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## Sublimating Municipal Home Rule and Separation of Powers in Knick v. Township of Scott

Robert H. Thomas

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**SUBLIMATING MUNICIPAL HOME RULE AND  
SEPARATION OF POWERS IN *KNICK V.*  
*TOWNSHIP OF SCOTT***

*Robert H. Thomas\**

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**INTRODUCTION**

It may be bordering on apostasy in certain circles to suggest that *Knick v. Township of Scott*<sup>1</sup> — in which a sharply divided Supreme Court held that municipal and local governments may be sued in

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1. 139 S. Ct. 2162 (2019).

federal court to recover just compensation for Fifth Amendment regulatory takings<sup>2</sup> — is a ruling that municipalities could celebrate. After all, how could a decision that overruled a case that for more than three decades had effectively shut federal takings claimants out of federal court by relegating them to (presumably) more local government-friendly state courts be a *good* thing for local governments?

The *Knick* majority concluded that a federal regulatory takings claim is ripe for federal court review from the moment a municipality adopts an allegedly confiscatory regulation without providing compensation, even if a state court would also entertain a state law takings or inverse condemnation claim.<sup>3</sup> The reason why local governments should look for a silver lining in the majority ruling is the unstated premise which all the justices confronted: Are local governments merely conveniences of the state, or are they separate from the state and its judiciary? This Article suggests that the answer to that question is the latter — state courts resolving state law inverse condemnation and state takings claims are not part of a local government’s taking and compensation mechanism.

First, Part I of this Article summarizes the nature of a regulatory takings claim and explains the rationale which the Supreme Court crafted in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* to conclude that federal regulatory takings claims were not ripe for federal court review until a state court rejected a property owner’s pursuit of compensation through state procedures.<sup>4</sup> Part I also describes how the state procedures requirement and preclusion rules were employed to catch property owners in a trap in which their federal takings claims were deemed to be either too early or too late. Second, Part II analyzes the *Knick* decision and the majority and dissent’s rationales, and focuses on the critical — but unstated — rationale at the center of the Court’s debate. Finally, the Article concludes by arguing that reopening the federal courthouse doors to federal takings claims without the need to first pursue state remedies is supported by a strong view of municipal home rule and autonomy.

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2. *Id.* at 2168 (property owner “may bring his claim in federal court under [42 U.S.C.] § 1983 at that time”).

3. *Id.* at 2167 (“We now concluded that the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled.”).

4. 473 U.S. 172 (1985).

## I. TAKINGS, EXHAUSTION, PRECLUSION, AND REMOVAL

This Part of the Article summarizes the nature of a federal takings claim, how the Court in *Williamson County* adopted the state procedures requirement with little briefing (and none of the usual percolation of issues), and how two subsequent decisions magnified *Williamson County's* inherent unfairness.

### A. *Mahon*: An Old Idea Renewed

This section briefly explains the nature of a regulatory takings claim and the rationale the Court created in *Williamson County* to justify the state procedures requirement, purportedly based on the text of the Fifth Amendment, but in reality, manufactured from whole cloth by the Court.

A federal regulatory takings claim<sup>5</sup> is the idea, first articulated in the modern era in *Pennsylvania Coal Co. v. Mahon*,<sup>6</sup> that if a regulation goes “too far” in restricting the owner’s use of property, it is the functional equivalent of an exercise of eminent domain and will be recognized as a taking, for which the Fifth and Fourteenth Amendments mandate the payment of compensation. While *Mahon* is often cited as the first takings case,<sup>7</sup> the idea that an exercise of governmental power other than the eminent domain power could trigger an obligation to provide an affected property owner compensation was a long-standing principle of the common law.<sup>8</sup> In short, if a local government’s regulation restricts an owner’s use severely, it is, from the owner’s viewpoint, no different than a seizure of property by eminent domain.<sup>9</sup> Since 1897, state and local governments have been — by virtue of incorporation of the Fifth

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5. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

6. 260 U.S. 393, 415 (1922) (“The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).

7. See, e.g., David L. Callies, *Through a Glass Clearly: Predicting the Future in Land Use Takings Law*, 54 WASHBURN L.J. 43, 43–44 (2014).

8. See, e.g., *Gardner v. Village of Newbergh*, 2 Johns. Ch. 162 (N.Y. Ch. 1816) (Kent, J.) (municipality required to compensate riparian property owner before it rerouted the stream away from the owner’s land by ordinance); see also *In re The King’s Prerogative in Saltpeter*, 12 Coke R. 13, 14 (1606) (The King’s agents may take saltpeter, but “[t]hey ought to make the Places, in which they dig, so well and commodious to the Owner as they were before.”).

9. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 529 (2005) (the takings inquiry is designed “to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property”).

Amendment under the Fourteenth Amendment's Due Process Clause — subject to the just compensation imperative.<sup>10</sup> For more than 60 years after *Mahon*, there was not a serious question that a federal claim for compensation could be asserted against local governments by property owners in federal court. As a result, federal courts routinely resolved these cases.

### B. *Williamson County*: The Supreme Court Makes Up the State Procedures Requirement

In 1985, in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,<sup>11</sup> the Court — mostly out of nowhere, as neither the court below nor the parties had argued for it — adopted two procedural prerequisites owners had to show before a federal takings claim was considered ripe for federal court. First, the regulating agency had to make the final decision on what uses are allowed under the regulation.<sup>12</sup> If the agency's process is ongoing, there is no way for a reviewing court to tell what uses of the property remain. This is known as the “final decision” requirement.<sup>13</sup> Second,

10. *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 233–34 (1897).

11. *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

12. *Id.* at 186 (“As the court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.”).

13. The “final decision” referenced by the Court not only includes a decision by the local government applying the regulation to the property, but also what the Court called a “variance.” *Id.* at 187–88 (“But, like the *Hodel* plaintiffs, respondent did not then seek variances that would have allowed it to develop the property according to its proposed plat, notwithstanding the Commission's finding that the plat did not comply with the zoning ordinance and subdivision regulations.”). As anyone familiar with land use law will say, however, a variance is not simply a request for reconsideration, but is only available in limited circumstances where the denial of an application will result in severe and “unnecessary” hardship on the applicant. *See, e.g.*, *Otto v. Steinhilber*, 24 N.E.2d 851, 853 (N.Y. 1939); *Surfrider Found. v. Zoning Bd. of Appeals*, 358 P.3d 664, 676 (Haw. 2015). A variance permits a local zoning authority to allow a requested use or design that is otherwise prohibited and has been described as a “safety valve” to relieve hardship on a property owner that might be caused by strict application of zoning restrictions. *See, e.g.*, Jonathan E. Cohen, *A Constitutional Safety Valve: The Variance in Zoning and Land-Use Based Environmental Controls*, 22 B.C. ENVTL. AFF. L. REV. 307, 308 (1995). A general rule, after all, cannot account for all circumstances, and there may be instances where applying the rule to a particular parcel would create unfair hardship. *See, e.g.*, *Korean Buddhist Dae Won Sa Temple of Haw. v. Sullivan*, 953 P.2d 1315, 1319 (Haw. 1998) (owner argued that strict application of building height limit worked as a hardship). Variances are also safety

the owner must not only have been denied compensation by the local government, but she must also have sued the local government in state court for inverse condemnation to try and force it to pay compensation for the regulatory taking under state law.<sup>14</sup>

In what became known as the “state-litigation” or “state procedures” requirement, the *Williamson County* Court reasoned that the Fifth Amendment only makes a taking of property “without just compensation” unconstitutional.<sup>15</sup> The majority based its conclusion on the text of the Just Compensation Clause: “[N]or shall private property be taken for public use, without just compensation.”<sup>16</sup> The Court also referenced a touchstone of eminent domain law, that “the Fifth Amendment [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 and adequate provision for obtaining compensation’ exist at the time of the taking.”<sup>17</sup> This principle, which allows the federal government to “take now, pay later,” would become a key point of debate between the *Knick* majority and dissenters.<sup>18</sup> The *Williamson County* Court ultimately held that Tennessee courts would entertain an inverse condemnation lawsuit under a state statute, and, conflating local governments with “the State,” held that a state-law inverse condemnation lawsuit, prosecuted in state court, was a reasonable, certain, and adequate process to secure compensation.<sup>19</sup> The owner must both pursue a lawsuit — and lose it — before the federal takings claims ripened.<sup>20</sup> The Court reasoned that because the

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valves for the government since they are a takings avoidance mechanism, which allows development in lieu of a takings judgment when denial of permission to build would be a taking. *See, e.g., Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 297 (1981) (takings claim not ripe until owner has sought variance).

14. *Williamson Cty.*, 473 U.S. at 194 (“A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so.”).

15. *See, e.g., Hodel*, 452 U.S. at 297 n.40 (1981).

16. U.S. CONST. amend. V.

17. *Williamson Cty.*, 473 U.S. at 194 (quoting Reg’l Rail Reorganization Act Cases, 419 U.S. 102, 124–25 (1974) (quoting *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890))).

18. *Compare Knick v. Township of Scott*, 139 S. Ct. 2162, 2170 (2019) (“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.”), *with id.* at 2181 (Kagan, J., dissenting) (“The majority today holds, in conflict with precedent after precedent, that a government violates the Constitution whenever it takes property without advance compensation — no matter how good its commitment to pay.”).

19. *Williamson Cty.*, 473 U.S. at 196.

20. *Id.* (“The Tennessee state courts have interpreted § 29-16-123 to allow recovery through inverse condemnation where the ‘taking’ is effected by restrictive zoning laws

local government had not yet actually “denied” compensation until it lost the owner’s state court lawsuit to recover compensation, the constitutional wrong had not occurred until the state supreme court ruled in the government’s favor that no compensation was owed.<sup>21</sup> Only then was a taking “without just compensation,” and a federal takings claim substantively ripe for federal court consideration.<sup>22</sup>

To characterize this rationale as facile and recursive would be an understatement. In nearly every circumstance, the local government had, almost by definition, already “denied” owing compensation, either by not affirmatively providing for compensation in the allegedly offending regulation itself or by disclaiming Fifth Amendment liability in response to an owner’s pre-lawsuit demand. The government’s position in nearly every regulatory takings case, after all, is that it is merely *regulating* property under its police or other regulatory power — not *taking* it by eminent domain. Thus, it should have surprised no one that these regulations rarely if ever acknowledged the obligation to provide compensation. This convoluted logic resulted in commentators beginning to take apart *Williamson County*’s rationale and its stretching of the constitutional text almost immediately after the Court issued the opinion.<sup>23</sup>

The Court’s analysis in *Williamson County* was easily subject to attack because the Court based its holding on ripeness even though none of the parties raised or briefed it. The parties disputed whether a restriction on the use of property that is eventually lifted could be a temporary taking requiring compensation (an issue later resolved by the Court positively in *First English Evangelical Lutheran Church v. Los Angeles County*).<sup>24</sup> The U.S. Solicitor General, however, as amicus curiae argued that federal courts could not even hear a federal claim for compensation (permanent, temporary, or otherwise) until the

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or development regulations.” (citing *Davis v. Metro. Gov’t of Nashville*, 620 S.W.2d 532, 533–34 (Tenn. Ct. App. 1981); *Speight v. Lockhart*, 524 S.W.2d 249 (Tenn. Ct. App. 1975))).

21. *Id.* at 186.

22. *Id.*

23. The figurative ink was not dry on the opinion when commentators began immediately blasting the Court’s rationale. The first in a long line of scholarly attacks on the case was Michael M. Berger, *Anarchy Reigns Supreme*, 29 WASH. U. J. URB. & CONTEMP. L. 39, 39–40 (1985) (“[*Williamson County*] takes its place in the pantheon of indecision . . . as demonstrating that those learned in the ways of the law can always find a way to duck an issue. With all due respect, the . . . non-decision is both bad law and bad government.”).

24. *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 312 (1987) (compensation is an available remedy for a temporary taking, and an owner is not limited to seeking invalidation of the regulation).

owner either lost a state law inverse claim in her state’s highest court or could show that the remedy was not available under state law.<sup>25</sup> The Court latched on to that argument and adopted it as a virtual wall around the federal courts for federal takings claims.

The Court ventured into uncharted waters when it relied on two Tennessee Court of Appeals decisions to support the conclusion that a property owner could seek — and presumably in the right circumstances recover — just compensation for a regulatory taking in an inverse condemnation lawsuit.<sup>26</sup> The problem was that the only Tennessee court that mattered — the Tennessee Supreme Court — had actually *not* interpreted the statute that way and would not do so for another three decades. Indeed, at the time of *Williamson County*, the Tennessee Supreme Court expressly *limited* recovery of compensation under the statute to physical occupation and “nuisance-type” takings, as it later recognized:

It is true that until today this Court has recognized only physical occupation takings and nuisance-type takings . . . . We hold that, like the Takings Clause of the United States Constitution, article I, section 21 of the Tennessee Constitution encompasses regulatory takings and that the Property Owners’ complaint is sufficient to allege a state constitutional regulatory taking claim, for which they may seek compensation under Tennessee’s inverse condemnation statute, Tennessee Code Annotated section 29-16-123.<sup>27</sup>

In short, the *Williamson County* Court was flatly wrong when it concluded the property owner could pursue a compensation remedy in a Tennessee court for a regulatory taking under state law, and therefore was required to do so.

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25. See Brief for the United States as Amicus Curiae Supporting Petitioners, *Williamson Cty.*, 473 U.S. 172 (No. 84-4) (“The viability of respondent’s taking claim in federal court is further undermined by respondent’s failure to seek judicial review in state court of the Commission’s disapproval of its preliminary plat in June 1981. If, as it appears, there was an available state procedure for obtaining such review, then the Commission’s decision did not under state law constitute a final rejection by the State of respondent’s claim of a right to develop its property in conformity with its submission.”) (footnotes omitted); see also *Knick v. Township of Scott*, 139 S. Ct. 2162, 2174 (2019) (“As amicus curiae in support of the local government, the United States argued in this Court that the developer could not state a Fifth Amendment claim because it had not pursued an inverse condemnation suit in state court. Neither party had raised that argument before.” (footnote omitted)).

26. See *supra* note 20 and accompanying text.

27. *Phillips v. Montgomery County*, 442 S.W.3d 233, 243–45 (Tenn. 2014); see also *id.* at 242 (issue of whether compensation under the inverse condemnation statute was available for regulatory takings claims was “an issue of first impression for this Court”).



But despite its faulty foundation, *Williamson County* was the law, and local governments had a very potent tool in its quiver. Legal scholars who supported the *Williamson County* state-procedures rule (or, more accurately, the limitations it placed on property owners' rights) began searching for rationales to justify it (for example, through comity, federalism,<sup>28</sup> and even textualism).<sup>29</sup> Nevertheless, for the next three decades, the deconstruction of the case and its rationale by the property bar and much of the legal academy continued unabated.<sup>30</sup>

### C. The *San Remo* Preclusion Trap

The questionable rationale of *Williamson County* was dramatically laid bare in *San Remo Hotel v. City and County of San Francisco*,<sup>31</sup> where the Court took *Williamson County*'s flawed logic to its inevitable end. There, the Court endorsed a “you’re either too early, or you’re too late” theory. In essence, the very process by which an owner ripened a federal takings claim — chasing and eventually losing a state law inverse condemnation lawsuit in state court — also meant that when the owner later asserted a ripened federal takings claim in federal court, that claim would be deemed precluded by the Full Faith and Credit Clause.<sup>32</sup> Federal courts owe state judgments the same respect they would be given in state court, and that includes the effects of the state’s law of claim and issue preclusion.<sup>33</sup> Resolving the state inverse claim as *Williamson County* required meant that a property owner had also thereby litigated her future unripe federal takings claim (even where she expressly tried not to do so).<sup>34</sup> And, because a state court would consider a subsequent federal takings claim precluded by litigation of a state inverse condemnation claim, so must the federal court as a matter of full faith and credit.<sup>35</sup>

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28. See, e.g., Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 205 (2004).

29. See, e.g., Katherine Mims Crocker, *Justifying a Prudential Solution to the Williamson County Ripeness Puzzle*, 49 GA. L. REV. 163, 176–77 (2014).

30. See, e.g., Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251, 284–300 (2006).

31. 545 U.S. 323 (2005).

32. The Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, and the Full Faith and Credit statute, 28 U.S.C. § 1738 (2012), require that federal courts give judgments of state courts the same effect they would have in state court.

33. See *San Remo Hotel*, 545 U.S. at 345–46.

34. Nor could an *England* reservation avoid the preclusion trap. See *England v. La. State Bd. of Med. Exam’rs*, 375 U.S. 411, 428 (1964) (in state courts, a plaintiff may expressly “reserve” federal issues, and doing so avoids a later claim that the federal issue was litigated in state court).

35. See *San Remo Hotel*, 545 U.S. at 345.

The short story was that if a property owner filed a federal takings claim in federal court without first having lost in state court, the owner was deemed to be too early under *Williamson County's* state procedures requirement. But if the owner followed *Williamson County's* rule and went through the state law process and lost the claim for compensation, the owner would be barred by preclusion principles from “relitigating” in federal court his federal takings claim, even though he had never actually litigated that issue.

The Catch-22 nature of this prompted four justices to note in *San Remo* that the *Williamson County* rationale was due for a second look. (A first look, actually, since the question was never actually litigated by the parties in *Williamson County*.) Chief Justice Rehnquist wrote:

Finally, *Williamson County's* state-litigation rule has created some real anomalies, justifying our revisiting the issue . . . . 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 . . . . 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.<sup>36</sup>

The four concurring justices in *San Remo* were not interested in revisiting *Williamson County*, however, because the property owners had not asked them to (although that did not stop the Court in *Williamson County* from adopting a rule *sue sponte*, so it is unclear what spurred the hesitation in *San Remo*).<sup>37</sup>

#### **D. *International College*: The State Procedures Requirement Hits Rock Bottom**

In 1997, the Supreme Court completed the ripeness anomaly hat trick. In *City of Chicago v. International College of Surgeons*, the Court did not bat an eye when a local government defendant removed the plaintiff’s federal takings claim from state to federal court under

36. *San Remo Hotel*, 545 U.S. at 351–52 (Rehnquist, C.J., concurring).

37. An exchange in the *San Remo* oral arguments with Justice O’Connor went like this:

JUSTICE O’CONNOR: And you haven’t asked us to revisit that *Williamson County* case, have you?

MR. UTRECHT: We have not asked that this Court reconsider the decision in *Williamson County*.

JUSTICE O’CONNOR: Maybe you should have.

Transcript of Oral Argument at 6, *San Remo Hotel*, 545 U.S. 323 (No. 04-340).

federal question “arising under” jurisdiction.<sup>38</sup> The plaintiff raised a state law claim in state court (as *Williamson County* required it do).<sup>39</sup> How could the municipality remove a case where under the “state litigation” requirement, the federal constitutional issue was not ripe because the state litigation had not resulted in a denial of compensation? The answer to this question is not clear, as the Court provided no answer.

This resulted in the asymmetry where a federal regulatory takings plaintiff could not bring a case in federal court, but a local government (or state defendant if it was willing to waive its Eleventh Amendment immunity) could remove the state court lawsuit to federal court *because the federal claim originally could have been brought there* (even though technically under *Williamson County*, it could not). In a few of the more extreme examples of this anomaly, some courts did not blink when the local government defendant — which had removed the case to federal court — then sought dismissal of the takings claim on the grounds that *the federal takings claims were not ripe because the state courts had not yet rejected the owner’s claim for compensation*. The reason why the state courts had not denied the plaintiff’s state law claim for compensation was because the defendant had removed the case to federal court. Several courts rejected this sleight-of-hand, in some cases even sanctioning the government for having spoken out of both sides of its mouth.<sup>40</sup>

But many courts paid no mind at all. *Warner v. City of Marathon*<sup>41</sup> exemplifies these latter cases. There, Florida property owners raised a regulatory takings claim in Florida state court<sup>42</sup> — a prudent move, given *Williamson County*. The city removed the case as a federal question, exercising its *International College* power.<sup>43</sup> The district court dismissed the case as unripe under *Williamson County*’s state procedures requirement, and the Eleventh Circuit affirmed. Wait a minute, the property owner argued, we did what the Supreme Court in

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38. *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156 (1997).

39. *Id.* at 160.

40. *See, e.g.*, *Yamagiwa v. City of Half Moon Bay*, 523 F. Supp. 2d 1036, 1110 (N.D. Cal. 2007) (city removed case to federal court, and on the eve of trial sought a remand under *Williamson County*; the court rejected the argument, concluding, “the City having invoked federal jurisdiction, its effort to multiply these proceedings by a remand to state court smacks of bad faith”); *see also* *Sherman v. Town of Chester*, 752 F.3d 554, 564 (2d Cir. 2014); *Sansotta v. Town of Nags Head*, 724 F.3d 533, 544–47 (4th Cir. 2013); *Key Outdoor Inc. v. City of Galesburg*, 327 F.3d 549, 550 (7th Cir. 2003).

41. *Warner v. City of Marathon*, 718 Fed. App’x. 834 (11th Cir. 2017) (per curiam).

42. *Id.* at 836.

43. *See id.*

*Williamson County* told us we had to do: We brought our state law takings claim in a Florida court, asking for compensation through available procedures, so we're not here in federal court willingly. We were in the process of ripening our federal claim in state court when the city removed us to federal court. But the Eleventh Circuit rejected that argument, concluding the case was not ripe because the property owners had not secured a denial of their compensation claim by the state court:

The plaintiffs also did not allege in their complaint that they availed themselves of this remedy and were denied relief. Instead, the plaintiffs seem to assert on appeal that the takings claim presented in their complaint is their just compensation claim. Notwithstanding the possibility that they were attempting to assert an inverse condemnation claim in Florida state court before the case was removed to federal court, we cannot review the claim until the plaintiffs have been denied relief by a Florida court.<sup>44</sup>

Just how were the plaintiffs in *Warner* supposed to have sought and be denied compensation in state court when the city removed the case midstream, before they could pursue and obtain a ruling there? Nonetheless, the court affirmed the district court's dismissal of the takings claim for lack of subject matter jurisdiction (without prejudice), which effectively served as a remand order of the city's removal.<sup>45</sup> Thus, the case returned to state court. Although the property owner lost time (and attorneys' fees), it at least did not suffer the indignity of a dismissal with prejudice. Even so, the case highlights the foolishness that *Williamson County's* state procedures requirement spawned: If the plaintiffs went back to state court (where they were originally) and filed a new suit against the city, what would prevent the city from removing it yet again? While extreme, this case is just one example of the very real problems that *Williamson County* enabled.<sup>46</sup>

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44. *Id.* at 838.

45. *Id.*

46. *See also, e.g.*, *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903–04 (8th Cir. 2006); *Sandy Creek Inv'rs, Ltd. v. City of Jonestown*, 325 F.3d 623, 626 (5th Cir. 2003) (dismissing the case on appeal because the district court did not have jurisdiction to resolve takings claims that were removed from state court); *Ohad Assocs., LLC v. Township of Marlboro*, No. CV 10-2183 (AET), 2011 WL 310708, at \*2 (D.N.J. Jan. 28, 2011); *8679 Trout, LLC v. N. Tahoe Pub. Utils. Dist.*, No. 2:10-cv-01569-MCE-EFB, 2010 WL 3521952, at \*3–5 (E.D. Cal. Sept. 8, 2010); *Del-Prairie Stock Farm, Inc. v. County of Walworth*, 572 F. Supp. 2d 1031, 1034 (E.D. Wis. 2008); *Rau v. City of Garden Plain*, 76 F. Supp. 2d 1173, 1174–75 (D. Kan. 1999) (recognizing the incoherent application of the *Williamson County* state litigation requirement and remanding a removed case to state court rather than dismiss the takings claims).

### E. Takings Litigation Devolves into Dickensian Dystopia

To a lawyer or legal scholar's eyes, *Williamson County's* state procedures requirement might charitably be called opaque. But when coupled with the you're-either-too-early-or-you're-too-late trap endorsed by *San Remo* and the unilateral removal power of *International College*, to property owners who needlessly must have budgeted years of legal fees if they wanted to even think about ripening a federal constitutional takings claim for federal court, it became maddeningly dense. It erected a nearly impossible-to-overcome hurdle for anyone who desired to vindicate their federal constitutional property rights in a federal forum.<sup>47</sup>

In theory, of course, a property owner who possessed the dual luxuries of time and a thick wallet could do what the Court contemplated: after the local government's position was fixed, the owner could ask the government for compensation, be denied, and then sue the government in state court to force the government to recognize its obligation to pay compensation under state law.<sup>48</sup> When, presumably, years later, the owner eventually lost that claim — thus ripening the federal takings claim because the local government had finally taken the property “without just compensation” — the owner could then bring a complaint in federal court.<sup>49</sup>

However, as a practical and procedural matter, owners never got anywhere close to successfully running *Williamson County's* gauntlet, and the substantive ripeness of the “state procedures” rationale amounted to a requirement for a property owner to exhaust state remedies. No other federal civil rights plaintiff alleging a violation of her federal constitutional rights by local governments had to adhere to this requirement. Thus, even a monkey — *a monkey!* — had the keys to the federal courthouse door to assert its property rights in a “selfie.”<sup>50</sup> Federal courts regularly entertained cases about whether — contrary to Chris Rock's dictum — something untoward really might

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47. See Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U. J.L. & POL'Y 99, 103 (2000) (“Ripeness rules are used as an offensive weapon to delay litigation, increase both fiscal and emotional costs to the property owner, and convince potential plaintiffs that they should not even try to ‘fight city hall.’” (internal citations omitted)).

48. See *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985).

49. See *id.* at 194.

50. *Naruto v. Slater*, 888 F.3d 418, 424, 426 (9th Cir. 2018) (concluding *Naruto*, a crested macaque, has Article III standing, but no standing under the Copyright Act).

be going on in the Champagne Room.<sup>51</sup> A local law interfered with a desire to create Valentine’s Day artwork out of the plaintiffs’ nude bodies? Go straight to federal court, no questions asked.<sup>52</sup> City animal control officers took a homeless man’s 18 diseased pigeons, pet crow, and seagull? Go straight to federal court, too — just be sure to couch the claim as a violation of the Fourth Amendment, not the Fifth.<sup>53</sup> But if a state or local government infringed on a Fifth Amendment property right? Go to state court and stay there. For more than 30 years, as a consequence of *Williamson County*’s state procedures requirement and *San Remo*’s preclusion trap, federal courts simply did not deign to “do” takings, unless the local government decided to remove it from state to federal court under *International College*.<sup>54</sup>

As a result, for 30-plus years, property owners, their lawyers, legal scholars, and the courts struggled. State court judges got a real education in federal takings law, but the only hope of having a federal court consider a federal takings claim was the thin reed of the Supreme Court exercising certiorari to review a state supreme court’s judgment. However, that is a notoriously thin reed. Of course, there were some efforts to limit the bite of the ripeness doctrine. For example, sensing the injustice of singling-out federal property claims for exclusion from federal courts, some lower courts treated *Williamson County*’s state-procedures ripeness rule as not jurisdictional, but merely a “prudential” requirement; a rule a federal court could overlook if it wanted to hear the case.<sup>55</sup> Case-by-case federal jurisdiction is not exactly the best circumstance to promote certainty, regularity, and predictability, though. However, a huge percentage of property owners who were not willing to pay their lawyers to contribute materials for Federal Courts treatises or otherwise endure years of pointless procedural wrangling declined to pursue their rights or ended up throwing in the towel midstream.

The Sixth Circuit summed up well the odyssey on which property owners were required to embark:

[I]t is obvious to us that, left to the devices of the Village’s counsel, this case will become another *Jarndyce v. Jarndyce*, with the

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51. *See, e.g.*, *Flanigan’s Enters. v. Fulton County*, 596 F.3d 1265, 1268–69 (11th Cir. 2010) (challenging ordinance prohibiting alcohol sales at nude dancing establishments).

52. *See, e.g.*, *Sole v. Wyner*, 551 U.S. 74 (2007).

53. *See* *Recchia v. City of L.A. Dep’t of Animal Servs.*, 889 F.3d 553 (9th Cir. 2018).

54. *See* *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 157 (1997).

55. *See, e.g.*, *Fowler v. Guerin*, 899 F.3d 1112, 1116–17 (9th Cir. 2018), *cert. denied*, 140 S. Ct. 390 (2019).

participants “mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities, running their . . . heads against walls of words, and making a pretense of equity . . .” For nearly ten years, the Kruses have endeavored to vindicate their property rights guaranteed by the Constitution and by state statutes. The Village’s actions threaten to turn the Kruse family into generations of “ruined suitors” pursuing legal redress in a system “which gives to monied might, the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope” as to leave them “perennially hopeless.” Enough is enough, and then some.<sup>56</sup>

*Williamson County*’s state procedures exhaustion requirement certainly could not have been intended to be simply a tool to financially bleed out property owners by running them through a time-consuming and ultimately pointless maze — a “procedural monster.”<sup>57</sup>

One additional dynamic contributed to the chaos. As noted above, the Supreme Court adopted the state-litigation rule without the benefit of party briefing or argument, and without a developed body of scholarly work as a foundation.<sup>58</sup> In doing so, it reversed the usual process of getting an issue up to the Supreme Court. Generally, issues contentious enough to merit high court review are most often allowed — even required — to “percolate” for years in the lower courts and law journals, before the Court is ready to take the issue up. That way, there is a developed body of lower court decisions and scholarly analysis for the Court to consider. Thus, in Supreme Court litigation, it is often better to be a later case to present an issue, not the first. That way, the Court can consider the question presented after an appropriate study by bench, academy, and bar. *Williamson County*, however, flipped that usual script: the Court adopted the state-litigation requirement on its own.<sup>59</sup> Only after the Court imposed the rule did the bar and the academy start to debate whether requiring a property owner to exhaust state law procedures to ripen a federal takings claim was consistent with the Fifth Amendment or was otherwise justifiable. Moreover, we spent the next 30-plus years doing so. Ironically, only in *Knick* did the Court finally get a full briefing on the issue.

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56. *Kruse v. Village of Chagrin Falls*, 74 F.3d 694, 701 (6th Cir. 1996) (quoting CHARLES DICKENS, *BLEAK HOUSE* (Oxford U. Press ed. 1989)).

57. See Berger, *supra* note 47, at 102 (*Williamson County* transformed “the ripeness doctrine from a minor anomaly into a procedural monster”).

58. See Brief for the United States, *supra* note 25.

59. See *id.*

## II. *KNICK* REOPENED THE FEDERAL COURTHOUSE DOORS

This Part summarizes the *Knick* majority and dissenting opinions, and focuses on their critical — but unstated — assumptions about the nature of local government, and their relationship to state courts and state inverse condemnation claims.

### A. Rose Mary Knick: Ghostbuster

The Township of Scott, Pennsylvania, apparently has a problem with unregulated cemeteries. So, it did what local governments do when they think they have a problem — it passed a law. That law, Ordinance 12-12-20-001, required owners of all cemeteries, public or private, to maintain them.<sup>60</sup> The ordinance also contained two troublesome provisions. First, it required the owners of the cemeteries to keep them open to the public during the day.<sup>61</sup> Second, it allowed the Township’s code inspectors to enter “any property” to inspect and determine whether it complies with the ordinance.<sup>62</sup> Under the authority of the ordinance, a code inspector came on Rose Mary Knick’s property without a warrant and informed her that the Township believed that an open field on her land was home to an old cemetery.<sup>63</sup> She disagreed. The inspector wrote her up for violating the ordinance.<sup>64</sup>

In *Knick v. Township of Scott*, Knick sued in Pennsylvania state court, seeking to enjoin the enforcement action.<sup>65</sup> In response, the Township withdrew the notice of violation, and the parties agreed to stay enforcement actions.<sup>66</sup> But Knick did not include an inverse condemnation claim or any other claim for compensation in her state court challenge.<sup>67</sup> After the Township issued a second notice of violation of the ordinance and the state court denied Knick’s request for a contempt order, she sued in federal court, asserting a violation of her Fourth Amendment rights against warrantless searches, and her Fifth and Fourteenth Amendment rights to due process and just compensation.<sup>68</sup> After some back-and-forth on the contents of the

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60. Scott Township, Pa., Ordinance 12-12-20-001 § 5 (Dec. 20, 2012); *see also* *Knick v. Township of Scott*, 139 S. Ct. 2162, 2168 (2019).

61. *See Knick*, 139 S. Ct. at 2168.

62. *See id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 2168–69; *Knick v. Township of Scott*, 2016 WL 4701549, at \*1–2 (M.D. Pa. Sept. 7, 2016).



pleadings, the federal district court dismissed the action because Knick had not exhausted her state law remedies under *Williamson County's* state procedures requirement.<sup>69</sup>

The U.S. Court of Appeals for the Third Circuit affirmed.<sup>70</sup> The court concluded that Knick lacked Article III standing to assert a facial Fourth Amendment search-and-seizure claim because she did not appeal the district court's ruling that the ordinance, as applied to her, was lawful because the search was of an open field, and thus not protected.<sup>71</sup> She thus "accepted the District Court's conclusion that her Fourth Amendment rights were not violated."<sup>72</sup> Therefore, even if she was injured by the inspector's actions, her Fourth Amendment rights were not violated. Even if a court were to enjoin the Township from unconstitutionally enforcing the ordinance, it could still search an open field (with or without the ordinance). Although the opinion "recognize[d] that the Ordinance's inspection provision 'is constitutionally suspect and we encourage the [Township] to abandon it (or, at least, to modify it substantially),' " the court held that it needed a plaintiff with standing in order to consider the argument.<sup>73</sup>

Ms. Knick fared no better with her claim for just compensation under the Fifth Amendment. The court concluded she had not sought compensation via available Pennsylvania law avenues and rejected each of her three arguments that she did not need to pursue just compensation in Pennsylvania courts. First, the court concluded that a facial takings claim is not exempt from the state-procedures prong of *Williamson County*.<sup>74</sup> Second, the court rejected Knick's argument that her earlier state court lawsuit was enough to comply with the requirement to pursue compensation in state court.<sup>75</sup> That case, however, was not a claim for just compensation, only for injunctive relief, so the court held the state had not yet denied her compensation.<sup>76</sup> Finally, the court applied *Williamson County* and held the federal takings claim was not ripe because Knick had not sought and been denied compensation in Pennsylvania's courts.<sup>77</sup> Yes,

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69. *Id.* at 2169.

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

71. *Id.* at 317.

72. *Id.* at 318.

73. *Id.* at 322.

74. *Id.* at 323. The Third Circuit had already held otherwise in *County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159 (3d Cir. 2006), and "[w]e cannot overrule our own precedent." *Knick*, 862 F.3d at 323.

75. *Id.* at 323–24.

76. *Id.* at 326.

77. *Id.*

it is an optional (“prudential”) doctrine the court recognized, but the facts here did not suggest that it would be unfair to require Ms. Knick to go back to state court and try and obtain compensation.<sup>78</sup> The Third Circuit distinguished decisions from other circuits which declined to apply *Williamson County*, concluding that “there is ‘value in forcing a second trip’ to state court here.”<sup>79</sup> The Supreme Court agreed to consider the case, which expressly asked the Court to revisit and overrule *Williamson County*’s state litigation requirement.<sup>80</sup>

### B. The *Knick* Majority: “That’s Some Catch, That Catch-22”<sup>81</sup>

The majority, concurring, and dissenting opinions issued by a sharply divided Supreme Court employed a plethora of very evocative language: “aborning,”<sup>82</sup> “[c]atch-22,”<sup>83</sup> “loot,”<sup>84</sup> “shaky,”<sup>85</sup> “this ‘sue me’ approach to the Takings Clause,”<sup>86</sup> “overthrows,”<sup>87</sup> “a mountain of precedent,”<sup>88</sup> “smashes a hundred-plus years of legal rulings to smithereens,”<sup>89</sup> “first crack,”<sup>90</sup> and “points for creativity.”<sup>91</sup> Ultimately, the most important word from the case was “overruled,” because the Court did just that: it expressly eliminated the state procedures ripeness requirement.<sup>92</sup> Not cut back, not worked around, not questioned. Overruled. It is enough that the regulation takes property, and the government has not already paid the owner compensation, and property owners have no obligation to ripen a federal takings claims by suing the local government for compensation in a state court. The federal courthouse doors are open once again to

78. *Id.* at 328.

79. *Id.*

80. Petition for Writ of Certiorari at i, *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019) (No. 17-647) (“Whether the Court should reconsider the portion of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194–96 (1985), requiring property owners to exhaust state court remedies to ripen federal takings claims, as suggested by Justices of this Court?”).

81. JOSEPH HELLER, *CATCH-22* 57 (6th ed. 1976).

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

83. *Id.*

84. *Id.* at 2172.

85. *Id.* at 2178.

86. *Id.* at 2180 (Thomas, J., concurring).

87. *Id.* at 2183 (Kagan, J., dissenting).

88. *Id.* (Kagan, J., dissenting).

89. *Id.* (Kagan, J., dissenting).

90. *Id.* at 2184 (Kagan, J., dissenting).

91. *Id.* at 2185.

92. *Id.* at 2179 (“The state-litigation requirement of *Williamson County* is overruled.”).

property owners seeking to vindicate their federal constitutional claims for compensation for municipal government overregulation of their property.<sup>93</sup>

The majority opinion began by laying out the one-two punch of *Williamson County* and *San Remo*: “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.”<sup>94</sup>

Then, importantly, the Court defined when a takings claim ripens, and in doing so, defined what a “taking” looks like: “We now conclude that the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled. A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it.”<sup>95</sup>

To be sure, the Court expressly overruling the state-litigation ripeness requirement is important. But, the more critical part of this statement is “conflicts with the rest of our takings jurisprudence,” because it signals that *Knick* reveals more about substantive takings doctrine than it does about the intricacies of federal procedure.<sup>96</sup> By defining the takings cause of action as ripe when the regulation applies to the property and compensation has not been provided, the Court emphasized that timing is everything.

The majority also summarized the biggest analytical hurdle, *Williamson County*'s rationale which was purportedly based on the text of the Fifth Amendment (“nor shall private property be taken for public use without just compensation”), and acknowledged that the Fifth Amendment does not require payment contemporaneous with the taking as long as there are procedures in place for the owner “to obtain compensation after the fact.”<sup>97</sup> The majority highlighted a distinction that it would delve into later in the opinion — the difference between equitable remedies for takings, and compensation — and concluded that a federal court Section 1983 claim is ripe and may be

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93. *See id.*

94. *Id.* at 2167. Even if the plaintiff wins in state court, he has no federal claim, because by awarding compensation, the state court has, in effect, mooted the federal “without just compensation” problem.

95. *Id.*

96. *Id.*

97. *Id.* at 2168.

filed immediately upon the constitutional violation — “when the government takes his property without just compensation[.]”<sup>98</sup>

The majority opinion emphasized two main themes. First, property rights should be treated the same as other rights in the Bill of Rights, often more honored in the breach than the observance.<sup>99</sup> Property, as James Ely has reminded, was viewed by the original founders and the drafters of the Fourteenth Amendment as the “guardian of every other right,” and thus should be considered with the same scrutiny as other rights by the courts.<sup>100</sup>

The second theme employed by the majority was a focus on the text of the Fifth Amendment as the key to understanding the substance of a regulatory takings claim, which is also the key to when such a claim is ripe.<sup>101</sup> Of course, the issue before the Court might have been answered very simply: a municipality has taken property “without compensation” when it applies a regulation to property, and the regulation itself does not acknowledge the obligation to provide compensation. The government claims it is merely regulating — not taking — and, therefore, it does not believe that it is obligated to provide compensation. That notion seems to be built into the concept of regulatory takings where it is the exercise of some power *other* than eminent domain, which is claimed by the property owner to have taken property. Instead, the *Knick* majority responded directly to the core logic of *Williamson County* by focusing instead on a more difficult question:

The 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.” If a local government takes private property without paying for it, the government has violated the Fifth Amendment — just as the Takings Clause says — without regard to subsequent state court proceedings.<sup>102</sup>

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98. *Id.*

99. *See id.* at 2169 (“The state-litigation requirement relegates the Takings Clause ‘to the status of poor relation’ among the provisions of the Bill of Rights.” (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994))); *see also* *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993) (“Individual freedom finds tangible expression in property rights.”).

100. *See generally* JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (3d ed. 2008).

101. *See Knick*, 139 S. Ct. at 2179 (Thomas, J., concurring) (“The United States, by contrast, urges us not to enforce the Takings Clause as written.”).

102. *Id.* at 2170.

Interestingly, the majority noted that it does not matter for purposes of defining the constitutional violation, whether it is eminent domain or some other governmental power being exercised, and “[t]he form of the remedy d[oes] not qualify the right.”<sup>103</sup> Having recognized that the Constitution itself mandates when a taking occurs, the majority used this line of thought to attack *Williamson County*’s rationale.<sup>104</sup> The obligation to pay compensation when property is taken is “self-executing,” and “automatically arises at the time the government takes property without paying for it.”<sup>105</sup> Thus, post-violation compensation is a *remedy*, not an element of a claim. The Court also recognized the distinction between “without just compensation” as an element of a takings claim (*Williamson County*’s core textual rationale), and just compensation as the most frequently-sought *remedy* for a regulatory taking: “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.”<sup>106</sup>

As the majority opinion memorably put it, “[a] bank robber might give the loot back, but he still robbed the bank.”<sup>107</sup> Thus, the right to compensation “arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner.”<sup>108</sup> The Court relied on the case which requires that interest owed on a compensation award runs from the time of the taking, and includes both takings situations: affirmative exercises of the condemnation power, and inverse condemnations.<sup>109</sup> Section 1983 recognizes a cause of action for a “deprivation” of a right “secured by the Constitution,” and a “property owner may sue the government at that time in federal court,” because that is when the deprivation of Fifth Amendment rights occurs.<sup>110</sup>

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103. *Id.* (“*Jacobs* made clear that, no matter what sort of procedures the government puts in place to remedy a taking, a property owner has the Fifth Amendment entitlement to compensation *as soon as* the government takes his property without paying for it.” (emphasis added) (citing *Jacobs v. United States*, 290 U.S. 13 (1933))).

104. *Id.*

105. *Id.* at 2171.

106. *Id.*

107. *Id.* at 2172.

108. *Id.*

109. *See Jacobs*, 290 U.S. at 16–17. Of course, this is not technically “interest” at all, but, more accurately, just compensation in the form of the time value of money. However, everyone refers to it as interest, so this Article will as well.

110. *Knick*, 139 S. Ct. at 2170 (citing 42 U.S.C. § 1983 (1996)).

The majority next addressed the biggest conceptual hurdle that Ms. Knick had to overcome: the idea that the Takings Clause “does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken.”<sup>111</sup> One might say that a large part of current eminent domain practice is built on the notion, first expressed in *Cherokee Nation v. Southern Kansas Railway Co.*, that takings are valid even if the condemner does not immediately provide just compensation, but only if the owner has a vested right to obtain it in the future, including compensation for the delay in payment.<sup>112</sup> Governments can, and often do, acquire or take property in multiple ways, including “quick-take,” and in many of these situations, the compensation is paid post-taking.<sup>113</sup> As the courts have phrased it, there must be a “reasonable, certain, and adequate” means to obtain compensation for a taking to be valid.<sup>114</sup> The *Knick* Court was keenly aware that any ruling would need to avoid radically upsetting these existing processes.<sup>115</sup> The majority distinguished *Cherokee Nation* by focusing on the remedy sought in that case: an injunction to stop the taking (not compensation): “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.”<sup>116</sup>

The majority also distinguished *Ruckelshaus v. Monsanto Co.*, a case in which the Court held that a property owner asserting a Fifth Amendment takings claim against the federal government must seek compensation under the Tucker Act in the Court of Federal Claims.<sup>117</sup> Until she does so, the owner “has no claim against the Government” for a taking.<sup>118</sup> The majority concluded that the case must be read narrowly because the remedy the plaintiff sought was to enjoin the allegedly offending regulation.<sup>119</sup> Applying the maxim that law comes before equity, the Court noted that *Ruckelshaus* only should be read to preclude equitable relief (injunction) when there is a legal remedy (compensation), not that an owner has no takings claim until after a

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111. *Knick*, 139 S. Ct. at 2175.

112. 135 U.S. 641, 659–61 (1890).

113. *See Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 4–5 (1984).

114. *Cherokee Nation*, 135 U.S. at 659.

115. *See Kirby*, 467 U.S. at 3–5 (detailing at least three different ways in which the federal government affirmatively takes property and provides compensation).

116. *Knick*, 139 S. Ct. at 2175.

117. 467 U.S. 986, 1018 (1984).

118. *Id.* at 1018 n.21.

119. *Knick*, 139 S. Ct. at 2177–78.

Tucker Act claim is rejected.<sup>120</sup> In short, according to the majority, there was a huge difference between trying to stop an exercise of the eminent domain power or application of a regulation because compensation has not already been provided, and a claim to recover compensation once the property has been taken (either affirmatively or by regulation).

Finally, the Court noted the practicalities. The *Williamson County/San Remo* combination was “unworkable in practice,”<sup>121</sup> and the sky will not fall because of the new *Knick* rule, as it merely opens the door to an alternative tribunal:

Our holding that uncompensated takings violate the Fifth Amendment will not expose governments to new liability; it will simply allow into federal court takings claims that otherwise would have been brought as inverse condemnation suits in state court.

Governments need not fear that our holding will lead federal courts to invalidate their regulations as unconstitutional. As long as just compensation remedies are available — as they have been for nearly 150 years — injunctive relief will be foreclosed. For the same reason, the Federal Government need not worry that courts will set aside agency actions as unconstitutional under the Administrative Procedures Act. Federal courts will not invalidate an otherwise lawful uncompensated taking when the property owner can receive complete relief through a Fifth Amendment claim brought under the Tucker Act.<sup>122</sup>

Justice Thomas issued a short concurring opinion, also noting that he “join[ed] in full” the majority:

This “sue me” approach to the Takings Clause is untenable. The Fifth Amendment does not merely provide a damages remedy to a property owner willing to “shoulder the burden of securing compensation” after the government takes property without paying for it. Instead, it makes just compensation a “prerequisite” to the government’s authority to “tak[e] property for public use.” A

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120. *Id.* at 2173 (“Equitable relief was not available because monetary relief was under the Tucker Act.”).

121. *Id.* at 2178.

122. *Id.* at 2179 (citation omitted). In *Knick*, the remedy sought was just compensation — money. And the defendant was a local municipal government. Thus, it was an easy question whether the case could proceed in federal court. That leaves unresolved the question: What about when the remedy sought is not compensation, and the defendant who is alleged to have affected the taking is a state official — not a municipality? When state officials who are alleged to have taken property without compensation in violation of the Fifth and Fourteenth Amendments assert immunity to damage remedies under the Eleventh Amendment, the remedies available to a property owner for the taking should include declaratory and injunctive relief.

“purported exercise of the eminent-domain power” is therefore “invalid” unless the government “pays just compensation before or at the time of its taking.”<sup>123</sup>

With *Williamson County*’s state procedures ripeness requirement now gone — if only by a one-justice margin — what does this mean for takings law?

First, *Williamson County* itself is not overruled, and the “final decision” requirement, which was not challenged in *Knick*, is still operative.<sup>124</sup> Thus, in most cases, property owners still need to obtain a final decision from the local government or agency about what uses, if any, may be made of their property under the allegedly restrictive regulation.<sup>125</sup> A court will still need to know the remaining uses under the allegedly offending regulation before it can determine whether the economic impact on the owner of the regulation is so great that it goes “too far” and amounts to a taking.<sup>126</sup>

Second, the *San Remo* preclusion trap is gone. The overruling of the state-litigation requirement also implicitly overruled the “preclusion trap” Catch-22 from that case.<sup>127</sup> A property owner may choose to litigate her state law takings or inverse claims in state court.<sup>128</sup> If she does so, she will likely be barred from later raising a federal takings claim. However, she will no longer be *forced* to go to

123. *Id.* at 2179 (Thomas, J., concurring) (quoting *Arrigoni Enterprises, LLC v. Durham*, 136 S. Ct. 1409 (2016)). I think Justice Thomas wrote separately for several reasons. First, Justice Thomas emphasized that the Constitution’s requirements are the requirements, and that we have always done it this way, and arguments based on the idea that “this might cost too much” are not going to fly with him: “if this requirement makes some regulatory programs ‘unworkable in practice,’ then so be it — our role is to enforce the Takings Clause as written.” *Id.* (citation omitted). Strong stuff. Second, Justice Thomas apparently does not care for nationwide injunctions, and *Knick*’s focus on the compensation remedy over injunctive relief gave him a chance to ring that bell. Finally, Justice Thomas noted that the Court’s recognition of a federal takings claim that may be raised in federal court does not preclude other similar claims from being pursued, including “common-law tort claims, such as trespass.”

124. *See id.* at 2169 (“*Knick* does not question the validity of this finality requirement, which is not at issue here.”).

125. *See Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186–87 (1985); *see also Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 297 (1981).

126. *See Williamson Cty.*, 473 U.S. at 190–91 (holding the economic impact of regulation “simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question”).

127. *See Knick*, 139 S. Ct. at 2167 (the majority noted, “[t]he *San Remo* preclusion trap should tip us off that the state-litigation requirement rests on a mistaken view of the Fifth Amendment.”).

128. *See id.*



state court in the first instance and raise a state law inverse condemnation claim, only to be later told she thereby litigated the federal takings claim by implication. Property owners again have the choice of a state or federal forum, as plaintiffs asserting their constitutional rights have in every other situation.<sup>129</sup> As do municipal and state defendants, at least in part, because they may still remove a takings lawsuit filed in state court to federal court if the suit includes a federal takings claim. But the shenanigans which surrounded the *International College* remove-and-dismiss game, as well as the doctrinal imbalance of letting defendants choose a federal forum while denying plaintiffs that same choice, are over.

Third, *Knick* reemphasized the usual remedy for regulatory takings claims: show me the money.<sup>130</sup> The usual cause of action in cases against municipal and local government defendants is under the Civil Rights Act and Section 1983, seeking compensation. Property owners are not going to get the federal courts to enjoin an uncompensated regulatory taking or declare a statute or regulation unconstitutional for violating the Takings Clause unless, for some reason, no compensation is available.<sup>131</sup> For example, what if the defendant is a state, and recovering compensation is barred in federal court by the Eleventh Amendment? If you are prohibited from your legal remedy of compensation, may you ask for an injunction under *Ex parte Young*?<sup>132</sup>

Fourth, with the “too early” ripeness requirement now somewhat defanged, look for a revival of “too late” arguments such as statutes of limitations. One court has already picked up the mantle, asserting that *Knick*’s holding about when a taking occurs means that the statute of limitations clock starts ticking from the moment a regulation applies to a property owner, even if the owner did not realize that it had.<sup>133</sup>

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129. *Leone v. County of Maui*, 404 P.3d 1257 (Haw. 2017), *cert. denied*, 139 S. Ct. 917 (2019), is a good example of why federal court jurisdiction for federal takings claims is important. There, because of *Williamson County*, a wealthy property owner was forced to ask a county jury to decide whether he was entitled to compensation for the county’s deprivation of a very expensive beachfront property of all uses. The local jury, unsurprisingly, said no. Would the outcome have been different had the jury been selected from the federal district’s pool, and not merely the from the defendant’s locale? Unknown, of course. But the property owner would have at least liked to have that choice.

130. *Knick*, 139 S. Ct. at 2172.

131. *Id.* at 2168.

132. 209 U.S. 123 (1908). Also, under *Horne v. Department of Agriculture*, 569 U.S. 513 (2013), a property owner may raise a takings defense to the imposition of a regulation or statute, on the grounds that subjecting the owner to the statute’s requirements would result in an uncompensated taking.

133. *See Campbell v. United States*, 932 F.3d 1331, 1338 (Fed. Cir. 2019).

Finally, the *Knick* majority took great care to preserve the existing system of regulatory or inverse claims against the *federal* government, where property owners seek compensation for relatively small takings in district courts, and for major compensation, in the Article I Court of Federal Claims.<sup>134</sup>

As a result of *Knick*, the federal judiciary’s unnecessary thirty-year abandonment of property and takings cases involving municipal and local governments is at long last over. The Court rightly relegated to history’s dustbin a judicially created doctrine that deprived property owners of a federal court forum to resolve federal constitutional claims. The decades of damage that *Williamson County*’s state procedures requirement wrought on property owners cannot be retroactively undone, of course. However, by putting property rights back on equal footing with other constitutional rights, *Knick* was a big step in the right direction. The Court rectified an unforced error — a mistake it never should have made — and correctly restored property owners’ rights to the “full-fledged constitutional status” they should enjoy.<sup>135</sup>

### C. The *Knick* Dissent: Chicken Little and Let Sleeping Dogs Lie

During the first round of oral arguments, Justice Breyer asked whether, even if *Williamson County* was a bad rule, the Court should “let sleeping dogs lie?”

JUSTICE BREYER: You don’t have to — the problem — the problem — I mean, you could say what Justice Gorsuch said, couldn’t you? The state says: No, we’re not going to pay you. Ha, because there’s no compensation — there’s no taking. Ha.

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In the case of a regulatory taking, however, the taking may occur before the effect of the regulatory action is felt and actual damage to the property interest is entirely determinable. As the Supreme Court recently stated in a regulatory takings case, “a property owner has a claim for a violation of the Takings Clause as soon as [the] government takes his property for public use without paying for it” without regard to post-taking remedies that may be available. In other words, “because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time.”

*Id.* (quoting *Knick*, 139 S. Ct. at 2170).

134. *Knick*, 139 S. Ct. at 2179.

135. *See id.* at 2170, 2174 (noting that *Williamson County* could have been decided on the basis that the property owner had not obtained a final decision from the agency, and it was unnecessary for the Court to adopt the state procedures requirement).

And we could say that's a final decision not to take it. We could. I mean, I don't see any logic. But *Williamson* didn't. So I thought: Well, why let the sleeping dog — let it lie?<sup>136</sup>

The idea that repose is more important than getting it right turned out to be a key point of departure for the four dissenters, who revealed several fundamental disconnects with the majority about takings law.<sup>137</sup> Interestingly, the dissenters did not merely hold their figurative noses to let the state procedures dog lie because it had been around for thirty-plus years, but instead doubled down on its rationale. Justice Kagan's dissent was the full-throated explication of *Williamson County* that the Court in *Williamson County* itself never made: the state procedures rationale was not merely long-standing law, it was correct.<sup>138</sup>

The first fundamental disconnect with the majority about takings law was that the dissenters rejected the majority's view that property rights should be treated the same as other rights recognized under the Bill of Rights. Instead, they viewed the Takings Clause as "unique among the Bill of Rights' guarantees."<sup>139</sup> To the dissenters, this is a textual argument (harking back to *Williamson County*) because, in their view, there is no constitutional violation unless and until "the government" denies compensation.<sup>140</sup> The dissent focuses on the long-standing rules which do not require payment of compensation before or at the time of an affirmative taking by eminent domain.<sup>141</sup> *Cherokee Nation* rejected the notion that the Fifth Amendment requires advance payment, as long as "reasonable, certain, and adequate" post-taking compensation is available.<sup>142</sup> To the dissenters, a state law inverse condemnation action in state court qualifies as a vested promise to pay, if there has been a taking.<sup>143</sup> *Williamson County* merely reflected how the Takings Clause works in regulatory takings cases: the same way it works in eminent domain (according to the dissent). Thus, the logic goes, a state court inverse claim to recover compensation for the legal taking is a prerequisite to a ripe federal cause of action. This, the

136. Transcript of Oral Argument at 44–45, *Knick*, 139 S. Ct. 2162 (No. 17-647).

137. See *Knick*, 139 S. Ct. at 2180 (Kagan, J., dissenting).

138. *Id.* at 2186–87 (Kagan, J., dissenting).

139. *Id.* at 2181 (Kagan, J., dissenting).

140. *Id.* (Kagan, J., dissenting) ("So when the government 'takes and pays,' it is not violating the Constitution at all.").

141. See *id.* at 2181–86 (Kagan, J., dissenting).

142. See *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890) ("[T]he owner is entitled to reasonable, certain, and adequate provision for obtaining . . . the compensation to which, under the constitution, he is entitled[.]").

143. *Knick*, 139 S. Ct. at 2185 (Kagan, J., dissenting).

dissent asserted, is based on “a hundred years” worth of “precedent after precedent,”<sup>144</sup> “stretching back to the late 1800s.”<sup>145</sup> After all, the dissenters argued, no one is claiming that federal quick-takes are unconstitutional.<sup>146</sup> There, property is seized before the adjudication and payment of compensation. Is there not a critical difference between an eminent domain quick-take where the government occupies now, with the corresponding recognition of the absolute obligation of the government to pay whatever the court later determines is just compensation, and a regulatory taking where the government is exercising some other power, and absolutely denies that it needs to pay anything? “Reasonable, certain, and adequate” presumes that the government admits it owes compensation, not where, as in inverse and regulatory cases, it asserts it was merely regulating, and thus owes nothing for exercising that power.

The second fundamental split between the majority and the dissent was on the practical consequences of the decision. In contrast to the majority, which focused on the impacts the state procedures requirement has had on property owners, the dissent focused instead on regulators: “The majority’s overruling of *Williamson County* will have two damaging consequences. It will inevitably turn even well-meaning government officials into lawbreakers. And it will subvert important principles of judicial federalism. To begin with, today’s decision means that government regulators will often have no way to avoid violating the Constitution.”<sup>147</sup>

As Justice Gorsuch recently wrote in another case, “*Really?*”<sup>148</sup> Government regulators are in no worse off position after *Knick* on the merits of takings questions than they were before, and are no more “lawbreakers” today than in the past thirty years.<sup>149</sup> The only major difference is that as a consequence of *Knick*, they may now have to answer to a federal judge and not a state judge, and cannot employ *Williamson County*’s state procedures requirement. The bar that property owners must cross in order to prove a regulation actually

144. *Id.* at 2185 (Kagan, J., dissenting).

145. *Id.* at 2180 (Kagan, J., dissenting).

146. *Id.* at 2182 (Kagan, J., dissenting).

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

148. See *Gamble v. United States*, 139 S. Ct. 1960, 1999 (2019) (Gorsuch, J., dissenting) (emphasis added).

149. For more thoughts on this, see Ilya Somin, *Knick v. Township of Scott: Ending a Catch-22 that Barred Takings Case from Federal Court*, 2018–2019 CATO SUP. CT. REV. 153, 185 (2019).

takes property and requires compensation remains extremely high.<sup>150</sup> This objection was more like chicken nothing than chicken little.<sup>151</sup>

#### D. Stare Decisis and Reverse Percolation

Perhaps the dissent's most significant criticism of the majority was on the question of the sleeping dog and stare decisis.<sup>152</sup> In the last section of her dissent, Justice Kagan vigorously argued the Court should not overturn *Williamson County* for all the reasons that a court of last resort should not lightly overturn precedent. This appeared to be aimed at a much broader audience than the majority justices, property owners, their lawyers, and takings scholars because the stare decisis debate is part of a much larger context, framed by other cases. Whether it is prudent to go back and revisit existing case decisions and rules of law generally is a question this Article shall leave to other commentators. Despite concerns about overturning recent decisions, *Williamson County* was a uniquely bad stare decisis hill to die on, for two main reasons.

First, the state-litigation rule which *Williamson County* adopted sua sponte was the usual "percolation" process in reverse.<sup>153</sup> The Solicitor General raised the issue (not the parties),<sup>154</sup> and the Court simply accepted and adopted it without the benefit of party briefing or prior deep consideration by the legal academy.<sup>155</sup> Consequently, the rationale which the Court adopted in *Williamson County* was too

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150. See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

151. In *Arkansas Game and Fish Commission v. United States*, 568 U.S. 23 (2012), a unanimous Court rejected a similar argument that holding in favor of the property owner on compensation would undermine the federal government's ability to control flooding. See *id.* at 37 ("We have rejected this argument when deployed to urge blanket exemptions from the Fifth Amendment's instruction. While we recognize the importance of the public interests the Government advances in this case, we do not see them as categorically different from the interests at stake in myriad other Takings Clause cases. The sky did not fall after [*United States v. Causby*], 328 U.S. 256 (1946)], and today's modest decision augurs no deluge of takings liability."); see also Somin, *supra* note 149, at 185 ("However, it is far from clear that *Knick* presages a major revolution in favor of stronger protection for constitutional property rights under the Takings Clause.").

152. See *Knick*, 139 S. Ct. at 2189 (Kagan, J., dissenting) ("Everything said above aside, *Williamson County* should stay on the books because of *stare decisis*.").

153. See *id.* at 2174.

154. See *id.*

155. The majority responded to the dissent's outrage that by overruling *Williamson County*, the majority was creating a stare decisis crisis. Noting the avalanche of criticisms from all sides of the spectrum, the majority pointed out the doctrine's "shaky foundations" and slow erosion from a seemingly mandatory jurisdictional rule to an optional prudential one. *Id.* at 2178.

clever by half, and a self-inflicted wound. Nor was the validity and application of the doctrine ever tested or argued directly in the Court in the intervening decades, with a small exception of 2005's *San Remo v. City and County of San Francisco*.<sup>156</sup> However, even in that case, the arguments were more focused on preclusion and full faith and credit, and why *Williamson County* did not control, *not* why it was fundamentally wrong.<sup>157</sup> The petitioner avoided expressly asking to overrule *Williamson County*.<sup>158</sup>

That leads to the second reason that *Williamson County* should rank low in the hierarchy of stare decisis precedents. The last 30-plus years of experience starkly revealed that the theory did not work in practice. What value was there in retaining a procedure that led to such overwhelming real-world problems? Even the rule's supporters, as the majority pointed out, did not strenuously defend it for the reasons it was adopted.<sup>159</sup> In *Knick*, the Township did not vigorously defend *Williamson County* under the same analysis by which the Court originally adopted the rule. Instead, it couched its arguments mainly in terms of federal jurisdiction and Section 1983.<sup>160</sup> This was not exactly a resounding endorsement of *Williamson County*'s rationale. Thus, the dissent's objections on stare decisis grounds are really more of a howl of protest about the doctrine in other cases, not this one, which did not deserve deference simply by the passage of time.

### III. DISCOVERING *KNICK*'S HOME RULE RATIONALE

Part III argues that the *Knick* opinions are best understood in light of the unstated assumptions that each held about the nature of the relationship between municipal governments and state courts. This Part further suggests that *Knick* was based on a separation of powers between local governments and state judiciaries.

The most fundamental disconnect between the *Knick* majority and the dissent was, interestingly, not expressly set out in either opinion. Yet it underlies the competing rationales. The core of this sublimated dispute was whether a state law inverse condemnation claim, resolved

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156. 545 U.S. 323 (2005).

157. *Id.* at 337–38.

158. *See generally id.* The lesson from the *San Remo* arguments was not lost on property owners and their counsel. By the time Ms. Knick filed her petition, several had already asked the Court directly to overturn *Williamson County*. *See, e.g., Arrigoni Enters., LLC v. Town of Durham*, 136 S. Ct. 1409 (2016).

159. *Knick*, 139 S. Ct. at 2174–75.

160. *See* Brief for Respondents at 28–34, *Knick*, 139 S. Ct. 2162 (No. 17-647) (“A plaintiff invoking Section 1983 must allege a violation of the Constitution.”).

by a state court, was part-and-parcel of a local government's taking and compensation process.<sup>161</sup> Put another way, is the availability of a state court lawsuit the functional equivalent of a local government's promise to pay for a taking?

The majority concluded no: "A property owner has an actionable Fifth Amendment takings claim when *the government* takes his property without paying for it."<sup>162</sup> The majority assumed that when a municipal government is doing the taking, state law making a state court inverse condemnation lawsuit available was not "the [same] government" doing the compensating. Thus, to the majority, the availability of after-the-taking compensation in state court by way of a state law inverse condemnation claim was completely irrelevant to the question of whether the taking was accomplished "without just compensation" by the local government.<sup>163</sup>

The dissent, by contrast, had a completely different view on the matter. Although the dissenters reached the opposite conclusion on that question, Justice Kagan's opinion at least regarded the inquiry similarly: whether "the government" promises to pay compensation when state law makes available a state court inverse condemnation claim.

Begin with the basics — the meaning of the Takings Clause. The right that the Clause confers is not to be free from government takings of property for public purposes. Instead, the right is to be free from those takings when *the government* fails to provide 'just compensation.' In other words, the government can take private property for public purposes, so long as *it* fairly pays the property owner.<sup>164</sup>

The dissenters viewed state courts as part-and-parcel of the local government's compensation mechanism, not truly separate branches of state governments.<sup>165</sup> The answer was obvious, and nothing more than what follows from a reading of the Takings Clause "as night the day."<sup>166</sup> So obvious that the dissent did not address its assumption that local governments and state courts are, collectively, "the government,"

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161. *See, e.g., Knick*, 139 S. Ct. at 2186 (Kagan, J., dissenting) (asserting that state court inverse condemnation claim is the equivalent of a Tucker Act claim for compensation).

162. *Id.* at 2167 (emphasis added).

163. *Id.* at 2177.

164. *Id.* at 2181 (Kagan, J., dissenting) (emphases added and in original).

165. *Id.* (Kagan, J., dissenting) ("Put another way, a Takings Clause violation has two necessary elements. First, *the government* must take the property. Second, *it* must deny the property owner compensation." (emphasis added)).

166. *Id.* at 2182 (Kagan, J., dissenting).

except with an unsupported assertion that “[t]he Tucker Act is the Federal Government’s equivalent of a State’s inverse condemnation procedure, by which a property owner can obtain just compensation.”<sup>167</sup>

However, when state courts adjudicate a state law inverse condemnation claim, they are not acting as an arm of local government. Instead, state courts are simply doing what courts do: resolving a controversy.<sup>168</sup> The dissent’s assumption that state courts are tasked with authority to provide compensation when local governments take property is based on an outmoded view of local governments as legally indistinguishable from the state because local governments are mere administrative conveniences and do not possess any distinct or independent authority.<sup>169</sup> This is the storied “Dillon Rule.” However, this is a decidedly minority view today, and the overwhelming approach to a state’s relationship with its political subdivisions can be characterized as either the “Cooley rule,”<sup>170</sup> or “home rule.”<sup>171</sup> Under

167. *Id.* at 2186 (Kagan, J., dissenting).

168. See Brian P. Keenan, Note, *Subdivisions, Standing and the Supremacy Clause: Can a Political Subdivision Sue Its Parent State Under Federal Law?*, 103 MICH. L. REV. 1899, 1900 (2005) (“[Local governments] offer a miniature version of federalism on the state level, dividing the power of the state and placing many important decisions in the hands of representatives closer to the people.”).

169. See *City of Clinton v. Cedar Rapids & Mo. River R.R. Co.*, 24 Iowa 455, 475 (1868) (Dillon, C.J.); 1 JOHN F. DILLON, *THE LAW OF MUNICIPAL CORPORATIONS* § 55, at 174 (2d ed. 1873); see also *City of Trenton v. New Jersey*, 262 U.S. 182, 188 (1923) (“The power of the state, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for ‘governmental purposes’ cannot be questioned.”); Josh Bendor, *Municipal Constitutional Rights: A New Approach*, 31 YALE L. & POL’Y REV. 389, 390 (2012) (noting that “[m]unicipalities were held to be creatures of the state, having no rights beyond those given to them by the state that created them”) (citing *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907)).

170. In *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 108 (1871) (Cooley, J., concurring), Justice Thomas Cooley, responding to the Dillon Rule, wrote:

The state may mould [sic] local institutions according to its views of policy or expediency; but local government is matter of absolute right; and the state cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty where the state not only shaped its government, but at discretion sent in its own agents to administer it; or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control in their local affairs, or no control at all.

*Id.*

171. JEFFERSON FORDHAM, *MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE* (1953). Forty-eight states have “home rule” legislation or constitutional provisions. Jarit C. Polley, *Uncertainty for the Energy Industry: A Fractured Look at Home Rule*, 34 ENERGY L.J. 261, 268 (2013) (citing RICHARD BRIFFAULT & LAURIE REYNOLDS, *STATE AND LOCAL GOVERNMENT LAW* 268 (6th ed. 2004)).



this approach, in areas of local interest, municipalities have the power to act without the state's approval, and in some instances, a locality's law may be superior to conflicting state law.<sup>172</sup> Even though the Supreme Court endorsed the Dillon Rule in *Hunter v. City of Pittsburgh*,<sup>173</sup> the Court subsequently recognized that states' usual broad powers over political subdivisions are limited when important federal constitutional rights are at issue.<sup>174</sup> Thus, even in a Dillon Rule jurisdiction, the federal interest in ensuring just compensation for actions which effect a taking should count more than a state's interest in exercising detailed control over its political subdivisions. This is the more enlightened view of the place of municipalities within the federal-state-local government vertical separation of governmental powers and responsibilities.<sup>175</sup> The *Knick* majority's implicit recognition of the separation between local governments and state judiciaries should be considered an affirmation of the modern view of state-municipal relations.<sup>176</sup>

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172. See, e.g., HAW. CONST. art. VIII, § 2 ("Each political subdivision shall have the power to frame and adopt a charter for its own self-government within such limits and under such procedures as may be provided by general law. Such procedures, however, shall not require the approval of a charter by a legislative body. Charter provisions with respect to a political subdivision's executive, legislative and administrative structure and organization shall be superior to statutory provisions, subject to the authority of the legislature to enact general laws allocating and reallocating powers and functions.").

173. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

174. See *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994) (federal interest in avoiding the establishment of religion); *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (federal interest in race-neutral municipal boundaries); Keenan, *supra* note 168, at 1902 n.15 (citing *Grumet*, 512 U.S. 687) ("The state's power over its political subdivisions is therefore not completely unlimited.").

175. See *Hunter*, 207 U.S. at 179–80; *Shirk v. City of Lancaster*, 169 A. 557, 560 (Pa. 1933); Michael A. Lawrence, *Do "Creatures of the State" Have Constitutional Rights?: Standing for Municipalities to Assert Procedural Due Process Claims Against the State*, 47 VILL. L. REV. 93, 94 n.6 (2002) ("In addition, other state and federal cases bolster the proposition that states' power over their municipal corporations is limited in some respects by the Constitution." (citing *Atlanta Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders*, 893 F. Supp. 301 (D.N.J. 1995))).

176. Two additional rules emphasize the difference between local governments and states. First, unlike states, local governments and other creatures of state law are not immune under the Eleventh Amendment from being sued in the federal courts without their consent. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."); *Hans v. Louisiana*, 134 U.S. 1 (1890) (the amendment is a form of sovereign immunity). Second, local governments and municipal corporations are "persons" under the statutory vehicle most often employed to raise federal constitutional claims, the Civil Rights Act of 1871. 42 U.S.C. § 1983 (1996); *Monell v. Dep't of Soc. Servs.* 436 U.S. 658, 683 (1978) ("An examination of the debate on § 1

Thus, when the dissent asserted, “[t]he Takings Clause is different because it does not prohibit takings; to the contrary, it permits them provided the government gives just compensation. So when the government ‘takes and pays,’ it is not violating the Constitution at all,” one can see how it conflates the municipal government defendant and the state judiciary into “the government.”<sup>177</sup> But in *Knick*, the Township has not “taken and paid,” and the Township had not provided an implied *promise* to pay if indeed it took property. Indeed, the only reason a property owner needs to sue “the government” is that “the government” has *refused* to pay. Rather, the local government has taken, and the state judiciary may have eventually ordered it to pay. One of the theories of federal separation of powers is premised on the idea that every governmental action may be classified as legislative, executive, or judicial.<sup>178</sup> When a state court adjudicates a state law taking or inverse condemnation claim, it is plainly acting in its judicial capacity.

The following passage best reveals the dissent’s false assumption: “The majority today holds, in conflict with precedent after precedent, that a government violates the Constitution whenever it takes property without advance compensation — no matter how good its commitment to pay.”<sup>179</sup>

What “commitment to pay” has a local government made if all it says to property owners who say that their property has been taken by regulation is “sue me” in state court?<sup>180</sup> None. The availability of a state court action for inverse condemnation under state law is not any kind of recognition by the local government that it may be liable for a taking at all. It is simply an available avenue to *adjudicate* whether a local government may be liable for a taking under state law. The *Knick* majority’s unstated assumption is that state judges and state courts are much like their federal counterparts — the deciders. Indeed, even judges on the most “local” of courts view themselves as adjudicators, separate from their local governments.<sup>181</sup>

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[of the Civil Rights Act] and application of appropriate rules of construction show unequivocally that § 1 was intended to cover legal, as well as natural, persons.”)

177. *Knick v. Township of Scott*, 139 S. Ct. 2162, 2181 (2019) (Kagan, J., dissenting).

178. See David A. Carrillo & Danny Y. Chou, *California Constitutional Law: Separation of Powers*, 45 U.S.F. L. REV. 655, 659 (2011) (citing Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1734–35 (1996)).

179. *Knick*, 139 S. Ct. at 2181 (Kagan, J., dissenting).

180. Hat tip to Justice Thomas. *Id.* at 2180 (Thomas, J., concurring).

181. See Ethan J. Leib, *Local Judges and Local Governments*, 18 N.Y.U. J. LEGIS. & PUB. POL’Y 707, 715–16 (2015) (“At the most local level, judges maintain a strong sense of separation of powers, that tends to isolate local judges from other local

Illustrating the distinction is the *Knick* dissent's reliance on an analogy to federal Tucker Act claims for compensation in the Court of Federal Claims, and the majority opinion's rejection of that analogy. The dissenters asked why a state court inverse condemnation lawsuit seeking compensation is not the very same thing as a Tucker Act claim for compensation, a process the majority did not disturb:

Fourth and finally, the majority lays claim to another line of decisions — involving the Tucker Act — but with no greater success. The Tucker Act waives the Federal Government's sovereign immunity and grants the Court of Federal Claims jurisdiction over suits seeking compensation for takings. According to the majority, this Court's cases establish that such an action “is a claim for a violation of the Fifth Amendment” — that is, for a constitutional offense that has already happened because of the absence of advance payment. But again, the precedents say the opposite. *The Tucker Act is the Federal Government's equivalent of a State's inverse condemnation procedure, by which a property owner can obtain just compensation.* The former, no less than the latter, forestalls any constitutional violation by ensuring that an owner gets full and fair payment for a taking.<sup>182</sup>

The majority opinion pointed to the same Tucker Act process, but reached a completely different conclusion about its meaning:

We have long recognized that property owners may bring Fifth Amendment claims against the Federal Government as soon as their property has been taken. The Tucker Act, which provides the standard procedure for bringing such claims, gives the Court of Federal Claims jurisdiction to “render judgment upon any claim against the United States founded either upon the Constitution” or any federal law or contract for damages “in cases not sounding in tort.” We have held that “[i]f there is a taking, the claim is ‘founded upon the Constitution’ and within the jurisdiction of the Court of Claims to hear and determine.”<sup>183</sup>

Were the Court of Federal Claims an Article III court, the dissenters might have had a better point in asserting that it is the same as state

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officials in the legislature and the executive. At the less-than-local county level, however, it seems that collaboration is more likely to occur as sister government branches work together to effectuate policy.”) (footnote omitted); *see also* Paul J. De Muniz, *Oregon Courts Today and Tomorrow*, 50 WILLAMETTE L. REV. 291, 292 (2014) (describing how the Oregon state court system evolved into a unified statewide system “shifting fiscal responsibility for the judiciary away from the local governments and placing it almost entirely with the state”).

182. *Knick*, 139 S. Ct. at 2186 (Kagan, J., dissenting) (emphasis added) (citations omitted).

183. *Id.* at 2170 (citations omitted).

general jurisdiction courts. But the Court of Federal Claims is an Article I legislative tribunal, different in kind than an Article III court.<sup>184</sup> Despite being labeled a “court,” and its members “judges,” the Court of Federal Claims in substance serves much the same function as Congress itself did in the days when claims for compensation were submitted as special bills: to determine whether the legislature must pay compensation.<sup>185</sup> Thus, most critically for the *Knick* analysis, by creating the Court of Federal Claims:

Congress did not create the Court of Federal Claims as an independent “constitutional” court pursuant to Article III of the constitution. Instead, Congress explicitly provided, when creating it, that the new Court of Federal Claims is a “legislative court,” created pursuant to Article I. The distinction is one with a profound difference.<sup>186</sup>

The division of power between local governments, on the one hand, and state courts, on the other, differs from both types of federal takings — eminent domain takings, and regulatory takings or inverse condemnations by the federal government — in two ways. First, in federal eminent domain takings, the federal government has acknowledged its obligation to pay compensation if it decides to acquire the property at the adjudicated prices, and the owner’s right to compensation vests when title transfers from owner to the federal

184. *See Brott v. United States*, 858 F.3d 425, 427 (6th Cir. 2017) (the Court of Federal Claims, an Article I tribunal, has exclusive jurisdiction to consider takings claims which seek in excess of \$10,000 in compensation), *cert. denied*, 138 S. Ct. 1324 (2018).

185. The judges of the Court of Federal Claims do not enjoy the same protections afforded Article III judges. For example, they are appointed for 15-year terms, are subject to removal by a majority of the members of the Federal Circuit, and their salaries may be reduced. *See* 28 U.S.C. §§ 172, 176 (1992). Takings claimants in the Court of Federal Claims are not entitled to have the case considered by a jury. 28 U.S.C. § 1491 (2011); *see also* Michael P. Goodman, *Taking Back Takings Claims: Why Congress Giving Just Compensation Jurisdiction to the Court of Federal Claims is Unconstitutional*, 60 VILL. L. REV. 101, 104 (2015) (“The Court of Federal Claims is not entirely like the federal district courts, however . . . there are important differences between the Court of Federal Claims and the federal district courts.”).

186. Goodman, *supra* note 185, at 86 (citing 28 U.S.C. § 171(a) (1992)). Whether Congress’ assignment of major just compensation claims to an Article I tribunal comports with the ideas that the right to compensation is “self-executing” and should therefore not need a waiver of sovereign immunity, and that the calculation of compensation is an “inherently judicial” function, *see Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893), is beyond the scope of this Article. For our purposes here, suffice it to note that challenges to the Court of Federal Claims’ exclusive jurisdiction over these claims have not met with a receptive audience. *See, e.g., Brott*, 858 F.3d at 429, *cert. denied*, 138 S. Ct. 1324 (2018); *TrinCo Inv. Co. v. United States*, 140 Fed. Cl. 530 (2018).

government. Second, in federal regulatory takings, the federal government itself has created a legislative forum where property owners who assert that an action by the government has affected a taking may seek compensation. Thus, the role of the Court of Federal Claims and state courts are dramatically different. In a federal taking, the federal government is both doing the (alleged) taking, and, via the Court of Federal claims, has offered up a “reasonable, certain, and adequate” means for obtaining post-hoc compensation. Not so in regulatory takings by local governments. In short, the more sensible understanding is that once “the [municipal] government” (allegedly) takes property, all the owner need do to ripen a claim is ask “the government” (the same government) to pay up, and it does not need to ask a separate branch of the state to force the municipality to do so.

### CONCLUSION

In the nearly 100 years since Justice Holmes famously opined in *Mahon* that if a regulation goes “too far” it will be recognized as a taking without just compensation, the Court has made clear that a regulation is a taking when it either forces an owner to surrender even a small part of her right to exclude, or deprives the owner of “productive use” of property. In *Knick*, we now have the first case in the modern takings oeuvre in which the Court expresses clearly what the second part of a cause of action — “without just compensation” — looks like.

At long last, a majority of the Court appears to understand that a federal takings claim against a local or municipal government is ripe for adjudication if the government has not acknowledged its obligation to provide compensation. Because the government’s obligation is “self-executing,” the claim arises now and the owner may pursue a federal compensation remedy now, either in state or federal court. Pursuing and losing a state law inverse condemnation claim is not an element of a federal takings claim.