

Horne v. USDA might well have been a law professor's hypothetical. In order to smooth out raisin prices, the federal government has a program of taking "surplus" raisins off the market and diverting them to "non-competitive markets" like foreign countries and school lunch programs. The effect is to keep up market prices for raisins. The plaintiffs naturally wanted the benefit of higher market prices without having to give up any raisins, so they disobeyed the law. Actually they disobeyed the law not only with respect to their own raisins but with respect to raisins by other growers that they handled. They refused to pay the fine, claiming among other things that the set-aside requirement was a taking of property without compensation.

The reason that this would be a great hypo or exam question is that raised so many issues:

1. Could the plaintiffs raise their taking claim as a defense to the fine, or was this an issue that could only be litigated by turning over the raisins and suing in the Court of Claims for just compensation. *The Supreme Court said in an earlier phase of the litigation they didn't have to go to the Court of Claims.*
2. Was the claim ripe, even though they hadn't demanded compensation for the raisins (and couldn't since they had never turned them over to the government)? *The Supreme Court said yes.*
3. Did they have standing to contest the part of the fine relating to other people's raisins? *The Ninth Circuit said yes.*
4. Is the raisin program a total physical taking of the raisins involved? *The Ninth Circuit said yes.*
5. Is the program a total taking of the raisins under *Lucas*. *The Ninth Circuit said no because Lucas applies to land, not personal property, and because they didn't lose all of their ownership interest given that they could get a share of the proceeds.* (Of course, they didn't actually have an ownership interest in many of the raisins, which belonged to someone else — but never mind that.)
6. Is the fine a "financial exaction" subject to review under the *Nollan/Dolan* test? *The Ninth Circuit said yes because the fine was the alternative to giving up a significant part of their interests as owners in the surplus raisins.*

7. Does the fine pass the *Nollan/Dolan* test? *The Ninth Circuit said it did — there was a logical nexus and rough proportionality between the violation and the fine, as required by these tests.*

In short, there's a lot of legal complexity packed into this relatively simple set of facts. I won't try to untangle all of the issues in a short blog post. Instead, I'd like to just offer a few quick observations. To begin with, despite the plaintiffs' bluster about how oppressive this statute is, they don't seem to understand the economics. The government is running a cartel, keeping up prices to benefit the raisin industry at the expense of consumers. They plaintiffs have nothing to complain about economically when the whole program is designed to help them gouge the public.

In terms of the constitutional analysis, I think the Ninth Circuit went down the wrong track by thinking of this as an exaction case. The Supreme Court interpreted the plaintiffs as claiming that they could not be fined for failing to go along with an unconstitutional taking. Presumably, they would be making the same claim if they had been sentenced to prison instead, so analogizing a penal fine to a development fee is a red herring.

You can see, however, why the taking claim is appealing since the government does take over the raising. On the other hand, it's essentially diverting the raisins from sale in order to benefit the plaintiffs economically, and the plaintiffs retain some benefit from the raisins because they get paid if the government receives more than its expenses when it unloads the raisins. So the "taking" label isn't completely implausible but isn't self-evident. My own view would be that it's easy to make a lot of economic regulations look "sort of kind of" like takings, and that we should limit takings doctrine to clearcut cases.

In many ways, the case is a tribute to the ability of courts to tie themselves into complicated doctrinal knots. As a common sense matter, this regulatory scheme is no different than many other regulations that may be misguided but are clearly constitutional. The government could simply have given raisin growers quotas as a way of restricting the amount on the market. Or it could place a floor price, making it illegal to sell raisins below that price, which would have left the plaintiffs with an equal number of unsold raisins. Those options would be unquestionably constitutional under current law. It's not clear to me why the mechanism that the government adopted should be any more constitutionally suspect.

As you can tell, I think this whole program is bad policy. But it's bad policy for

reasons that have nothing to do with any injury to the plaintiffs.