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**KNICK V. TOWNSHIP OF SCOTT, PA: HOW A
GRAVEYARD DISPUTE RESURRECTED THE FIFTH
AMENDMENT’S TAKINGS CLAUSE**

Brian T. Hodges*

The United States Supreme Court’s decision in Knick v. Township of Scott, Pa., holds that a “property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under [42 U.S.C.] §1983 at that time” without regard to the availability of state remedies. At first glance, this decision appears to be a modest ruling on ripeness. But in truth, Knick marks a significant development in takings law. Indeed, to reach the ripeness question, Knick concluded that its earlier decision, Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, had “rest[ed] on a mistaken view of the Fifth Amendment” and therefore Knick adopts a very different approach to the Takings Clause. This Note discusses the state of takings law both before, during, and after the demise of Williamson County’s state litigation ripeness requirement. By doing so, the Note provides context that will highlight the Court’s changed interpretation of the Fifth Amendment and what that change might mean for future takings litigants. The Note concludes that Knick will have a significant impact on the development of takings law and litigation practices nationwide.

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*"Let's talk of graves, of worms, and epitaphs"*¹

*"It's fitting that a dispute over an alleged cemetery would resurrect
a long-buried constitutional right."*²

*"Cemeteries used to be nice and quiet. Now they're teeming with
life."*³

I. INTRODUCTION

Decided on June 21, 2019, the U.S. Supreme Court's decision in *Knick v. Township of Scott, Pa.*,⁴ holds that a "property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring

1. WILLIAM SHAKESPEARE, THE LIFE AND DEATH OF KING RICHARD THE SECOND act 3, sc. 2.

2. Nick Sibilla, *Supreme Court Ends "Catch-22" That Blocked Property Owners from Suing the Government*, FORBES (June 22, 2019), <https://www.forbes.com/sites/nick-sibilla/2019/06/22/supreme-court-ends-catch-22-that-blocked-property-owners-from-suing-the-government/#a98646b3687f>.

3. ANTHONY T. HINCKS, AN AUTHOR OF LIFE 146 (2018).

4. *Knick*, 139 S. Ct. at 2162.

his claim in federal court under [42 U.S.C.] § 1983 at that time.”⁵ While a seemingly modest ruling at first blush, *Knick* in fact marks a sea change in the U.S. Supreme Court’s interpretation of the Fifth Amendment and promises to have a significant impact on the development of takings law and litigation practices nationwide by overruling key aspects of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* in a manner that provides more predictability for property rights jurisprudence.⁶

The Fifth Amendment provides: “[N]or shall private property be taken for public use without just compensation.”⁷ For years, the Court was divided on whether this provision prohibits an uncompensated taking or merely operates as a condition on the government’s otherwise unrestrained power of eminent domain.⁸ The distinction between these two approaches is dramatic.⁹ If the Fifth Amendment is interpreted as a condition, then a taking is arguably incomplete, and thus not ripe for federal suit until a property owner exhausts procedures for obtaining compensation. On the other hand, if interpreted as a prohibition, then a property owner’s dispute ripens immediately at the time an uncompensated taking occurs.

The Court itself has confused these interpretations. Adopting the “conditional power” interpretation, the U.S. Supreme Court’s 1985 decision in *Williamson County* concluded that a property owner whose property has been taken by a local government has not suffered a violation of his Fifth Amendment rights— and thus cannot bring a federal takings claim in federal court—until a state court has denied his claim for just compensation under state law.¹⁰ Thus, *Williamson County* held that an owner whose property has *in fact* been taken by a local

5. *Id.* at 2168. Chief Justice Roberts authored the majority opinion in which Justices Thomas, Alito, Gorsuch, and Kavanaugh joined. Justice Thomas filed a concurring opinion. Justice Kagan authored a dissenting opinion, in which Justices Ginsburg, Breyer, and Sotomayor joined.

6. 473 U.S. 172 (1985), overruled by *Knick*, 139 S. Ct. at 2162; *Knick*, 139 S. Ct. at 2170.

7. U.S. CONST. amend. V.

8. *See, e.g.*, *First English Evangelical Lutheran Church of Glendale v. Cty. of L.A.*, 482 U.S. 304, 315 (1987) (explaining that the Takings Clause is “designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.”).

9. *See* David J. Kochan, *The [Takings]—Keepings Clause: An Analysis of Framing Effects from Labeling Constitutional Rights*, 45 FLA. ST. U. L. REV. 1021, 1069-81 (2018) (discussing the effect that labeling has on judicial understanding and enforcement of constitutional provisions).

10. *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 195 (1985).

government must first sue in the state courts, under the state constitution, and be denied relief before a federal takings claim will ripen.¹¹

Williamson County's approach to the Fifth Amendment had consequences that went far beyond what the justices had contemplated when establishing what it believed to be a ripeness rule. Most notably, in the 2005 decision *San Remo Hotel, L.P. v. City and County of San Francisco*, the U.S. Supreme Court held that adverse findings and conclusions entered by a state court had both res judicata and collateral estoppel effects and will preclude a subsequent federal claim.¹² In combination, *Williamson County* and *San Remo* effectively barred property owners from seeking relief for a federal constitutional violation in a federal court—unless, of course, the government opted to remove the claim to the federal court as allowed by *City of Chicago v. International College of Surgeons*.¹³ Even removal, however, did not ensure that a property owner could have his or her claims heard by a federal court. In some jurisdictions, the federal courts endorsed a defense strategy whereby the government would remove the case to the federal district court, only to have it dismissed as unripe.¹⁴ In those jurisdictions, the property owner was denied access to both federal *and* state courts, leaving the owner with no remedy for a constitutional violation.¹⁵

As Justice Breyer recognized during the first *Knick* argument, it would have been easy for the Court to deal with the more serious consequences of the state litigation rule by writing a line or two into an opinion.¹⁶ But such a ruling would have left the theoretical underpinnings of *Williamson County* in place, with all of its attendant consequences. Therefore, *Knick* overruled *Williamson County* on three express grounds by holding that the state litigation requirement (1) “rests on a mistaken

11. See Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U. J. L. & POL'Y 99, 103 (2000).

12. See generally *San Remo Hotel v. City & Cty. of S.F.*, 545 U.S. 323 (2005).

13. See *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 174 (1997). *International College of Surgeons* confirmed that government retains the discretion to remove takings claims alleging a violation of the Fifth Amendment to the federal courts regardless of the local nature of the dispute; thus, creating removal imbalance that gave the government the power to select the forum in most circumstances.

14. See, e.g., *Ohad Assocs., LLC v. Township of Marlboro*, No. 10-2183, 2011 WL 310708, at *1-2 (D.N.J. Jan. 28, 2011). Other jurisdictions saw through this gambit and would either remand the matter to state court, for example, *Doak Homes, Inc. v. City of Tukwila*, No. C07-1148MJP, 2008 U.S. Dist. LEXIS 7740, at *11-12 (W.D. Wash. Jan 18, 2008), or deem that the government waived the state litigation ripeness requirement by removing the claim. See, e.g., *Sansotta v. Town of Nags Head*, 724 F.3d 533, 549 (4th Cir. 2013).

15. *Id.*

16. Transcript of Oral Argument at 26, *Knick v. Township of Scott, Pa.*, 139 S. Ct. 2162 (2018) (No. 17-647), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-647_aplc.pdf.

view of the Fifth Amendment”); (2) “conflicts with the rest of our takings jurisprudence”; and (3) “imposes an unjustifiable burden on takings plaintiffs.”¹⁷ The Court further concluded that “[f]idelity to the Takings Clause and our cases construing it requires overruling *Williamson County* and restoring takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights.”¹⁸ *Knick* concluded that the plain language of the Takings Clause prohibits an uncompensated taking.¹⁹ Thus, a property owner suffers a constitutional violation at the moment the government takes his property without paying compensation.²⁰ The fact that the government may provide compensation later (if ordered to do so by a court) does not change the fact that a constitutional violation occurred.²¹ As Chief Justice Roberts illustrated, “A bank robber might give the loot back, but he still robbed the bank.”²²

From a practical perspective, *Knick* restores balance to takings litigation by providing the owner with the option of immediately filing a federal claim in the federal courts when a local government action takes their private property.²³ Furthermore, *Knick* also signals a reinvigorated approach to the Takings Clause which will likely have ramifications far beyond the case.²⁴ To adequately illustrate *Knick*’s impact on takings practice, Section II of this Article describes the historical development of takings litigation and the development of the ripeness doctrine, culminating in the state litigation and preclusion rules adopted by *Williamson County* and *San Remo Hotel*. Section III provides the factual and legal background for the *Knick* decision, while Section IV provides an analysis of the decision. Section V discusses the importance of access to federal courts for civil rights plaintiffs. The Article concludes with

17. *Knick*, 139 S. Ct. at 2167.

18. *Id.* at 2170.

19. *See id.* at 2167-68.

20. *Id.* at 2168.

21. *Id.* at 2172.

22. *Id.*

23. *Knick* will also have a significant impact on Washington takings law by overruling state precedent holding that “a constitutional violation does not result” unless and until an owner is denied just compensation in a state proceeding. *Orion Corp. v. State*, 109 Wash. 2d 621, 666 (1987); *see also Sintra v. City of Seattle*, 119 Wash. 2d 1, 19-20 (1992) (“[I]f a landowner fails to seek compensation through *state* judicial procedures, a [federal] takings claim is said to be not yet ripe.”).

24. *See, e.g.,* Miriam Seifter, *Opinion analysis: Court overrules takings precedent, allowing more suits in federal court*, SCOTUSBLOG (June 22, 2019), <https://www.scotusblog.com/2019/06/opinion-analysis-court-overrules-takings-precedent-allowing-more-suits-in-federal-court/>; The Editorial Board, *The Supreme Court’s Fifth Amendment Reclamation*, WALL ST. J. (June 23, 2019), <https://www.wsj.com/articles/the-supreme-courts-fifth-amendment-reclamation-11561318947>; Sibilla, *supra* note 2.

Section V, which surveys the changes and challenges that takings practitioners will face in a post-*Knick* environment.

II. LEGAL BACKGROUND

To understand the impact that *Williamson County*'s state litigation requirement has on property rights, it is necessary to briefly review the general framework of takings law.

A. Overview of Takings Law

Over the years, the Court has recognized that the government may take private property in a variety of ways.²⁵ The most straightforward situation occurs when it institutes eminent domain proceedings in a court of law. In such proceedings, the government declares its intent to take property for a public use and deposits funds in anticipation of its duty to pay just compensation for the taking.²⁶ Assuming the validity of the public use, the only disputed issues relate to the amount of compensation due and how and when the owner will receive it. In these takings cases, the just compensation requirement functions predominately as a condition on the government's power to complete eminent domain proceedings. A taking is final and legitimate when the owner receives adequate compensation.²⁷

A taking can alternatively occur through administrative and legislative actions without the government initiating condemnation proceedings. Such regulatory takings are a species of what is known as inverse condemnation because, while not explicitly designed to condemn property, they cause an impact on property that is tantamount to a taking.²⁸ The clearest example is a government action that causes a permanent "physical occupation" of private property.²⁹ Such a physical taking occurs when the government physically occupies or seizes property for its own use.³⁰ It can also occur when the government authorizes third parties, including members of the general public, to enter and use private

25. *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012) (noting "the nearly infinite variety of ways in which government actions or regulations can affect property interests").

26. *Kirby Forest Indus. v. United States*, 467 U.S. 1, 4-5 (1984).

27. *Danforth v. United States*, 308 U.S. 271, 284-85 (1939) ("[T]itle does not pass until compensation has been ascertained and paid" (quoting *Hanson Lumber Co. v. United States*, 261 U.S. 581, 587 (1923))); *First English*, 482 U.S. at 320 (In "condemnation proceedings a taking does not occur until compensation is determined and paid").

28. *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001) (explaining that regulatory takings are a subset of inverse condemnation).

29. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432-33 (1982).

30. *Kirby*, 467 U.S. at 5; *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002).

property.³¹ A taking may also arise when governmental actions restrict the use of private property. Such a “regulatory taking” automatically occurs when a regulation deprives property of “all economically beneficial use[.]”³² Under *Penn Central Transportation Co. v. New York City*,³³ a regulation can also cause a taking, even if it does not deprive private property of all economically beneficial use, depending on “the magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate property interests.”³⁴

The distinction between condemnation and inverse condemnation is of critical importance. In the former circumstance, the government invokes a statutory process whereby it acknowledges its constitutional obligation to pay compensation and establishes a process for determining how much is due.³⁵ In the latter circumstance, the government denies that a taking occurred; thus, questions concerning compensation must await a judicial determination of constitutional liability under the Takings Clause.³⁶ In this context, the Just Compensation Clause only kicks in after a determination of liability and operates only to prescribe the remedy for a taking.³⁷ The Just Compensation Clause thus operates as an indemnification guarantee when the government acts to take property without directly condemning it.³⁸

B. The Takings Ripeness Doctrine

Courts have long insisted that cases be sufficiently clear, or “ripe,” before a court will render judgment.³⁹ The basic rationale for this doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over

31. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831-32 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979).

32. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

33. 438 U.S. 104 (1978).

34. *Lingle*, 545 U.S. at 540; *see also* *United States v. Clarke*, 445 U.S. 253, 257 (1980) (“The phrase ‘inverse condemnation’ appears to be . . . a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.”).

35. *See First English*, 482 U.S. at 315-16; *see also* *Am. Sav. & Loan Ass’n v. Marin Cty.*, 653 F.2d 364, 369 (9th Cir. 1981) (“The issue is not the same in condemnation cases and in inverse condemnation cases. In condemnation cases the issue is damages: How much is due the landowner as just compensation? In inverse condemnation the issue is liability: Has the government’s action effected a taking of the landowner’s property?”).

36. *See id.* at 316.

37. *See First English*, 482 U.S. at 316 (explaining that the Takings Clause requires a “compensation remedy” “in the event of a taking.”).

38. *See generally* *Monongahela Navigation Co. v. U.S.*, 148 U.S. 312, 326 (1893) (The Fifth Amendment declares “that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner.”).

39. *Suitum v. Tahoe Reg’l Plan. Agency*, 520 U.S. 725, 735-38 (1997) (reviewing cases).

administrative policies and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.⁴⁰ Although this doctrine may seem innocuous, when it is misapplied, the doctrine acts as an inflexible barrier to the courts (and, by extension, a barrier to one's constitutional guarantees).

Historically, the Supreme Court held that a property owner must refrain from asserting a taking claim until a governmental action limiting property rights is sufficiently concrete and final so that a claim is ripe.⁴¹ For example, in *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, the Court held that a property owner raising an as-applied regulatory takings claim had to pursue "administrative solutions" capable of reducing the impact of challenged regulations (such as a "variance") to secure a final agency decision and a ripe claim.⁴²

Williamson County confirmed this finality ripeness doctrine, at least initially. There, a developer asserted that application of certain land use regulations temporarily deprived it of all economically viable use of property.⁴³ The Court granted certiorari to decide whether damages were a proper remedy for a temporary regulatory taking under 42 U.S.C. § 1983.⁴⁴ But, after reviewing the case, the Court concluded that it could not reach that question because the case was unripe.⁴⁵

Drawing on *Hodel*, the *Williamson County* Court explained that a claim asserting that land use restrictions cause a taking, will not ripen until the government reaches a "final decision" on the application of the challenged regulations to the plaintiff's property.⁴⁶ The Court emphasized that a final decision will often not arise until the property owner used available variance procedures within the regulatory scheme that might allow the government to soften the challenged property restrictions.⁴⁷ On this requirement, the Court determined that the takings claimant need not exhaust all state remedies to obtain a final decision:

[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an

40. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967).

41. *See Horne v. Dep't of Agric.*, 569 U.S. 513, 525 (2013).

42. 452 U.S. 264, 297 (1981).

43. *See Williamson Cty.*, 473 U.S. at 186-90.

44. *Id.* at 185.

45. *Id.* at 186.

46. *See id.*

47. *Id.* at 191-92.

injured party may seek review of an adverse decision and obtain a remedy⁴⁸

The Court then held that the plaintiff in *Williamson County* had not secured a final decision because it failed to seek variances that might have allowed it to expand the allowable use of the property.⁴⁹

The Supreme Court refined the finality requirement in *Palazzolo v. Rhode Island*, where it recognized that the government cannot “burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision.”⁵⁰ *Palazzolo* also holds that a takings claim likely ripens once there is a reasonable degree of certainty that the government agency lacks further discretion to permit or deny development or use of land.⁵¹ The reasonable measure test provided by the Court in *Palazzolo* reflects the observation by lower courts that some form of a “futility exception” exists to the ripeness finality requirement.⁵²

Under this settled understanding of the doctrine, the availability of state just compensation remedies for a taking is irrelevant to ripeness.⁵³ If a governmental burden on property is final and concrete, the owner may sue to establish that it is a taking, warranting compensation.⁵⁴ The “owner has a right to bring an ‘inverse condemnation’ suit . . . on the date of the intrusion” alleged as a taking.⁵⁵

C. Williamson County’s State Litigation Requirement

Williamson County should have ended with the application of the final decision ripeness rule. Yet, in dicta, and without briefing from the parties, the Court went on to articulate a second, ripeness barrier: the state litigation requirement.⁵⁶ In so doing, the Court started with the observation that the Just Compensation Clause “proscribes” takings “without just compensation.”⁵⁷ From there, it stated that the Clause does not “require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a ‘reasonable, certain

48. *Id.* at 192-93.

49. *Williamson Cty.*, 473 U.S. at 193-94.

50. 533 U.S. 606, 621 (2001).

51. *Id.* at 620.

52. David L. Callies, *Through a Glass Clearly: Predicting the Future in Land Use Takings Law*, 54 WASHBURN L.J. 43, 102 (2014) (citing *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990)).

53. *See Williamson Cty.*, 473 U.S. at 192-93.

54. *Id.*

55. *Kirby Forest Indus.*, 467 U.S. at 5.

56. As noted in *Knick*, the state litigation requirement was raised by the U.S. Solicitor General in an amicus brief as an alternative basis for affirming the court of appeals’ decision. *Knick*, 139 S. Ct. at 2174.

57. *Williamson Cty.*, 473 U.S. at 194.

and adequate provision for obtaining compensation' exist at the time of the taking."⁵⁸ This led the Court to conclude that "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking."⁵⁹ This ultimately meant "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."⁶⁰ The Court indicated that the claim in *Williamson County* was unripe under the new principle because the plaintiff had not filed an inverse condemnation suit—a judicial action—under Tennessee law in Tennessee state court.⁶¹ Later, the Court characterized *Williamson County*'s "state procedures" ripeness requirement as a "state litigation" requirement—a requirement that "finds no parallel in the ripeness cases from other areas of law."⁶²

I. Outright Bar to Federal Courts

Williamson County led to the practice of property owners filing state-based takings claims in state court while "reserving" any federal claims for subsequent litigation in federal court pursuant to *England v. Louisiana State Board of Medical Examiners*.⁶³ This "English reservation" strategy, however, only lasted until *San Remo Hotel, L. P. v. City and County of San Francisco*, in which the Court brought the full effect of the state litigation rule to light.⁶⁴

San Remo involved a takings challenge to San Francisco's requirement that hotel owners pay a special fee when they converted room rentals from long-term residential tenancies to overnight accommodations for tourists.⁶⁵ The owners filed first in state court, reserving their federal

58. *Id.* (quoting Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 124-25 (1974)).

59. *Id.* at 194-95 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 n.21 (1984)).

60. *Id.* at 195.

61. *Id.*

62. Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 22 (1995); see generally *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (First Amendment); *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (Equal Protection); *Monroe v. Pape*, 365 U.S. 167 (1961) (Fourth Amendment).

63. 375 U.S. 411 (1964). See J. David Breemer, *You Can Check Out But You Can Never Leave: The Story of San Remo Hotel—The Supreme Court Relegates Federal Takings Claims to State Courts Under a Rule Intended to Ripen the Claims for Federal Review*, 33 B.C. ENVTL. AFF. L. REV. 247, 252-58 (2006).

64. 545 U.S. 323, 338 (2005).

65. *Id.* at 326-28. Writing in dissent, California Supreme Court Justice Janice Rogers Brown assailed the challenged law as "redefin[ing] the American dream." *San Remo Hotel L.P. v. City & Cty. of S.F.*, 27 Cal. 4th 643, 692 (2002) (Brown, J., dissenting). She continued,

claims, and lost.⁶⁶ In any event, after losing at the state Supreme Court, the owners filed a new federal case, this time asserting the federal claims that they had reserved in the state court proceedings.⁶⁷ The District Court and Ninth Circuit, however, concluded that the state claim precluded the federal claim because the federal courts owed full faith and credit to the state courts' judgments, and thus refused to consider the takings claims *de novo*.⁶⁸

The San Remo owners successfully petitioned the U.S. Supreme Court to review the Ninth Circuit decision, arguing that they did not run afoul of *Williamson County* because they had not litigated their federal claims in state court.⁶⁹ The Court, however, affirmed.⁷⁰ While San Remo's argument demonstrated the injustice of *Williamson County*, it did not provide the optimal angle of attack. Indeed, during oral argument, Justice O'Connor asked the owners whether they had sought to overturn *Williamson County*. When counsel said "no," Justice O'Connor responded that "maybe you should have."⁷¹

The Court explained that because the owner could have filed the federal claim in state court, he should have.⁷² And because the federal claim could have been litigated in state court, the judgment of the state court must control under the Full Faith and Credit Act.⁷³ In other words, it was now impossible to pursue a federal takings claim seeking compensation in federal court, regardless of any reservation. *Williamson County* and *San Remo* thus made takings claims against local governments the only constitutionally protected right that could not be vindicated in federal court.⁷⁴

Justices Rehnquist, O'Connor, Kennedy, and Thomas concurred in the Court's decision, but as Justice Rehnquist noted, "[i]t is not clear to me that *Williamson County* was correct in demanding that, once a government entity has reached a final decision with respect to a claimant's

"[w]here once government was closely constrained to increase the freedom of individuals, now property ownership is closely constrained to increase the power of government. Where once government was a necessary evil because it protected private property, now private property is a necessary evil because it funds government programs." *Id.*

66. See *San Remo*, 27 Cal. 4th at 649-50; see also *San Remo*, 545 U.S. at 326-27.

67. *San Remo*, 545 U.S. at 326.

68. *Id.* at 327.

69. *Id.*

70. *Id.* at 336-41.

71. Transcript of Oral Argument at 6, *San Remo Hotel v. City & Cty. of S.F.*, 545 U.S. 323 (2005) (No. 04-340), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2004/04-340.pdf.

72. See *San Remo*, 545 U.S. at 347.

73. See *id.* at 347-48.

74. *Arrigoni Enters., LLC v. Town of Durham*, 136 S. Ct. 1409, 1410-11 (2016) (Thomas, J., dissenting from denial of cert.).

property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court.”⁷⁵ Justice Rehnquist continued,

I joined the opinion of the Court in *Williamson County*. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic. Here, no court below has addressed the correctness of *Williamson County*, neither party has asked us to reconsider it, and resolving the issue could not benefit petitioners. In an appropriate case, I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts.⁷⁶

The ultimate result of the *San Remo* decision was that, when a property owner unsuccessfully pursues a claim for compensation in state court to comply with *Williamson County*, the claim was thereafter barred from federal courts—no claim was ripened.⁷⁷ “The takings plaintiff thus finds himself in a Catch-22: He cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court. The federal claim dies aborning.”⁷⁸

2. Supreme Court Attempts to Soften the Impact of the State Litigation Rule

In subsequent decisions, the Supreme Court attempted to both preserve *Williamson County* while at the same time softening the impact of the state litigation rule by explaining that *Williamson County* should not be viewed as having established a jurisdictional bar to litigating takings cases in federal courts, but instead was intended only as “a discretionary, prudential ripeness doctrine.”⁷⁹ For example, in *Stop the Beach Renourishment Inc. v. Florida Department of Environmental Protection* the Court considered whether a beach renourishment project deprived shoreline owners of their littoral rights and the Court summarily rejected the

75. *San Remo*, 545 U.S. at 349 (Rehnquist, J., concurring).

76. *Id.* at 352.

77. *See id.* at 346-47; *Arrigoni*, 136 S. Ct. at 1410-11; *Trafalgar Corp. v. Miami Cty. Bd. of Comm’rs*, 519 F.3d 285, 287 (6th Cir. 2008) (because “the issue of just compensation under the Takings clause . . . was directly decided in a previous state court action, it cannot be relitigated in federal district court”).

78. *Knick*, 139 S. Ct. at 2167.

79. J. David Breemer, *The Rebirth of Federal Takings Review? The Courts’ “Prudential” Answer to Williamson County’s Flawed State Litigation Ripeness Requirement*, 30 *TOURO L. REV.* 319, 339-40 (2014) [hereinafter *Rebirth of Federal Takings Review*]; *see also Suittum*, 520 U.S. at 733-34 (noting that the ripeness requirements of *Williamson County* are prudential).

government's *Williamson County* argument because the ripeness objection was not jurisdictional and was therefore waived when the government failed to raise the issue in response to the petition for a writ of certiorari.⁸⁰ A few years later in *Horne v. Department of Agriculture*,⁸¹ the Court again explained that "prudential ripeness" is "not, strictly speaking, jurisdictional."⁸² In a footnote, the Court clarified that a "[c]ase or [c]ontroversy exists once the government has taken private property without paying for it. Accordingly, whether an alternative remedy exists does not affect the jurisdiction of the federal court."⁸³

3. *Confusion Among the Circuit Courts of Appeals*

The Supreme Court, by emphasizing the prudential nature of the state litigation rule in *Stop the Beach* and *Horne* seemed to indicate that the lower federal courts may directly address takings claims against local governments under the right circumstances.⁸⁴ In practice, however, this attempt to relax the state litigation requirement caused even more confusion and unpredictable application of the rule. A few federal courts, acknowledging the prudential nature of the state litigation rule, declined invitations to dismiss federal takings claims, but this was a hit or miss affair.⁸⁵ Others recognized that facial claims and claims not seeking monetary damages for takings could be heard in federal courts.⁸⁶ But still other federal courts began to extend the reach of *Williamson County* to all property-related claims, even those that sounded in Due Process, Equal Protection, or even the First Amendment.⁸⁷ In other words, the

80. 560 U.S. 702, 729-30 (2010).

81. 569 U.S. 513 (2013).

82. *Id.* at 526.

83. *Id.* at 526 n.6 (internal quotations omitted).

84. See *Rebirth of Federal Takings Review*, *supra* note 79, at 339.

85. Compare *Sansotta v. Town of Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013) (using prudential ripeness considerations to directly address the takings issue), and *Peters v. Village of Clifton*, 498 F.3d 727, 734 (7th Cir. 2007) ("Williamson County's ripeness requirements are prudential in nature. The prudential character of the Williamson County requirements do not, however, give the lower federal courts license to disregard them.").

86. See, e.g., *Int'l Union of Operating Eng'rs Local 139 v. Schimel*, 863 F.3d 674, 678 (7th Cir. 2017); *Clayland Farm Enters. v. Talbot Cty.*, 672 F. App'x 240, 243-44 (4th Cir. 2016); *Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach*, 727 F.3d 1349, 1359 n.6 (11th Cir. 2013); *Opulent Life Church v. City of Holly Springs Miss.*, 697 F.3d 279, 287 (5th Cir. 2012); *Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 14 (1st Cir. 2007); *Peters v. Clifton*, 498 F.3d 727, 732 (7th Cir. 2007); *Philip Morris v. Reilly*, 312 F.3d 24, 30 (1st Cir. 2002).

87. See, e.g., *River Park v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994) (holding that substantive and procedural due process land use claims are subject to Williamson County); *J.B. Ranch v. Grand Cty.*, 958 F.2d 306, 308 (10th Cir. 1992) (applying Williamson County to plaintiff's substantive due process claim); *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 350, 353 (2d Cir. 2005); *Kurtz v. Verizon N.Y., Inc.*, 758 F.3d 506,

state of *Williamson County* was becoming increasingly unpredictable and chaotic in the lower federal courts.

By the time the Court granted certiorari in *Knick*, the federal circuit courts of appeals were deeply divided on whether the state litigation requirement imposed a jurisdictional barrier to the federal courts or simply required a prudential evaluation.⁸⁸ The Second, Fourth, Fifth, Sixth, and Ninth Circuits explicitly described the prudential nature of ripeness and reserved discretion in applying the state action prong accordingly.⁸⁹ The Third, Seventh, and Tenth Circuits appeared to be on the verge of treating the second prong as prudential, but expressed hesitance in allowing the lower courts to use discretion when applying the doctrine, noting that that the prudential nature of the *Williamson County* requirements “do[es] not, however, give the lower federal courts license to disregard them.”⁹⁰ Meanwhile, the First, Eighth, and Eleventh Circuits continued to strictly apply the state litigation rule as a jurisdictional barrier to federal review.⁹¹

Making matters even more unpredictable, *Williamson County* inspired gamesmanship in some jurisdictions, where local governments, after being sued in a state court, as required by *Williamson County*, would remove the case to federal court. Removal by takings claim *defendants* (and only by defendants) had been endorsed in *City of Chicago v. International College of Surgeons*.⁹² But once in federal court, the defendants would move to dismiss the case under *Williamson County*'s state litigation requirement. Some federal courts readily agreed,

515 (2d Cir. 2014) (explaining that *Williamson County* “has been extended to equal protection and due process claims asserted in the context of land use challenges”) (citations omitted).

88. *Rebirth of Federal Takings Review*, *supra* note 79, at 340-41; David L. Callies, *Through a Glass Clearly: Predicting the Future in Land Use Takings Law*, 54 WASHBURN L.J. 43, 97, 101 (2014).

89. See *Sherman v. Town of Chester*, 752 F.3d 554, 561 (2d Cir. 2014); *Wilkins v. Daniels*, 744 F.3d 409, 418 (6th Cir. 2014); *Rosedale Missionary Baptist Church v. New Orleans City*, 641 F.3d 86, 88-89 (5th Cir. 2011); *Town of Nags Head v. Toloczko*, 728 F.3d 391, 399 (4th Cir. 2013); *Sansotta*, 724 F.3d at 545; *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1118 (9th Cir. 2010) (en banc); see also *MHC Fin. Ltd. P’ship v. City of San Rafael*, 714 F.3d 1118, 1130 (9th Cir. 2013) (exercising its discretion not to impose the “prudential requirement of exhaustion in state court” (quoting *Guggenheim*, 638 F.3d at 1118), *cert. denied*, 134 S. Ct. 900 (2014)).

90. *Peters v. Village of Clifton*, 498 F.3d 727, 734 (7th Cir. 2017); see also *Alto Eldorado P’ship v. Cty. of Santa Fe*, 634 F.3d 1170, 1179-80 (10th Cir. 2011); see also *Cty. Concrete Corp. v. Twp. of Roxbury*, 442 F.3d 159, 164 (3d Cir. 2006).

91. See *Marek v. Rhode Island*, 702 F.3d 650, 653-54 (1st Cir. 2012); see also *126th Ave. Landfill, Inc. v. Pinellas Cty.*, 459 F.App’x 896, 899-900 (11th Cir. 2012); see also *Snaza v. City of Saint Paul*, 548 F.3d 1178, 1181-82 (8th Cir. 2008).

92. 522 U.S. at 163-66 (1997).

potentially leaving the plaintiff with no avenue for relief.⁹³ Other federal courts began to catch on to this scheme, ruling that by removing the case to federal court, the defendants had waived their right to dismiss.⁹⁴ Thus, by the time the *Knick* certiorari petition was filed, the lower courts were in a state of utter disarray on the simple question how a property owner can file a claim for a violation of the Fifth Amendment in the federal courts.

III. BACKGROUND: *KNICK V. TOWNSHIP OF SCOTT*

A. *Factual Background*

The case, *Knick v. Township of Scott*, provided an all-too-common example of how the state litigation rule operated to bar an individual from enforcing her federal constitutional rights. At issue was an ordinance that authorized officials from the Township of Scott, Pennsylvania, to freely enter private property to determine if it contained a burial site and, if it is determined that one is present, created a public easement from the nearest public road and to any cemetery lying on private land.⁹⁵ Although the subject of the law may seem extraordinary or unusual, it is actually quite common to find private family gravesites throughout rural Pennsylvania with burial plots dating back hundreds of years.⁹⁶

In 1970, Rose Mary Knick and her family purchased 90 acres of farmland in the Township.⁹⁷ Almost forty years later, Township officials contacted Ms. Knick in response to a public inquiry about a purported

93. *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.); *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903 (8th Cir. 2006) (affirming dismissal of a removed takings claim for lack of finished state court procedures); *8679 Trout, LLC v. N. Tahoe Pub. Util. Dist.*, No. 2:10CV01569MCE EFB, 2010 WL 3521952, at *5-6 (E.D. Cal. Sept. 8, 2010) (“Although the claim was ripe when it was originally filed in state court, it became unripe the moment that Defendants removed it.”). It is true that some federal courts will remand a removed takings claim to state court, rather than dismiss it, upon finding the claim unripe under *Williamson County*. See, e.g., *Del-Prairie Stock Farm, Inc. v. Cty. of Walworth*, 572 F. Supp. 2d 1031, 1034 (E.D. Wis. 2008). This outcome is of little solace to the plaintiff. That removed and remanded litigant has been involuntarily yanked from the state court—which is supposedly the only proper forum for a takings claim—to a federal court—which is not a proper forum—only to be sent back to the state court where it all began, without any hearing in the process. Through it all, valuable resources and time are wasted, and the government may prevail by attrition.

94. See, e.g., *Sansotta*, 724 F. 3d at 544; see also *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005) (“The process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources.”).

95. *Knick v. Twp. of Scott*, 862 F.3d 310, 314 (3d Cir. 2017).

96. *Knick*, 139 S. Ct. at 2168.

97. Petitioner’s Brief on the Merits at 4, *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019) (No. 17-647) [hereinafter Petitioner’s Brief on the Merits]; *Knick*, 139 S. Ct. at 2168.

historic grave on her property.⁹⁸ Ms. Knick had no knowledge of any burial sites on her property and was not aware of any physical evidence of a grave on her land.⁹⁹ Several years later, after continued demands from an individual who wanted to visit the putative grave site, the Township enacted an ordinance forcing property owners to open their land to the public if Township officials determine that it contains a gravesite.¹⁰⁰ The ordinance authorizes fines of \$300-\$600 per day for noncompliance, plus all court costs, including attorney fees.¹⁰¹

A few months later, on April 10, 2013, the Township's code enforcement officer entered Ms. Knick's land without her consent to search for evidence of a burial plot.¹⁰² A day later, the Township issued a notice of violation, informing her that an "inspection" of her land identified "[m]ultiple grave markers/tombstones."¹⁰³ According to the notice, stones located on Ms. Knick's property qualified as a "cemetery" under the ordinance. The notice declared that Ms. Knick was "in violation of section # 5 . . . which requires that all cemeteries within the Township shall be kept open and accessible to the general public during daylight hours."¹⁰⁴ Then, a few months later, the Township issued a second, almost identical notice of violation—it too commanded Ms. Knick to "make access to the cemetery available to the public."¹⁰⁵

B. Judicial Procedure

1. State Court Proceedings

Shortly after the Township issued the first notice of violation, Ms. Knick filed a lawsuit in the Pennsylvania Court of Common Pleas, claiming that the Township's adoption and enforcement of the cemetery ordinance effected a physical taking of an easement without compensation.¹⁰⁶ In response, the Township withdrew its notice of violation and agreed to stay any enforcement action.¹⁰⁷ The court, thereafter, refused to rule on Ms. Knick's takings claim, concluding that her claims would not be ripe until the Township filed a separate civil enforcement action

98. *Knick*, 139 S. Ct. at 2168; *see also* Petitioner's Brief on the Merits, *supra* note 97, at 4.

99. Petitioner's Brief on the Merits, *supra* note 97, at 4-5.

100. *Id.* at 5.

101. *Knick*, 862 F.3d at 315; Petitioner's Brief on the Merits, *supra* note 97, at 5-6.

102. Petitioner's Brief on the Merits, *supra* note 97, at 6.

103. *Id.*

104. *Id.* at 6-7.

105. *Id.* at 7.

106. *Knick*, 139 S. Ct. at 2168; Petitioner's Brief on the Merits, *supra* note 97, at 7.

107. *Knick*, 139 S. Ct. at 2168.

against Ms. Knick.¹⁰⁸ The state court’s decision left the ordinance in place and left Ms. Knick subject to future enforcement actions for interfering with the public’s right to access her land.

2. Federal Procedure

At this point, Ms. Knick turned to the federal district court for relief. She filed a complaint alleging that the ordinance, on its face and as applied, violated the Takings Clause of the Fifth Amendment, as enforced through 42 U.S.C. § 1983.¹⁰⁹ The district court, however, dismissed Ms. Knick’s takings claims as unripe under *Williamson County* until she fully litigated an “inverse condemnation” action in state court.¹¹⁰ On appeal, the Third Circuit noted the “extraordinary and constitutionally suspect” nature of the ordinance, but nonetheless upheld the district court’s order of dismissal for lack of ripeness under *Williamson County*’s state litigation requirement.¹¹¹ Thus, like many property owners before her, Ms. Knick was denied access to either state or federal court to enforce rights guaranteed by the Fifth Amendment.

On October 31, 2017, Ms. Knick filed a petition for a writ of certiorari with the Supreme Court of the United States, asking “[w]hether the . . . Court should reconsider the portion of *Williamson County* . . . that requiring property owners to exhaust state court remedies to ripen federal takings claims.”¹¹² The Court granted review on that question and set argument for October 3, 2018, which took place before an 8-Justice Court. After Justice Kavanaugh was seated, the Court ordered re-argument, which occurred on January 16, 2019.¹¹³

IV. THE SUPREME COURT’S DECISION

Knick overruled *Williamson County* on three grounds, finding that the state litigation requirement (1) “imposes an unjustifiable burden on takings plaintiffs,” (2) “rests on a mistaken view of the Fifth Amendment,” and (3) “conflicts with the rest of our takings jurisprudence.”¹¹⁴ Overruling the *Williamson County* state litigation requirement enabled the Court to hold that “a government violates the Takings Clause when

108. *Id.*

109. *Id.*; Petitioner’s Brief on the Merits, *supra* note 97, at 8.

110. *Knick*, 139 S. Ct. at 2169.

111. *Id.*

112. Petition for Writ of Certiorari at i, *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) (No. 17-647).

113. Docket, *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) (No. 17-647), <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-647.html>.

114. *Knick*, 139 S. Ct. at 2167.

it takes property without compensation, and that a property owner may bring a Fifth Amendment claim under § 1983 at that time.”¹¹⁵

A. Williamson County Imposed “an Unjustifiable Burden” on Takings Plaintiffs

The undue burden that *Williamson County* placed on property owners is plain and is well-documented by legal scholars.¹¹⁶ Although the Court had envisioned a process by which an owner could ripen claims for federal review, the state litigation requirement proved instead to create a barrier to the federal courts. Since property owners cannot file a Fifth Amendment takings claim in federal court as an initial matter under *Williamson County*—and under *San Remo Hotel* cannot sue after a failed state court proceeding due to preclusion rules—they are forced to file Fifth Amendment claims in state court or not at all.¹¹⁷ Furthermore, compliance with the state litigation requirement set up the case to be removed to federal court under 28 U.S.C. § 1441 on the basis that it raises a “federal question.”¹¹⁸ In that circumstance, however, the claim was often found to be unripe under *Williamson County* because state compensation procedures remain unexhausted.¹¹⁹ This outcome was emblematic of the state litigation doctrine’s extraordinary and unworkable character—because the injustice arises from perfect compliance with the doctrine.

B. Williamson County Rested on a “Mistaken View of the Fifth Amendment”

The *Knick* majority began its legal analysis by emphasizing that *Williamson County* was based on “a different view of how the Takings

115. *Id.* at 2177.

116. See, e.g., Frederic Bloom & Christopher Serkin, *Suing Courts*, 79 U. CHI. L. REV. 553, 605 (2012) (“State courts thus get first bite at these actions under *Williamson County*—and they get the only bite under *San Remo*”); Michael M. Berger & Gideon Kanner, *Shell Game! You Can’t Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 URB. LAW. 671, 687 (2004) (*Williamson County* and *San Remo Hotel* serve as a “mechanism for keeping property owners out of federal court”); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Rule in Regulatory Takings*, 3 WASH. U. J.L. & POL’Y 99, 103 (2000); THOMAS ROBERTS, *Ripeness and Forum Selection in Land-Use Litigation*, in TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS (Am. Bar Ass’n, Callies ed., 1996).

117. See *Rockstead v. City of Crystal Lake*, 486 F.3d 963, 968 (7th Cir. 2007).

118. See *Int’l Coll. of Surgeons*, 522 U.S. at 164 (affirming removal of a complaint including a takings claim).

119. See, e.g., 8679 Trout, LLC v. N. Tahoe Pub. Util. Dist., No. 2:10CV01569MCE EFB, 2010 WL 3521952, at *13-14 (E.D. Cal. Sept. 8, 2010) (dismissing removed takings claim “for lack of jurisdiction”); see also *Rebirth of Federal Takings Review*, *supra* note 79, at 332-38 (discussing cases endorsing the remove and dismiss strategy).

Clause works”—*i.e.*, the conditional power approach.¹²⁰ “According to *Williamson County*, a taking does not give rise to a federal constitutional right to just compensation at that time, but instead gives a right to a state law procedure that will eventually result in just compensation.”¹²¹ That was a mistake. As *Knick* explains, “[t]he Clause provides: ‘[N]or shall private property be taken for public use, without just compensation.’ It does not say: ‘Nor shall private property be taken for public use, without an available procedure that will result in compensation.’”¹²² Based on the text of the Fifth Amendment, *Knick* held that “[i]f a local government takes private property without paying for it, that government has violated the Fifth Amendment—just as the Takings Clause says—without regard to subsequent state court proceedings.”¹²³

Knick explained that the Fifth Amendment’s just compensation guarantee is properly understood to provide the remedy for a taking—the Amendment cannot be read to place a condition on the constitutional cause of action:

A later payment of compensation may remedy the constitutional violation that occurred at the time of the taking, but that does not mean the violation never took place. The violation is the only reason compensation was owed in the first place. A bank robber might give the loot back, but he still robbed the bank. The availability of a subsequent compensation remedy for a taking without compensation no more means there never was a constitutional violation in the first place than the availability of a damages action renders negligent conduct compliant with the duty of care.¹²⁴

This interpretation of the Takings Clause finds its roots in *Jacobs v. United States*¹²⁵ and *First English Evangelical Lutheran Church v. County of Los Angeles*,¹²⁶ both of which held that a constitutional cause of action arises at the time of the taking.¹²⁷ The fact that the Takings Clause prescribes a remedy—and is not a condition on a right—is important because “[t]he form of the remedy d[oes] not qualify the right. It rest[s] upon the Fifth Amendment.”¹²⁸

Knick’s interpretation of the Fifth Amendment marks a critical development in takings law. The “conditional right” approach adopted by

120. *Knick*, 139 S. Ct. at 2171.

121. *Id.*

122. *Id.* at 2170.

123. *Id.*

124. *Id.* at 2172.

125. 290 U.S. 13 (1933).

126. 482 U.S. 304 (1987).

127. See *Knick*, 139 S. Ct. at 2172.

128. *Id.* at 2170 (quoting *Jacobs*, 290 U.S. at 16).

Williamson County—and espoused by the dissent in *Knick*—had effectively relegated the Takings Clause “‘to the status of a poor relation’ among the provisions of the Bill of Rights.”¹²⁹ *Williamson County* had suggested that property rights were unlike all other rights secured by the Bill of Rights, which are immediately and directly enforceable in the federal courts when a state or local entity violates those rights.¹³⁰ And none are subject to an exhaustion of state remedies requirement.¹³¹ *Knick*’s decision restored property rights to the proper state of a full-fledged right, finding that a “property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under § 1983 at that time.”¹³²

C. Williamson County “Conflicts with the Rest of Our Takings Jurisprudence”

As support for the state litigation requirement, *Williamson County* relied on *Ruckelshaus v. Monsanto*,¹³³ and *Parratt v. Taylor*.¹³⁴ Neither decision, however, imposed such a requirement on inverse condemnation plaintiffs.¹³⁵ Thus, *Knick* concluded that “*Williamson County* was not just wrong. Its reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence.”¹³⁶

For example, *Williamson County* referred to *Monsanto* for the proposition that, until a property owner has used the state’s procedure for securing compensation, the owner “has no claim against the Government for a taking.”¹³⁷ But *Monsanto* arrived at no such conclusion. There, the Court considered a pesticide company’s claim that provisions of the Federal Insecticide, Fungicide, and Rodenticide Act as applied caused an unconstitutional taking of property, by requiring disclosure of the company’s trade secrets.¹³⁸ Importantly, the company bypassed the statutory arbitration procedure for securing damages, filing a lawsuit that sought declaratory and injunctive relief—not compensation.¹³⁹ *Monsanto* ruled

129. *Id.* at 2169 (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994)).

130. *See id.* at 2167-68; *see also* U.S. CONST. amend. XIV, § 1 (Prohibiting state actions that deprive individuals of “life, liberty, or property, without due process of law.”).

131. *See Knick*, 139 S. Ct. at 2167 (citing *Heck v. Humphrey*, 512 U.S. 477, 480 (1994) (quoting *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 501 (1982))).

132. *Id.* at 2168.

133. 467 U.S. 986 (1984).

134. 451 U.S. 527 (1981).

135. *See San Remo*, 545 U.S. at 349 n.1 (Rehnquist, C.J., concurring).

136. *Knick*, 139 S. Ct. at 2178.

137. *Williamson Cty.*, 473 U.S. at 194-95 (quoting *Monsanto*, 467 U.S. at 1018 n.21).

138. *See Monsanto*, 467 U.S. at 990.

139. *See id.* at 998-99.

only that equitable relief was not available under a takings theory in federal district court.¹⁴⁰

That conclusion “was enough to decide the case.”¹⁴¹ But *Monsanto* caused some confusion by commenting that “if the plaintiff obtained compensation in arbitration, then ‘no taking has occurred and the [plaintiff] has no claim against the Government.’”¹⁴² That passage does not say that a takings plaintiff is required to exhaust all available state remedies. Instead, as *Knick* explained, the passage merely states the obvious: that “a fully compensated plaintiff has no further claim, but that is because the taking has been *remedied* by compensation, not because there was *no taking* in the first place.”¹⁴³ *Williamson County*’s reliance on *Monsanto*, therefore, was mistaken.¹⁴⁴

Williamson County also sought justification for its state litigation requirement on the Court’s repeated observation that the Takings Clause “‘does not provide or require that compensation shall be actually paid in advance of the occupancy of the land taken. But the owner is entitled to reasonable, certain and adequate provision for obtaining compensation’ after a taking.”¹⁴⁵ That observation, however, concerned claims for injunctive relief, noting that equitable relief is not available where there is such a provision for compensation.¹⁴⁶ “Simply because the property owner was not entitled to injunctive relief at the time of the taking does not mean there was no violation of the Takings Clause at that time.”¹⁴⁷

Williamson County’s reliance on *Parratt v. Taylor*,¹⁴⁸ was also misplaced. “Like *Monsanto*, *Parratt* did not involve a takings claim for just compensation.”¹⁴⁹ Instead, *Parratt* involved a due process claim.¹⁵⁰ And ruling on that distinct claim, *Parratt* held that a prisoner who had been deprived of \$23.50 worth of hobby materials by the rogue acts of a state employee could not state a procedural due process claim until he used

140. *See id.* at 1016.

141. *Knick*, 139 S. Ct. at 2173.

142. *Id.* (quoting *Monsanto*, 467 U.S. at 1018 n.21).

143. *Id.*

144. “*Williamson County* also relied on *Monsanto* when it analogized its new state-litigation requirement to federal takings practice, stating that ‘taking[s] claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act.’ But the Court was simply confused. A claim for just compensation brought under the Tucker Act is not a prerequisite to a Fifth Amendment takings claim—it is a Fifth Amendment takings claim.” *Knick*, 139 S. Ct. at 2174 (emphasis in original) (internal citations omitted).

145. *Id.* at 2175 (quoting *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890)).

146. *See id.*

147. *Id.*

148. 451 U.S. 527 (1981).

149. *Knick*, 139 U.S. at 2174.

150. *See Parratt*, 451 U.S. at 543; *see also Knick*, 139 U.S. at 2174.

available state post-deprivation remedies.¹⁵¹ In reaching that conclusion, *Parratt* reasoned that the state's action is not complete in the sense of causing a due process injury unless or until the state fails to provide an adequate post-deprivation for the property loss.¹⁵² *Knick* explained that *Parratt*'s conclusion, which turned entirely on procedural due process law, was factually and legally distinct from the questions presented in an inverse condemnation lawsuit seeking a just compensation remedy for "the taking of property by the government through physical invasion or a regulation that destroys a property's productive use."¹⁵³ In the inverse condemnation context, a taking is complete once the government acts in a manner that deprives the owner on his or her property—there is no need or basis for the type of post-deprivation hearing that was specifically designed to satisfy the procedural requirements of due process.¹⁵⁴ *Williamson County*'s reliance on *Parratt*, therefore, was similarly mistaken.

V. WHY DOES DIRECT ACCESS TO FEDERAL COURTS MATTER?

The importance of direct access to the federal courts is frequently overlooked when a case involves a purely local regulation, such as city or county land use controls. After all, people commonly think that a local court is the most appropriate forum in which to consider local regulations.¹⁵⁵ And as long as a property owner can get to a state court to consider the legality and effect of a land use regulation, then the owner has had his or her day in court and there is no real harm. In contrast, *Knick* confirms that property rights are civil rights.¹⁵⁶ And the American system for protecting individual civil rights rests on the understanding that federal courts will enforce those rights against abuse by local government and local agents.

151. See *Parratt*, 451 U.S. at 529, 543-44; see also *Knick*, 139 U.S. at 2174.

152. *Parratt*, 451 U.S. at 543-44.

153. *Knick*, 139 U.S. at 2174.

154. In *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976), the U.S. Supreme Court established a three-part balancing to determine when a due process plaintiff is entitled to a pre- or post-deprivation hearing. That test directs the court to consider (1) "the private interest affected that will be affected by the official action;" (2) "the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

155. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 626-29 (2013) (J. Kagan, dissenting) (arguing that federal review threatens the ability for local government to respond to local conditions).

156. See generally *Knick*, 139 S. Ct. at 2162.

It is true that the state courts generally have authority to address claims arising from the federal constitution, but the U.S. Constitution created the federal court system to ensure that federal laws and rights are fully enforced.¹⁵⁷ This dual court system has not always been in place, however. Prior to the Civil War, the state and federal courts had distinctly different roles.¹⁵⁸ At that time, the federal courts were largely limited to hearing claims against the federal government; thus, a person seeking to enforce her civil rights against a local government typically had to do so in the state courts.¹⁵⁹

This fractured approach to federal civil rights changed when the Reconstruction Congress adopted the Fourteenth Amendment in 1868.¹⁶⁰ That amendment bound the states (and their political subdivisions) to adhere to the fundamental concept that the state and local government may not deprive a person of life, liberty, or property without due process of law.¹⁶¹ One of the main purposes of “incorporating” the Bill of Rights against state governments was to ensure that residents of all states enjoy at least a minimum level of protection for their basic constitutional rights.¹⁶² Congress believed that access to the federal courts was essential to ensure a uniform national baseline of protection for constitutional rights, including those protected by the Takings Clause.¹⁶³

Additionally, in 1871, Congress passed the Civil Rights Act.¹⁶⁴ This law created a federal cause of action when a state or local government deprives an individual of a federal constitutional right.¹⁶⁵ An injured person could still go to state court, but they were no longer limited to that court system.¹⁶⁶ Congress decided that federal courts should also be open to civil rights claims against local actors because state courts may not be completely neutral (or may be perceived to be biased) when they consider charges against a local politician or political body.¹⁶⁷ Critically, the Civil Rights Act “undertook to . . . secure to all citizens of

157. U.S. CONST. art. III, § 2; *see also* Gene R. Nichol, Jr., *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959, 960-61 (1987).

158. Nichol, *supra* note 157, at 960-61.

159. *Id.*

160. *Id.*

161. U.S. CONST. amend. XIV, § 1.

162. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1218-19 (1992).

163. *Id.* at 1213-17.

164. 42 U.S.C. § 1983.

165. *See* 42 U.S.C. § 1983; *see also* *Briscoe v. Lahue*, 460 U.S. 325, 363-64 (1983) (“The debates over the 1871 Act are replete with hostile comments directed at state judicial systems.”); *see generally* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

166. Nichol, *supra* note 157, at 960-61.

167. Amar, *supra* note 162, at 1213-17.

every race and color . . . those fundamental rights which are the essence of civil freedom[.]”¹⁶⁸ Among those fundamental rights are “the rights to acquire, enjoy, own and dispose of property.”¹⁶⁹

Thus, since the Civil Rights Act of 1871, part of “judicial federalism” has been the availability of a federal cause of action when a local government violates the Constitution.¹⁷⁰ The dual court system worked as intended for more than 100 years. Citizens could sue in state or federal court when asserting that their property was taken without compensation or if another one of their constitutional rights were violated.¹⁷¹ Moreover, aggrieved citizens seeking federal protection did not have to try the state system first; they could go immediately to federal court with their claim.¹⁷² During this time, direct access to the federal courts promoted a more uniform development of federal constitutional law.¹⁷³

There are practical reasons, too, why a property owner may prefer to litigate a takings claim in a federal court. Perhaps most significantly, state courts vary widely on several takings doctrines that impact an owner’s procedural and substantive rights. For example, the New York courts bar landowners from challenging a land use restriction in effect at the time of acquisition if that regulation grants the government discretionary permitting authority.¹⁷⁴ The federal courts, by contrast, typically

168. Civil Rights Cases, 109 U.S. 3, 22 (1883).

169. Lynch v. Household Fin. Corp., 405 U.S. 538, 544 (1972) (“Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee”); see also Chicago, Burlington & Quincy Railroad Co. v. City of Chicago, 166 U.S. 226, 239 (1897) (holding that the Fourteenth Amendment expressly incorporated the Fifth Amendment’s protection of property rights against the states).

170. *Knick*, 139 S. Ct. at 2177 n.8.

171. See, e.g., Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141, 1142 (9th Cir. 1983) (considering inverse condemnation claim against local agency under § 1983).

172. *Id.*

173. As Justice Story explained in *Martin v. Hunter’s Lessee*, 14 U.S. 304, 347–48 (1816) (Story, J.), one of the most important reasons that the U.S. Supreme Court has ultimate jurisdiction over federal constitutional issues is “the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution.” The Court also emphasized the danger of undermining uniformity by giving free reign to possible state court bias in favor of their own state governments: “The Constitution has presumed . . . that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct or control, or be supposed to obstruct or control, the regular administration of justice.” *Id.* at 347.

174. See, e.g., *Kelleher v. N.Y. Dep’t of Env’tl. Conservation*, 69 N.Y.S.3d 832, 832-33 (2018); *N.Y. Ins. Ass’n, Inc. v. New York*, 41 N.Y.S.3d 149, 159 (N.Y. App. Div. 2016); *Novara ex rel. Jones v. Cantor Fitzgerald, LP*, 795 N.Y.S.2d 133, 138 (2005); *Linzenberg v. Town of Ramapo*, 766 N.Y.S.2d 217, 218-19 (2003); *Preble Aggregate, Inc. v. Town of Preble*, 694 N.Y.S.2d 788, 793 (App. Div. 3rd Dept. 1999); *Brotherton v. Dep’t of Env’tl. Conservation*, 675 N.Y.S.2d 121, 122-23 (App. Div. 2nd Dept. 1998); *Gazza v. N.Y. State Dep’t of Env’tl. Conservation*, 89 N.Y.2d 603, 613-16 (1997).

allow such claims to proceed to the merits.¹⁷⁵ In that circumstance, access to the federal courts is clearly preferable.

Moreover, property owners forced to use state courts for their takings claims must use state rules and procedures. These state rules are often more confusing and burdensome than the simple federal court procedures.¹⁷⁶ On a federal level, a plaintiff must simply claim that the government took their property without providing or guaranteeing compensation for the act—such an allegation will state a cause of action under 42. U.S.C. § 1983.

Direct access to the federal courts is also desirable when a property owner challenges the constitutionality of a locally enacted, and potentially popular, regulation or policy. Federal judges are typically viewed as being more removed from local politics than their state counterparts (a vast majority of whom are elected).¹⁷⁷ The need to distance oneself from local politics is often pronounced in the context of takings law because the central purpose of the Takings Clause is to “bar Government from

175. See, e.g., *Mehaffy v. United States*, 499 F. App'x 18, 22 (Fed. Cir. 2012); *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349-50 (Fed. Cir. 2004).

176. See *Knick*, 139 S. Ct. at 2168 n.1 (discussing Ohio's procedure for remedying a taking). In California, for example, before a property owner can file a state takings claim, the owner must first seek a writ of administrative mandamus to invalidate the offending action, a time-consuming process that cannot result in damages. *Cal. Coastal Comm'n v. Superior Court*, 210 Cal. App. 3d 1488, 1496 (1989) (explaining that a property owner could not sue in inverse condemnation because he failed to file a petition for writ of administrative mandamus); see generally *Mola Dev. Corp. v. City of Seal Beach*, 57 Cal. App. 4th (1997). If the challenged action is held invalid, the property owner's injury is converted into a temporary one, which California precedent holds is not compensable. See generally *Landgate, Inc. v. Cal. Coastal Comm'n*, 17 Cal. 4th 1106 (1998). On the other hand, if the action is held valid in the mandamus phase, the owner may still be barred from bringing a cognizable inverse condemnation takings claim. *Hensler v. City of Glendale*, 8 Cal. 4th 1, 13 (1994), as modified on denial of reh'g (Sept. 22, 1994) (“If the alleged taking is a ‘regulatory taking’ . . . the owner must afford the state the opportunity to rescind the ordinance or regulation or to exempt the property from the allegedly invalid development restriction once it has been judicially determined that the proposed application of the ordinance to the property will constitute a compensable taking.”). Under this “mandamus first” process, the powerful California Coastal Commission has never had to pay compensation for actions amounting to a taking. See, e.g., *Surfside Colony, Ltd. v. Cal. Coastal Comm'n*, 226 Cal. App. 3d 1260, 1267-69 (1991) (finding a taking in the mandamus proceeding, but no damages awarded); *Liberty v. Cal. Coastal Comm'n*, 113 Cal. App. 3d 491, 503 (1980).

177. See Ilya Somin, *Stop the Beach Renourishment and the Problem of Judicial Takings*, 6 DUKE J. CONST. L. & POL'Y 91, 99–100 (2011) (discussing this distinction and its implications for takings jurisprudence). While conscientious judges will surely try to rule impartially, their political and institutional loyalties could easily influence their decisions, consciously or not. *Id.* at 99. Such dangers make a federal forum for ensuring the protection of constitutional rights essential. Jeri Zeder, *Electeds vs. Appointed?*, HARV. L. TODAY (July 1, 2012), <https://today.law.harvard.edu/book-review/in-new-book-shugerman-explores-the-history-of-judicial-selection-in-the-u-s/> (“Today, about 90 percent of state judges must run for office, and the elections have become increasingly expensive and nasty.”).

forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹⁷⁸

The Takings Clause’s anti-majoritarian mandate creates natural tension—perceived or otherwise—when a local court is tightly bound to community pressure. Indeed, this tension animated much of the dispute in this case. The United States filed an amicus brief arguing that government officials should be free to implement regulatory programs “without fear” of the Takings Clause “even when” the program is so far reaching that the officials “cannot determine whether a taking will occur.”¹⁷⁹ Justice Kagan, writing in dissent to *Knick*, echoed this concern, suggesting that a reinvigorated Takings Clause will chill regulatory action by “turn[ing] even well-meaning government officials into law-breakers.”¹⁸⁰ According to Justice Kagan, the Court’s recognition that the Fifth Amendment is violated at the time the government takes property (rather than a later date when the owner is wrongfully denied compensation), is unfair to the government because it “means that government regulators will often have no way to avoid violating the Constitution.”¹⁸¹ This, she worries, will have a chilling effect on an official who could, before *Knick*, “do his work without fear of wrongdoing.”¹⁸²

The risk of regulatory paralysis, however, is unlikely to occur. Local governments have always had to weigh the likelihood that their actions may give rise to liabilities; allowing a property owner to file a takings claim in federal court does not change that.¹⁸³ It only provides landowners with an alternative avenue for relief. The risk of liability, moreover, is in the nature of the Constitution, which places limits on lawful government authority. Thus, Justice Thomas responded in his concurring opinion that, if the Fifth Amendment “makes some regulatory programs ‘unworkable in practice,’ so be it—our role is to enforce the Takings Clause as written.”¹⁸⁴ “So long as the property owner has some way to obtain compensation after the fact, governments need not fear that courts will enjoin their activities.”¹⁸⁵

178. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

179. *Knick*, 139 S. Ct. at 2180 (Thomas, J. concurring) (quoting Supplemental Letter Brief for the United States as *Amicus Curiae* at 5).

180. *Id.* at 2187 (Kagan, J. dissenting).

181. *Id.*

182. *Id.*

183. *See, e.g., Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (holding that a zoning ordinance must substantially advance a legitimate government interest to satisfy the constitution).

184. *Knick*, 139 S. Ct. at 2180 (Thomas, J., concurring) (quoting Supplemental Letter Brief for the United States as *Amicus Curiae* at 5) (internal citations omitted).

185. *Id.* at 2168.

VI. CONCLUSION

By overruling *Williamson County*'s state litigation requirement, *Knick* reset the game board for takings litigation jurisdiction in a number of ways. Most notably, *Knick* abandoned the removal imbalance created by *International College of Surgeons*, which held that only defendants could remove a takings claim to federal court.¹⁸⁶ Property owners may now remove such claims or file a federal takings claim directly in federal court, “without regard to subsequent state court proceedings.”¹⁸⁷ But owners still have the option to bring a § 1983 claim in state court if they believe that it would provide a better forum (Of course, federal claims filed in a state court are still subject to removal to federal court by municipal defendants).¹⁸⁸

If the property owner opts to file a federal takings claim in federal court, the cause of action is § 1983 and the remedy sought should be limited to just compensation unless monetary relief is unavailable, in which case declaratory relief may be available.¹⁸⁹ For example, a property owner may ask a court to enjoin a regulatory taking, or declare a statute or regulation unconstitutional, if the takings claim is raised in defense to imposition of a regulation or statute. Unlike many state causes of action, a property owner is entitled to a jury trial under a § 1983 claim.¹⁹⁰

Several considerations remain the same, however. *Williamson County*'s “finality” ripeness requirement was not challenged and remains good law. And, while *San Remo Hotel*'s “preclusion trap” is gone, preclusion remains a concern for property owners who choose to litigate a state law takings claims in state court. Currently, a property owner cannot raise a federal takings claim seeking damages against a state government in a federal court (Eleventh Amendment).¹⁹¹ The question

186. *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 164 (1997).

187. *Id.* at 2170; *see also id.* (“The Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner”); *id.* at 2172 (“A later payment of compensation may remedy the constitutional violation that occurred at the time of the taking, but that does not mean the violation never took place. The violation is the only reason compensation was owed in the first place. A bank robber might give the loot back, but he still robbed the bank.”).

188. 42 U.S.C. § 1983.

189. *Id.* at 2176 (“Today, because the federal and nearly all state governments provide just compensation remedies to property owners who have suffered a taking, equitable relief is generally unavailable.”).

190. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999).

191. *See Quern v. Jordan*, 440 U.S. 332, 345 (1979); *see, e.g., Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1214 (10th Cir. 2019) (“*Knick* did not involve Eleventh Amendment immunity, which is the basis of our holding in this case. Therefore, we hold that the takings claim against the [Utah Department of Corrections] must be dismissed based on Eleventh

remains, however, whether just compensation falls within the category of “damages” contemplated by the Eleventh Amendment.¹⁹² Also, if just compensation is not available, could a property owner seek declaratory relief against a state actor directly under the Fifth Amendment?

A federal takings claim against a local government may still fall within one of several abstention doctrines. Under the *Pullman* doctrine, a federal court will abstain from deciding sensitive policy issues that are best handled by state courts.¹⁹³ Under *Younger*, a federal court will abstain where there are ongoing state proceedings that involve a question of state interest and where there is an adequate state remedy.¹⁹⁴ *Burford* provides that a federal court must abstain when (1) there are difficult questions of state law that will impact questions of substantial public import; or (2) where federal review would be disruptive of state efforts to establish a coherent policy on matters of substantial public concern.¹⁹⁵ Finally, the *Rooker-Feldman* doctrine holds that a federal district court cannot rule on a question of state constitutional or statutory law once the highest court of the state has done so.¹⁹⁶ The doctrine recognizes that only U.S. Supreme Court can review a decision on federal law made by a state’s highest court.¹⁹⁷

Amendment immunity.”); *Bay Point Props., Inc. v. Miss. Transp. Comm’n*, 937 F.3d 454, 456 (5th Cir. 2019) (“Nor does anything in *Knick* even suggest, let alone require, reconsideration of longstanding sovereign immunity principles protecting states from suit in federal court.”).

192. An individual may still seek prospective relief against state officers under *Ex parte Young*, 209 U.S. 123 (1908), but may not seek damages. And one may still sue individual state actors in their personal capacity. It is unclear, but doubtful, that any of this is changed by the Court’s statement in *Knick* on the unavailability of injunctive relief.

193. See generally *R.R. Comm’n v. Pullman Co.*, 312 U.S. 496 (1941).

194. See generally *Younger v. Harris*, 401 U.S. 37 (1971).

195. See generally *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

196. See generally *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

197. See generally *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983).