

UNTANGLING *HORNE*; RESUSCITATING *NOLLAN*

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Not atypically, the Supreme Court in Horne interprets the canonical Nollan narrowly as a case about developer exactions. Viewed that way, Nollan does not speak to the issue in Horne: the raisins that the government took from the owners were not surrendered in exchange for explicit permission to engage in an activity the government either did or could forbid.

But Nollan stands for a far broader principle: the government should not be induced to reject a policy instrument that necessitates taking steps that would otherwise constitute a compensable taking in favor of an alternative policy instrument that does not give rise to a compensation obligation if (a) it meets the same purpose as the non-compensable action would have met and (b) the owner is neutral toward, or prefers, the policy instrument that includes a traditional taking.

In Nollan itself, the Court is clear that the state should not be discouraged from using its preferred policy instrument to protect public view of the ocean (allowing development of a bigger, view-blocking structure and seizing a viewing easement on the landowner's property) rather than an inferior instrument (refusing to permit development) by being forced to compensate when it seizes the easement. If an owner accepts the state's offer to surrender the easement—rather than merely refusing to develop—we know that the deal is Pareto superior.

In Horne, the federal government should not be induced to use an inferior policy instrument that does not give rise to a duty to compensate (ex ante production quotas or ex post restrictions on raisin sale) rather than a superior one (seizing raisins once market conditions are known) by being forced to compensate only if it uses the instrument that involves a traditionally compensable physical seizure.

Though it is generally easiest to tell in exaction cases that the owner prefers the state's favored policy choice when the owner surrenders property in exchange for a permit, it is

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simple to tell in Horne as well because the owners retain a contingent interest in the profits earned on the sale of seized raisins, and any rational grower would prefer that to a simple sale restriction.

I

In the canonical case *Nollan v. California Coastal Commission*, the Supreme Court held that the California Coastal Commission was obliged to compensate parcel owners who had surrendered a lateral easement across the dry sand adjacent to the sea wall between their home and the ocean only because the Commission conditioned the grant of a building permit to expand their home on the surrender of the easement.¹ The case is justifiably understood to pose two significant sorts of limits on state power. In terms of takings law, a state cannot argue that it has not taken but been granted property when it takes advantage of its monopoly power to provide certain desired benefits to extort “voluntary” transfers; property is taken, not truly granted, unless the permit condition serves the same legitimate policy purpose as a refusal to issue the permit would have served. More generally, read as a case on unconstitutional conditions, *Nollan* reminds us that greater powers need not include lesser powers. The government cannot simply demand that a party surrender a constitutional right in order to receive a gratuitous benefit. Just because State U is not obliged to grant Professor P tenure, it cannot condition a tenure grant on a free speech restrictive agreement to desist from criticizing the governor; just because the state need not grant an owner a building permit, it cannot condition a permit grant on surrendering her right to be compensated for a taking.

What is less clearly understood, though, is that *Nollan* did not just limit state power. Properly understood, *Nollan* should be read to protect the state’s flexibility when it is choosing between multiple policy instruments designed to meet the same ends. What *Nollan* teaches us is that the state should not choose some particular policy instrument #1 (e.g., denying a building permit) designed to achieve some policy outcome over a superior instrument #2 (e.g., granting the permit while seizing an easement that will undo the untoward impact of the new building) simply because it will be free from the obligation to compensate if it uses method #1 (straightforward regulation) but not method #2 (involving a traditional taking), at least so

¹ See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987).

long as instrument #2 is Pareto superior to #1 (not worsening the position of the parcel owner.) In *Horne v. Department of Agriculture*²—the subject of this essay—the Court reads *Nollan* quite narrowly as a case solely about developer exactions and loses sight of the fact that the case is in significant part about maintaining takings-law neutrality between Pareto-superior and Pareto-inferior policy instruments that meet the same goals. The narrow result of the *Horne* litigation, effectively ending a program of dubious merit designed to limit crop supply to bolster prices, is hardly tragic, but the misunderstanding of the true import of *Nollan* may be.

II

Stripped of all constitutionally irrelevant details, the Agricultural Marketing Agreement Act of 1937 authorizes the Secretary of Agriculture to establish a supply-suppressing cartel of raisin growers: it limits the amount of raisins available for sale in an effort to increase grower revenue by inflating raisin prices.³ New Deal policymakers often thought cartelization was good policy. More particularly, they thought that instability in agricultural prices (raisin prices had fallen below 1/5 of their 1921 peak by the Depression)⁴ hurt both consumers and producers. Agriculture was thought to be a high-fixed cost/low-marginal cost industry: thus, when prices during supply gluts fell to marginal cost, farmers would not cover fixed costs and would face tremendous hardship, or even bankruptcy.⁵ However, cartelization may well be social welfare reducing: it obviously creates deadweight loss, and it may fail to protect producers,⁶ unduly harm consumers, or both. The

² 135 S. Ct. 2419 (2015).

³ See Agricultural Marketing Agreement Act of 1937 § 8(a)(5), 7 U.S.C. § 608a (2018).

⁴ *Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1133 (9th Cir. 2014).

⁵ See, e.g., Ben C. French, *Fruit and Vegetable Marketing Orders: A Critique of the Issues and State of Analysis*, 64 AM. J. AGRIC. ECON. 916, 918 (1982). This basic picture of “overproduction” depressing prices is given by the Supreme Court in *Parker v. Brown*, 317 U.S. 341, 364 (1943). A mildly fuller version of the same view of the policy’s origins can be found in 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, 5–6 (1995).

⁶ The appellants in *Horne* might be correct that theirs was a badly managed cartel and that grower profits would have been higher if growers were allowed to sell more raisins, even if prices dropped. Of course, the Hornes could also have simply been free-riding defectors from the cartel: they of course would be best off if they could sell everything they produced (or be compensated at market price by the government for the raisins they were not permitted to sell), while other raisin growers cut back the raisins they made available to market. Obviously,

general consensus position among economists is that it is bad policy,⁷ though the consensus is hardly universal.⁸

The mechanism the Department of Agriculture uses to cartelize the raisin market is to promulgate “marketing orders.” A government-authorized private body (the Raisin Administrative Committee) may (if it believes in a given year that supply gluts unduly threaten prices) order that growers set aside a percentage of their crop for the government’s account. The appellants in *Horne* were subject to such a marketing order when they were forced to set aside as much as 43% of their crop in one year.⁹ At that point, the government essentially has full-blown ownership of the set-aside raisins—it may choose to donate them or sell them in noncompetitive markets, or destroy them. The Court essentially concluded that because the government gained full dominion over what had once been the Hornes’s property, this was the simplest sort of *per se* physical appropriation case, best pictured as a simple physical seizure of personal property in the same way that the canonical *Loretto*¹⁰ case involved government authorization of a third party’s physical seizure of real property.¹¹ Though the government in many ways has full dominion over the raisins at that point, parties like the Hornes still retain an interest in the raisins: if the government sells

the additional raisins they would sell if not subject to the marketing orders would not suppress price in any significant way. Generally speaking, defection from cartels is often suppressed by government enforcement. The view that the Hornes may well be simple cartel defectors is articulated in Dean Lueck, *The Curious Case of Horne v. Department of Agriculture: Good Law, Bad Economics?*, 10 N.Y.U. J.L & LIBERTY 608 (2016).

⁷ See, e.g., L. Alan Winters, *The Economic Consequences of Agricultural Support: A Survey*, 9 OECD ECON. STUD. 7, 47 (1989) (concluding that agricultural intervention can cause GNP to decrease by 1% in some places due to deadweight loss).

⁸ For examples of papers either outright enthusiastic about the beneficial impact of the raisin marketing order or agnostic about the possibility that price supports are social welfare enhancing, see generally Ben C. French & Carole Frank Nuckton, *An Empirical Analysis of Economic Performance Under the Marketing Order for Raisins*, 73 AM. J. AGRIC. ECON. 581 (1991); D.M.G. Newberry & J.E. Stiglitz, *The Theory of Commodity Price Stabilisation Rules: Welfare Impacts and Supply Responses*, 89 ECON. J. 799 (1979). A good overview of the debates can be found in James A. Chalfant & Richard J. Sexton, *Marketing Orders, Grading Errors, and Price Discrimination*, 84 AM. J. AGRIC. ECON. 53 (2002).

⁹ See *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2424 (2015).

¹⁰ See generally *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436–38 (1982) (finding that the government authorizing the installation of a minor but permanent cable wire constituted a taking of property for which just compensation was due).

¹¹ See *Horne*, 135 S. Ct. at 2428 (“The Government’s ‘actual taking of possession and control’ of the reserve raisins gives rise to a taking as clearly ‘as if the Government held full title and ownership.’”) (internal citation omitted).

them, and sells them for more than the costs of administering the program, the profits are redistributed to the growers. The majority and dissent analyze this profit-distribution feature quite differently, and I analyze it differently than either of them.

In this Essay, I explore in detail only one aspect of the *Horne* case. Assume (as I do) that some of the Hornes's raisins were physically appropriated. The Court pretty much thinks that is the end of the story—physical appropriations are *per se* takings. But this is obviously overstated, because while the Court in *Nollan* held that the parcel owners in that case were entitled to compensation, the Court gave a clear example of a situation in which the Nollans would *not* be entitled to compensation, notwithstanding the fact that the government would have plainly seized their property.¹²

Justice Scalia, writing for the *Nollan* majority, invalidates the particular exaction demanded by the California Coastal Commission in exchange for a permit to develop a bigger home on beachfront property—a lateral easement for the public to walk across the dry sand adjacent to the owner's sea wall—because permitting lateral access to the public would not serve the same purpose as taking the regulatory step that would be reviewed under a *Penn Central* balancing test, denying the permit to expand the home altogether in order to preserve public access to ocean views. But Justice Scalia could not be clearer that had the Coastal Commission engaged in an unambiguous physical taking that had met the same purpose as denying the permit would have met, it would have been reviewed under the *Penn Central* standard (and sustained). Here is the language from the opinion:

The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree. Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. *Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a*

¹² See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834–36 (1987).

*viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere.*¹³

III

Before returning to my main goal, to critique the unduly narrow way in which the *Horne* Court reads *Nollan*—even the dissenting Justice largely views it as a case solely about conditional permitting—I should briefly run through the other points of contention between the Supreme Court majority and those who would have decided *Horne* differently (the Ninth Circuit,¹⁴ Justice Sotomayor in dissent,¹⁵ and Justice Breyer, concurring in part and dissenting in part).¹⁶

- The Ninth Circuit rejected Horne’s claim in part by relying on a very weak argument that personal property (like raisins) does not deserve full-blown protection against takings. The argument is grounded in an odd interpretation of some dicta in *Lucas*.¹⁷ The Ninth Circuit assumed that because the *Lucas* Court expressly held that land title is held subject to no “implied limitations,” all other property was so held.¹⁸ The Ninth Circuit seems to ignore a long history of cases in which the right to receive compensation for seizures of both personal property and intangible property has been coextensive with and indistinguishable from the right to receive compensation for the seizure of real property.¹⁹
- Both the Ninth Circuit, and Justice Sotomayor, further argued that this was *not* a case, like *Loretto*, in which the owners no longer retained any significant interest in the seized property because they retained the right to profits from the seized raisins (and, as Justice Sotomayor noted, the *most* significant interest the Hornes have in fungible property is the ability to profit on its sale.)²⁰ The

¹³ *Id.* at 836 (emphasis added).

¹⁴ *Horne v. U.S. Dep’t. of Agric.*, 750 F.3d 1128 (9th Cir. 2014).

¹⁵ *Horne*, 135 S. Ct. at 2437.

¹⁶ *Id.* at 2433.

¹⁷ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

¹⁸ *Horne*, 750 F.3d at 1140.

¹⁹ *See, e.g.*, *James v. Campbell*, 104 U.S. 356, 358 (1882) (protecting a patent from government appropriation without just compensation). The majority opinion in *Horne* does a very good job demolishing this aspect of the Ninth Circuit’s argument, on both historical and policy grounds. *See* 135 S. Ct. at 2425–28.

²⁰ *Horne*, 135 S. Ct. at 2439 (Sotomayor, J., dissenting); *Horne*, 750 F.3d at 1141.

majority counters both that the interest was unduly contingent—there were no distributed profits in one of the two years at issue in the case, though profits *had* been distributed in forty-two of the forty-nine crop years for which a reserve pool was operative—and, more generally, that while it might be permissible to reduce the compensation owed to the Hornes if they had received distributed profits,²¹ the physical taking was complete when the government took physical possession and control of the raisins.²²

The issue arises at all because of the Court's long-standing, if indefensible, decision to (fool itself into believing that it can) use *per se* tests in physical invasion cases and balancing tests in other cases. This decision forces the courts to draw some very peculiar lines that do not respond to the actual interests that owners have in receiving compensation when the state compromises what they contend are their property rights (either in earning economic profit or simply in using their property as they wish, exercising psychologically salient dominion over the property). The Court has decided that it is *not* a *per se* physical taking to require an owner to permit some invitees but not others on their property (e.g., people toward whom they bear racist animus;²³ incumbent tenants²⁴), to require an owner who has opened her property to some kinds of use (e.g., shopping and browsing) to open it to other uses they would prefer not occur (e.g., picketing),²⁵ and to require a landlord to dedicate parts of his building to another's use so long as he retains formal ownership over the dedicated property (e.g., a requirement that each tenant gets a mailbox, accessible to the USPS).²⁶

²¹ The Supreme Court did not remand *Horne* to determine damages. As a result, different groups of raisin farmers filed claims in the Court of Federal Claims, consolidated into a single class action under the caption *Ciapessoni v. United States*, No. 1:15-CV-00938 (Fed. Cl. filed Aug. 26, 2015). We do not know yet how (or if) the Court will resolve either the narrow claim that farmers should receive less than the fair market value of the seized raisins if they have already received some of that value when profits from the sale of the seized raisins were distributed or the much more profound claim raised in Breyer's partial dissent that compensation should be diminished to the extent that they received "special benefits" from the taking because prices for their retained raisins rose as a result of the marketing orders. I discuss Breyer's claim briefly in the text as well.

²² *Horne*, 135 S. Ct. at 2423.

²³ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 259–61 (1964).

²⁴ *Yee v. City of Escondido*, 503 U.S. 519, 531 (1992); *Block v. Hirsh*, 256 U.S. 135, 156–58 (1921).

²⁵ *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83–84 (1980).

²⁶ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 453 (1982)

Having sailed away on this leaky ship, there is both something to be said for the majority's approach and something profoundly confused at the same time. If the state seized a landlord's building and then rented the building out at "rent-control-level" prices, promising the landlord a share of the profits realized in renting the building, the *Horne* majority's approach would be to say that the owner must be compensated for the seizure of the building, though he may have already received some of the compensation owed to him when he got the rental profits. But in figuring out how much he should receive as compensation, should we treat the value of the building as the value it has in a world in which rents are set "appropriately" below market levels—in which case he is fully compensated when we give him the profits—or give him the value the building would have absent price control?

Doing the second misses the point of a (constitutionally permissible) rent-control scheme, converting it to a state-financed housing subsidy program. If we think the state should be able to take ownership of buildings with rent-control eligible tenants, rather than enact rent-control regulations without having to aid poor tenants through subsidy instead of by cutting back what the state sees as prices set at levels that generate abnormally high profits—for instance because it believes that absent taking ownership of the building, the private landlords will surreptitiously overcharge in ways that are too hard to monitor or, perhaps, drive protected incumbent tenants out—then it is imperative that we set the value of the seized good based on the prices the initial owner could *legitimately* have received. (The price raisin growers can legitimately receive is the price set for the seized raisins that does not compromise the prices charged for other raisins.) If we do that, though, the owner's retained interest in the profits will not merely limit compensation—it will inevitably eliminate it. The fact that the majority suggests that if we made the building owner collect the rent checks himself and capped prices—a regulatory intervention that would closely substitute for the seizure and rent-out program—he would receive *nothing*, while if we seize the buildings without first imposing rent control, he might receive the full value of the buildings in an uncontrolled market, minus the profits he received from tenants paying restricted rents, makes me think that the majority does not really understand the dissent's point.

But Justice Sotomayor's argument in the dissent hinges

(Blackmun, J., dissenting).

just as much on the indefensible lines we draw between *per se* and balancing-test takings: she suggests that even if the state gave the growers only 50% of what they would have earned had they sold the raisins at permissible prices, it might not be a compensable taking because they were not deprived of all interests in their raisins and the losses imposed on them were just not significant enough.²⁷ To follow up on the rent control example, the implication is that if the apartment is seized and the owner retains an interest in receiving *some* of the profits earned renting the units in the building—say the profits that would be earned on 50% of the rent that tenants paying sub-market rent actually pay—that we might conclude they are not owed any compensation at all because their claim for compensation should be tested under a balancing test, and we might find that the diminution in the value of their holdings was not sufficient to justify compensation. This outcome is also daffy. Justice Breyer further argues that if the growers should receive compensation for the raisins that have been seized, compensation ought to be reduced to account for the fact that the prices at which their retained raisins were sold increased because of the seizure program. So, let us say that a grower retains ten tons of raisins that would have sold for \$10,000 (\$1,000/ton) in a non-cartelized market and sold for \$15,000 (\$1,500/ton) in the cartelized market. And assume that one ton of raisins were seized and we value those raisins at the prevailing cartelized market price. Still, while he “lost” \$1,500, he gained \$5,000 because he (and similarly situated growers) had raisins expropriated. Breyer’s claim is that conventional takings law permits (though it does not require) that compensation be reduced to account for either the “special benefits” (that flowed from the taking to retained portions of the condemnee’s parcel or holdings) or “general benefits” (that flowed from the taking to multiple property owners, including the condemnee). Accounting for such benefits requires that compensation be reduced (and might well entail that it be eliminated) here.²⁸

Breyer’s argument seems mostly right to me, but it raises more complex questions than I think worth addressing here about whether *Horne* is a case in the heartland of “special” or “general” benefits law. Even those jurisdictions which do employ the special benefits rule seem to do so in circumstances in which, in the absence of the seizure of the owner’s property,

²⁷ See *Horne*, 135 S. Ct. at 2442–43.

²⁸ *Id.* at 2434–36.

a project beneficial to the owner's retained property would not be feasible. In this situation, it would plainly be possible to prop up raisin prices without seizing Hornes's raisins in particular. At the same time, it is also not clear that the Hornes receive any particular benefit from the seizure of *their* raisins—we may need a more extensive program to impact prices—and yet, in the classic special benefits case, there appears to be a close nexus between the particular seizure and the benefits the condemnee receives. (Well, maybe: assume that O's retained portions of his parcel becomes more valuable because, after the condemnation, it will be proximate to a public highway. Would we say that the condemnation of O's land alone benefitted her retained property because seizing a portion of her property guaranteed that the highway would be proximate to the retained portions of her parcel, or should we emphasize that absent the condemnation of other property to build the road, her retained property would not be helped? Did the condemnation increase the value of the retained property or did the broader program? If forty of my fifty acres of land are seized to build a highway, and my ten retained acres are not near the highway built on the forty acres, but they are increased in value because adjacent to a highway built on land seized from others as part of the same broad project, my compensation for the lost forty acres is almost surely not reduced: the Hornes might well claim that is the best analogy here.)²⁹

Moreover, there is rather limited authority³⁰ for the proposition that “general benefits” may be accounted for in reducing the amount of compensation a condemnee is due and limited law enabling us to ascertain whether we should conceive of the Hornes as receiving a special or general benefit if similarly situated, but only similarly situated, condemnees receive the relevant benefits?³¹

²⁹ Another key problem occurs at the administrative stage here. Experts will plainly disagree on the price impacts of creating the cartel. Each district court that adjudicates a takings case of this form is put in the position of making its own judgment about whether Congress and the Department of Agriculture are right or wrong in their assumption that they are protecting, not harming, farm incomes.

³⁰ The only Supreme Court case on point is *McCoy v. Union Elevated R.R. Co.*, 247 U.S. 354, 366 (1918), holding that the fact that those from whom property has not been seized have received a similar benefit does not preclude the state from reducing compensation to account for the actual benefits the condemnee received.

³¹ There is one last side issue worth mentioning that appears nowhere in the litigation. The intuition behind the Hornes's position that we must focus on the seizure of whatever items of personal property were taken is straightforward.

Imagine that the government seized a privately owned, historic document that an owner kept in his home so that it could put it on public display in a museum. The government should not be able to claim that if the document were worth only 1% of what the home is worth, then there had been nothing more than a mild diminution of the value of the owner's parcel, likely acceptable under the *Penn Central* test, when the document was taken. Instead, the owner would rightly argue that the relevant personal property—the historic document—had been seized in its entirety. What *Horne* is claiming here is that a significant quantity of raisins was seized, and it does not matter that he retained other raisins or that the agricultural land on which the raisins were grown retained much of its value.

Of course, the government might have replied that this simple intuitive story seems to apply just as readily to the order to destroy the cedar trees that was litigated in the canonical case of *Miller v. Schoene*, 276 U.S. 272 (1928), yet the Court found no simple condemnation there. Plainly, the government will successfully argue that it cannot matter that in *Miller* the state merely ordered the owners to destroy the disease-spreading cedar trees, rather than seizing the trees and then destroying them itself. The question that arises is what differentiates the *Miller* case from this one, since the government takes and destroys *some* of an owner's personal property in each case.

The most obvious distinction appears to be that the cedar-tree owners could be said to harm the apple-orchard owners unless the trees are destroyed. But the *Miller* Court wisely expressed its reluctance to say that the cedar-tree owners harmed another party: the Court goes out of its way to state that the cedars need not be nuisances or illicit in any way (“We need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law; or whether they may so be declared by statute.”), believing that relying on notions of “harm” implies some form of moral fault which might not be present. *Id.* at 280. One might still say that the interaction between the cedar-tree owners and the apple-orchard owners created a social cost, which could be reduced by destroying the cedar trees. *Horne* might argue that the raisins neither harm another party nor do the raisin growers interact with other parties in ways that we would describe as creating a Coasean social cost, and this argument appears reasonably plausible if one focuses solely on physical harm or physical interaction. The government should respond, however, that if the raisins are available to be marketed, that will indeed hurt other raisin growers by depressing the price of their crop. In a legal regime in which the pecuniary losses visited upon competitors have never been thought of as compensable, though, it is plausible (though hardly inevitable) that *Horne* would have the better of this argument. The state would note, though, that if price support is a legitimate government aim (just as saving the apple orchards from cedar rust is), the cases look awfully similar.

It is possible as well that the government will challenge the basic analogy that I began this footnote with, arguing that one reason that the parcel owner in the *Miller* case does not get compensation is because the personal property that the state orders to be destroyed is, in essence, just a portion of what should be construed as a conceptually inseparable bundle or piece of property on the land. The state did not order *all* of the trees on the cedar owner's property to be destroyed, just those that were infected with cedar rust. One could argue that the owner's inventory of trees was a single conceptually unified entity, his “crop,” and that the government had not taken the crop but merely enacted a regulation (destroy the rust-infected ones) that diminished its value. The parallel claim here would be that *Horne* did not have his raisin crop seized, but rather that the use of the crop was regulated (some could be sold, some could not) in a way that merely diminished its aggregate value. This argument bears a family resemblance, of course, to familiar arguments that focus on the “denominator” problem: just as a zoning ordinance that demands a setback does not render the unusable portions of a parcel fundamentally valueless (under *Lucas*) or grant

IV

That brings us to the core of the argument. Assume, in this section, that the seized raisins are used in just two ways: they are either destroyed to restrict supply and bolster prices, or they are sold (and profits remitted to the growers) when selling them (in particular markets or on open markets) will increase aggregate grower revenue.³²

All of the parties and Justices seem to concede that had the growers surrendered the raisins in exchange for receiving a discrete permit and that surrendering the raisins would meet the same governmental purpose as denying the permit would have met, then *Nollan* would preclude the need to compensate.³³ This is what I am calling the *narrow* view of *Nollan*, the view that it is simply an exaction case. In this narrow view, the Supreme Court recognizes three distinct classes of takings cases: (1) physical seizures (*Loretto*)³⁴ and regulations that deprive an owner of all the economic value of the property, though they do not abate a nuisance (*Lucas*),³⁵ are *per se* takings; (2) regulations that diminish value are subject to a balancing test (*Penn Central*)³⁶ and (3) exactions—property rights surrendered by developers in exchange for development permits—are not compensable if exacting the property meets the same end as denying the permit would have met but are compensable if it does not. Put another way, an uncompensated exaction is fine if and only if the developer's property concession solves the sort of problem that permitting his development would otherwise cause.³⁷

Viewed in this narrow way, the question in *Horne* is whether the growers gave up the raisins in exchange for any sort of permit, and viewed this narrowly, I think the majority is right to say that the government's claims—that the growers gave up the raisins in exchange for permission to engage in

servitudes to neighbors, so, the government would argue, it is best to see Horne's *raisin crop* as restricted, rather than to see individual raisins as taken.

³² In Part V, I consider whether the analysis of the taking changes, under *Dolan v. City of Tigard*, 512 U.S. 374 (1994), if the government uses some of the seized raisins to meet other public purposes (e.g., gives them away as foreign food aid.)

³³ *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

³⁴ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

³⁵ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

³⁶ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

³⁷ *Nollan* requires that the exaction meet the same sort of end as development bans would meet; *Dolan* refines the *Nollan* test by adding that the state cannot exact substantially more from the developer than it needs to solve the problem that permitting development would create.

commerce or to sell raisins—are spurious.³⁸ This is true not only because, as a matter of fact, the government does not explicitly issue permits to engage in commerce or to sell raisins, but because the government would almost surely lack the constitutional authority to forbid the growers from engaging in commerce or from selling any raisins. In the *Nollan* context, it is not merely the case that the state does in fact require permits to construct new buildings on ocean-front land, but that it clearly has the authority to deny such permits (without compensation) to meet its police power ends (e.g., protecting public views of the ocean).

The dissent is trying to get on the right track, I think, when it argues that the government may condition the ability to offer goods on the market on giving up certain property rights.³⁹ But I think that by sticking, to a great extent, to the narrow exactions framework, the Hornes got something they are not entitled to (the right to participate in a government-regulated market at prices supported by government intervention), and therefore, may be asked to give something up (a portion of their crop) to get that benefit—the argument gets muddled. The government is *not* establishing anything like a permit program here: the government does not in fact meet its supply-squelching ends here by refusing to allow some set of growers to participate in the market, so if we are constitutionally required to look for a negotiated concession here to put this case in the exactions bucket—I will give you the raisins if you let me participate in the market—we will not find one.

The proper argument the dissent is inching towards—that the state has the constitutional authority to grant only conditional permits, without compensating for the losses the condition entails, even if it cannot deny permits *simpliciter*—ultimately depends on taking what I believe to be the broader, more convincing view of *Nollan*, one in which the fact that *Nollan* is an exaction case at all is secondary.

In the broader view, what *Nollan* teaches us is the following: When the government can meet the same goal through one of two methods, one of which involves what would otherwise be a taking and one of which does not, the method that involves the taking will in certain circumstances be

³⁸ See *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2430 (2015) (emphasizing that basic and familiar uses of property (like selling the property in commerce) are not the sorts of government benefits that can be withheld or exchanged for concessions that undo the harms associated with the grant of a benefit).

³⁹ *Id.* at 2441.

reviewed under the same standard as the method that does not involve the taking would be reviewed. In *Nollan*, the California Coastal Commission faces two broad choices when it seeks to protect the public's ability to view the ocean: it can insure that no view-blocking building is built (this can occur either because the owner applies for no permit or, to focus on the explicit step the state could take, because the government denies the permit), or it can seize a viewing spot if the building is built.⁴⁰ Since government-based technique #1—forbidding the building—would be reviewed under the *Penn Central* standard, so should the close substitute program #2 (permitting the building and seizing the viewing spot). In *Horne*, the government's goal is to restrict raisin supply to bolster overall farm incomes: it can do this by an *ex ante* production quota (#1), an *ex post* restriction on sales volume (#2), or (technique #3) by seizing raisins *ex post*.⁴¹ Since #1 and #2 receive *Penn Central* review, so should #3.⁴²

The California Coastal Commission may have thought that permitting buildings and seizing viewing spots was more sensible from their vantage point than forbidding building; the Department of Agriculture may well think it is far more sensible to use *ex post* seizures than *ex ante* quotas (since they will have more information on crop levels and prices once the growing season is done) and more sensible to seize the raisins rather than try to administer sales limits (which could readily be sidestepped by handlers operating in black markets). What *Nollan*, read broadly, tells us is that in the first instance, the government need not be deterred (by a compensation requirement that applies to only one regulatory method) from using a more efficacious method of meeting its goals. This is a very sensible holding.

Now, obviously, the fact that the government might, in *Nollan*, prefer to gain a viewing spot alongside a bigger

⁴⁰ See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 828–29, 835–36 (1987).

⁴¹ See *Horne*, 135 S. Ct. at 2424–25.

⁴² This understanding of what the state should be permitted to do without penalty helps explain what it cannot do as well: the fact that the parcel owners in *Nollan* agreed to grant a lateral easement to get the permit does *not* mean that the easement was not taken from them. The state may well prefer program #1 (lateral easement and permit) to #2 (no permit), but they are not substitutes for one another. #1 does not meet #2's aims and, therefore, need not be reviewed as #2 would be reviewed. In fact, the "neutrality" argument cuts toward demanding compensation: just as the state should not choose to ban development when it prefers to meet the end that banning development would meet through a property seizure, so it should not permit unwanted development just so it has leverage to get an easement, rather than just condemning the desired easement.

oceanside home to a smaller oceanside home, does not mean that it can take the viewing spot and then mandate that the owner build the structure that would justify the seizure. Taking the viewing spot without compensation is permissible only when the owner chooses to build, when not just the state but the owner *prefers* the outcome that occurs if the state follows regulatory strategy #2 (building and seized viewing spot) to #1 (no building). But the fact that the viewing spot is surrendered in exchange for a permit—that it is exacted rather than simply seized—is important for but one limited reason. The fact that the parcel owner assents (and consents) to the property surrender in any exaction case is simply the most obvious way of guaranteeing that the chosen regulatory outcome is in the interests of both the state and the private party.⁴³

But what do we do, in cases like *Horne*, where the state does not give the owners the explicit option between seizure and either *ex ante* quotas or *ex post* sales limits? Need we worry that the owner of the property is being forced to embrace a regulatory solution that is worse for her than the options that are plainly more deferentially reviewed under the *Penn Central* standard? Here, I think, the observation that the Hornes are given a contingent interest in the profits on sale means that

⁴³ In this view, what makes the exaction context special in any sense is that the exaction taking is not mandatory in that context alone; the owner can *choose* to keep his property and avoid the taking by not applying for a permit. Assent to a taking or surrender of a property right is a necessary but insufficient condition to permitting the taking without compensation. (As I have noted, we know it is not sufficient because Nollan's *assent* to the taking of the lateral easement too, but it does not count as *consent* because it is coerced by the state exploiting its permit-granting authority to get Nollan to surrender a constitutional right.)

It is instructive to think about *Nollan* wholly as a case about unconstitutional conditions in thinking about the assent/consent distinction. What makes the condition that the Commission demanded in *Nollan* an *unconstitutional condition* is that the seizure of the lateral-access easement is a taking because there is no reason to review it as one would review the permit denial, since it is conceptually disconnected from the goals that would justify the permit denial, and the state cannot demand that a party surrender a constitutional right—to be compensated for taking—in order to receive a government benefit. Recall the simple case: The State University may not be duty-bound to grant Professor P tenure, but it cannot grant him tenure on condition that he refrain from criticizing the governor—he cannot be coerced into surrendering his free speech rights by the threat to withdraw the gratuitous benefit. He is coerced not in the simplest sense (I will deny you something to which you are entitled unless you choose X), but under more complex views that one is coerced if forced to make choices for irrelevant reasons. What immunizes a demand for a viewing spot from falling prey to unconstitutional conditions doctrine is that the seizure of the viewing spot is *not* a compensable taking at all if it meets the same regulatory end as denying the permit would have met. Therefore, the owner has surrendered no constitutional right to get the benefit of a permit.

the existing program unquestionably dominates a constitutionally permissible sales-restricting program from the growers' vantage point, in which the raisins that could not be sold at all would plainly be less valuable than seized raisins that might yield profit. The issue is trickier in relationship to *ex ante* production quotas because the cost of growing seized raisins is positive, while the cost of forbearing growing is plainly lower. But I do not think the argument saves the day for the Hornes for two distinct reasons: First, the existing program unquestionably dominates a sales-restricting program that all parties concede would not constitute a *per se* taking;⁴⁴ there is no possibility of garnering residual profits if sales of some portion of the crop are effectively barred. Second, even in relationship to an *ex ante* production quota, the Hornes do not raise the claim that what they see as the program's constitutional defects would be cured if those who surrendered raisins had been offered the option of complying with production quotas (because, of course, their real complaint is that, to put it charitably, they want to end the cartelization of the market and use the compensation requirement to do so and, to put it uncharitably, they want to free ride and defect from the cartel while reaping its benefits).

This broader view of *Nollan* has important implications outside of the *Horne* case. Think about the cases in which Congress sought to abolish the right to devise or pass through descent highly fractionated interests in property held by Native Americans,⁴⁵ which would instead automatically escheat to the tribe on death, and assume that it is properly thought of as a *per se* taking to abolish the rights to pass on property at death.⁴⁶ Assume, too, as the facts in *Hodel v. Irving* clearly indicate, that were the Bureau of Indian Affairs to charge actuarially fair user fees to holders of highly fractionated land to account for the costs of managing the property and assigning them their income shares, holders of the fractionated shares would all abandon them, because the fees would far

⁴⁴ *Horne*, 135 S. Ct. at 2443 (citing Brief for Petitioners at 23, 52, *Horne*, 135 S. Ct. 2419 (2015) (No. 14-275)).

⁴⁵ *Babbitt v. Youpee*, 519 U.S. 234 (1997); *Hodel v. Irving*, 481 U.S. 704 (1987).

⁴⁶ I recognize that the Court claims to decide the cases under *Penn Central*, but the *only* factor utilized in the *Penn Central* balancing test that cuts in favor of finding a taking is the "extraordinary" character of the regulation, the fact that it abolishes core rights of descent and devise, in the same way that *Loretto* property seizures destroy core property interests (though it too causes none of the sorts of other harms that the *Penn Central* Court attends to, most notably loss of value or disappointed investment-backed expectations).

exceed the income generated by the fractionated shares.⁴⁷ If one believes that (a) the aim of the federal government, to get rid of fractionated interests, can be met, without constitutional impediment, through imposing user fees and (b) that the escheat provisions meet these same ends and (c) that the government would prefer not to impose user fees on all holders of Native property, then (d) it need not offer a *choice* between user fees and surrendering the right to devise highly fractionated property or have it pass through descent (since giving up the right to pass the property along at death unambiguously dominates paying user fees—no one holding highly fractionated interests would choose to hold the property and pay the user fees.) The escheat provisions should be reviewed in the same fashion as the user fees would be reviewed (and thereby sustained) because they are (from the vantage of the federal government) simply a more efficacious method of meeting the same acceptable goal (they get rid of fractionated interests without imposing unwanted costs on holders of less fractionated property) and, from the vantage point of those surrendering a property interest, unambiguously preferable to selecting the putative option (paying user fees) that the government never explicitly offers.

Properly understood, *Nollan* squashes the unwarranted pressure to choose a regulatory option to meet an acceptable goal that is worse for both the state and the party from whom a conventional property interest is seized simply because the state need not compensate if it employs one option yet must if it uses the other. The fact that *Nollan* happens to be an exaction case is of secondary relevance in interpreting what the case is really about; the fact that it is an exaction case merely is one simple way of assuring that the owner, as well as the state, prefers the regulatory option that results in the loss of a conventional property interest.

V

Assume, now, that the government does not merely want

⁴⁷ The *Hodel v. Irving* Court notes that the administrative costs of handling one of the typical fractionated tracts at issue in the litigation is \$17,560 annually, *sixteen times* higher than the income the tract produces. If the owners had to pay the administrative costs of managing the tract—and the Bureau of Indian Affairs plainly has the constitutional authority to charge such user fees, rather than fund administrative costs out of general revenues—all of the owners of the fractionated land would plainly not just fail to pass these claims to descendants but would give up their claims. *Hodel*, 481 U.S. at 712–13.

to remove raisins from the market to inflate prices but uses some of the seized raisins as foreign-aid food grants. Does the fact that the government has received more from the Hornes than it needs to receive to meet the regulatory purpose that it could have met without paying compensation (under *Penn Central*) using *ex ante* supply limitations or sales controls change the picture here? In *Dolan*, the Court found that the city could not seize substantially more property than was needed to meet the same regulatory end that it would have met by denying the Dolan's request for a building permit.⁴⁸ If one reads *Dolan* to mean that the government ought to be at least roughly indifferent between banning the development and receiving whatever property it seizes, then the claim that Horne should make is that the government would be indifferent between sales restrictions or *ex ante* quotas and *ex post* supply limitations if they had the same impact on the quantity of raisins reaching market but would become better off if they not only restricted supply but got to use the raisins for foreign-aid purposes.

The *Dolan* facts are paradigmatic in this regard. Assume that the city of Tigard would be entitled to demand a non-development easement restricting the use of 100 square feet of the Dolans's property so that the undevelopable land could absorb whatever additional water would run off the property when the Dolans were permitted to pave over additional parking area. The non-development easement would preclude exacerbating flood risk in the area surrounding the creek adjacent to the owner's property. If, though, the city took a 1000-foot non-development easement, it would need to compensate the owners for the 900 feet of easement that was not needed to meet the same regulatory end as denying the permit to increase the quantity of impermeable land would have met. The argument that the Hornes might make here is that when the government took the right to dispose of the raisins, they did more than was needed to meet their regulatory end (supporting prices by avoiding over-supply).

It would, however, require a radical extension and re-conception of *Dolan* to argue that the Hornes can make a *Dolan* claim here at all: While it is true that the government has likely gotten more than it would have gotten had it simply seized and destroyed the raisins, all *Dolan* refers to is cases where the owner loses more than he would have under the constitutionally permissible act. It is by no means established

⁴⁸ See *Dolan v. City of Tigard*, 512 U.S. 374, 394–95 (1994).

law (and would be a senseless extension of the holding) that *Dolan* forbids the government from receiving a peripheral benefit when it takes no more than it is permitted to do without compensation or (to put *Horne's* possible point here even more starkly) that it be indifferent between non-development and development with the exaction. Assume that the California Coastal Commission members thought the public would be happier to have a viewing spot on the owner's land than smaller homes that covered less of the parcel. Assume too that taking the viewing spot was no more (or maybe even less) of an imposition on the owner's rights than restricting building and that no less extensive seizure of a property interest would undo the ill effects of development; it is plainly not the case that the owner would thereby gain a right to compensation because a state entity *prefers* to seize the easement rather than restrict building, that it is pleased as punch that the Nollans chose to build and give up the viewing spot rather than forego building. More pointedly, the flood-prevention easement needed to undo the impact of paving the Dolans's parking lot might make the area around the creek a lot prettier too, so that the state gains both flood prevention and aesthetic amenities. As a constitutional matter, we should be protecting the owners against excessive losses, not barring the state from gaining too much.

As a prudential matter, though, it is possible that those who want to restrict the use of the condemnation power, perhaps in part because they fear that owners are never adequately compensated when their property is seized, may believe that we *should* be wary of encouraging the government to substitute physical takings for regulations and that one way of achieving that goal is to establish a prudential rule of thumb that the government restricts itself to physical takings which leave it no better off than it would be using the regulatory mechanism. This is particularly true as a prudential matter if one believes that entities like the California Coastal Commission would not really have been willing to ban the development (thinking the costs of the ban would outweigh the benefits) but were instead merely tempted to use the threat of a ban to extort property it would not otherwise be able to obtain. If we are worried above all about that kind of extortion, we would not worry that a rule of thumb that forbade takings that not only substituted for permissible regulations, but improved the position of the state entity, would simply lead to needless development bans that may make both the developer and the state entity worse off. Instead, we would worry that

the government in this case—really seeking raisins for foreign aid that should plainly be paid for by taxpayers generally—will pretend to have a real interest in supply restriction for its own sake. We should put them to the test by making them engage in the most straightforward, constitutionally permissible behavior (to see if they really think it is worth it), rather than a substitute for that behavior that gives them more.

The prudential counterargument is that we end up making everyone worse off because we are unduly panicked about pretextual conditional takings: in the *Dolan* context, we will get needless development bans if we really force the city to do no better than it could do if it imposed a ban, and here, we will throw out raisins for no good reason just because we are suspicious of the government's motives in seizing the raisins.