

# A RAISIN IN RESERVE: *HORNE*, TAKINGS, AND THE PROBLEM OF GOVERNMENT PRICE SUPPORTS

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2016 MICH. ST. L. REV. 713

## ABSTRACT

*In Horne v. Department of Agriculture, the Supreme Court recently held that the government could not assess a fine on a raisin grower for refusing to surrender a portion of his crop in compliance with a government program to artificially inflate the price of raisins, benefitting raisin producers. The Court was split, with Justice Sotomayor strongly opposed to the entire decision and Justices Ginsburg, Breyer, and Kagan dissenting in part. Interestingly, only a very brief concurring opinion written by Justice Thomas touched on the strongest foundation for the majority's result—in order for a justly compensated taking to be constitutional, it must be for a public use, and clearly a program designed to benefit the narrow class of raisin growers at higher costs and lower raisin availability for the public is not a public use. This Article analogizes the price support program to a government-created cartel that increases prices to confer a private benefit on producers. Such programs are bad policy and in some cases unconstitutional.*

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## I. INTRODUCTION

In *Horne v. Department of Agriculture*,<sup>1</sup> the Supreme Court recently held that the government could not assess a fine on a raisin grower for refusing to surrender a portion of his crop in compliance with a government program to artificially inflate the price of raisins, benefitting raisin producers.<sup>2</sup> The Court was split, with Justice Sotomayor strongly opposed to the entire decision<sup>3</sup> and Justices Ginsburg, Breyer, and Kagan dissenting in part.<sup>4</sup> Interestingly, only a very brief concurring opinion written by Justice Thomas touched on what I consider the strongest foundation for the majority’s result—in order for a justly compensated taking to be constitutional, it must be for a public use, and clearly a program designed to benefit the narrow class of raisin growers at higher costs and lower raisin availability for the public is not a public use.<sup>5</sup>

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1. 135 S. Ct. 2419 (2015).

2. *See id.* at 2431 (“Raisins are not like oysters: they are private property—the fruit of the growers’ labor—not ‘public things subject to the absolute control of the state’ . . . . Any physical taking of them for public use must be accompanied by just compensation.”) (quoting *Leonard v. Earle*, 141 A. 714, 716 (1928) (internal citation omitted)).

3. *See id.* at 2443 (Sotomayor, J., dissenting) (“I would affirm the judgment of the Ninth Circuit.”).

4. *See id.* at 2433 (Breyer, J., concurring in part and dissenting in part) (“I agree with Parts I and II of the Court’s opinion. However, I cannot agree with the Court’s rejection, in Part III, of the Government’s final argument.”).

5. *See id.* (Thomas, J., concurring). Justice Thomas wrote:

The Takings Clause prohibits the government from taking private property except “for public use,” even when it offers “just compensation.” That requirement, as originally understood, imposes a meaningful constraint on the power of the state—“the government may take property only if it actually uses or gives the public a legal right to use the property.” It is far from clear that the Raisin Administrative Committee’s conduct meets that standard. It takes the raisins of citizens and, among other things, gives them away or sells them to exporters, foreign importers, and foreign governments. To the extent that the Committee is not taking the raisins “for public

This Article will describe the raisin price-support program and analyze the legal arguments made in *Horne*. It will also provide an economic analysis explaining why price support programs such as this are unequivocally poor policy.

In a world where there is only a finite supply of all resources, prices adjust to equilibrate the quantity supplied with the quantity demanded.<sup>6</sup> When people desire a quantity greater than that in supply, prices will rise providing incentives to supply more and also causing people to desire less until equilibrium is restored.<sup>7</sup> Shortages thus create price increases.<sup>8</sup> When the quantity available in supply exceeds the amount people desire, prices will drop creating an incentive to reduce production of the service or commodity and also causing people to increase their consumption of the good until equilibrium is restored.<sup>9</sup> Thus, surpluses cause price decreases.<sup>10</sup>

Throughout history, governments have attempted to manipulate prices much as they have attempted to manipulate flowing water.<sup>11</sup> Attempts to manipulate flowing water have often resulted in large-scale problems.<sup>12</sup> Attempts to manipulate prices have been even more unsuccessful.<sup>13</sup> Two kinds of manipulation are possible. Price ceilings are designed to keep the prices of certain commodities or

use,” having the Court of Appeals calculate “just compensation” in this case would be a fruitless exercise.

*Id.* (citations omitted).

6. See R. GLENN HUBBARD & ANTHONY P. O’BRIEN, MICROECONOMICS 82 (4th ed. 2013) (explaining that the equilibrium price causes the quantity supplied to equal the quantity demanded).

7. See *id.* at 83 (“A higher price will simultaneously increase the quantity supplied and decrease the quantity demanded.”).

8. See *id.* (observing that shortages create upward pressure on price).

9. See *id.* (“When there is a surplus, firms have unsold goods piling up, which gives them an incentive to increase their sales by cutting the price. Cutting the price will simultaneously increase the quantity demanded and decrease the quantity supplied.”).

10. See *id.* (observing that surpluses create downward pressure on price).

11. See *id.* at 109 (“Producers or consumers who are dissatisfied with the competitive equilibrium price can lobby the government to legally require that a different price be charged. In the United States, the government only occasionally overrides the market outcome by setting prices.”).

12. See Greg Shimokawa, *America’s Infrastructure: Can We Smooth Out the Bumpy Regulatory Road?*, 47 CREIGHTON L. REV. 287, 292-93 (2014) (describing the shift in government efforts to control water for the protection of farmland towards protection of population growth and property development near water).

13. JOSEPH E. STIGLITZ, PRINCIPLES OF MICROECONOMICS 114-16 (2d ed. 1997).

services low,<sup>14</sup> and price supports are designed to keep the prices of certain commodities or services high.<sup>15</sup> A common example of price ceilings would be rent control.<sup>16</sup> Political leaders observe a “problem” that shelter is expensive and pass a law prohibiting price increases for existing renters.<sup>17</sup> These politicians then claim to have worked to help solve the problem of affordable housing, and existing tenants receive the benefit of a below-market rent.<sup>18</sup> However, these laws actually exacerbate housing shortages by creating a disincentive to invest in new housing and to maintain the existing housing stock.<sup>19</sup> Property owners remove their housing from the market, or they allow it to depreciate into dilapidated housing stock.<sup>20</sup> Economists have universally condemned rent control and have attributed urban blight to this type of government interference in the real estate market.<sup>21</sup>

The raisin-reserve program at the center of *Horne* is a price-support program designed to keep the price of raisins above the normal market equilibrium for the benefit of farmers.<sup>22</sup> Historically

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14. See HUBBARD & O'BRIEN, *supra* note 6, at 112 (describing price ceilings).

15. See *id.* at 110 (describing price floors).

16. *Id.* at 112.

17. See, e.g., Gisselle Acevedo & Paul Freese, *Officials Should Fight for Affordable Housing*, DAILY NEWS L.A., Mar. 4, 2008, at A11 (arguing that high housing costs are a problem that should be dealt with by enforcing rent control).

18. See HUBBARD & O'BRIEN, *supra* note 6, at 115 (“The winners with rent control are the people who are paying less for rent because they live in rent-controlled apartments.”).

19. See *id.* at 112-13. Professors Hubbard and O'Brien explain: The fall in the quantity of apartments supplied can be the result of landlords converting some apartments into offices, selling some off as condominiums, or converting some small apartment buildings into single-family homes. Over time, landlords may even abandon some apartment buildings. At one time in New York City, rent control resulted in landlords abandoning whole city blocks because they were unable to cover their costs with the rents the government allowed them to charge.

*Id.*

20. See *id.* at 113 (“In London, when rent controls were applied to rooms and apartments located in a landlord’s own home, the quantity of these apartments supplied dropped by 75 percent.”).

21. See Mark Klock, *Financial Options, Real Options, and Legal Options: Opting to Exploit Ourselves and What We Can Do About It*, 55 ALA. L. REV. 63, 106 (2003) (“We know that permitting tenants to rent at below-market rates both causes housing shortages and dilapidation of neighborhoods.”).

22. *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2434 (2015) (Breyer, J., concurring in part and dissenting in part) (“The reserve requirement is intended, at

in the United States, farmers were a politically important power center and succeeded in institutionalizing some devices to give farmers political power that exceeds their proportional size.<sup>23</sup> For example, two Senators per state gives Wyoming ranchers a voice in the Senate proportional with New York that disproportionately exaggerates the political power of rural states.<sup>24</sup> When Congress created the Federal Reserve Bank system, Missouri was made the only state to house two Federal Reserve banks.<sup>25</sup> This was a blatant effort to appease the farming community into accepting the Federal Reserve System.<sup>26</sup>

The political power of the farming community has perpetuated a powerful interest that established and maintained price-support programs to benefit farmers at the expense of consumers supporting high prices for milk, cheese, corn, sugar, beets and other crops.<sup>27</sup>

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least in part, to enhance the price that free-tonnage raisins will fetch on the open market.”).

23. For example, there are just twelve Federal Reserve districts, each with a main Federal Reserve bank, and Missouri—an important farming state—is the only state that is home to two Federal Reserve banks, one in St. Louis and one in Kansas City. See FREDERIC S. MISHKIN & STANLEY G. EAKINS, *FINANCIAL MARKETS AND INSTITUTIONS* 194 (7th ed. 2012).

24. See Jim Chen, *The American Ideology*, 48 *VAND. L. REV.* 809, 824 n.72 (1995) (“This sort of geographic apportionment gives more sparsely populated states—that is, relatively rural states—a lopsided advantage in the Senate.”).

25. See ANTHONY SAUNDERS & MARCIA CORNETT, *FINANCIAL MARKETS AND INSTITUTIONS* 95 (4th ed. 2009) (map depicting the twelve Federal Reserve districts).

26. Cf. Sarah Binder & Mark Spindel, *De-Central Bank: The Politics of Selecting the Federal Reserve Banks in 1914*, Paper Presented at the Congress and History Conference 12, BROWN UNIV. (June 9, 2011), [https://www.brown.edu/conference/congress-and-history/files/uploads/binder\\_spindel\\_june\\_2011.pdf](https://www.brown.edu/conference/congress-and-history/files/uploads/binder_spindel_june_2011.pdf) [<https://perma.cc/QC6W-BPSC>] (“[G]iven the perception of the Federal Reserve as the brainchild of a Democratic president and Congress, the Democratic RBOC had a strong incentive to dole out reserve banks with an eye to currying the support of Republicans . . .”).

27. See HUBBARD & O’BRIEN, *supra* note 6, at 111. The professors explain: The federal government’s farm programs have often resulted in large surpluses of wheat and other agricultural products. In response, the government has usually either bought the surplus food or paid farmers to restrict supply by taking some land out of cultivation. Because both of these options are expensive, Congress passed the Freedom to Farm Act of 1996. The intent of the act was to phase out price floors and government purchases of surpluses and return to a free market in agriculture. To allow farmers time to adjust, the federal government began paying farmers *subsidies*, or cash payments based on the number of acres planted. Although the subsidies were originally scheduled to be

Before delving into greater detail about the mischief created by agricultural price supports, it is useful to have a brief primer on economics.

## II. MICROECONOMIC PRINCIPLES

One simple definition of economics is that economics is the study of decision-making under the condition of scarce resources.<sup>28</sup> Scarce is simply a synonym for finite.<sup>29</sup> With infinite resources, households would not have to make any difficult decisions as there would be an abundance of everything and people could have more of anything they desired without sacrificing anything at all.<sup>30</sup> Obviously this would be nirvana, and nirvana does not exist on earth.<sup>31</sup> When resources are scarce, obtaining more of one thing necessarily entails giving up something else.<sup>32</sup> For example, increasing the production of pistachios would require more water for more pistachio trees and would mean less available water for other agricultural products.<sup>33</sup>

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phased out, Congress has passed additional Farm Acts that have resulted in the continuation of subsidies.

*Id.*

28. See *id.* at 4 (“Economics is the study of the choices consumers, business managers, and government officials make to attain their goals, given their scarce resources.”).

29. See *id.* (explaining that choices based on scarcity are the inevitable result of finite resources).

30. See Mark Klock, *Contrasting the Art of Economic Science with Pseudo-Economic Nonsense: The Distinction Between Reasonable Assumptions and Ridiculous Assumptions*, 37 PEPP. L. REV. 153, 160 (2010) (“If both investors have infinite wealth, they would have no incentive to trade regardless of their beliefs. They would not have to make *any* choices. They could have everything without sacrificing anything.”).

31. See, e.g., Susannah T. French, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CALIF. L. REV. 929, 971 n.244 (1993) (“The notion of complete representativeness is an illusion, a version of nirvana. It does not exist, because it cannot.” (quoting LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 323 (1965))).

32. See Klock, *supra* note 30, at 157 (“For a model to be part of the subject matter of economics, the decision makers *must make sacrifices*. That is, they must choose between alternatives.”).

33. See Todd C. Frankel, *California’s Next Big Drought Crisis - Groundwater - Lurks Below Surface*, WASH. POST, Apr. 3, 2015, at A4 (“Farmers have planted more water-intensive, high-profit crops, with pistachios and almonds needing extensive watering.”).

Under conditions of scarcity, there are many feasible models for allocating the scarce resources.<sup>34</sup> A central authority could make resource allocation decisions, and resources could be rationed.<sup>35</sup> An alternative and well-known model for allocation of resources is the competitive free-market economy.<sup>36</sup> In this environment the pricing mechanism works to allocate scarce resources in the most efficient manner.<sup>37</sup> Scarcer and more desired resources command a higher price, and more abundant and less desirable resources trade at lower prices.<sup>38</sup>

The pricing mechanism works to equilibrate the quantity of goods that households demand with the quantity that firms supply.<sup>39</sup> If there is disequilibrium, then there is either an excess supply or an excess demand.<sup>40</sup> An excess demand means a shortage of goods, which will put upward pressure on prices.<sup>41</sup> As prices rise, firms will

34. See HAL R. VARIAN, *INTERMEDIATE MICROECONOMICS* 11-12 (8th ed. 2010) (“[W]e described the equilibrium for apartments in a competitive market. But this is only one of many ways to allocate a resource . . .”).

35. See *id.* at 13-14 (describing a situation in which government dictates a maximum price that results in rationing).

36. See *id.* at 14 (listing a competitive equilibrium as one method for resource allocation).

37. See *id.* at 16 (“The outcome of the competitive market is Pareto efficient.”).

38. See STIGLITZ, *supra* note 13, at 152. Professor Stiglitz writes:

If the price of oil is high, it is because oil is scarce and the high price reflects that scarcity. . . . [E]conomists regard such situations not as market failures but as the hard facts of economic life. Much as everyone would like to live in a world where all individuals could have almost everything they wanted at a price they could afford, this is simply unrealistic. Those calling on government to “solve” the problem of scarcity by passing laws about prices simply shift the problem. They reduce prices for some and cause shortages for everyone else.

*Id.*

39. See VARIAN, *supra* note 34, at 3 (“Prices adjust until the amount that people demand of something is equal to the amount that is supplied.”).

40. See *id.* at 8 (explaining what happens if the market price is not in equilibrium).

41. See *id.* Professor Varian describes the situation where price is below the equilibrium price:

At this price at least some of the landlords will have more renters than they can handle. There will be lines of people hoping to get an apartment at that price; there are more people who are ailing to pay the price  $p$  than there are apartments. Certainly some of the landlords would find it in their interest to raise the price of the apartments they are offering.

*Id.* at 7.

have an incentive to increase the quantity supplied and households will be incentivized to lower the quantity demanded.<sup>42</sup> This continues until the quantities supplied and demanded are again in equilibrium.<sup>43</sup> If there is an excess supply, then there will be downward pressure on price giving households an incentive to demand more and firms will be incentivized to supply less.<sup>44</sup>

To provide a little more background on this, a necessary condition for optimal decision-making requires either that the rate at which an individual can substitute goods exactly equal the rate that the individual is willing to substitute goods or that the individual consume a quantity of zero for one of the goods.<sup>45</sup> For example, suppose that I like both apples and pears but I like pears twice as much as apples, so I am only willing to give up one pear for two apples or two apples for one pear. If the price of pears is \$1, and the price of apples is 50 cents, then I am in equilibrium whatever my consumption of pears and apples is because I am unable to make a reallocation that improves my welfare. The rate at which I am willing to substitute apples for pears is exactly equal to the rate at which I can substitute apples for pears.<sup>46</sup> A reallocation (holding my total expenditure on pears and apples fixed) will leave me equally well off but not better off. However, if the price ratio is anything other than two apples for one pear, I would be able to improve my welfare by trading all my apples for pears if the price of pears was less than double apples or all my pears for apples if the price of pears was more than double apples.<sup>47</sup>

In reality, the rate at which I am willing to trade apples for pears is not likely to be constant because of something economists

42. *See id.* at 294 (“[A] price that is not an equilibrium price cannot be expected to persist since at least some agents would have an incentive to change their behavior.”).

43. *See id.* (“[T]he market price will be pushed up to the point where demand and supply are equal.”).

44. *See id.* (“Thus excess supply exerts a downward pressure on the market price.”).

45. *See id.* at 76 (“If the optimal choice involves consuming some of both goods—so that it is an interior optimum—then necessarily the indifference curve will be tangent to the budget line.”).

46. *See id.* at 78 (“If the consumer is at a consumption bundle where he or she is willing to stay put, it must be one where the MRS is equal to this rate of exchange:  $MRS = -p_1/p_2$ .”).

47. *See id.* (“Whenever the MRS is different from the price ratio, the consumer cannot be at his or her optimal choice.”).



call diminishing marginal utility.<sup>48</sup> As I consume more and more apples, I value the next one less and less, which means that if I eat a lot of apples I might be willing to sacrifice a greater number of apples for an occasional pear.<sup>49</sup> Understanding diminishing marginal utility is not really important for the point of this paper. The important point is that at any price level, everyone makes decisions that put them in equilibrium. Then if the relative price changes, people will consume more of the now relatively less expensive product and less of the relatively more expensive product.<sup>50</sup> Additionally, the concept of *marginal* is frequently invoked in economics.<sup>51</sup> *Marginal* is simply economic language for the incremental change.<sup>52</sup> In economics, decisions are made at the margin, or with respect to small changes in profit, utility, or other variables.<sup>53</sup>

The concept of marginal rate of substitution now allows us to construct a demand schedule. A demand schedule shows the quantity of a good that people will want to purchase at a given price.<sup>54</sup> People will demand a low quantity at high prices.<sup>55</sup> As the price falls, the quantity people demand increases as people can afford more and will consume more of the lower priced good.<sup>56</sup> Traditionally economists graph this schedule with price on the vertical axis and quantity on the

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48. See HUBBARD & O'BRIEN, *supra* note 6, at 311 (explaining the concept of diminishing marginal utility).

49. See *id.* ("For nearly every good or service, the more you consume during a period of time, the less you increase your total satisfaction from each additional unit you consume.").

50. See *id.* at 317 (explaining the substitution effect resulting from a change in relative prices).

51. See *id.* at 7 (explaining that "optimal decisions are made at the margin").

52. See VARIAN, *supra* note 34, at A4 ("Typically  $\Delta x$  will refer to a *small* change in  $x$ . We sometimes express this by saying that  $\Delta x$  represents a marginal change.").

53. Cf. HUBBARD & O'BRIEN, *supra* note 6, at 7 ("[M]ost decisions in life involve doing a little more or a little less.").

54. *Id.* at 70.

55. See *id.* at 71 ("[C]onsumers will buy . . . less of a good when the price rises . . .").

56. See *id.* ("Buyers demand a larger quantity of a product as the price falls because the product becomes less expensive relative to other products and because they can afford to buy more at a lower price.").

horizontal axis.<sup>57</sup> Thus, the demand schedule slopes downward as in Figure 1.<sup>58</sup>

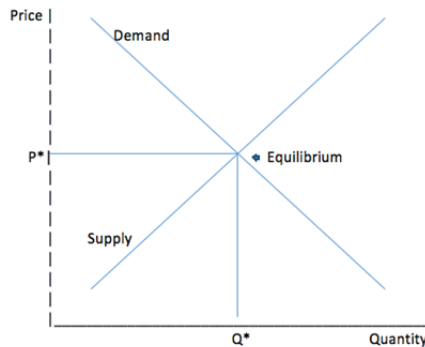


Figure 1. Supply and Demand

The supply schedule shows the quantity of a good that firms will want to produce at a given price.<sup>59</sup> The profit-maximizing necessary condition for firms is that marginal revenue equals marginal cost.<sup>60</sup> If marginal revenue is greater than marginal cost, then producing more will increase profit.<sup>61</sup> If marginal revenue is less than marginal cost, then producing less will increase profit.<sup>62</sup> For a perfectly competitive firm, marginal revenue is equal to price so increasing prices translates into a higher quantity supplied.<sup>63</sup> An upward sloping supply schedule is also depicted in Figure 1.

57. See KARL E. CASE, RAY C. FAIR & SHARON M. OSTER, *PRINCIPLES OF ECONOMICS* 51 (10th ed. 2012) (“[Q]uantity ( $q$ ) is measured along the horizontal axis and *price* ( $P$ ) is measured along the vertical axis.”).

58. *Id.* at 52.

59. *Id.* at 61.

60. Mark Klock, *Unconscionability and Price Discrimination*, 69 TENN. L. REV. 317, 321 (2002).

61. See JACK HIRSHLEIFER, *PRICE THEORY AND APPLICATIONS* 183 (3d ed. 1984) (“[I]f a unit increment of output will increase revenue more than it does cost . . . then the increment should be produced; we are not yet at the profit-maximizing output.”).

62. See *id.* (“If [marginal revenue is less than marginal cost], on the other hand, the last unit caused a decrease in profit so that output has been pushed beyond the optimum.”).

63. See WILLIAM S. BROWN, *PRINCIPLES OF ECONOMICS* 267 (1995) (“This is important: for a pure competitive firm, marginal revenue is equal to selling price.”).

Equilibrium then occurs at the price for which the quantity supplied equals the quantity demanded.<sup>64</sup> Any shock to the system creating an excess supply or an excess demand will result in a price adjustment to restore equilibrium.<sup>65</sup> Thus, competitive market prices are the mechanism by which resources are channeled to their highest-valued use.<sup>66</sup>

One important concept in welfare economics is the concept of Pareto optimality.<sup>67</sup> A resource allocation is said to be Pareto optimal (or Pareto efficient) if no individual can be made better off without making someone else worse off.<sup>68</sup> If it is possible to improve the welfare of someone without making someone else worse off, the allocation is Pareto inferior.<sup>69</sup> Pareto inferior allocations imply that resources are being wasted or not put to their highest-valued use.<sup>70</sup> Obviously, Pareto inferior allocations are undesirable.<sup>71</sup> Fortunately, two important theorems of welfare economics are first, that every competitive equilibrium is Pareto efficient,<sup>72</sup> and second, that any Pareto efficient allocation can be achieved via a competitive equilibrium.<sup>73</sup> These theorems explain why economists frequently prefer market forces to political forces.<sup>74</sup>

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64. See Klock, *supra* note 60, at 320 (“Equilibrium requires that markets clear, or that supply equals demand.”).

65. See VARIAN, *supra* note 34, at 7-8 (explaining why a nonequilibrium price cannot persist).

66. See *id.* at 16 (explaining that a competitive market equilibrium assigns resources to those who place the highest value on them).

67. See *id.* at 15 (“One useful criterion for comparing the outcomes of different economic institutions is a concept known as Pareto efficiency or economic efficiency.”).

68. *Id.*

69. *Id.*

70. *Id.*

71. See *id.* (“If there is a way to make someone better off without hurting anyone else, why not do it?”).

72. See EUGENE SILBERBERG, *THE STRUCTURE OF ECONOMICS: A MATHEMATICAL ANALYSIS* 480 (1978) (“The first theorem is that perfect competition leads to a Pareto-optimal allocation of goods and services.” (emphasis omitted)).

73. See *id.* at 481 (“The second ‘theorem’ of classical welfare economics is the statement that there is an allocation under perfect competition for any overall Pareto optimum.”).

74. See RICHARD W. TRESCH, *PUBLIC FINANCE: A NORMATIVE THEORY* 4 (1981) (“[T]he competitive market economy is seen as the ideal economic system, so much so that competitive market failure is a necessary condition for public sector activity.”).

Another measure of consumer welfare is called consumer surplus.<sup>75</sup> Consumer surplus is the difference between what consumers would have been willing to pay for each unit of a good (the area under the demand curve) and the amount that they actually pay in a competitive market equilibrium.<sup>76</sup> Consumer surplus is represented as the shaded area depicted in Figure 2. It is easily demonstrated that competitive market equilibrium maximizes consumer surplus.<sup>77</sup>

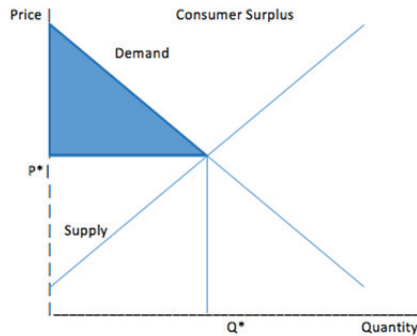


Figure 2. Consumer Surplus

Now, suppose that rather than allowing the market to set a competitive price, politicians opt to set the price. If they happen to set the price at the same level as the competitive market would have, there is no problem.<sup>78</sup> However, if they set the price at any other level, they will necessarily create either shortages or surpluses, and in either case they will lower the economic surplus.<sup>79</sup> The resulting allocation will necessarily be Pareto inferior, meaning that it will be possible to improve the welfare of someone without making anyone

75. EDWIN MANSFIELD, MICROECONOMICS: THEORY/APPLICATIONS 100 (6th ed. 1988) (“Consumer’s surplus is a measure of the net benefit received by the consumer.”).

76. *Id.* at 100-01.

77. See HUBBARD & O’BRIEN, *supra* note 6, at 500 (“Equilibrium in a perfectly competitive market results in the greatest amount of economic surplus . . .” (emphasis omitted)).

78. *Cf.* VARIAN, *supra* note 34, at 13-14 (assuming that rent control prices are set below the competitive market equilibrium price).

79. See HUBBARD & O’BRIEN, *supra* note 6, at 109 (“Anything that causes the market for a good or service not to be in competitive equilibrium reduces the total benefit to society from the production of that good or service.”).

else worse off.<sup>80</sup> The Pareto inferior allocation results from a noncompetitive equilibrium price because either scarce resources are being spent on less valued goods or scarce resources are prevented from flowing into more valued goods.<sup>81</sup> This can be illustrated by considering the special cases of government-set price ceilings and price supports.

Consider the case of a price ceiling first. Suppose some people complain that housing is too expensive and that they cannot afford their rent. Politicians seeking votes might consider bestowing favors upon potential voters by promising rent controls—government enforced laws to keep the price of rental property from going above a certain level.<sup>82</sup> There are two possibilities. First, the politicians could set the price ceiling at or above the competitive market equilibrium in which case the constraint is not binding and the market price prevails.<sup>83</sup> The second possibility is, of course, that the politicians set the ceiling below the competitive market equilibrium in which case they have created a shortage of housing.<sup>84</sup> They are bestowing on a select group (usually existing renters staying put) an opportunity to consume a good below-market price, while making housing unavailable to others.<sup>85</sup> The result is illustrated in Figure 3.

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80. See VARIAN, *supra* note 34, at 17 (discussing Pareto improvements under rent control).

81. See *id.* (explaining that rent control results in resources being allocated to lesser valued uses).

82. R. GLENN HUBBARD, ANNE GARNETT & PHIL LEWIS, *ESSENTIALS OF ECONOMICS* 124 (2d ed. 2013) (“Occasionally, however, consumers succeed in having the government impose a price ceiling, which is a legally determined maximum price that sellers may charge. Rent control is an example of a price ceiling.”).

83. See *id.* at 130-31 (“To affect the market outcome the government must set a price floor that is above the equilibrium price, or set a price ceiling that is below the equilibrium price. Otherwise, the price ceiling or price floor will not be *binding* on buyers and sellers.”).

84. See VARIAN, *supra* note 34, at 14 (noting that this situation will create excess demand meaning that there will be a shortage of units at the legal price).

85. See HUBBARD & O’BRIEN, *supra* note 6, at 115 (“The winners with rent control are the people who are paying less for rent because they live in rent-controlled apartments. . . . The losers from rent control are the . . . renters who are unable to find apartments to rent at the controlled price.”).

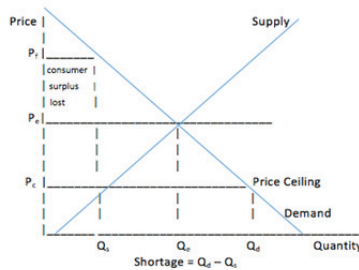


Figure 3. Price Ceiling

The allocation is no longer Pareto optimal because there are displaced potential renters who value the existing stock of rental housing at a higher value than some of the existing renters.<sup>86</sup> Side deals could potentially be made where both groups could be made better off simultaneously.<sup>87</sup> This is economically inefficient, but there is also a set of even uglier secondary effects. The rent control laws create a disincentive to invest in additional housing stock that could alleviate the shortage.<sup>88</sup> Instead, the incentive that is created is to disinvest, which in the case of a fixed stock of housing means to allow the property to depreciate and fall into disrepair—further exacerbating the shortage.<sup>89</sup> This is a major cause of urban decay.<sup>90</sup> Further, the shortage of housing in the rent-controlled city pushes people to live in neighboring jurisdictions without rent control and pushes the rents up in those jurisdictions.<sup>91</sup> This further exacerbates

86. See *id.* at 114 (“Because rent controls cause a shortage of apartments, desperate tenants are often willing to pay landlords rents that are higher than the law allows . . .”).

87. See VARIAN, *supra* note 34, at 16. Professor Varian explains this concept:

Suppose that we think of all voluntary trades as being carried out so that all gains from trade are exhausted. The resulting allocation must be Pareto efficient. If not, there would be some trade that would make two people better off without hurting anyone else—but this would contradict the assumption that all voluntary trades had been carried out.

*Id.*

88. See STIGLITZ, *supra* note 13, at 116 (“[A]partment owners may not wish to construct new ones if they cannot charge enough in rent to cover their costs.”).

89. See *id.* (“Apartments may be abandoned as they deteriorate . . .”).

90. See *id.* (“[T]he quantity of available rental housing will decrease, so that many would-be-residents will be unable to find rental housing in the market.”).

91. See *The High Cost of Rent Control*, NAT’L MULTIFAMILY HOUSING COUNCIL, <http://www.nmhc.org/News/The-High-Cost-of-Rent-Control/> [<https://perma.cc/73H4-F939>] (last visited Oct. 20, 2016) (“[T]he costs of rent controls are not

the problem of affordable housing, and contributes to urban sprawl and traffic congestion.<sup>92</sup>

The other form of price interference common in American politics is the price support, which seeks to maintain price levels above the competitive market equilibrium.<sup>93</sup> Though price supports are popular within farming communities, creating artificially high prices is not economically efficient.<sup>94</sup> The California raisin reserve program is one of these styles of programs.<sup>95</sup> As can be seen from visualizing a price floor in the graph of supply and demand in Figure 3, a price set above the competitive market equilibrium lowers consumer surplus and creates an excess supply of raisins that mirrors the shortage created by a price ceiling.<sup>96</sup> The government must dispose of the excess supply, which is wasteful, and consumers end up paying a higher price for fewer raisins (or other commodities) than they would consume under competitive market equilibrium.<sup>97</sup>

Of course, the ugly secondary effects are there, too. The marginal farmers are now disincentivized to leave farming but continue to produce excessive amounts of the crop that is then

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confined to the political boundaries of those communities that adopt them, but often impose significant costs throughout regional housing markets.”).

92. *See id.* The report states:

Consumers who would otherwise move to smaller or larger homes or closer to their jobs do not do so because they do not want to lose the subsidy. This loss of mobility can be particularly costly to families whose job opportunities are geographically or otherwise limited and who may have to travel long distances to reach those jobs available to them. And for the community at large—including nearby communities that have not themselves imposed rent control—reduced consumer mobility can mean increased traffic congestion and demand for city services, among other costs.

*Id.*

93. *See* HUBBARD & O’BRIEN, *supra* note 6, at 110 (“The Great Depression of the 1930s was the worst economic disaster in U.S. history . . . Farmers were able to convince the federal government to set price floors for many agricultural products. Government intervention in agriculture . . . has continued ever since.”).

94. *See id.* (“[F]armers benefit from this program, but consumers lose. . . . [A] price floor reduces economic efficiency.”).

95. *See generally* Horne v. Dep’t of Agric., 750 F.3d 1128, 1133-34 (9th Cir. 2014), *rev’d*, 135 S. Ct. 2419 (2015) (providing background on the history of the raisin price support program).

96. *See* HUBBARD & O’BRIEN, *supra* note 6, at 110.

97. *See id.* at 110-11.

disposed of by the government.<sup>98</sup> In the competitive market equilibrium, less would be produced, but consumers would get more and pay lower prices.<sup>99</sup> Resources would be shifted to more valuable uses.<sup>100</sup> The interference with the price mechanism for allocating resources prevents resources from being channeled from less valuable uses to more valuable uses by providing a strong incentive to keep the resources engaged in the production of less valued commodities.<sup>101</sup> One might hope that the severe water shortage in California would cause people to reevaluate the rationality of these agricultural price support programs that perpetuate the overproduction (and wasted water) on certain favored crops.<sup>102</sup> That background will now make it easier to understand the underlying facts in *Horne* and to understand the compensation arguments of the Justices in their analyses of the case.

### III. THE *HORNE* DECISION

#### A. Facts of the Case

Under the U.S. Department of Agriculture's California Raisin Order, a raisin grower must set aside a portion of his or her crop for the government free of charge.<sup>103</sup> The government removes those raisins from the competitive market to decrease the available supply and artificially increase the market price of raisins for the benefit of raisin producers.<sup>104</sup> The question before the Court was whether the Fifth Amendment's Takings Clause prohibits the government from

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98. *See id.* at 111 (discussing the large surpluses of agricultural products that have been bought by the federal government as a result of farm support programs).

99. *Id.* at 110.

100. *See id.* (“[T]he price floor has caused the marginal benefit of the last bushel of wheat to be greater than the marginal cost of producing it.”).

101. *See* EDWIN G. DOLAN, BASIC ECONOMICS 499 (3d ed. 1983) (“[G]enerous subsidies do not encourage the orderly withdrawal of resources from farming or even the orderly transfer of resources from heavily subsidized crops (such as wheat) to other valuable crops (such as soybeans) that traditionally pay their own way.”).

102. *See* Frankel, *supra* note 33 (“The current predicament has been exacerbated by decades of allowing groundwater usage to be essentially unmanaged . . .”).

103. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2424 (2015).

104. *See id.* (“The Agricultural Marketing Agreement Act of 1937 authorizes the Secretary of Agriculture to promulgate ‘marketing orders’ to help maintain stable markets for particular agricultural products.”).



imposing its requirement of surrendering a portion of a farmer's raisin crop without just compensation.<sup>105</sup>

The Agricultural Marketing Agreement Act of 1937 authorized the Secretary to promulgate marketing orders to maintain stable markets for certain agricultural commodities.<sup>106</sup> The Secretary also appointed members of the Raisin Administrative Committee, "a Government entity composed largely of growers and others in the raisin business," who set the percentage of raisins required to be turned over to the government annually.<sup>107</sup> In 2002-2003, the Committee set the percentage at 47%; for the next year it was 30%.<sup>108</sup>

The raisins claimed by the government are called "reserve raisins," and the remaining portion is called "free-tonnage raisins."<sup>109</sup> Raisin farmers usually ship all of their raisins to a "handler" who then separates the free-tonnage raisins from the reserve raisins.<sup>110</sup> The handlers pack and sell the free-tonnage raisins and pay the farmers for these.<sup>111</sup> The Raisin Committee takes title to the reserve raisins and has the discretion to determine how to dispose of them.<sup>112</sup> According to the Court, "[The Raisin Committee] sells them in noncompetitive markets, for example to exporters, federal agencies, or foreign governments; donates them to charitable causes; releases them to growers who agree to reduce their raisin production; or disposes of them by 'any other means' consistent with the purposes of the raisin program."<sup>113</sup>

Chief Justice Roberts explained that:

Proceeds from Committee sales are principally used to subsidize handlers who sell raisins for export (not including the Hornes, who are not raisin exporters). Raisin growers retain an interest in any net proceeds from sales the Raisin Committee makes, after deductions for the export subsidies and the Committee's administrative expenses. In the years at issue in this case, those proceeds were less than the cost of producing the crop one year, and nothing at all the next.<sup>114</sup>

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105. *Id.* at 2425.

106. *Id.* at 2424.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

The Hornes are a family that both grows raisins and handles raisins.<sup>115</sup> Chief Justice Roberts described the Hornes' conduct that resulted in their dispute with the government: "In 2002, the Hornes refused to set aside any raisins for the Government, believing they were not legally bound to do so. The Government sent trucks to the Hornes' facility at eight o'clock one morning to pick up the raisins, but the Hornes refused entry."<sup>116</sup> The government subsequently fined the Hornes \$480,000 based on the market value of the reserve raisins plus an additional civil penalty of a little more than \$200,000 for failure to comply with the order to surrender the raisins.<sup>117</sup>

As a defense to the fine, the Hornes argued that the raisin reserve requirement was an unconstitutional taking.<sup>118</sup> The government argued that the lower courts lacked jurisdiction to decide the constitutional question.<sup>119</sup> That issue was appealed to the Supreme Court, which rejected the government's contention and remanded the case back to the Ninth Circuit to address the Hornes' argument on the merits.<sup>120</sup>

The Court of Appeals agreed with the Horne family that the legality of the fine rode on the constitutionality of the raisin reserve requirement.<sup>121</sup> According to the Supreme Court, the Ninth Circuit "considered whether that requirement was a physical appropriation of property, giving rise to a *per se* taking, or a restriction on a raisin grower's use of his property, properly analyzed under the more flexible and forgiving standard for a regulatory taking."<sup>122</sup> The Ninth Circuit rejected the Hornes' argument finding that the Takings Clause provides less protection to personal property than real property and holding that because growers keep an interest in the revenue from the sale of reserve raisins the Hornes "are not completely divested of their property rights."<sup>123</sup>

The Court of Appeals classified the reserve requirement as a use restriction akin to the grant of a land use permit subject to a government condition.<sup>124</sup> In similar permit cases, the government

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115. *Id.*

116. *Id.*

117. *Id.* at 2425.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

imposes a condition in exchange for conferring a benefit.<sup>125</sup> The court saw the reserve requirement as the condition exchanged for the benefit of an orderly raisin market.<sup>126</sup> Because the Horne family could avoid the condition by not planting raisins, the court classified the reserve requirement as “a proportional response to the Government’s interest in ensuring an orderly raisin market, and not a taking under the Fifth Amendment.”<sup>127</sup> The Hornes appealed to the U.S. Supreme Court, and the Court granted certiorari.<sup>128</sup>

## B. The Majority Opinion

The Court held the raisin reserve requirement to be an unconstitutional *per se* taking and excused the Hornes’ fine.<sup>129</sup> Chief Justice Roberts delivered the majority opinion, which Justices Scalia, Kennedy, Thomas, and Alito fully joined.<sup>130</sup> Justice Thomas also wrote a brief concurring opinion to add an additional point consistent with the holding.<sup>131</sup> Justices Breyer, Ginsburg, and Kagan concurred with most of the majority’s analysis, but dissented from the final argument and the result.<sup>132</sup> Justice Sotomayor dissented from all of the majority’s holdings.<sup>133</sup>

The Court made four inquiries.<sup>134</sup> The first inquiry was whether the government’s categorical duty to provide just compensation under the Fifth Amendment when there has been a physical taking of property applied only to real property and not personal property.<sup>135</sup> The Court answered no.<sup>136</sup> The second question was whether the government may avoid the duty to pay just compensation “by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government’s discretion.”<sup>137</sup> The

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125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *See id.* at 2433 (“[T]he Hornes should simply be relieved of the obligation to pay the fine and associated civil penalty they were assessed when they resisted the Government’s effort to take their raisins.”).

130. *Id.* at 2423.

131. *Id.*

132. *Id.*

133. *Id.*

134. *See id.* at 2425-32 (discussing four questions presented).

135. *Id.* at 2425.

136. *Id.*

137. *Id.* at 2428.

Court answered no to this.<sup>138</sup> Third, the Court asked “[w]hether a governmental mandate to relinquish specific, identifiable property as a ‘condition’ on permission to engage in commerce effects a per se taking.”<sup>139</sup> The Court answered yes,<sup>140</sup> and the partial dissent agreed with the majority on all three of these questions.<sup>141</sup>

The final argument, where the Court split more deeply, was whether the benefit of better market prices for the free-tonnage raisins might provide adequate compensation for taking the reserve raisins.<sup>142</sup> The partial dissent argued that the case should be remanded for a determination of this question.<sup>143</sup> The majority believed the law of just compensation would require fair market value at the time of the taking.<sup>144</sup>

The majority set the tone for its analysis of this case with the first question.<sup>145</sup> Is the raisin reserve requirement a government taking of property (per se) or a mere land use restriction (a regulatory taking)?<sup>146</sup> The Court found this to be a simple question.<sup>147</sup> Quoting from *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court stated, “[T]he ‘classic taking [is one] in which the government directly appropriates private property for its own use.’”<sup>148</sup> The Court considered whether the classical taking applies only to real property and not to personal property and concluded no, reasoning:

138. *Id.*

139. *Id.* at 2430.

140. *Id.*

141. *See id.* at 2433 (Breyer, J., concurring in part and dissenting in part) (“I agree with Parts I and II of the Court’s opinion. However, I cannot agree with the Court’s rejection, in Part III, of the Government’s final argument.”).

142. *See id.* at 2432 (majority opinion) (“The Government contends that the calculation [of compensation] must consider what the value of the reserve raisins would have been without the price support program . . .”).

143. *Id.* at 2436 (Breyer, J., concurring in part and dissenting in part).

144. *See id.* at 2432 (majority opinion) (“The Court has repeatedly held that just compensation normally is to be measured by ‘the market value of the property at the time of the taking.’” (quoting *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984))).

145. *See id.* at 2425-28 (discussing the history of the Takings Clause).

146. *See id.* at 2427-28 (describing the difference between a direct appropriation of property and a land use restriction).

147. *See id.* at 2428 (“The reserve requirement imposed by the Raisin Committee is a clear physical taking. Actual raisins are transferred from the growers to the Government. Title to the raisins passes to the Raisin Committee.”).

148. *Id.* at 2425 (quoting *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 324 (2002)).

Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.<sup>149</sup>

The Court discussed the history of the clause noting that it applies to “private property” without distinguishing different types of property.<sup>150</sup> Moreover, the principle has origins at least 800 years old reflected in the Magna Carta of 1215, which “specifically protected agricultural crops from uncompensated takings.”<sup>151</sup> The Court noted that the colonists brought the Magna Carta principles with them and specifically referenced early laws in the colonies of Massachusetts, Virginia, and South Carolina that prohibited governmental taking of agricultural goods or necessities without fair compensation.<sup>152</sup> Furthermore, early during the Revolutionary War, the New York Legislature adopted a law providing for compensation for the impressment of horses and carriages among other things.<sup>153</sup> The Court wrote:

According to the author of the first treatise on the Constitution, St. George Tucker, the Takings Clause was “probably” adopted in response to “the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatever.”<sup>154</sup>

To further support the argument that the takings rule applies to personal property, the Court cited its 1882 decision in *James v. Campbell*, which concerned an alleged governmental appropriation of a patent and held that the government could no more use the patented invention without just compensation than it could use private land.<sup>155</sup>

The Court attributed confusion about the Takings Clause to more modern times.<sup>156</sup> Prior to 1922, the Takings Clause “was

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149. *Id.* at 2426.

150. *See id.* (“It protects ‘private property’ without any distinction between different types.”).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* (quoting I WILLIAM BLACKSTONE, COMMENTARIES 305-06 app. (1803)).

155. *Id.* at 2427 (quoting *James v. Campbell*, 104 U.S. 356, 358 (1882)).

156. *See id.* (“The Ninth Circuit based its distinction between real and personal property on this Court’s discussion in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), a case involving extensive limitations on the use of shorefront property.”).

understood to provide protection only against a direct appropriation of property—personal or real.”<sup>157</sup> In 1922, the Court decided the well-known and often cited *Pennsylvania Coal Co. v. Mahon*, which held that a use restriction on property that went too far could be a “regulatory taking” requiring compensation.<sup>158</sup> In *Pennsylvania Coal*, the company held mining rights.<sup>159</sup> The Commonwealth of Pennsylvania passed a law that effectively barred mining underneath structures, which made the company’s land interest worthless, and the Court held that the law was an unconstitutional taking.<sup>160</sup> Justice Holmes wrote the majority opinion and noted, “[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>161</sup>

The present Court observed that there have been some distinctions between real property and personal property in the context of regulatory takings, but concluded, “The different treatment of real and personal property in a regulatory case suggested by *Lucas* did not alter the established rule of treating direct appropriations of real and personal property alike.”<sup>162</sup> *Lucas* was the 1992 case that decided that a regulation prohibiting building on beachfront property could be a taking.<sup>163</sup> The Court also cited its language in *Tahoe-Sierra Preservation Council* stating that it is “inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a ‘regulatory taking,’ and vice versa.”<sup>164</sup>

The distinction between a per se taking and a regulatory taking is that a regulatory taking requires an analysis of whether the interference in the property right goes too far, whereas a direct appropriation of property does not require any such analysis.<sup>165</sup>

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157. *Id.*

158. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

159. *Id.* at 412.

160. *Id.*

161. *Id.* at 415.

162. *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2427-28 (2015).

163. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (“[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”).

164. *Horne*, 135 S. Ct. at 2428 (citing *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 323 (2002)).

165. *See id.* at 2427 (“Our cases have stressed the ‘longstanding distinction’ between government acquisitions of property and regulations . . .” (quoting *Tahoe-Sierra Pres. Council*, 535 U.S. at 323)).

Oddly enough, both sides rely on the 1982 *Loretto* decision to support their theories.<sup>166</sup> There the Court invalidated a statute that required landlords to permit cable television companies to install equipment on the landlords' premises.<sup>167</sup> Although the occupation was small, no inquiry into whether the taking went too far was permitted because it involved a physical taking of real property.<sup>168</sup> The *Horne* majority wrote, "That reasoning—both with respect to history and logic—is equally applicable to a physical appropriation of personal property."<sup>169</sup> On the other hand, Justice Sotomayor's dissenting opinion argued that the *Loretto* rule does not apply when the property owner continues to retain "some property right" such as the right to the net proceeds of the reserve raisins.<sup>170</sup>

The majority countered this argument with the argument that title to the reserve raisins passed to the Raisin Committee.<sup>171</sup> The Committee was permitted to dispose of the raisins as it wished as long as it was consistent with the purposes of the USDA's marketing order.<sup>172</sup> The majority wrote:

Raisin growers subject to the reserve requirement thus lose the entire "bundle" of property rights in the appropriated raisins—"the rights to possess, use and dispose of" them—with the exception of the speculative hope that some residual proceeds may be left when the Government is done with the raisins and has deducted the expenses of implementing all aspects of the marketing order.<sup>173</sup>

The Court viewed this as an unquestionable direct appropriation and per se taking.<sup>174</sup> The Court next addressed the question as to whether the compensation requirement in a taking can

166. Compare *id.* at 2426 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-35 (1982), to support the proposition that an appropriation of real property is a per se taking requiring just compensation), with *id.* at 2437 (Sotomayor, J., dissenting) (citing *Loretto*, 458 U.S. at 435, for the proposition that a per se taking requires the destruction of all rights).

167. See *Loretto*, 458 U.S. at 438-39.

168. See *id.* at 436 ("[C]onstitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.").

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

170. *Id.* at 2437-39 (Sotomayor, J., dissenting).

171. See *id.* at 2428 (majority opinion).

172. See *id.* ("The Committee disposes of what become its raisins as it wishes, to promote the purposes of the raisin marketing order.").

173. *Id.* (quoting *Loretto*, 458 U.S. at 435).

174. See *id.* ("The Government's formal demand that the Hornes turn over a percentage of their raisin crop without charge, for the Government's control and use, is 'of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine.'" (quoting *Loretto*, 458 U.S. at 432)).

be avoided “by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government’s discretion.”<sup>175</sup> The Court’s simple answer was no, again relying on the reasoning in *Loretto*.<sup>176</sup> When there has been a physical taking of the property, there is no inquiry into the extent of the reduction in value.<sup>177</sup> Although the underlying intrusion in the *Loretto* case was small—installation of a small cable box on the roof of a large apartment building—it constituted a *per se* taking, which constitutionally invokes a compensation requirement.<sup>178</sup> Here in *Horne*, the government’s possession of the reserve raisins renders any argument that the Hornes retained a partial interest in the property irrelevant.<sup>179</sup> Even the three Justices who dissented in part agreed with this portion of the Court’s analysis.<sup>180</sup> According to all but one Justice, once there has been a physical appropriation of the property, any analysis based on regulatory takings is irrelevant other than for a determination of the magnitude of compensation.<sup>181</sup> Compensation is required in order for the taking to be constitutional.<sup>182</sup> And because the raisin reserve program is

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175. *Id.*

176. *See id.* at 2428-29 (citing *Loretto*, 458 U.S. at 430, 436) (“For example, in *Loretto*, we held that the installation of a cable box on a small corner of *Loretto*’s rooftop was a *per se* taking, even though she could of course still sell and economically benefit from the property.”).

177. *See Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002) (“When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.” (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951))).

178. *See Loretto*, 458 U.S. at 436-37 (“[C]onstitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.”).

179. *See Horne*, 135 S. Ct. at 2429 (“[W]hen there has been a physical appropriation, ‘we do not ask . . . whether it deprives the owner of all economically valuable use’ of the item taken.” (alteration in original) (quoting *Tahoe-Sierra Pres. Council*, 535 U.S. at 323)).

180. *See id.* at 2433 (Breyer, J., concurring in part and dissenting in part) (“I agree with Parts I and II of the Court’s opinion.”).

181. *See id.* (questioning only the calculation of just compensation).

182. *See id.* at 2426 (majority opinion) (“The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.”).



unconstitutional, the fines levied for violation of the program are unenforceable.<sup>183</sup>

The third question considered by the Court was “[w]hether a governmental mandate to relinquish specific, identifiable property as a ‘condition’ on permission to engage in commerce effects a per se taking.”<sup>184</sup> The Court answered that in the case before it, the answer was yes.<sup>185</sup> The argument advanced by the government was that the raisin reserve requirement was not a taking because the Hornes voluntarily chose to grow raisins, and they had the option to grow some other crop instead if they did not like the requirement.<sup>186</sup> Thus, there was an argument that this was merely a condition on the government’s grant of permission to use the Hornes’ land to grow raisins.<sup>187</sup>

The Court was not impressed with this argument, observing that a similar argument was advanced and rejected in *Loretto*.<sup>188</sup> There it had been argued that if landlords did not want cable boxes installed on their property, they could cease renting their units.<sup>189</sup> The *Loretto* Court held that “a landlord’s ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation.”<sup>190</sup> The Court explained that a contrary holding would simply go too far:

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183. See *id.* at 2433 (“[T]he Hornes should simply be relieved of the obligation to pay the fine and associated civil penalty they were assessed when they resisted the Government’s effort to take their raisins.”).

184. *Id.* at 2430.

185. See *id.*

186. See *id.* (quoting Brief for the Respondent at 32, *Horne*, 135 S. Ct. 2419 (2015) (No. 14-275)).

187. See *id.* (“[A] landlord’s ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation.” (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982))).

188. See *id.* (“In *Loretto*, we rejected the argument that the New York law was not a taking because a landlord could avoid the requirement by ceasing to be a landlord.”).

189. See *Loretto*, 458 U.S. at 439 n.17. The Court observed:

Teleprompter notes that the law applies only to buildings used as rental property, and draws the conclusion that the law is simply a permissible regulation of the use of real property. We fail to see, however, why a physical occupation of one type of property but not another type is any less a physical occupation.

*Id.* at 438-39.

190. *Id.* at 439 n.17.

For example, it would allow the government to require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices.<sup>191</sup>

The Court observed that the dissent and government both relied heavily on *Ruckelshaus v. Monsanto Co.*, which held that the Environmental Protection Agency could require companies to disclose information, including trade secrets, as a condition of being allowed to sell dangerous chemicals.<sup>192</sup> The Court summarily dismissed the application of this case stating,

The taking here cannot reasonably be characterized as part of a similar voluntary exchange. In one of the years at issue here, the Government insisted that the Hornes turn over 47 percent of their raisin crop, in exchange for the “benefit” of being allowed to sell the remaining 53 percent. The next year, the toll was 30 percent. We have already rejected the idea that *Monsanto* may be extended by regarding basic and familiar uses of property as a “Government benefit” on the same order as a permit to sell hazardous chemicals. Selling produce in interstate commerce, although certainly subject to reasonable government regulation, is similarly not a special governmental benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection. Raisins are not dangerous pesticides; they are a healthy snack. A case about conditioning the sale of hazardous substances on disclosure of health, safety, and environmental information related to those hazards is hardly on point.<sup>193</sup>

The fourth and final argument considered by the Court was that the case should be remanded for a calculation as to what the Hornes’ raisins would have been worth without the raisin reserve program.<sup>194</sup> The government’s argument here was that the benefit the Hornes received from a higher price for their free-tonnage raisins likely (it was asserted without any evidence) exceeded the value that the entire raisin crop (reserve and free-tonnage combined) would have been worth without the raisin reserve program.<sup>195</sup> On this point, the Court split 5–4.<sup>196</sup>

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191. *Id.*

192. *Horne*, 135 S. Ct. at 2430 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 985, 1008 (1984)).

193. *Id.* at 2430-31.

194. *See id.* at 2431-32 (“Finally, the Government briefly argues that if we conclude that the reserve requirement effects a taking, we should remand for the Court of Appeals to calculate [compensation] . . .”).

195. *See id.* at 2432 (“The Government contends that the calculation must consider what the value of the reserve raisins would have been without the price

The majority dismissed this argument, noting that the government cited no precedent for this hypothetical approach “or its notion that general regulatory activity such as enforcement of quality standards can constitute just compensation for a specific physical taking.”<sup>197</sup> The majority did note that the dissenting opinions cited cases with some concern that *Horne* might limit a condemning authority’s ability to offset compensation for a partial taking by deducting the increased value for the remaining property, for example, when land is taken to construct a road which makes the remaining land more valuable by virtue of its accessibility.<sup>198</sup> The majority dismissed these cases as being off point and not creating any exception to the general rule that the appropriate measure of compensation in a per se taking is the fair market value at the time of the taking.<sup>199</sup> The majority also refuted the dissenting opinions with the observation that the government did not cite any of their cases, which further suggests that they are not on point.<sup>200</sup>

The majority’s most compelling argument on this point was its simplest argument. The Court quoted itself: “The Court has repeatedly held that just compensation normally is to be measured by ‘the market value of the property at the time of the taking.’”<sup>201</sup> Furthermore, the government set the market value of the taken property when it assessed the Hornes with a fine.<sup>202</sup> The Court said, “The Government cannot now disavow that valuation.”<sup>203</sup> The majority concluded:

There is accordingly no need for a remand; the Hornes should simply be relieved of the obligation to pay the fine and associated civil penalty they were assessed when they resisted the Government’s effort to take their raisins. This case, in litigation for more than a decade, has gone on long enough.<sup>204</sup>

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support program . . . [A]ccording to the Government, the Hornes would ‘likely’ have a net gain under this theory.” (quoting Brief for the Respondent at 56, *Horne*, 135 S. Ct. 2419 (2015) (No. 14-275)).

196. *See generally id.* at 2423-43 (majority opinion joined by five Justices, partial dissent of three Justices dissenting on this point, and dissent of Justice Sotomayor).

197. *Id.* at 2432.

198. *See id.*

199. *See id.*

200. *See id.*

201. *Id.* (quoting *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984)).

202. *See id.* at 2433.

203. *Id.*

204. *Id.*

### C. The Dissenting Opinion

Justice Sotomayor dissented from all of the majority's holdings.<sup>205</sup> She first argued that the raisin reserve requirement should not be seen as a taking of the raisins, but rather as a use restriction on the land used to produce the raisins.<sup>206</sup> Based on this view of the substance of the transactions, she would have upheld the raisin reserve program as a regulatory use restriction.<sup>207</sup> She essentially argued that because the government could achieve its goal by restricting the growing of raisins, it should also be able to take a portion of the crop.<sup>208</sup> Justice Sotomayor wrote:

[W]hat makes the Court's twisting of the doctrine even more baffling is that it ultimately instructs the Government that it can permissibly achieve its market control goals by imposing a quota without offering raisin producers a way of reaping any return whatsoever on the raisins they cannot sell. I have trouble understanding why anyone would prefer that.<sup>209</sup>

The majority retorted:

A physical taking of raisins and a regulatory limit on production may have the same economic impact on a grower. The Constitution, however, is concerned with means as well as ends. The Government has broad powers, but the means it uses to achieve its ends must be "consist[ent] with the letter and spirit of the constitution."<sup>210</sup>

Justice Sotomayor's dissent also argued vociferously that no *per se* taking of the raisins occurred because the Hornes retained a

205. See *id.* at 2443 (Sotomayor, J., dissenting) ("I would affirm the judgment of the Ninth Circuit.").

206. See *id.* at 2440 ("[T]he government may require certain property rights to be given up as a condition of entry into a regulated market without effecting a *per se* taking.").

207. See *id.* at 2441 ("[T]he Government may condition the ability to offer goods in the market on the giving-up of certain property interests without effecting a *per se* taking. The [Raisin] Order is a similar regulation.").

208. See *id.* at 2443. Justice Sotomayor wrote:

The Hornes and the Court both concede that a cap on the quantity of raisins that the Hornes can sell would not be a *per se* taking. . . . I know of no principle, however, providing that if the Government achieves a permissible regulatory end by asking regulated individuals or entities to physically move the property subject to the regulation, it has committed a *per se* taking rather than a potential regulatory taking.

*Id.*

209. *Id.*

210. *Id.* at 2428 (quoting *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)).

right to net proceeds from the reserve raisins.<sup>211</sup> She argued that if any right was retained, however small, no direct appropriation of property has occurred.<sup>212</sup> This is an implausible argument because it implies that the government could appropriate any property if it leaves with the owner the right to collect one dollar per year in rent in perpetuity.<sup>213</sup> Surely we have not endured more than 200 years of constitutional jurisprudence to only just learn that the Takings Clause can be so easily circumvented. In short, it is very difficult to reconcile Justice Sotomayor's views that the law in *Loretto* requiring landlords to permit cable companies to install equipment on their rooftops is a taking, but that the taking of a large portion of a raisin crop with a speculative contingent interest in the net proceeds is not a taking.

#### D. The Partial Dissent

Justice Breyer wrote an opinion concurring in part and dissenting in part with whom Justices Ginsburg and Kagan joined.<sup>214</sup> They agreed with the majority on the first three questions—that the reserve requirement is a taking requiring just compensation rather than a regulatory restriction, that compensation cannot be avoided by providing a contingent interest, and that the government cannot condition the Hornes' right to grow and sell raisins on surrendering a portion of the crop.<sup>215</sup> They disagreed with the fourth issue, whether the higher value that the Hornes received for their free-tonnage raisins through the reserve program could provide the just compensation required for the raisins taken.<sup>216</sup>

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211. See *id.* at 2438-39 (Sotomayor, J., dissenting) (“The Hornes, however, retain at least one meaningful property interest in the reserve raisins: the right to receive some money for their disposition.”).

212. See *id.* at 2440 (“The fact that at least one property right is not destroyed by the Order is alone sufficient to hold that this case does not fall within the narrow confines of *Loretto*.”).

213. Cf. *id.* at 2439 (“Granted, this equitable distribution may represent less income than what some or all of the reserve raisins could fetch if sold in an unregulated market. In some years, it may even turn out (and has turned out) to represent no net income.”).

214. *Id.* at 2433 (Breyer, J., concurring in part and dissenting in part).

215. See *id.* (“I agree with Parts I and II of the Court’s opinion.”).

216. See *id.* (“The Government contends that we should remand the case for a determination of whether any compensation would have been due if the Hornes had complied with the California Raisin Marketing Order’s reserve requirement. In my view, a remand for such a determination is necessary.”).

These Justices cited cases involving partial takings where the government took a portion of a parcel of land, and in calculating the just compensation constitutionally required, the government was entitled to offset any enhanced value in the land not taken.<sup>217</sup> Examples include taking land for the construction of roads or waterways or flood control, which left the untaken land improved and more valuable.<sup>218</sup> The difference between Justice Breyer's analysis and Justice Roberts's is that Justice Breyer viewed the raisin reserve requirement as a partial taking of the entire raisin crop, whereas Justice Roberts viewed it as a complete taking of the reserve raisins.<sup>219</sup> Given that raisins are a fungible good and lack the attributes of real property,<sup>220</sup> I would argue that Justice Roberts has the more logical view. Certainly his perspective simplifies the law and keeps the calculations realistic rather than hypothetical and speculative.<sup>221</sup>

#### IV. ECONOMIC ANALYSIS OF *HORNE*

##### A. The Private Nature of Price Supports

As far as economic policy goes, the raisin reserve program is bad policy.<sup>222</sup> It is a price support program intended to benefit raisin growers at the expense of consumers.<sup>223</sup> It creates a wedge between

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217. See *id.* at 2434-35.

218. See *id.*

219. Compare *id.* at 2434 (“When the Government takes as reserve raisins a percentage of the annual crop, the raisin owners retain the remaining, free-tonnage, raisins.”), with *id.* at 2428 (majority opinion) (“Raisin growers subject to the reserve requirement thus lose the entire ‘bundle’ of property rights in the appropriated raisins . . .”).

220. See *id.* at 2439 (Sotomayor, J., dissenting) (“[T]he property at issue is a fungible commodity for sale . . .”).

221. See *id.* at 2432 (majority opinion) (“[O]ur cases have set forth a clear and administrable rule for just compensation . . .”).

222. See STIGLITZ, *supra* note 13, at 113. Professor Stiglitz writes:

[A]s powerful as governments may be, they can no more repeal the law of supply and demand than they can repeal the law of gravity. When they interfere with its working, the forces of supply and demand will not be balanced. There will either be excess supply or excess demand. Shortages and surpluses create problems of their own, often worse than the original problem the government was supposed to resolve.

*Id.*

223. See *Horne*, 135 S. Ct. at 2434 (Breyer, J., concurring in part and dissenting in part) (“The reserve requirement is intended, at least in part, to enhance the price that free-tonnage raisins will fetch on the open market.”).

the marginal cost of the last raisin produced and the marginal value of the last raisin consumed that prevents the achievement of a Pareto efficient equilibrium.<sup>224</sup> Hence, the resulting allocation is not Pareto efficient and there are wasted resources.<sup>225</sup> In other words, consumers lose more than raisin producers gain.<sup>226</sup> It is analogous to transferring wealth from consumers to producers, using a leaking bucket to do so.<sup>227</sup>

Economic policy does not trump the law.<sup>228</sup> But our law is deeply rooted in economic theory.<sup>229</sup> Contract law has developed based on the axiom that free markets and freedom to contract increase prosperity.<sup>230</sup> Good law is consistent with good economic policy, and good law is inconsistent with bad economic policy.<sup>231</sup> As Justice Thomas pointed out in his concurring opinion, the Court had

224. See HUBBARD & O'BRIEN, *supra* note 6, at 110 (“[T]he price floor has caused the marginal benefit of the last bushel of wheat [consumed] to be greater than the marginal cost of producing it.”).

225. See *id.* (“We can conclude that a price floor reduces economic efficiency.”).

226. See *id.* (describing the deadweight loss resulting from consumers losing more than what farmers gain).

227. See ARTHUR M. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF 91 (1975) (drawing the analogy of the tradeoff to taking from the poor to give to the rich, but carrying the money in a leaky bucket; the amount of leakage is the loss in efficiency).

228. See, e.g., Irma S. Russell, *The Scholarship of Cass Sunstein: Measure for Measure: Cost-Benefit Analysis and Environmental Policy*, 43 TULSA L. REV. 891, 919 (2008) (“The existence of an economic template does not trump laws, and laws often include judgments about moral choice. Economics does not deprive sources of law of the power to alter the cost-benefit analysis.”).

229. See generally ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 277-79 (6th ed. 2012) (describing the economic foundations of contract law).

230. Cf. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 25-26 (5th ed. 1789). Mr. Smith wrote:

Whoever offers to another a bargain of any kind, proposes to do this: Give me that which I want, and you shall have this which you want, is the meaning of every such offer; and it is in this manner that we obtain from one another the far greater part of those good offices which we stand in need of. It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest.

*Id.*

231. Cf. Roger C. Bern, “Terms Later” Contracting: *Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law*, Judge Easterbrook Notwithstanding, 12 J.L. & POL’Y 641, 717 (2004) (“Law and economics is supposed to be able to predict and thus produce good policy for society, giving the supposed justification for courts operating from an *ex ante* perspective informed by economic reality to create policy.”).

an opportunity to more closely align the law with good economic policy by tying the constitutionality of takings with the requirement that there be a public use, and he noted that keeping the price of an agricultural commodity artificially high certainly contains no public benefit.<sup>232</sup> The raisin reserve program was intended to confer a private benefit on a narrow class at public expense.<sup>233</sup> As Justice Thomas wrote:

The Takings Clause prohibits the government from taking private property except “for public use,” even when it offers “just compensation.” That requirement, as originally understood, imposes a meaningful constraint on the power of the state . . . . It is far from clear that the Raisin Administrative Committee’s conduct meets that standard. It takes the raisins of citizens and, among other things, gives them away or sells them to exporters, foreign importers, and foreign governments.<sup>234</sup>

There is another important economic point to be made regarding the partial dissent written by Justice Breyer. He would uphold the constitutionality of the raisin reserve program precisely when it would be most disruptive to markets. To see this, it is useful to understand the economist’s concept of elasticity. The demand for a good is said to be relatively elastic when a small change in price causes a large change in the quantity demanded,<sup>235</sup> and the good is inelastic if a large change in price causes only a small change in quantity demanded.<sup>236</sup> Gasoline is a standard example of an inelastic good.<sup>237</sup> Justice Breyer thought that the case should be remanded to assess what the Hornes would have earned without price supports.<sup>238</sup>

232. See *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2433 (2015) (Thomas, J., concurring) (explaining why the government’s taking of the raisins is not for a public use).

233. See *id.* (“To the extent that the Committee is not taking the raisins ‘for public use,’ having the Court of Appeals calculate ‘just compensation’ in this case would be a fruitless exercise.”).

234. *Id.*

235. See *VARIAN, supra* note 34, at 276 (“An elastic demand curve is one for which the quantity demanded is very responsive to price . . .”).

236. See *id.* (explaining that demand is inelastic when the percentage change in demand is less than the percentage change in price).

237. See *HUBBARD & O’BRIEN, supra* note 6, at 190 (explaining that increasing the tax on gasoline will increase tax revenue because demand for gasoline is inelastic).

238. The only way the Hornes could be better off with the price support is if their revenue for selling a smaller quantity of raisins at a higher price is larger. This can only happen if the demand curve is inelastic. See *VARIAN, supra* note 34, at 279 (“Thus revenue increases when price increases if the elasticity of demand is less than 1 in absolute value.”).



But Breyer's reasoning would tend to uphold takings based on the elasticity of the goods: the more inelastic the good, the more likely the taking would be upheld. Yet the more inelastic the good, the more government interference with prices disrupts the market.<sup>239</sup>

Assume that Justice Breyer's arguments had prevailed and the case was remanded for a factual determination of the question as to whether the higher price received for free-tonnage raisins more than offset the loss in the value of the reserve raisins. To keep the arithmetic simple, suppose that the reserve raisin requirement was 50% and that the court found that market prices under the program were more than double what they would be without the program. By obtaining prices that are more than twice as high for half the crop, the growers are better off with the program. But what kind of policy sense does such an outcome make? Clearly, it makes no sense at all. As an aside, it is highly unlikely that raisins are this inelastic as there are plenty of other foods for people to eat.<sup>240</sup> Reducing the quantity available on the market will increase the price, but not by so much that the increased revenue from the higher price will more than offset the lost revenue from the reserve raisins.<sup>241</sup>

## B. Antitrust Analogies

If the raisin growers were to collude to withhold raisins from the market to inflate prices, then we would have a clear violation of the antitrust laws.<sup>242</sup> It is not rational to permit the U.S. Department of Agriculture to enable raisin growers to do something that would clearly be illegal if they did it on their own.<sup>243</sup>

This brings us to the most compelling economic argument against the raisin reserve program—it is a government created

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239. See generally *id.* at 279-80 (describing how the 1979 United Farm Workers strike resulted in a 50% reduction in supply but a 400% increase in price).

240. See *id.* at 277 ("If a good has many close substitutes, we would expect that its demand curve would be very responsive to its price changes.").

241. See *id.* at 279 ("[R]evenue decreases when price increases if the elasticity of demand is greater than 1 in absolute value.").

242. See STIGLITZ, *supra* note 13, at 366 ("[B]oth state and federal governments have passed antitrust laws prohibiting collusive behavior. This makes it impossible for firms to get together and sign legally binding contracts that would require each firm to keep output low and prices high.").

243. Cf. *id.* (describing how removal of New York state government protection of New York dairy producers benefited New York's public consumers).

monopoly.<sup>244</sup> Why do the antitrust laws exist? They exist to protect consumers from the exercise of monopoly power.<sup>245</sup> There is no rational argument that creating a monopoly in the raisin market benefits the public.<sup>246</sup> This is far worse than the government intruding on the interests of the few to protect the interests of the many. This is the government intruding on the interests of many consumers to protect the interests of a few raisin growers.<sup>247</sup> When examining the big picture of what the raisin reserve requirement is actually doing, it is baffling that Justices Breyer, Ginsburg, Kagan, and Sotomayor would uphold the program. These programs are bad policy.<sup>248</sup> They are designed to injure the consumer in order to enrich the

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244. Cf. D. Daniel Sokol, *Limiting Anticompetitive Government Interventions that Benefit Special Interests*, 17 GEO. MASON L. REV. 119, 120 (2009) (“[G]overnment-created monopoly immunizes the company from antitrust law even though it can abuse its monopoly position in the market to hurt consumers. This behavior, in turn, produces significant negative externalities that may worsen the very problems that antitrust law, now forced to take a backseat to other government regulatory schemes, was intended to address.”).

245. See, e.g., *United States v. Von’s Grocery Co.*, 384 U.S. 270, 274 (1966). Justice Black wrote:

From this country’s beginning there has been an abiding and widespread fear of the evils which flow from monopoly—that is the concentration of economic power in the hands of a few. On the basis of this fear, Congress in 1890, when many of the Nation’s industries were already concentrated into what it deemed too few hands, passed the Sherman Act in an attempt to prevent further concentration and to preserve competition among a large number of sellers.

*Id.*

246. Cf. Steven Semeraro, *Demystifying Antitrust State Action Doctrine*, 24 HARV. J.L. & PUB. POL’Y 203, 243-44 (2000). Professor Semeraro writes:

A wide range of government programs . . . may be inefficient, including price support programs, government created monopolies, minimum wage laws, trade quotas, and patent grants. All of this government conduct produces precisely the type of harm the antitrust laws are intended to prevent: “The consumer pays more than the competitive price regardless of whether the market is distorted by a private, profiteering cartel or a state-sanctioned (and presumptively ‘public-spirited’) cartel.”

*Id.* (quoting David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J.L. & PUB. POL’Y 293, 330 (1994)).

247. See *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2433 (2015) (Thomas, J., concurring) (explaining that there is no public purpose in taking the raisins).

248. See *DOLAN*, *supra* note 101, at 496 (“Neither price supports nor acreage controls offer much to consumers but the prospect of spending more and getting less.”).

producers.<sup>249</sup> They are inconsistent with fundamental American values favoring free honest markets and consumer protection. The government has no rational purpose in hurting consumers to enrich producers.<sup>250</sup>

To understand why monopolization of markets is so damaging to Pareto efficiency, one has to understand the difference between competitive market equilibrium and the equilibrium that results when a market is monopolized. All sellers will seek to maximize profits whether they are large monopolists or small individuals.<sup>251</sup> The necessary mathematical first order condition for profit maximization is that marginal revenue equals marginal cost.<sup>252</sup> If marginal revenue exceeds marginal cost, then profits can be increased by selling more, and if marginal cost exceeds marginal revenue, then profits can be increased by selling less.<sup>253</sup>

In a competitive market, each agent is too small to have any noticeable impact on the market price.<sup>254</sup> Therefore, each seller perceives the demand curve to be flat and perceives marginal revenue to equal price.<sup>255</sup> For an individual seller to decide to sell more or less will have no impact on the price.<sup>256</sup> As a result, in equilibrium marginal revenue equals marginal cost equals price.<sup>257</sup>

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249. See *id.* at 498 (“Administrative costs and misallocation of resources mean that for each dollar in cost to consumers, farmers gain only something like 40 to 80 cents in real net profits.”).

250. See *id.* at 499 (“Marketing orders . . . enhance farm incomes but only at the expense of high consumer prices and wasteful misallocation of resources.”).

251. See COOTER & ULEN, *supra* note 229, at 26 (“[F]irms maximize profits subject to the constraints imposed on them by consumer demand and the technology of production.” (emphasis omitted)).

252. See BROWN, *supra* note 63, at 291 (explaining that the fundamental rule for profit maximization, producing a quantity at which marginal revenue equals marginal cost, is the same for monopolists and competitive firms).

253. See COOTER & ULEN, *supra* note 229, at 26 (“[W]hen marginal revenue exceeds marginal cost, the firm should expand production, and . . . when marginal cost exceeds marginal revenue, it should reduce production.”).

254. See BROWN, *supra* note 63, at 260 (“There are so many sellers that no one seller is large enough to influence price. . . . This is why competitive firms are said to be price takers. Purely competitive firms cannot set their selling price; they can only charge the price determined by supply and demand in the entire market.”).

255. See *id.* at 264 (“The demand (sales) curve facing a single firm under pure competition is perfectly horizontal because each firm produces such a small portion of industry output that it perceives that it can sell an unlimited quantity at the prevailing market price.”).

256. See *id.* at 260 (“[C]ompetitive firms are said to be price takers.”).

257. See *id.* at 267 (“This is important: for a pure competitive firm, marginal revenue is equal to selling price.”).

This then results in the situation depicted in Figure 4 with a consumer surplus equal to the shaded area.<sup>258</sup> As explained earlier, the consumer surplus represents the difference between the value consumers place on the resources and the amount consumers pay for the resources.<sup>259</sup>

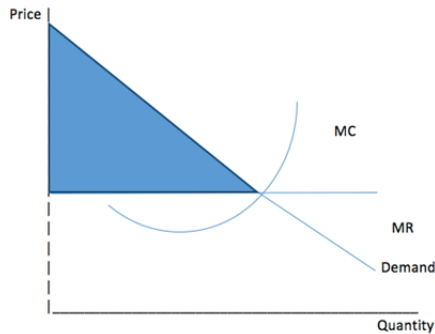


Figure 4. Perfect Competition

In contrast, a monopolist knows that selling more will lower the market price and selling less will raise the market price.<sup>260</sup> The monopolist knows that his marginal revenue curve is downward sloping.<sup>261</sup> Like any profit-maximizing firm, the monopolist produces the quantity that equates marginal revenue to marginal cost, but the monopolist is able to earn monopoly profits by charging a price that is well above marginal cost.<sup>262</sup> The result is a lower quantity of the good, higher prices, and lower consumer surplus.<sup>263</sup> This is seen in Figure 5.

258. See Klock, *supra* note 60, at 324.

259. See *id.* at 324-35.

260. See *id.* at 325.

261. See STIGLITZ, *supra* note 13, at 338 (explaining that the monopolist's demand curve is downward sloping).

262. See Klock, *supra* note 60, at 326 (“[F]or the monopolist . . . price does not equal marginal revenue, but is instead set higher according to the level that the market will bear.”).

263. See *id.*

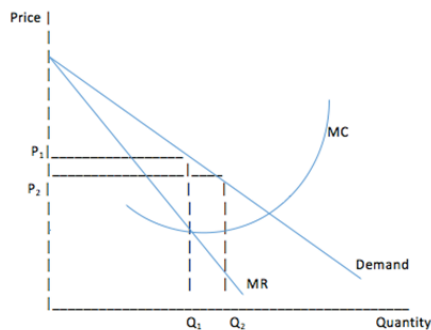


Figure 5. Monopoly

The monopolist's profit-maximizing output is  $Q_2$  where marginal revenue equals marginal cost, but price is set above that at  $P_2$ .<sup>264</sup> If the monopolist produced less at the level  $Q_1$  and charged more at the level  $P_1$ , the incremental revenue received from charging a higher price would be less than the incremental revenue lost from selling a lower quantity.<sup>265</sup> This can be seen by visually comparing the rectangles formed by the dashed lines. If the monopolist were instead a perfectly competitive firm, it would produce up to the point where marginal cost equals demand and the price would also equal marginal cost.<sup>266</sup>

The evil of monopoly is that consumers place a greater value on the marginal unit than it would cost to produce it.<sup>267</sup> This means that resources are not being put to their highest valued use, too little of the monopolist's good is being produced, and the economy is not Pareto efficient.<sup>268</sup>

Section 2 of the Sherman Antitrust Act of 1890 states, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign

264. *See id.* at 325.

265. *See id.* ("The difference between the two rectangles is the marginal revenue associated with increasing output from  $Q_1$  to  $Q_2$ .")

266. *See id.* at 326 n.60 and accompanying text (discussing how a monopolist in a contestable market with costless reversible entry could produce and price the same as a perfect competitor).

267. *See id.* at 326 ("Most importantly, the value that society would place on additional output is greater than the cost to society of producing the output. In other words, the social gain from putting more resources into production of the product exceeds the cost.")

268. *Id.*

nations, shall be deemed guilty of a felony.”<sup>269</sup> If monopoly is a felony to deter people from creating monopolies, it cannot be logical to allow a self-interested constituency to cause the government to create a monopoly on its behalf.<sup>270</sup>

Justice Sotomayor asserted that it is baffling that the majority did not uphold the raisin reserve program when it conceded that the government could accomplish the same effect through the establishment of quotas.<sup>271</sup> She asked why anyone would prefer that.<sup>272</sup> I think the more appropriate question is why anyone would prefer either. We have antitrust laws to protect consumers from the evil of monopoly.<sup>273</sup> What rational purpose can be served by allowing the government to do for raisin growers that which the antitrust laws prohibit the raisin growers from doing for themselves? Effectively, raisin growers are using the government to create a monopoly for them in order to control supply, prices, and profits. If the raisin growers did this for themselves, they could be prosecuted and even subjected to private class action treble damage liability.<sup>274</sup> The raisin reserve program confers a private benefit on raisin growers at the public’s expense in exchange for political support of the government.<sup>275</sup> Those who are upset by the decision in *Citizens United*<sup>276</sup> and claim that it amounts to the selling of our country should surely be as upset by programs, such as the raisin reserve, that sell private benefits at public expense for political support. Justice

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269. 15 U.S.C.A. § 2.

270. See, e.g., *Hoover v. Ronwin*, 466 U.S. 558, 584 (1984) (Stevens, J., dissenting) (“The risk that private regulation of market entry, prices, or output may be designed to confer monopoly profits on members of an industry at the expense of the consuming public has been the central concern of . . . our antitrust jurisprudence”); *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980) (“The national policy in favor of competition cannot be thwarted by casting [a] gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.”).

271. *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2443 (2015) (Sotomayor, J., dissenting).

272. See *id.*

273. See *FTC v. Phoebe Putney Health Sys.*, 133 S. Ct. 1003, 1010 (2013) (“[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, ‘state-action immunity is disfavored, much as are repeals by implication.’” (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992))).

274. 15 U.S.C. § 15.

275. See *STIGLITZ*, *supra* note 13, at 116 (“Farmers, because of their political influence, have succeeded in persuading government to impose a floor on the prices of many agricultural products . . .”).

276. See *Citizens United v. FEC*, 558 U.S. 310, 367 (2010).

Thomas was correct to emphasize in the context of *Horne* that a taking cannot be constitutional unless it is for a public purpose.<sup>277</sup> Keeping the price of raisins above the competitive market equilibrium is surely not a public purpose.<sup>278</sup> It is giving consumer's money to government-created monopolists.<sup>279</sup>

In another case decided last term by the Supreme Court, *North Carolina State Board of Dental Examiners v. Federal Trade Commission*,<sup>280</sup> the Court wrote the following about our federal antitrust law:

Federal antitrust law is a central safeguard for the Nation's free market structures. In this regard it is "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market.<sup>281</sup>

This case involved an effort by dentists to use the power of the state of North Carolina to prevent non-dentists from offering teeth whitening services at a lower cost than dentists charged.<sup>282</sup> In the interest of protecting consumers against the monopoly power being exercised, the Federal Trade Commission took action against the dentists.<sup>283</sup> The dentists responded with a claim of sovereign immunity under the doctrine of *Parker*.<sup>284</sup> The Court was not sympathetic to the dentists and held that a nonsovereign could only

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277. See *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2433 (2015) (Thomas, J., concurring).

278. See *id.*

279. See *DOLAN*, *supra* note 101, at 499 ("Marketing orders allow farmers to control the flow of produce into particular markets and to practice a form of price discrimination. They enhance farm incomes but only at the expense of high consumer prices and wasteful misallocation of resources.").

280. See *Horne*, 135 S. Ct. at 1101.

281. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1109 (2015).

282. See *id.* at 1108.

283. See *id.* at 1108-09 ("In 2010, the Federal Trade Commission (FTC) filed an administrative complaint charging . . . that the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition.").

284. See *id.* at 1107 ("The question is whether the board's actions are protected from Sherman Act regulation under the doctrine of state-action antitrust immunity, as defined and applied in this Court's decisions beginning with *Parker v. Brown*, 317 U. S. 341 (1943).").

claim immunity if it is regulated by the sovereign, which the board of dental examiners was not.<sup>285</sup>

No antitrust claim was made in *Horne* because the cartel was created by an agency of the U.S. government.<sup>286</sup> But under the Court's analysis in *North Carolina State Board of Dental Examiners*, it is clear that the state of California would not be able to create a similar Raisin Committee and allow it to run an unsupervised cartel as the U.S. Department of Agriculture was doing.<sup>287</sup> If our antitrust policy makes good policy sense as I believe it does, it should not be something that can be easily undercut by the U.S. Department of Agriculture any more than it cannot be undercut by the North Carolina State Board of Dental Examiners. Justice Thomas was correct to point out that constitutional takings must have a public purpose, and there is no public purpose in keeping raisin prices above the competitive market equilibrium.<sup>288</sup> Indeed, in the Hornes' first appearance before the Court, Justice Breyer described the effect of the Raisin Marketing Order as "tak[ing] raisins that we grow, [and] in effect throw[ing] them in the river."<sup>289</sup> Clearly he saw no public purpose in such action.

### C. Public Choice

Public choice is the field of economics that applies economic analysis to politics.<sup>290</sup> In the words of a leading scholar in the field,

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285. See *id.* at 1117. The Court explains:

The Sherman Act protects competition while also respecting federalism. It does not authorize the States to abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies. If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked.

*Id.*

286. See generally *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2424-33 (2015) (decision not mentioning antitrust).

287. See *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1117 ("If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked.").

288. See *Horne*, 135 S. Ct. at 2433 (Thomas, J., concurring).

289. Transcript of Oral Argument at 36, *Horne v. Dep't of Agric.*, 133 S. Ct. 2053 (2013) (No. 12-123), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-123\\_1537.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-123_1537.pdf) [<https://perma.cc/TMG4-XUE8>].

290. See Mark Klock, *Is It "The Will of the People" or a Broken Arrow? Collective Preferences, Out-of-the-Money Options, Bush v. Gore, and Arguments for Quashing Post-Balloting Litigation Absent Specific Allegations of Fraud*, 57 U.



“[p]ublic choice can be defined as the economic study of nonmarket decision making, or simply the application of economics to political science.”<sup>291</sup> Institutions develop to benefit constituencies, and public choice theorists argue that more cohesive and powerful constituencies have the upper hand in gaining control over political institutions.<sup>292</sup> For example, industry interests might successfully exert more influence over the Food and Drug Administration than pet owners because pet owners are not as cohesive and organized as industry interests. Under this view it is common to refer to government regulators as being captured by the industries they regulate.<sup>293</sup> In the words of one commentator, “[r]egulation, formerly conceived of as a method of advancing public interest over private advantage, in many instances came to be conceived of as a method of subsidizing private interests at the expense of public good.”<sup>294</sup>

An excerpt from a leading book in the field explains:

In arguing that government intervention is needed to correct the failures of the market when public goods, externalities, and other sorts of impure private goods are present, the economics literature has often made the implicit assumptions that these failures could be corrected at zero cost. The government is seen as an omniscient and benevolent institution dictating taxes, subsidies, and quantities so as to achieve a Pareto-optimal allocation of resources. In the sixties, a large segment of the public choice literature began to challenge this “nirvana model” of government. This literature examines not how governments may or ought to behave, but how they do behave. It reveals that governments, too, can fail in certain ways.<sup>295</sup>

A way in which governments can fail is spending more on a good than it is worth.<sup>296</sup> For example, governments have the ability to

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MIAMI L. REV. 1, 46 (2002) (“Public choice is the application of economic analysis to the study of politics.”).

291. DENNIS C. MUELLER, PUBLIC CHOICE III 1 (2003).

292. *See id.* at 347 (“The legislature takes from those who are least capable of resisting the demands for wealth transfers and gives to those who are best organized for pressing their demands.”).

293. *See, e.g.*, Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1050 (1997) (“The primary pathology of agency government emphasized during the era was that agencies were likely to become ‘captured’ by the business organizations that they are charged with regulating.”).

294. John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 723 (1986).

295. MUELLER, *supra* note 291, at 4.

296. *See id.* at 337 (discussing the possibility that rent seekers collectively spend more attempting to gain monopoly rents than the rents are worth).

redistribute wealth.<sup>297</sup> Self-interested groups might spend resources in an effort to get government to redistribute wealth in their favor.<sup>298</sup> Conflicting groups could collectively spend more than the amount being redistributed.<sup>299</sup>

The pursuit of government-bestowed benefits has been termed rent seeking in the literature.<sup>300</sup> Agricultural interests, seeking to obtain prices above the free market level for their produce, spend resources to obtain government subsidies or price supports and collect monopoly rents.<sup>301</sup> The monopoly rents are a prize worth pursuing for those who might obtain them, but their existence creates economic inefficiency.<sup>302</sup> As Professor Dennis Mueller discusses, “[E]ntrepreneurial rent seeking under competitive conditions more than fully dissipates all potential rents.”<sup>303</sup> Professor Mueller further explains:

In the regulatory process, producer and consumer interests are opposed. The higher the price that the regulators set, the bigger the monopoly rent rectangle going to the producers. Since regulation is a political bureaucratic process, it is reasonable to assume that the sellers of a regulated product place some pressure on the regulators to raise price and increase the size of the rectangle . . . . [This argument] draws attention to the rent-creating powers of regulators and the rent-seeking efforts of those regulated.

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297. See *id.* at 45 (“[W]e examine several hypotheses as to why redistribution occurs, after which we shall examine some statistics regarding the actual distribution activities of governments.”).

298. See *id.* at 62 (“There are many forms of redistribution in the industrial democracies that benefit middle and upper income groups, and are difficult to reconcile with the various voluntary-redistribution hypotheses discussed . . . , so many in fact that some scholars regard *all* government activity as selfishly and redistributively motivated.” (citations omitted)).

299. See *id.* at 62. Professor Mueller explains:

Many of the benefits to farmers from governmental agriculture policies do not come in the form of direct cash subsidies, but rather through price floors and other policies that raise agricultural prices. This means that the costs to the citizen/consumer from this form of redistribution are greater than the budget transfer figures.

*Id.*

300. *Id.* at 333.

301. See *id.* at 61-62 (discussing how farm policies in the United States, Japan, and European Union have raised farm incomes at a cost to consumers that far exceeds the increase to the farmers).

302. See *id.* at 334 (describing rent-seeking expenditures that may be socially wasteful).

303. *Id.* at 341.

Although most regulated industries are not monopolies, the number of sellers is generally small. It is certainly small relative to the number of consumers. The costs of organizing the producers and the concentration of the benefits [is likely to make the change in votes from increasing the benefits to the regulated greater than the change in votes from increasing the benefits to consumers]. Stigler (1971) stresses this point in arguing that the main beneficiaries of regulation are the regulated firms. . . . By this argument, Peltzman helps to explain the ubiquitous regulation of agriculture around the world and other interventions in seemingly competitive industries like trucking and taxicabs in the United States.<sup>304</sup>

An independent judiciary can curtail legislative efforts to use public powers to confer private benefits on a favored group.<sup>305</sup> This is exactly what the Court did in the *Horne* decision, and they are to be commended for it. Justice Thomas is to be especially commended for observing the omission of any public purpose in the Agriculture Department's raisin marketing order.

## V. CONCLUSION

In *Horne*, the Court properly held that government appropriation of chattel property is a taking that categorically requires just compensation in order to be constitutional.<sup>306</sup> If the law authorizing the appropriation does not provide for compensation based on the fair market value at the time of the taking, the law is unconstitutional and cannot be enforced.<sup>307</sup> Interestingly, only Justice Thomas made the point that takings, in addition to being compensated, must *also* be for a public purpose, and taking raisins for the purpose of diminishing the market supply and increasing the price to consumers serves no public purpose.<sup>308</sup>

Economists are in agreement that price supports are bad policy.<sup>309</sup> Economists also agree that antitrust policy, which deters

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304. *Id.* at 344-45.

305. *See id.* at 348 (“[A]n independent judiciary can increase the value of the legislation sold today by making it somewhat immune from short-run political pressures that might try to thwart or overturn the intent of the legislation in the future.”).

306. *See Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2426 (2015) (“The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.”).

307. *See id.* at 2431 (“[T]he Hornes may, in their capacity as handlers, raise a takings-based defense to the fine levied against them.”).

308. *Id.* at 2433 (Thomas, J., concurring).

309. *See Dan Fuller & Doris Geide-Stevenson, Consensus on Economic Issues: A Survey of Republicans, Democrats and Economists*, 33 E. ECON. J. 81, 87 (2007) (showing modest consensus among economists with the proposition that

monopoly, is good policy.<sup>310</sup> It is not logical to allow a small constituency to circumvent the antitrust laws by having the government create the equivalent of a cartel conspiracy to inflate prices to the public and enrich the small constituency. Justice Thomas's concurring opinion provides a basis to challenge not only the wisdom of such policies, but also the legality of such policies. It is time to stop allowing small constituencies to manipulate the government to bestow private benefits at great public expense. Justice Thomas's words could provide some leverage to contract these costly and irrational programs.

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“[e]conomic evidence suggests there are too many resources in American agriculture”).

310. *See id.* at 88 (showing modest consensus among economists with the proposition “[a]ntitrust laws should be enforced vigorously to reduce monopoly power from its current level”).