulgated the marketing order for Raisins Produced from Grapes Grown in California. The sections of the order relevant to this Note are §§ 989.66 and 989.67, which pertain to “free-tonnage” and “reserve-tonnage” raisins, and how the Secretary acquires and disposes of them.

According to the marketing order, the Raisin Administrative Committee (“RAC”), a group of raisin producers and handlers,<sup>80</sup> administers the marketing order and acts as an intermediary between the Secretary and other raisin farmers.<sup>81</sup> Once a year, the RAC recommends a percentage of raisins that should physically be set aside by handlers pursuant to the order—this constitutes the “reserve tonnage.”<sup>82</sup> This percentage can vary drastically: in 1983 the RAC recommended reserving 62.5% of the crop, but in 2005 only 17.5%.<sup>83</sup> Pursuant to the RAC’s decision, producers deliver their harvest to handlers, who set aside reserve-tonnage raisins for the RAC and pay producers for the “free-tonnage” raisins.<sup>84</sup> The free-tonnage raisins are those raisins not set aside pursuant to the marketing order that the handlers will sell commercially on the producers’ behalf.<sup>85</sup> After collecting the reserve tonnage raisins from the handlers and tracking the quantities each producer contributes, the RAC disposes of the reserve as it sees fit, but always in accordance with the general guidelines of 7 C.F.R. § 989.67(b).<sup>86</sup> Generally, the RAC will sell the reserve tonnage raisins in non-competitive markets, to other federal agencies, or to foreign governments and importers.<sup>87</sup> At the end of the season, the RAC returns the proceeds from its sales on a pro rata basis

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<sup>77</sup> 7 U.S.C. § 602(1), (4).

<sup>78</sup> *Id.* at § 608c(6)(I).

<sup>79</sup> *Id.* at § 602.

<sup>80</sup> Under 7 C.F.R. § 989.26, the 47-person committee consists of 35 raisin producers, 10 handlers, one representative of the collective bargaining association, and one lay person.

<sup>81</sup> *See id.* at § 989.63.

<sup>82</sup> *Id.* at § 989.54(d).

<sup>83</sup> *Horne v. Dep’t of Agric.*, No. CV–F–08–1549 LJO SMS, 2009 WL 4895362, at \*25 n.9 (E.D. Cal. Dec. 11, 2009), *rev’d*, *Horne II*.

<sup>84</sup> *See* 7 C.F.R. § 989.66.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at § 989.67(b).

<sup>87</sup> 7 U.S.C. § 608c(6)(E); 7 C.F.R. § 989.66(h).

to the original participating producers, who have retained an equitable interest in the reserve tonnage throughout the process.<sup>88</sup>

Courts have characterized the purpose of the marketing order in different ways. The Supreme Court, for instance, described the AMAA's overall regulatory scheme as designed to "help maintain stable markets for particular agricultural products."<sup>89</sup> The Ninth Circuit, on the other hand, in an opinion the Supreme Court would later reverse, noted that "[t]he program's goal is to keep raisin supply relatively constant from year to year, smoothing the raisin supply curve and thus bringing predictability to the market for producers and consumers alike."<sup>90</sup> According to the USDA's marketing policy in § 989.54, the RAC must also consider such factors as raisin quality, grade, and consumer income levels when setting the reserve percentage.<sup>91</sup> The variety of factors the RAC is instructed to take into account in setting the reserve percentage reflects the varied goals of the program.

Because the RAC may be particularly concerned with one aspect of the market or consumer welfare one year and something entirely different in other years, it becomes difficult to accurately quantify the benefits of the program. One empirical study of the raisin marketing order from the early 1990s noted this difficulty.<sup>92</sup> The authors stated rather equivocally that

consumers were not made worse off . . . , that the program reduced the variability of prices and return . . . , [g]rower average net returns may or may not have increased . . . , [and] [o]verall, the results of the study suggest the public interest may have been well served by the raisin control program, or at worst, there was no significant welfare loss.<sup>93</sup>

Despite these less-than-definitive results, the study's conclusion demonstrates that the program often affords the general consuming public and the raisin producers and handlers benefits along a number of different metrics.

The RAC itself is composed only of persons "actively engaged in the business of the group which he represents either in his own behalf, or as an officer, agent, or employee of a business unit engaged in such business."<sup>94</sup>

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<sup>88</sup> 7 C.F.R. § 989.66(h).

<sup>89</sup> *Horne II*, 135 S. Ct. at 2419, 2424 (2015).

<sup>90</sup> *Horne v. Dep't of Agric.*, 750 F.3d 1128, 1132 (9th Cir. 2014), *rev'd*, *Horne II*.

<sup>91</sup> 7 C.F.R. § 989.54(e).

<sup>92</sup> See Ben C. French & Carole Frank Nuckton, *An Empirical Analysis of Economic Performance Under the Marketing Order for Raisins*, 73 AM. J. AGRIC. ECON. 581, 592–93 (1991).

<sup>93</sup> *Id.* at 593.

<sup>94</sup> 7 C.F.R. § 989.27.



And this direct representation on the RAC cannot be far removed: “only producers . . . engaged as such with respect to the most recent grape crop, are eligible to serve on the Committee . . . [and] [o]nly handlers who packed or processed raisins during the then current crop year shall be eligible to represent handlers on the Committee.”<sup>95</sup> The relevant regulations also leave the administration of the marketing order largely, if not entirely, in the hands of the community it was designed to benefit. This, along with the fact that the RAC receives no federal funding,<sup>96</sup> demonstrates a conscious attempt to incentivize the RAC’s good-faith behavior and maximize the agricultural community’s and the public’s ultimate benefit.<sup>97</sup>

### III. *HORNE II* & (UN)JUST COMPENSATION

In 2004, an Administrator of the Agriculture Marketing Service filed a complaint at the USDA against the Hornes, raisin farmers for nearly fifty years as well as handlers under the marketing order, for violation of the AMAA.<sup>98</sup> The Administrator levied a fine of over \$680,000 against the Hornes, including the USDA’s assessment of the unremitted reserve tonnage pursuant to 7 C.F.R. § 989.166(c), and a civil fine of approximately \$200,000.<sup>99</sup> While an appeal of their administrative case remained pending, the Hornes filed suit in the Eastern District of California, seeking declaratory relief on various grounds, one of which was the Takings Clause.<sup>100</sup> The district court held that, since no physical taking occurred, the Fifth Amendment claim must fail.<sup>101</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at § 989.82 (“All pool expenses shall be deducted from the proceeds obtained by the committee from the sale or other disposal of such reserve raisins held for the account of the committee.”).

<sup>97</sup> *See id.* § 989.67(d)(1) (“Reserve tonnage raisins shall be sold to handlers at prices and in a manner intended to maximum producer returns and achieve maximum disposition of such raisins by the time reserve tonnage raisins from the subsequent crop year are available.”); *see also* *Horne v. Dep’t of Agric.*, 750 F.3d 1128, 1134 (9th Cir. 2014), *rev’d*, *Horne II*.

<sup>98</sup> *Horne v. Dep’t of Agric.*, No. CV–F–08–1549 LJO SMS, 2009 WL 4895362, at \*5 (E.D. Cal. Dec. 11, 2009), *rev’d*, *Horne II*.

<sup>99</sup> *Id.*; 7 C.F.R. 989.166(c) (2004).

<sup>100</sup> *Horne*, 2009 WL 4895362, at \*7, \*23.

<sup>101</sup> *Id.* at \*27. For simplicity’s sake, this Note omits from the body text an intervening step in the litigation. The Court of Appeals originally affirmed the trial court’s holding on procedural grounds. *See Horne v. U.S. Dep’t of Agric.*, 673 F.3d 1071, 1082 (9th Cir. 2012). The court found that, since the Hornes had brought suit in their capacity as raisin producers rather than handlers, they were required to first sue in the Court of Federal Claims under the Tucker Act, rather than in federal district court. *Id.* The Hornes appealed. Justice Thomas, writing for a unanimous court, overruled the Ninth Circuit’s holding. *See Horne v. Dep’t of Agric.* (*Horne I*),



The Court of Appeals agreed that the Hornes had not suffered a “paradigmatic” taking, and decided to wade through the “doctrinal thicket of the Supreme Court’s regulatory takings jurisprudence.”<sup>102</sup> The court reasoned that “[b]ecause the government neither seized any raisins from the Hornes’ land nor removed any money from the Hornes’ bank account, the Hornes cannot—and do not—argue they suffered this sort of ‘paradigmatic taking.’”<sup>103</sup> This conclusion is predicated upon the fact that in the year the Hornes refused to comply with the marketing order, no property changed hands. The Hornes found themselves in administrative hot water for the very reason that they did not deliver their share of raisins to the RAC. The decisive question, then, at least to the Court of Appeals, was whether the fine was the result of an unconstitutional regulatory program.<sup>104</sup> The court answered that question in the negative.<sup>105</sup>

#### A. *Personal vs. Real Property—Does it Make a Difference?*

The Supreme Court reversed, holding that the marketing order effected a taking of private property for which compensation was due.<sup>106</sup> As a threshold matter, the Court held that the government’s duty to compensate for an unlawful taking does not depend on whether the property taken is personal or real property.<sup>107</sup> The Constitution does not distinguish between personalty and realty in the Takings Clause.<sup>108</sup> The Court also stated that “[n]othing in the . . . history of the Takings Clause, or our precedents, suggests that the rule [regarding *per se* takings] is any different when it comes to appropriation of personal property.”<sup>109</sup> Unfortunately, this contention is not entirely accurate.

In *Lucas*, Justice Scalia stated that a “property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers.”<sup>110</sup> He went on to clarify that this expectation is even more pronounced

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133 S. Ct. 2053, 2064 (2013). Since the Hornes had raised the Takings Clause issue as an affirmative defense to the government’s administrative action, the Hornes could challenge the fine on constitutional grounds in District Court pursuant to 7 U.S.C. § 608c(14). *Id.* at 2063–64.

<sup>102</sup> *Horne*, 750 F.3d at 1138.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 1144.

<sup>105</sup> *Id.*

<sup>106</sup> *Horne II*, 135 S. Ct. 2419, 2428 (2015).

<sup>107</sup> *Id.* at 2425.

<sup>108</sup> See U.S. CONST. amend V.

<sup>109</sup> *Horne II*, 135 S. Ct. at 2426.

<sup>110</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027–28 (1992) (citing *Andrus v. Allard*, 444 U.S. 51, 66–67 (1979)).

in the case of personal property, [where] by reason of the State's traditionally high degree of control over commercial dealings, [the property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale).<sup>111</sup>

This proposition's applicability to the Horne's personal property, their raisins, does not require a great leap of reason. The Hornes, and all raisin growers similarly situated, certainly had reason to know that the federal government had an interest in regulating their personal property—California raisins had been subject to the marketing order for decades.<sup>112</sup> Further, the Hornes did not dispute that the raisins' only economically productive use was in their eventual sale.<sup>113</sup> The Court offered no explanation for its deviation from Justice Scalia's reasoning. Nonetheless, Chief Justice Roberts made certain to set forth at the outset of his opinion that the Takings Clause protects property “without any distinction between different types.”<sup>114</sup>

### B. Unjust Compensation?

Putting aside the question of whether the marketing order constitutes a taking,<sup>115</sup> this Note argues that the more problematic oversight was the

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<sup>111</sup> *Id.*

<sup>112</sup> See generally *supra* Part II. The AMAA and the California Raisin Marketing Order.

<sup>113</sup> See Reply Brief for Petitioner at 6, *Horne II*, 135 S. Ct. 2419 (2015) (No. 14-275) (acknowledging that agricultural products “are in a sense fungible and useful to the businesses that deal in them only by generating revenue” (internal quotation marks omitted)).

<sup>114</sup> *Horne II*, 135 S. Ct. at 2426.

<sup>115</sup> Justice Sotomayor offers an exhaustive (and well reasoned) analysis of why the majority's holding as to whether the marketing order constitutes a taking is incorrect. See generally *id.* at 2437–43 (2015) (Sotomayor, J., dissenting). The thrust of her argument is that, in relying on *Loretto*, the Hornes' had failed to state a claim, since *Loretto* “only applies where all property rights have been destroyed by governmental action.” *Id.* at 2437 (Sotomayor, J., dissenting). Since the marketing order did not destroy all of the raisin growers' rights (the growers retained the future pro rata right to the reserve tonnage), the order could not constitute a taking. *Id.* at 2439 (Sotomayor, J., dissenting). This Note agrees largely with this analysis—in particular with Justice Sotomayor's conclusion that the majority fundamentally misunderstands *Loretto*. In *Loretto*, the property owner was required by statute to suffer a permanent physical occupation of her property. See *supra* discussion accompanying notes 46–53. On its face, the marketing order requires the RAC to

Court's decision to rely on the "market-value" standard to calculate just compensation instead of striving for a more realistic assessment of compensation through the *Bauman* doctrine.<sup>116</sup> Just compensation was not central to the case, and, indeed, was not one of the questions presented in the petition for writ of certiorari.<sup>117</sup> Accordingly, the Court dealt with the matter only in the majority opinion's closing paragraphs, holding that "[t]he Government has already calculated the amount of just compensation in this case, when it fined the Hornes the fair market value of the raisins: \$483,843.53."<sup>118</sup> Estopping the government from seeking a different calculation certainly afforded the court a measure of expediency. But the cost of estoppel in this instance, and the similar instances that may follow, could turn out to be greater than expected.

As Justice Breyer illustrated in his concurrence, *Bauman v. Ross* established an exception to the "fair-market-value" calculation for just compensation where only a portion of land was taken.<sup>119</sup> As Justice Breyer argued, *Bauman* and its progeny are relevant to *Horne II* because "the benefit [to the Hornes as a result of the marketing order] might equal or exceed the value of the raisins taken . . . [and] [i]n that case, the California Raisin Marketing Order does not effect a taking without just compensation."<sup>120</sup> It is therefore curious why the *Bauman* doctrine did not garner more attention from the majority.<sup>121</sup>

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maximize the beneficial effect the marketing order is designed to create, and return the proceeds of the reserve tonnage to the growers. *See supra* discussion accompanying notes 90–97. Further, in *Loretto*, the plaintiff's property at the time of the suit was physically occupied by cable equipment, whereas the Hornes had *not* complied with the marketing order during the year in question, and had sued to avoid payment of civil penalties. *See supra* discussion accompanying notes 102–105. Therefore, *Horne II* should have turned only on the constitutionality of the regulation itself and *not* on the government's physical appropriation of raisins. There had been not been one. *Id.* Necessarily then, *Horne II* presented a regulatory takings claim and not a physical takings claim, though the majority nonetheless seized on the physical nature of the set-aside and ran with it. *Horne II*, 135 S. Ct at 2424 ("[A] percentage of a grower's crop must be *physically* set aside . . .") (emphasis added).

<sup>116</sup> *Horne II*, 135 S. Ct. at 2432.

<sup>117</sup> *See* Petition for Writ of Certiorari at i, *Horne II*, 135 S. Ct. 2319 (2015) (No. 14-275), 2014 WL 4404781 at \*i.

<sup>118</sup> *Horne II*, 135 S. Ct. at 2433.

<sup>119</sup> *Id.* at 2434 (Breyer, J., concurring in part and dissenting in part); *see also* discussion *supra* accompanying notes 66–68.

<sup>120</sup> *Horne II*, 135 S. Ct. at 2435.

<sup>121</sup> *See id.* at 2436 (Breyer, J., concurring in part and dissenting in part) ("But neither am I aware of any precedent that would distinguish between how the *Bauman* doctrine applies to the reserve requirement itself and how it applies to other types of partial takings."); *see also supra* Part III.A.

This Note has explained the benefits that the marketing order was designed to create.<sup>122</sup> Presumably, a court could conduct largely the same analysis. Along with the aid of expert witnesses, it could then quantify those benefits and appropriately set them off from the raisins' market value. But even ignoring Chief Justice Roberts' decision to not apply the *Bauman* doctrine to this specific case, the majority's adherence to the market-value standard is, on its own, problematic.

The reason the majority gives for dismissing the government's argument for remand (and the concurring Justices' concerns) is briefly stated: "[*Bauman* and its progeny] raise complicated questions involving the exercise of the eminent domain power, but they do not create a generally applicable exception to the usual compensation rule, based on asserted regulatory benefits of the sort at issue here."<sup>123</sup> As a means of advancing judicial expediency, this one paragraph rejection is effective. But the quoted sentence is a conclusion, not an explanation, and a reticence to address "complicated questions" does nothing to settle them.

The Court may see a distinction with regards to partial *real*-property takings pursuant to eminent domain powers and partial *personal*-property takings vis-à-vis just compensation. However, the Court in no uncertain terms held that the requirements attendant to *per se* takings apply with equal force whether the underlying property is personalty or realty. A later implication, even a nuanced one, to the contrary would create an internal contradiction undermining the majority's formalistic reasoning.

The more likely rationale is that the Court was concerned with the practical ramifications of embarking on the more complex *Bauman* doctrine analysis. Chief Justice Roberts (thankfully) noted that the government had cited no support for application of *Bauman* to personal property takings.<sup>124</sup> This does not mean, however, that no such support exists.

In *U.S. v. Commodities Trading Corp.*,<sup>125</sup> the Court held that, while "market value has normally been accepted as a just standard [of determining compensation] . . . when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards."<sup>126</sup> Likewise, Justice Jackson argued, albeit in dissent, that a government mandated price should not "be used as the sole measure of just compensation."<sup>127</sup> The *Horne II* court would

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<sup>122</sup> See *supra* Part II. The AMAA and the California Raisin Marketing Order.

<sup>123</sup> *Horne II*, 135 S. Ct. at 2432.

<sup>124</sup> *Id.*

<sup>125</sup> 339 U.S. 121 (1950).

<sup>126</sup> *Id.* at 123.

<sup>127</sup> *Id.* at 141 (Jackson, J., dissenting). In *Commodities Trading Corp.*, the government during wartime had taken a quantity of whole black pepper and sought to pay only the price-per-pound established by Congress through the Emergency

therefore not have been without precedent in finding an exception to the general market-value rule. Indeed, given the lengths to which the RAC and the USDA had gone in ensuring that the marketing order afforded direct benefits to growers through price and market stability, there is an argument that applying the market-value standard *did* result in “manifest injustice” to some extent.

Legal scholarship is relatively scarce on the applicability of the *Bauman* doctrine to personal property,<sup>128</sup> but many scholars are unequivocal regarding the inadequacy of the market-value method to complex takings cases.<sup>129</sup> This Note does not purport to suggest that *Bauman* should definitively be incorporated wholesale into all partial-taking just compensation determinations. That question is beyond the scope of this Note. What this Note does suggest is that the *Bauman* doctrine deserves more attention than it received in *Horne II*. The majority underestimated the capacity of modern trial courts to accurately calculate incidental benefits. The following section elaborates on one commentator’s predictions as to *Horne II*’s further-reaching implications.

### C. Future Problems

Ryan Cooper of *The Week*, in his recap of *Horne II*, posed the following hypothetical as an example:

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Price Control Act. *Id.* at 122–23. The plaintiff sought a higher price—one closer to what the pepper might fetch if the price were not artificially suppressed. *Id.* The similarities between *Commodities Trading Corp.* and *Horne II* are evident, though the pricing situation is reversed. Both involve agricultural commodities subject to government programs that intentionally alter the commodity’s price. It is worth considering whether *Commodities Trading Corp.* might have come out differently but for its unique background facts.

<sup>128</sup> See, e.g., Gary Knapp, *Annotation: Supreme Court’s views as to what constitutes “just compensation” required, under Federal Constitution’s Fifth Amendment, for taking of private personal property for public use*, 155 L. ED. 2d 1185, § 18 (2d ed. 2012) (discussing *United States v. Commodities Trading Corp.*); John J. Costonis, “Fair” Compensation and the Accommodation Power: Antidotes For the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021, 1041–42 (1975) (discussing application of *Bauman*’s “benefit set-off” method in federal and state courts and expressing incredulity as to the courts’ arguments that it presents practical inapplicability).

<sup>129</sup> See, e.g., Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871, 873 (2007) (“[I]n practice, current law settles for the payment of the market value of the property taken—a benchmark that often falls far short of the reserve price of the aggrieved owner.”). This and other inadequacies have been noted by jurists as well, such as Judge Richard Posner, who asserts that “[c]ompensation in the constitutional sense is [] not full compensation, for market value is not the value that every owner of property attaches to his property but merely the value that the marginal owner attaches to *his* property.” *Consiton Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988).

Consider a climate policy that simultaneously enacted a tax on carbon pollution and nationalized a bunch of coal reserves. Those reserves are valuable today because it is possible to pollute the atmosphere with greenhouse gases and harm society without paying for the damage. Therefore, a carbon tax would reduce their value. But under Roberts' reasoning, the government would be required to pay the previous (likely enormous) price of the coal without being allowed to consider the fact that the previous value was based to a great extent on essentially a theft from the rest of society.<sup>130</sup>

As a doctrinal matter, Mr. Cooper is correct that, if *Horne II*'s reasoning were applied, the government would be required to pay the artificially-enhanced price because just compensation is determined at the time of taking.<sup>131</sup> At least, this is what the market-value method would dictate.<sup>132</sup> This example is dramatic and perhaps oversimplified, but it demonstrates how potentially unjust the resulting compensation windfall would be for the private property owner, and how concomitantly damaging the results could be to the public.

A state actor looking to regulate in the field of private property or property prices should always consider *ex ante* whether a regulation could conceivably constitute a taking, and factor that consideration into cost determinations.<sup>133</sup> Where the state actor ignores the private costs of government action, takings scholars say she is operating under a "fiscal illusion."<sup>134</sup> Under efficiency-based justifications for the Takings Clause, the just compensation requirement helps to avoid the fiscal illusion by constitutionally requiring payment of private costs in the event a planned government action involves a taking.<sup>135</sup> However, as Abraham Bell and Gideon Parchomovsky argue, where the government is required to pay only market value for property, and the market undervalues the private property by ignoring external factors, the government will take too much.<sup>136</sup> The cost

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<sup>130</sup> Ryan Cooper, *How the Supreme Court just quietly rolled back a key element of the New Deal*, THE WEEK (June 24, 2015), <http://theweek.com/articles/562363/how-supreme-court-just-quietly-rolled-back-key-element-new-deal> [<https://perma.cc/BE3J-Y64Q>].

<sup>131</sup> *Olson v. United States*, 292 U.S. 246, 255 (1934).

<sup>132</sup> *Id.*

<sup>133</sup> See Bell & Parchomovsky, *supra* note 129, at 881–82.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 882.

<sup>136</sup> *Id.*

of the taking will be lower. This, of course, would strike an unhealthy balance between private and public interests.

The type of regulation in *Horne II* presents the opposite situation: where the market *overvalues* property by neglecting the incidental benefits the owner has already received, the government will be less likely to take, even if the taking would be beneficial. The cost of such action would be higher. No matter how sensible the regulation might be, the government would have to think twice before pursuing it, which on its own would likely compound costs. In short, a strict adherence to the market-value method of calculating compensation in complex takings cases has the potential to make regulation far more costly than it need be.

An application of the *Bauman* doctrine could alleviate this problem to an extent. Continuing with Mr. Cooper's hypothetical, a court could use the *Bauman* doctrine to offset the incidental benefit the government's tax-free regulatory scheme had provided against the coal's market price. This would allow the compensation the government owed to more accurately approximate the coal's intrinsic value. Consequently, though the owner would obtain less than market value for her property, the government would not be forced to pay again for a boon it had already granted. In this hypothetical context, and in the context of *Horne II*, this seems to strike a more just balancing point between private and public interests.

#### CONCLUSION

Unfortunately, under *Commodities Trading Corp.*, the exception to the market-value method is available "only 'when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public.'"<sup>137</sup> The Court did not provide more explicit guidance as to when a court may elect to apply *Bauman*, for instance, as opposed to the market-value method. But with regards to *Horne II*, Chief Justice Roberts implicitly acknowledged the difficulty of adequately determining the reserve tonnage raisin's value when he glossed over the just compensation issue at the close of his opinion. Further, this Note has gone to modest lengths to demonstrate why the strict, formalistic application of the market-value method may result in injustice to the public. What *Horne II* accomplishes, then, is to draw into serious question the future applicability of *Commodities Trading Corp.*, and create roadblocks to future governmental regulation. In short, the Supreme Court squandered a prime opportunity to explore and settle a nebulous area of law, even with Justice Breyer and his fellow partial-dissenters raising the issue.

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<sup>137</sup> U.S. v. 50 Acres of Land, 469 U.S. 24, 29 (1984) (quoting U.S. v. Commodities Trading Corp., 339 U.S. 121, 123 (1950)).