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Overturning a Catch-22 in the Knick of Time: Knick v. Township of Scott and the Doctrine of Precedent

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OVERTURNING A CATCH-22 IN THE KNICK OF TIME: *KNICK V. TOWNSHIP OF SCOTT* AND THE DOCTRINE OF PRECEDENT

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INTRODUCTION

The Supreme Court's decision in *Knick v. Township of Scott* was an important milestone in takings jurisprudence.[1] But for many observers, it was even more significant because of its potential implications for the doctrine of stare decisis.[2] *Knick* overruled a key part of a 34-year-old decision, *Williamson County Regional Planning Commission v. Hamilton Bank*.[3] Some fear that the *Knick* decision signals the start of a campaign by the Court's conservative majority that will lead to the ill-advised overruling of other precedents. In his dissent in *Franchise Tax Board v. Hyatt*, a recent case overruling a different 40-year-old precedent, Justice Stephen Breyer complained that "[t]oday's decision can only cause one to wonder which cases the Court will overrule next."[4] Less than six weeks later, Justice Elena Kagan referenced Breyer's statement in her dissenting opinion in *Knick*: "[w]ell, that didn't take long. Now one may wonder yet again."[5]

Such fears are, to some extent, understandable, given ideological and jurisprudential differences between the justices and the deep ideological polarization in American society generally. However, at least when it comes to *Knick*, they are misplaced. This Article explains why the *Knick* Court was justified in overruling *Williamson County*, based on both the Supreme Court's own established rules for overruling precedent and on leading theories of stare decisis advanced

1. 139 S. Ct. 2162, 2167 (2019).

2. *See* Ilya Somin, Knick v. Township of Scott*: Ending a "Catch 22" that Barred Takings Cases from Federal Court*, 2018–2019 CATO SUP. CT. REV. 153, 171 (2019) [hereinafter Somin, Knick]; *cf.* Tadhg A.J. Dooley & David Roth, *Supreme Court Update*, NAT'L L. REV. (June 26, 2019), https://www.natlawreview.com/article/supreme-court-update-knick-v-township-scott-no-17-647-nc-dep-t-revenue-v-kimberley [https://perma.cc/B9P8-4A5C] ("*Knick* stands on its own as an important constitutional takings decision, but may well be remembered most as another example of the Roberts Court chipping away at longstanding precedent"); Henry Gass, *Overruled: Is Precedent in Danger at the Supreme Court?*, CHRISTIAN SCI. MONITOR (June 25, 2019), https://www.csmonitor.com/USA/Justice/2019/0625/Overruled-Is-precedent-in-danger-at-the-Supreme-Court [https://perma.cc/K3SM-S6QF].

3. 473 U.S. 172 (1985); *see Knick*, 139 S. Ct. at 2167.

4. Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting).

5. *Knick*, 139 S. Ct. at 2190 (Kagan, J., dissenting).

by individual justices and prominent legal scholars, both originalists and living constitutionalists.

Knick reversed a key provision of *Williamson County* that created what Chief Justice John Roberts described as a "Catch-22": preventing property owners from filing takings cases against state and local governments in federal court.[6] Under *Williamson County*, a property owner who claimed that the government had taken her property and therefore owed her "just compensation" under the Takings Clause of the Fifth Amendment, could not file a case in federal court without first securing a "final decision" from the relevant state regulatory agency and "exhausting" all possible remedies in state court.[7] Takings claims were not considered "ripe" for adjudication until these two prerequisites were met.[8] The validity of this second "exhaustion" requirement was the point at issue in *Knick*.

Even after both *Williamson County* requirements were met, it was *still* essentially impossible to bring a federal claim because procedural rules precluded federal courts from reviewing final decisions in cases initially brought in state court.[9] In *San Remo Hotel v. City and County of San Francisco*, the Court ruled that a final decision in a takings case from a state court precluded relitigation of the same issue in federal court.[10] As Chief Justice Roberts explained in his majority opinion in *Knick*, "[t]he 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."[11]

To make this system even more absurd, some state and local governments defending against takings claims even exercised their right to "remove" the case to federal court (on the grounds that it raised a federal question).[12] They then successfully moved to get the case dismissed because the property owner did not manage to first "exhaust" state court remedies, as required by *Williamson County* — a failure caused by the defendants' own choice to have the case removed.[13] All of this, at the very least, made *Williamson County* a

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6. *See Knick*, 139 S. Ct. at 2167.
7. *Williamson Cty.*, 473 U.S. at 186, 194–95.
8. *See id.*
9. *See Knick*, 139 S. Ct. at 2167.
10. 545 U.S. 323, 336 (2005).
11. *Knick*, 139 S. Ct. at 2167.
12. The federal question jurisdiction statute is found at 28 U.SC. § 1331 (1948).
13. *See, e.g.*, Warner v. City of Marathon, 718 F. App'x 834, 840 (11th Cir. 2017) (dismissing a takings claim removed to federal court under *Williamson County*);

strong candidate for overruling under any reasonable approach to stare decisis. Even if some incorrect precedents should be allowed to stand, *Williamson County* was sufficiently egregious that perhaps it should not have been one of them.

The rule of deference to precedent derives from the Latin maxim *stare decisis et non quieta movere*, which means "to stand by things decided and not disturb settled points."[14] Deciding whether to overrule a precedent requires addressing two issues: whether the precedent in question is correct or incorrect, and determining the necessary justifications for overruling an erroneous precedent.[15] If judges conclude that the challenged precedent was wrongly decided, they must decide whether to improve the law by correcting perceived mistakes or letting the mistakes remain in order to preserve reliance interests and respect for the rule of law.[16]

If *Williamson County* was correctly decided, then it would obviously follow that the *Knick* Court was wrong to overrule it. Stare decisis only comes into play in a situation where the precedent in question was wrong as an initial matter, but it can be argued that it should be maintained nonetheless. As a prominent recent treatise on judicial precedent puts it, stare decisis enters the picture "when a court has determined that the prior decision was wrongly decided."[17] Justice Antonin Scalia similarly emphasized that "[t]he whole function of the doctrine [of stare decisis] is to make us say that what is false under proper analysis, must nonetheless be held to be true, all in the interest of stability."[18] A recent Supreme Court decision frankly avows that "[r]especting *stare decisis* means sticking with some wrong decisions."[19]

Reahard v. Lee County, 30 F.3d 1412, 1418 (11th Cir. 1994) (same). The Supreme Court ruled that such "removal" shenanigans were permissible, despite the fact that the removed claim would not be "ripe" under *Williamson County*. City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156 (1997).

14. BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 5 (2016) (quoting BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 841 (3d ed. 2011)).

15. *See* RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 12 (2017).

16. *See id.* at 4.

17. GARNER ET AL., *supra* note 14, at 391.

18. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 139 (1997).

19. Kimble v. Marvel Entm't, 135 S. Ct. 2401, 2409 (2015).

Part I of this Article briefly summarizes the reasons why *Williamson County* was wrongly decided,[20] and why the *Knick* Court was justified in overruling it on the merits — at least aside from the doctrine of stare decisis. This Article's purpose is *not* to defend *Knick*'s rejection of *Williamson County* against those who believe the latter was correctly decided.[21] Rather, for present purposes, we assume that *Williamson County* was indeed wrong, and consider whether the *Knick* Court should have nonetheless, refused to overrule it because of the doctrine of stare decisis. However, as discussed more fully below, the reasons why *Williamson County* was wrong are relevant to assessing the *Knick* Court's decision to reverse it rather than keeping it in place out of deference to precedent.

Part II shows that *Knick*'s overruling of *Williamson County* was amply justified based on the Supreme Court's existing criteria for overruling constitutional decisions, which may be called its "precedent on overruling precedent." While that doctrine is not a model of clarity, *Knick*'s application of it to *Williamson County* turns out to be relatively straightforward. Part II also addresses Justice Elena Kagan's claim in her *Knick* dissent, that the majority's conclusion "requires declaring precedent after precedent after precedent wrong," thereby reversing numerous cases that long predate *Knick*.[22]

Part III explains why the overruling of *Williamson County* was justified based on the current leading originalist theories of precedent advanced by prominent legal scholars,[23] and by Supreme Court Justice Clarence Thomas in his recent concurring opinion in *Gamble v. United States*.[24] The key consideration here is that *Williamson County* itself had no basis in original meaning.

Part IV assesses the overruling of *Williamson County* from the standpoint of prominent modern "living constitutionalist" and pragmatic theories of precedent. Here too, it turns out that overruling was well-justified. In sum, the result in *Knick* is defensible based on a wide range of different approaches to stare decisis.

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20. One of the authors has written about these issues in greater detail in an earlier article. *See* Somin, Knick, *supra* note 2, at 153, 157–71, 181–84.

21. For criticism of *Knick*, see Stewart E. Sterk & Michael Pollack, *A Knock on* Knick*'s Revival of Federal Takings Litigation*, 72 FLA. L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3449281 [https://perma.cc/6YU5-QB3C].

22. Knick v. Township of Scott, 139 S. Ct. 2162, 2186 (2019) (Kagan, J. dissenting).

23. *See generally* Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451 (2018) (providing a helpful overview of such theories).

24. 139 S. Ct. 1960, 1980–89 (2019) (Thomas, J., concurring).

I. WHY *WILLIAMSON COUNTY* WAS WRONG

This Part summarizes the reasons why *Williamson County* was wrong to require takings plaintiffs to "exhaust" remedies in state court before filing a claim in federal court.[25] The *Knick* majority was therefore justified in eliminating this requirement — setting aside (for the moment) the doctrine of precedent. These reasons are relevant to any assessment of arguments that the relevant precedent should be preserved for the sake of stare decisis. Under many theories of stare decisis, whether an erroneous precedent should be preserved depends in large part on the reasons *why* it was wrong, and on the relative egregiousness of the error. This Article does not attempt to provide anything approaching a complete defense of the reasons for believing *Williamson County* was wrong.[26] We seek only to briefly lay out those reasons so they can then be considered in analyzing the stare decisis issue.

Knick arose from a dispute over alleged centuries-old gravesites.[27] Rose Mary Knick owned a 90-acre farm in the Township of Scott, Pennsylvania.[28] Members of her family had owned the land since 1970.[29] Beginning in 2008, some other area residents claimed that there were old gravesites on the Knick property and sought access to them. In December 2012, the Township enacted Ordinance 12-12-20-001, which required "[a]ll cemeteries . . . be kept open and accessible to the general public during daylight hours."[30]

In April 2013, the Township's code enforcement officer entered the property and concluded that several stones on the land were actually gravestones, and therefore, the land qualified as a "cemetery" under the ordinance.[31] Under the ordinance, Knick would have had to pay between $300 and $600 in daily fines for each day the public and township enforcement officials did not have daylight access to the "cemetery."[32]

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25. *See* Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985)).

26. *See generally* Somin, Knick, *supra* note 2, at 157–71 (arguing in detail why *Williamson County* was wrongly decided).

27. *See id.* at 155–56.

28. *See* Brief for Petitioner at 3–7, Knick v. Township of Scott, 139 S. Ct. 2162 (2019) (No. 17-647).

29. *See id.* at 4.

30. Scott Township, Pa., Ordinance 12-12-20-001 § 5 (Dec. 20, 2012).

31. Brief for the Petitioner, *supra* note 28, at 6.

32. *See id.* at 4–7.

Knick filed a lawsuit in state court challenging the ordinance, arguing that it amounted to an uncompensated taking in violation of the Takings Clause of the Fifth Amendment. The state court dismissed the case on procedural grounds.[33] After failing to secure a decision on the merits in state court, Knick filed a takings claim in federal court.[34] Citing *Williamson County*, both the district court and the U.S. Court of Appeals for the Third Circuit dismissed the case because Knick's takings claim was not ripe for review.[35] As the district court ruling explained, *Williamson County* required two prerequisites for an as-applied takings challenge:

> (1) 'the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue' (the 'finality rule'), and (2) the plaintiff has unsuccessfully exhausted the state's procedures for seeking 'just compensation,' so long as the procedures provided by the state were adequate.[36]

Because Knick's claim was a facial challenge to the Township's ordinance, she did not need to satisfy the "finality rule," but was still required to satisfy the "exhaustion" requirement by first seeking just compensation in state court in order for her claim to be ripe.[37] There is little doubt that the lower courts applied *Williamson County* correctly, thereby creating a potential opportunity for the Supreme Court to reconsider the second prong of the precedent, which required exhaustion of the claim in state court.

The most obvious reason why *Williamson County*'s state-exhaustion requirement was wrong is that it is at odds with the text of the Fifth Amendment. The relevant part of that text states that "nor shall private property be taken for public use, without just compensation."[38] As Chief Justice Roberts puts it in his majority opinion in *Knick*:

> [The Clause] . . . does not say: "[n]or 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, that government has violated the Fifth Amendment —

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

34. *Id.*

35. *See* Knick v. Township of Scott, 862 F.3d 310, 314 (3d Cir. 2017); Knick v. Township of Scott, 2016 WL 4701549, *5–6 (M.D. Pa. Sept. 7, 2016).

36. *Knick*, 2016 WL 4701549 at *5 (quoting Cty. Concrete Corp. v. Town of Roxbury, 442 F.3d 159, 164 (3d Cir. 2006) (citing Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186, 194–95 (1985)).

37. *Id.*; *see also Knick*, 862 F.3d at 323.

38. U.S. CONST. amend. V.

> just as the Takings Clause says — without regard to subsequent state court proceedings.[39]

The text of the Takings Clause indicates that the key trigger for liability and compensation is the taking itself, not the state court's subsequent possible decision upholding the taking. During whatever period in which the government has taken the property, but failed to provide compensation, there is a violation of the Fifth Amendment.

Justice Kagan's counterargument — that "the text does not say: '[n]or shall private property be taken for public use, without advance or contemporaneous payment of just compensation, notwithstanding ordinary procedures'" — ignores the fact that property rights exist in time, as well as in space.[40] It is a long-established principle of takings law that if the government takes private property for only a limited period of time, it must still pay just compensation for that period.[41] Under Justice Kagan's approach, there would be no violation of the Takings Clause until "the property owner comes away from the government's compensatory procedure empty-handed."[42]

This inference from the text is backed by the original meaning of the Fourteenth Amendment, which "incorporated" the Fifth Amendment and all or most of the rest of the Bill of Rights against the states.[43] The Amendment's framers sought to ensure that property rights would be protected against uncompensated takings by state governments; this issue was a major priority of theirs, as they feared that southern states would seek to undermine the property rights of African-Americans and whites who had sided with the Union during the recently concluded Civil War.[44]

In addition to being at odds with the text and original meaning, the *Williamson County* "Catch-22" also created a double standard under which property rights claimants under the Takings Clause were denied access to federal court in situations where access is routinely granted

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39. *Knick*, 139 S. Ct. at 2170.

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

41. *See, e.g.*, Kimball Laundry Co. v. United States, 338 U.S. 1, 10 (1949) (applying that rule); United States v. Petty Motor Co., 327 U.S. 372, 377–78 (1946) (same); United States v. Gen. Motors Corp., 323 U.S. 373, 374–75 (1945) (same). For an overview of the Court's jurisprudence on temporary takings, see Daniel L. Siegel & Robert Meltz, *Temporary Takings: Settled Principles and Unresolved Questions*, 11 VT. J. ENVTL. L. 479, 480 (2010).

42. *Knick*, 139 S. Ct. at 2184 (Kagan, J., dissenting).

43. For a general account of incorporation and the motivations behind it, see AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 163–294 (1998).

44. *See* Somin, Knick, *supra* note 2, at 160–62.

to other types of constitutional claims.[45] Many such claims could also have been treated as not "ripe" until the plaintiffs had exhausted all possible state court remedies. Examples include suits challenging prior restraints on speech and racial and ethnic discrimination in state university admissions, among others.[46]

Attempts to prove that *Williamson County* was not an unusual case by analogizing it to restrictions on habeas challenges to state court violations of criminal defendants' rights are unpersuasive. Such comparisons run afoul of the fact that the restrictions in question do not create a categorical bar to such challenges and are, at least in part, authorized by a statute enacted by Congress.[47]

Similarly unavailing are oft-heard claims that takings claims should be consigned to state court because state judges have special expertise on these issues, exceeding that of federal judges.[48] Such reasoning would justify relegating numerous other constitutional rights claims to state court, on the basis of supposedly superior expertise, including free speech cases, First Amendment Establishment Clause cases, and others.[49]

It is sometimes argued that property rights issues are a special case because state law defines what qualifies as "property."[50] This theory, however, does not give state courts any special expertise advantage greater than that which they enjoy in many other cases where the

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45. *Id.* at 163.

46. *Id.*

47. *See id.* at 169–71. We do not, however, mean to suggest that these restrictions on habeas claims are justified. We are sympathetic to many of the concerns about them raised by critics. *See, e.g.*, Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1219—20 (2015); Lynn Adelman, *Who Killed Habeas Corpus?*, DISSENT 2–3 (2018), https://www.dissentmagazine.org/article/who-killed-habeas-corpus-bill-clinton-aedpa-states-rights [https://perma.cc/Z52N-59E4].

48. *See, e.g.*, Knick v. Township of Scott, 139 S. Ct. 2162, 2187 (2019) (Kagan, J., dissenting); Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464, 494 (2000); Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 305 (1993); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 226–28 (2004).

49. *See* Somin, Knick, *supra* note 2, at 164–65; *see also* Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEGAL F. 53, 80–86 (2011) [hereinafter Somin, *Federalism and Property Rights*] (criticizing such arguments with respect to constitutional property right issues more generally).

50. *See, e.g.*, *Knick*, 139 S. Ct. at 2187–88 (Kagan, J., dissenting).

outcome may depend in part on interpretations of state and local law.[51] In addition, this point only applies to one term in the Takings Clause — "property" — but not to the interpretation of other key terms, including "take" and "just compensation." These are defined by federal constitutional law, and it is their definitions that are at issue in many Takings Clause cases, including *Knick*, where the critical dispute was not over whether Knick owned the land in question, but whether the government had "taken" her rights.[52] Moreover, property rights are not solely defined by state law, but also have roots in natural rights theory.[53]

Finally, it is important to emphasize that access to federal court is not just a minor procedural issue, with little or no practical import. In some situations, it is an essential safeguard enabling property owners to avoid political bias in state courts.[54] It also ensures that a minimum floor of federal constitutional rights is enforced throughout the nation.[55] As Justice Joseph Story noted in the classic 1816 Supreme Court decision, *Martin v. Hunter's Lessee*, one of the main reasons why federal courts have jurisdiction over federal constitutional issues is "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution."[56]

In sum, *Williamson County* was wrongly decided because it created a Catch-22 that violated the text and original meaning of the Fifth Amendment and established a blatant double-standard under which takings claims were systematically treated worse than other constitutional-rights cases. It also denied takings plaintiffs access to federal courts that, in some cases, might be essential to shielding them against biased state courts.

II. *KNICK* AND THE COURT'S EXISTING PRECEDENT ON OVERRULING PRECEDENT

The *Knick* majority's decision to overrule *Williamson County* is consistent with the Court's own previously stated criteria for overruling constitutional precedent.[57] We might call that doctrine the Court's

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51. Somin, Knick, *supra* note 2, at 165; *see also* Somin, *Federalism and Property Rights*, *supra* note 49, at 84–86 (offering more extended analysis of this point).

52. *See supra* notes 27–36 and accompanying text.

53. *See* Somin, *Federalism and Property Rights*, *supra* note 49, at 86.

54. *See* Somin, Knick, *supra* note 2, at 181–82.

55. *See id.* at 182–83.

56. 14 U.S. (1 Wheat.) 304, 347–48 (1816) (Story, J.).

57. *See* Somin, Knick, *supra* note 2, at 172.

"precedent about precedent." Although that precedent is not entirely clear, *Knick* is well within its scope.

A. *Williamson County* and the Court's Criteria for Reversal of Constitutional Precedent

The Supreme Court has stated that it will "overrule an erroneously decided precedent . . . if: (1) its foundations have been 'eroded' by subsequent decisions; (2) it has been subject to 'substantial and continuing' criticism; and (3) it has not induced 'individual or societal reliance' that counsels against overturning" it.[58] Some cases also highlight the "workability" of the precedent in question.[59]

An additional factor that the Court considers is whether the original decision was "well reasoned."[60] Furthermore, as Chief Justice Roberts points out in *Knick*, the doctrine of stare decisis "'is at its weakest when we interpret the Constitution,' as we did in *Williamson County*, because only this Court or a constitutional amendment can alter our holdings."[61]

Williamson County easily fits within these criteria. That decision embedded a double standard against takings claims, which treats them less favorably than other constitutional rights claims.[62] But that approach has been "eroded" by later Supreme Court decisions that explicitly caution against treating the Takings Clause — and property rights generally — as the "poor relation" of constitutional law.[63] Recent decisions have gradually cut back on other areas where takings claims have been disfavored relative to other constitutional rights cases.[64] In addition, post-*Williamson County* rulings have held that local government land-use regulations can be challenged in federal

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58. Lawrence v. Texas, 539 U.S. 558, 587 (2003) (Scalia, J., dissenting) (internal citations omitted).

59. Janus v. AFSCME, 138 S. Ct. 2448, 2481 (2018).

60. Montejo v. Louisiana, 556 U.S. 778, 792–93 (2009).

61. Knick v. Township of Scott, 139 S. Ct. 2162, 2177 (2019) (internal citation omitted).

62. *See supra* Part I.

63. *See* Dolan v. City of Tigard, 512 U.S. 374, 392 (1994) (holding that there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation").

64. *See generally* Ilya Somin, *Two Steps Forward for the "Poor Relation" of Constitutional Law:* Koontz, Arkansas Game & Fish*, and the Future of the Takings Clause*, 2012–2013 CATO SUP. CT. REV. 215 (2013) [hereinafter Somin, *Two Steps Forward*] (discussing two notable examples of such recent decisions).

court on other constitutional grounds, such as the First Amendment.[65] These developments make *Williamson County* even more anomalous than it was before.

There is also little doubt that *Williamson County* has been subject to "substantial and continuing" criticism.[66] As Chief Justice Roberts notes, "[t]he decision has come in for repeated criticism over the years from Justices of this Court and many respected commentators."[67] The ruling has been the object of widespread criticism by legal scholars who decry the Catch-22 problem and other aspects of the ruling.[68]

Perhaps more importantly, in a concurring opinion in *San Remo Hotel*, then-Chief Justice William Rehnquist noted that *Williamson County* had severe flaws, was inconsistent with the Court's treatment of other constitutional rights, and "ha[d] created some real anomalies, justifying our revisiting the issue."[69] Justice Rehnquist wrote that, although he had joined in the *Williamson County* ruling back in 1985, he had since come to believe that the state-litigation requirement of that ruling "may have been mistaken."[70] Justice Rehnquist's concurrence was joined by three other members of the Court: Justices

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65. *See, e.g.*, Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46–50 (1986) (deciding a First Amendment challenge to restrictions on locations of adult businesses).

66. Lawrence v. Texas, 539 U.S. 558, 587 (2003) (Scalia J., dissenting) (internal citations omitted).

67. Knick v. Township of Scott, 139 S. Ct. 2162, 2178 (2019) (citing examples).

68. For examples of the many critiques, see Peter A. Buchsbaum, *Should Land Use Be Different? Reflections on* Williamson County Regional Planning Board v. Hamilton Bank, *in* TAKING SIDES ON TAKINGS ISSUES: THE PUBLIC AND PRIVATE PERSPECTIVES 471, 473–74 (Thomas E. Roberts ed., 2002); Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 URB. L. 671, 673 (2004); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U. J.L. & POL'Y 99, 102–03 (2000); David Breemer, *Overcoming* Williamson County*'s Troubling State Procedures Rule: How the England Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 FLA. ST. J. LAND USE & ENVTL. L. 209 (2003); Joshua D. Hawley, *The Beginning of the End?* Horne v. Department of Agriculture *and the Future of* Williamson County, 2012–2013 CATO SUP. CT. REV. 245 (2013); R.S. Radford & Jennifer Fry Thompson, *The Accidental Abstention Doctrine: After Thirty Years, the Case for Diverting Federal Takings Claims to State Court Under* Williamson County *Has Yet to Be Made*, 67 BAYLOR L. REV. 567 (2015); Ilya Somin, *Supreme Court Will Hear Important Property Rights Case*, REASON: VOLOKH CONSPIRACY (Mar. 5, 2018), https://reason.com/volokh/2018/03/05/supreme-court-will-hear-important-proper [https://perma.cc/N79B-P8VT] [hereinafter Somin, *Supreme Court*].

69. San Remo Hotel, L.P. v. City & County of San Francisco, 545 U.S. 323, 351 (2005) (Rehnquist, C.J., concurring).

70. *Id.* at 348.

Anthony Kennedy, Sandra Day O'Connor, and Clarence Thomas.[71] Justice O'Connor was also on the Court in 1985 and joined in the *Williamson County* majority. Few Supreme Court decisions have been so seriously questioned by four members of the Court, including two who initially supported it.[72] If this does not qualify as "substantial and continuing criticism," it is hard to imagine what does.

When it comes to "workability," the Catch-22 created by the combination of *Williamson County* and *San Remo* has, as Roberts emphasized, made the decisions' rules "unworkable."[73] If any procedural rule qualifies as such, it is one where the very action that is a prerequisite to filing a case in federal court also prevents the plaintiff from doing so. The ability of defendants to defeat takings cases by "removing" them to federal court, and then getting them dismissed for lack of conformity to *Williamson County* further demonstrates the unworkable nature of the state exhaustion requirement.[74]

For reasons discussed elsewhere in this Article, the reasoning of *Williamson County* is unusually bad.[75] This flaw supports its reversal. As Chief Justice Roberts puts it, the decision "was not just wrong. Its reasoning was exceptionally ill-founded and conflicted with much of our takings jurisprudence."[76]

The reversal of *Williamson County* does admittedly upset some reliance interests. Some state and local governments that might otherwise have prevailed in takings cases filed in state court will probably now lose them in federal court. However, as Chief Justice Roberts points out, the Court does not usually give credence to reliance interests that depend on rules that do not "'serve as a guide to lawful behavior' . . . . 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."[77] If an uncompensated restriction on property rights is constitutionally valid, the government should be able to defend it successfully in federal

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71. *Id.*

72. We cannot think of another fully comparable example in constitutional law between the period when *Williamson County* was decided, and the present — a decision that has been severely criticized by four or more Supreme Court Justices, including two of those who were part of the majority that initially decided the case.

73. Knick v. Township of Scott, 139 S. Ct. 2162, 2178–79 (2019).

74. *See supra* Part I.

75. *See supra* Part I; *see also* Somin, Knick, *supra* note 2, at 157–59.

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

77. *Id.* at 2179 (quoting United States v. Gaudin, 515 U.S. 506, 521 (1995)).

court. Constitutionally valid policies do not require the protection of the *Williamson County* doctrine, and such protection is not extended against any other types of constitutional claims.

Ultimately, the only "reliance interests" *Williamson County* protects are those of state and local governments that engaged in uncompensated takings that would be struck down in federal court but upheld by state courts that are biased in their favor or erroneously interpret relevant federal takings precedent. That is not an interest anywhere near strong enough to justify continuing to bar an entire category of constitutional rights cases from access to federal court.

Chief Justice Roberts also effectively responds to Justice Kagan's argument that *Williamson County* should be given the "enhanced" form of stare decisis deference usually applied to statutory decisions because Congress could reverse it by enacting a statute eliminating the "preclusion" trap the Court upheld in *San Remo Hotel*.[78] This would only partly fix the problems *Williamson County* created, as there would still be a double standard between takings claims and other constitutional rights. As Roberts points out:

> [T]akings plaintiffs, unlike plaintiffs bringing any other constitutional claim, would still have been forced to pursue relief under state law before they could bring suit in federal court. Congress could not have lifted that unjustified exhaustion requirement because, under *Williamson County*, a property owner had no federal claim until a state court denied him compensation.[79]

Moreover, if applied consistently, Justice Kagan's argument would justify giving enhanced status to any precedents establishing judicially created barriers to bringing constitutional rights claims in federal court, so long as Congress could potentially reverse or mitigate them.

B. Is *Knick* at Odds with "Precedent after Precedent after Precedent"?

In addition to defending *Williamson County* on the grounds of stare decisis, Justice Kagan's dissent argues that the *Knick* majority implicitly overruled numerous precedents going back to the 1890 case of *Cherokee Nation v. Southern Kansas Railway Co*.[80] She contends that the majority's approach "requires declaring precedent after

78. *Id.* at 2189 (Kagan, J., dissenting).

79. *Id.* at 2179.

80. 135 U.S. 641 (1890). For Justice Kagan's discussion of these cases, see *Knick*, 139 S. Ct. at 2182 n.1, 2183–87 (Kagan, J., dissenting).

precedent after precedent wrong."[81] These cases all mandate 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'" provided the government offers "'reasonable, certain and adequate provision for obtaining compensation'" after the fact.[82]

In his majority opinion, Chief Justice Roberts argued that these cases could be explained by the Court's unwillingness to provide injunctive relief against takings where the property owner was able to get compensation.[83] Thus, "every one of the cases cited by the dissent would come out the same way — the plaintiffs would not be entitled to the relief they requested because they could instead pursue a suit for compensation."[84] Justice Kagan responds by pointing out that the distinction between compensation and injunctive relief "played little or no role in our analyses" in those cases.[85]

Both Roberts and Kagan ignore a far more significant distinction between most of the precedents the latter relies on and cases such as *Knick* and *Williamson County*. There is a crucial difference between a case where the government concedes there is a taking but merely delays paying compensation, and a situation where the government denies any taking has occurred at all. By definition, the latter scenario is *not* a situation where the government provides "reasonable, certain and adequate provision for obtaining compensation" after the fact.[86] Compensation from the state is uncertain — and thus also potentially inadequate — for the simple reason that the government denies any compensation is due at all, and state courts could potentially endorse that position even if federal courts might have decided the case differently.

Cases in which both sides agree that compensation is due might be characterized simply as disputes over the timing and amount of compensation, which can usually be resolved by factual determinations about the value of the property in question. By contrast, disputes over whether a taking has occurred at all are textbook examples of litigation over whether there has been a violation of federal constitutional law — precisely the sort of issue that belongs in federal court, if anything does. While a state court could potentially rule against the government on the issue of whether a taking has occurred, the same thing could

81. *Knick*, 139 S. Ct. at 2186 (Kagan, J. dissenting).
82. *Id.* at 2182 (quoting *Cherokee Nation*, 135 U.S. at 659).
83. *See id.* at 2176–77.
84. *Id.*
85. *Id.* at 2185 (Kagan, J., dissenting).
86. *Cherokee Nation*, 135 U.S. at 659.

happen whenever a state denies that it has violated some other constitutional right. As prominent takings lawyer Robert Thomas asks in a critique of Kagan's opinion:

> [I]sn't there a big difference between an eminent domain quick take where the government occupies now, with the corresponding recognition of the absolute obligation 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*?[87]

A close look at the pre-*Williamson County* cases cited by Justice Kagan shows that all cases brought against state and local governments (and some brought against the federal government) were in fact cases where compensation was "certain" because the government had already conceded a taking had occurred and payment was due. In *Cherokee Nation,* the 1890 case to which Kagan traces the doctrine in question, Congress mandated that "full compensation shall be made to the owner for all property to be taken" for the construction of a railroad that would pass through land owned by Native American tribes.[88] Since Congress had already authorized compensation for the land taken for the railroad, the Court ruled that "this provision is sufficiently reasonable, certain and adequate to secure the just compensation to which the owner is entitled."[89] The key point, however, is that "the owner is entitled to reasonable, certain and adequate provision for obtaining compensation *before his occupancy is disturbed*."[90] There can be no such advance assurance of "reasonable, certain, and adequate" compensation in a case where the government denies that any compensation is due in the first place.

Virtually all the other cases cited by Justice Kagan are similar. Those brought against state and local governments (and some against the federal government) involve scenarios where the government conceded in advance that compensation is due, and the only issue was its timing or amount.[91] Three cases were brought against the federal

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87. Robert H. Thomas, Knick *Analysis, Part IV: Why Not Let Sleeping Dogs Lie? The Dissent and Stare Decisis*, INVERSE CONDEMNATION BLOG (June 24, 2019), https://www.inversecondemnation.com/inversecondemnation/2019/06/knick-analysis-part-iv.html [https://perma.cc/Z63T-HUG4].

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

89. *Id.*

90. *Id.* (emphasis added).

91. *See generally* Dohany v. Rogers, 281 U.S. 362, 366–70 (1930) (state recognized duty to compensate and enacted legislation to do so for land taken for a railroad); Joslin Mfg. Co. v. Providence, 262 U.S. 668, 677–78 (1923) (city commits to providing compensation to owners of land taken for the acquisition of water); Albert Hanson

government in situations where the latter denied a taking had occurred.[92] But a takings claim against the federal government must be heard in federal court, regardless of the issue involved.[93] And if the condemning authority refuses to pay at the time of the taking, the remedy will have to be an award of compensation paid after the fact, regardless of exactly which federal court hears the case, and at which time.

Thus, such cases do not raise the possibility of denying access to federal court for a federal constitutional claim, and do not change the nature of the compensation remedy successful plaintiffs stand to receive. As the Supreme Court noted in one of these decisions, "if the authorized action in this instance does constitute a taking of property for which there must be just compensation under the Fifth Amendment, the Government has impliedly promised to pay that compensation and has afforded a remedy for its recovery by a suit in the Court of Claims."[94] The same point applies to Kagan's citation of cases involving takings claims brought against the federal government under the Tucker Act, which requires such cases to be brought in the Federal Court of Claims.[95]

Lumber Co. v. United States, 261 U.S. 581, 586–87 (1923) (government agreed in advance to provide compensation for land taken by eminent domain); Hays v. Port of Seattle, 251 U.S. 233, 234–38 (1920) (city formally asserted title over the owner's property, thereby essentially conceding that the property had been taken); Bragg v. Weaver, 251 U.S. 57 (1919) (government recognized obligation to compensate owners for land taken for purposes of repairing an adjoining road); Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239, 242–43, 251–54 (1905) (state authorized compensation for the use of eminent domain to condemn property for a railroad); Williams v. Parker, 188 U.S. 491, 502–04 (1903) (state legislature recognized liability and provide compensation for the taking of property by eminent domain, and had the power to impose that liability on the City of Boston despite lack of "technical" estoppel); Backus v. Fort St. Union Depot Co., 169 U.S. 557, 565–68 (1898) (state recognized obligation to compensate for damage to property that state law treated as the equivalent "condemnation" of property interests for the construction of railroad tracks); Sweet v. Rechel, 159 U.S. 380, 400–02 (1895) (state recognized duty to compensate owners for the takingand allocation of funds for that purpose). These cases are all cited in *Knick v. Township of Scott*, 139 S. Ct. 2162, 2182 n.1 (2019) (Kagan, J., dissenting).

92. *See* Yearsley v. W. A. Ross Constr. Co., 309 U.S. 18, 21–23 (1940); Hurley v. Kincaid, 285 U.S. 95, 104 (1932); Crozier v. Fried. Krupp Aktiengensellschaft, 224 U.S. 290, 305–06 (1912).

93. *See* 28 U.S.C. § 1491(a)(1) (2011) (establishing jurisdiction over such claims in the U.S. Court of Federal Claims).

94. *Yearsley*, 309 U.S. at 21.

95. *See Knick*, 139 S. Ct. at 2186 (Kagan, J., dissenting) (discussing several such cases).

Kagan's reliance on late-nineteenth and early-twentieth century cases brought against state and local governments is problematic for an additional reason. Those cases were decided before the Supreme Court recognized that the Takings Clause (and the rest of the Bill of Rights) was "incorporated" against the states.[96] As a result, takings claims brought against state and local governments in federal court could only be litigated under the Due Process Clause of the Fourteenth Amendment, utilizing the Court's so-called "substantive" due process doctrine.[97] During this era, takings cases decided under the Due Process Clause were often litigated under rules that gave greater deference to the government than was applied to those brought under the Takings Clause (which could only be used against the federal government).[98] Thus, it should not be assumed the former cases represent the Court's considered judgment of how takings claims against states and localities should be handled if the Takings Clause had applied to them.

In his concurring opinion in *Knick*, Justice Thomas went further than Chief Justice Roberts's majority opinion, arguing that:

> 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 "purported exercise of the eminent-domain power" is therefore "invalid" unless the government "pays just compensation before or at the time of its taking."[99]

Justice Thomas, therefore, rejects the "'sue me' approach to the Takings Clause" under which the government is free to undertake policies that take private property without paying compensation in advance or simultaneously with the taking.[100] Unlike the majority opinion, Thomas's argument probably would require overruling a substantial number of pre-*Williamson County* precedents holding that the Takings Clause does not require advance or contemporaneous compensation.[101]

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96. For a discussion of the evidence indicating lack of incorporation during this period and why it matters, see ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN 50–51, 123–26 (rev. ed. 2016).

97. *See id.* at 123–26 (discussing this distinction and its importance).

98. *See id.* at 50–51, 123–24.

99. *Knick*, 139 S. Ct. at 2180 (Thomas, J., concurring) (internal citations omitted).

100. *Id.*

101. *See supra* notes 80–100 and accompanying text.

Practically speaking, however, the difference between Justice Thomas's approach and the majority's will usually be modest, at most. Either way, government regulators will sometimes violate the Takings Clause even if they try, in good faith, to avoid doing so. Regardless, the practical remedy for any constitutional rights violation would be a lawsuit for compensation, filed after the fact.[102]

III. *KNICK* AND ORIGINALIST THEORIES OF PRECEDENT

Knick's reversal of *Williamson County* is also amply justified under theories of stare decisis advanced by leading originalists. A key reason for this conclusion is that the precedent in question has no originalist justification, and indeed the *Williamson County* Court did not even attempt to provide one.

Originalists have proposed several different approaches to dealing with wrongly decided precedent. Some argue that precedents that conflict with original meaning should get little or no judicial deference.[103] Others are willing to make exceptions for flawed precedents that are deeply entrenched in the fabric of society. Neither of these approaches justifies retaining *Williamson County*.

A. Theories That Reject All or Nearly All Deference to Non-Originalist Precedents

From the standpoint of theories that reject all or nearly all judicial deference to incorrect non-originalist precedents, it is fairly obvious that *Williamson County* deserved to be overruled, assuming it was

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102. *See Knick*, 139 S. Ct. at 2180 (Thomas, J., concurring) (rejecting the argument that government regulators should be able to pursue regulatory programs free of the threat of injunction). One potential difference is that Justice Thomas's theory might allow injunctive relief in some situations where Justice Roberts's would not. But it is far from clear that there would be any significant number of such cases. As Justice Thomas notes, "[i]njunctive relief is not available when an adequate remedy exists at law. And even when relief is appropriate for a particular plaintiff, it does not follow that a court may enjoin or invalidate an entire regulatory 'program.'" *Id.* (internal citations omitted).

103. *See, e.g.*, Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 1–2 (2007); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 24–25 (1994); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 291 (2005); Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2731–34 (2003); *cf.* Akhil Reed Amar, *The Document and the Doctrine*, 114 HARV. L. REV. 26, 26–27 (2000) (arguing that we should be "documentarians first; and doctrinalists second" thereby generally privileging "the amended Constitution's specific words and word patterns, the historical experiences that birthed and rebirthed the text, and the conceptual schemas and structures organizing the document" over judicial precedent).

flawed in the way we and other critics have described.[104] The state exhaustion requirement is, as *Knick* concluded, at odds with the text of the Fifth Amendment, and it also conflicts with the original understanding of the Fourteenth Amendment's incorporation of the Bill of Rights against state and local governments.[105]

Professor Randy Barnett argues that otherwise-flawed precedent might still deserve deference in the "construction zone," where the issues involved have to do with the implementation of "vague" aspects of the text and application of the text to complicated factual situations, rather than the construal of the text's core meaning.[106] This distinction is unlikely to save *Williamson County*. The state-exhaustion requirement was, in fact, at odds with the text of the Fifth Amendment itself, not merely some aspect of the implementation in the "construction zone."[107] Moreover, a Catch-22 that systematically bars a right from being vindicated in federal court is at odds with the central purpose of the right in question — and with the goal behind the Fourteenth Amendment's incorporation of the right against state and local governments.[108] It, therefore, goes against what Barnett would call the "core meaning" of the right in question, and would not qualify as "good faith construction."[109]

He further emphasizes that "construction" is only permissible in situations where the meaning of the relevant constitutional provision is too "vague" to resolve the issue directly, and must be done in a way that "furthers the constitutional principles" underlying the provision in question.[110] *Williamson County* fails both of these tests. The Takings Clause and the Fourteenth Amendment are not too vague to resolve the issue of when a "taking" has occurred, and the *Williamson County*

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104. *See supra* Part I.

105. *See supra* Part I.

106. Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 269 (2005). On the distinction between "interpretation" and "construction," see RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 118–30 (rev. ed. 2014); *see also* KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999); Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 34 (2018); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 108 (2010).

107. *See supra* Part I.

108. *See supra* Part I.

109. *See* BARNETT, *supra* note 106, at 124; Barnett & Bernick, *supra* note 106, at 32–36.

110. *See* BARNETT, *supra* note 106, at 128–30.

Catch-22 is most definitely at odds with the constitutional principles these provisions are supposed to vindicate.[111]

In a recent concurring opinion in *Gamble v. United States*, Justice Clarence Thomas, one of the Court's leading originalists, argued that "the Court's typical formulation of the stare decisis standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions — meaning decisions outside the realm of permissible interpretation — over the text of the Constitution and other duly enacted federal law."[112] He instead suggests that courts should only respect possibly erroneous precedent if its "traditional tools of legal interpretation show that the earlier decision adopted a textually permissible interpretation of the law," though even then deference to erroneous precedent is not mandatory.[113] By this, Justice Thomas clearly means that only precedents that are defensible based on originalist methodology can be maintained in the face of strong evidence that they were wrongly decided.[114] Similarly, Professor Lee Strang argues that only originalist precedent deserves deference.[115] Larry Solum also suggests that precedent may have greater force in situations "when the prior decision involved a good faith attempt to determine the original meaning of the constitutional text," as opposed to those "that ignored original meaning or gave decisive weight to policy judgments about desirable outcomes."[116]

From Justice Thomas's and Strang's standpoint, the key flaw in *Williamson County* is the Court's failure to attempt to square the state-exhaustion requirement with the text of the Fifth Amendment. Both in the Court's opinion and in justifications put forward subsequently by defenders of the ruling, the only rationales offered are pragmatic concerns and non-originalist doctrinal considerations.[117] Thus, it is not surprising that Justice Thomas voted with the *Knick* majority, and

111. *See supra* Part I.

112. Gamble v. United States, 139 S. Ct 1960, 1981 (2019) (Thomas, J., dissenting).

113. *Id.* at 1984.

114. *Id.* at 1986.

115. *See generally* Lee J. Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 BYU L. REV. 1729, 1764–65 (2010).

116. Solum, *supra* note 23, at 466.

117. These include the ripeness theory underlying *Williamson County* and various pragmatic arguments to the effect that state courts are better suited to handle taking cases than federal courts. *See* Somin, Knick, *supra* note 2, at 157–71, 181–87 (for an overview and critique).

indeed authored a concurring opinion advocating going further in overruling precedent than the majority did.[118]

Prominent originalist legal scholar and judge Amy Coney Barrett similarly advocates for only a "weak" presumption in favor of retaining precedent in constitutional cases, particularly when the precedent in question conflicts with the judge's own methodological priors.[119] She contends that it would be both unwise and unrealistic to demand more stringent adherence to precedent,[120] with the exception of a few "superprecedents."[121]

B. Theories That Permit Retention of Wrong, but Deeply Entrenched Precedents

Some originalists are willing to carve out a larger space for retaining flawed precedents than those who reject the idea almost entirely. In their influential book *Originalism and the Good Constitution*, John McGinnis and Michael Rappaport argue that originalist judges should immunize two types of erroneous precedents from overruling: those whose reversal would entail "enormous costs" to society, and those that are so "entrenched" that they have broad enough political support to have been enacted as constitutional amendments had the courts not preempted the amendment process with an incorrect interpretation of the existing Constitution.[122] Neither of these criteria can save *Williamson County*.

It is fairly obvious that overruling *Williamson County* will not lead to anything approaching the kinds of "enormous costs" McGinnis and Rappaport have in mind. They envision costs on the scale of those that might be endured if the Court were suddenly to invalidate Social Security or the use of paper money as legal tender, on originalist grounds, thereby potentially creating large-scale social and economic upheaval.[123] They also suggest that "enormous costs" might justify keeping an erroneous precedent in place in any situations where

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118. Knick v. Township of Scott, 139 S. Ct. 2162, 2180–81 (2019) (Thomas, J., concurring). See Section II.B for discussion of Justice Thomas's opinion.

119. *See* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1714–15 (2013).

120. *Id.* at 1721.

121. See Section III.B for a discussion of this aspect of Judge Barrett's position.

122. JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 179–83 (2013); *see also* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case against Construction*, 103 NW. L. REV. 751 (2009).

123. MCGINNIS & RAPPAPORT, *supra* note 122, at 179.

overturning it would require "a large number of programs" to be struck down, thereby forcing the legislature to undertake "immediate action" to avert a crisis.[124]

Overruling *Williamson County* does not, in and of itself, require invalidation of *any* government programs. It merely allows cases challenging some of these programs to proceed in federal rather than state court. While some policies are likely to be ruled takings in federal court that a state court would have upheld,[125] it is highly unlikely this will result in any "enormous cost" or social crisis. If the programs in question are truly vital, the state or local government in question can simply allocate money to pay compensation. In some situations, ensuring compensation could strengthen the security of property rights, and thereby actually benefit society by providing stronger incentives for development and investment. The need for secure property rights is one of the main insights of modern development economics.[126] Requiring compensation could also help incentivize state and local governments to consider the costs and benefits of their regulatory programs more carefully.[127] Far from imposing "enormous" social costs, the reversal of *Williamson County* could potentially create substantial benefits.

It is even more unlikely that *Williamson County* should have been preserved because it enjoyed such broad support that a constitutional amendment could have been enacted to enshrine its principles. The passage of a constitutional amendment requires a broad political consensus and strong popular support in order to overcome the supermajority requirements of Article V of the Constitution by securing the support of two-thirds of both houses of Congress and three-quarters of state legislatures.[128] McGinnis and Rappaport emphasize that their theory of "entrenched precedent" requires broad enough popular support to make the passage of an amendment "more likely than not."[129]

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124. *Id.* at 179–80.

125. *See*; Somin, Knick, *supra* note 2, at 181–83; *Supra* Part I

126. *See, e.g.*, ROBERT D. COOTER & HANS-BERND SCHAFER, SOLOMON'S KNOT: HOW LAW CAN END THE POVERTY OF NATIONS 64–81 (2012); HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 49–63 (2000). For a recent overview, see Peter J. Boettke & Rosolino Antonio Candela, *Development and Property Rights*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS (Alain Marciano & Giovanni Battista Ramello eds., 2014).

127. On this possibility, see, for example, Somin, *Two Steps Forward*, *supra* note 64, at 234–35.

128. U.S. CONST. art. V.

129. MCGINNIS & RAPPAPORT, *supra* note 122, at 181–83.

To our knowledge, there is no public opinion polling on *Williamson County* or its overruling by *Knick*. Indeed, it is highly likely that most of the public is completely unaware of the controversy surrounding these two cases,[130] which is largely confined to specialists in property law and land-use policy. Significantly, the reversal of *Williamson County* was not met by any widespread public outcry, nor have there been any significant efforts to try to alter *Knick* through legislation, such as new laws limiting federal court jurisdiction over takings cases.

A few commentators and officials worried that it might endanger some land-use regulations, especially in highly restrictive states, such as California.[131] Rhode Island Democratic Senator Sheldon Whitehouse wrote an op-ed denouncing the decision as "part of a pattern of 73 cases through the 2018 term where the Republican-appointed justices delivered big wins for big Republican donor interests."[132] But even these critics did not propose to reverse *Knick* by constitutional amendment, nor is there anything even remotely approaching a broad popular movement to do so.

If *Williamson County* and *Knick* somehow did attract widespread public attention, it is unlikely that a supermajority would prefer the doctrine of the former. Many voters might reject the idea that an entire category of constitutional property-rights claims should be denied access to federal court — a possibility consistent with the strong negative public reaction against the Court's 2005 decision in *Kelo v. New London*.[133] Most of the public perceived that ruling as gutting protection for property rights against unscrupulous local governments by allowing the government to take property for private "economic development."[134] If *Williamson County* were better known, it

130. Survey data indicates the majority of voters are often ignorant even of far more prominent political and legal controversies. For an overview of the evidence, see ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER 17–46 (2d ed. 2016).

131. *See, e.g.*, David G. Savage, *Supreme Court Bolsters Rights for Developers and Property Owners in California and Elsewhere*, L.A. TIMES (June 21, 2019, 8:34 AM), https://www.latimes.com/politics/la-na-pol-supreme-court-property-rights-taking-20190621-story.html [https://perma.cc/5SVP-CQVM] (quoting examples).

132. Sheldon Whitehouse, 'Knick'-*Picking: Why a Recent SCOTUS Ruling Signals a New Day*, NAT'L L.J. (July 1, 2019), https://www.whitehouse.senate.gov/news/op-eds/knick-picking-why-a-recent-scotus-ruling-signals-a-new-day [https://perma.cc/C4RA-VWH7]. Whitehouse also misleadingly described the case as about "whether states and local courts ought to have first say in disputes over 'just compensation' for landowners[,]" ignoring the "Catch-22" trap that prevented such cases from *ever* being considered in federal court under *Williamson County*. *Id.*

133. 545 U.S. 469 (2005).

134. For an overview of the political reaction against *Kelo*, see SOMIN, *supra* note 96, at 112–34.

probably would not have attracted as much opposition as *Kelo*. Unlike *Kelo*, it is a procedural rule that does not by itself deprive property owners of substantive rights, even though it may make such deprivation more likely in some cases.[135] But it seems even more unlikely that *Williamson County* could ever generate the widespread supermajority support needed to pass a constitutional amendment based on it.

An important new article by Professor Will Baude on "constitutional liquidation" argues that the meaning of "indeterminate" constitutional text can be "liquidated" over time if there is a longstanding "course of deliberate practice" favoring a given approach, and if there has been a "constitutional settlement" in which the "losing side" ultimately "gave up" and acquiesced in the interpretation it once opposed.[136] Baude's approach focuses primarily on "liquidation" by "practice" in the political branches of government.[137] But this reasoning presumably applies to judicial precedents that receive that kind of support.

Under Baude's criteria, the Court was amply justified in overruling *Williamson County*. Even assuming the Takings Clause is indeterminate on the issues at stake in *Williamson County*,[138] that precedent does not meet Baude's criteria for "liquidation." And even if there has been a consistent pattern of practice, the opponents of the ruling never acquiesced in any kind of "settlement." Far from giving up, they continued to oppose *Williamson County*, and sought its reversal — ultimately successfully.[139]

The late Justice Antonin Scalia, arguably the nation's most prominent originalist for many years, avowed that "*stare decisis* is not *part of* my originalist philosophy; it is a pragmatic *exception* to it."[140] This raises an obvious question: when does the exception apply? Scalia never developed a systematic answer to that query. If stare decisis requires near-absolute deference to precedent, then *Williamson County* should have been preserved — along with virtually every other Supreme Court precedent, no matter how flawed. However, Scalia's writings and opinions suggest that he did not, in fact, practice absolute adherence to precedent.[141] The point of the "pragmatic exception," in

135. *See supra* Part I.

136. Will Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 16–21 (2019).

137. *Id.*

138. In our view, it actually is not. *See supra* Part I.

139. *See supra* Section II.A.

140. SCALIA, *supra* note 18, at 140.

141. *See infra* note 145 (addressing his willingness to overrule precedent on abortion and affirmative action).

his view, was to prevent originalism from becoming "too strong to swallow."[142] Thus, the doctrine was meant to insulate from reversal such hallowed precedents as *Marbury v. Madison*, even if historical research reveals that they are wrong as a matter of original meaning.[143] Otherwise, originalism would have — for Scalia — the unacceptable consequence of reversing precedent backed by a broad societal consensus, and thereby become unpalatable to modern jurists.[144]

This consideration, however, would not protect precedents that are highly controversial, or at least do not enjoy the support of a strong consensus. Few would argue that reversing precedents of the caliber of *Williamson County* would make originalism inherently unacceptable, even if they might believe the precedent in question should have been retained. In cases where the precedents at issue were relatively recent and highly controversial, Scalia was often willing to overrule those he thought seriously wrong — most notably in cases involving abortion and affirmative action.[145]

To the extent there is a consistent pattern to Scalia's approach to precedent, it is that he was willing to overrule non-originalist decisions that he thought were seriously wrong and that did not have the support of a broad societal consensus. He only seemed unwilling to reverse what he considered to be incorrect precedent in cases where it would make originalism too bitter a pill to "swallow."[146] Scalia's theory seems to be entirely compatible with overruling *Williamson County*, assuming that the decision was wrong for the reasons critics have claimed.[147]

Judge Robert Bork, another leading originalist jurist of the same generation as Scalia, indicated in 1989 that a "clearly wrong" precedent "should not be overruled" if it is "thoroughly embedded in our national life."[148] Judge Amy Coney Barrett endorsed a similar notion in a 2013 article, where she suggested that such "superprecedents" have

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142. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L.REV. 849, 861 (1989).

143. *Id.*

144. *Id.*

145. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (advocating overruling of precedents upholding constitutionality of racial preferences, including *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547 (1990), which was overruled by the Court in *Adarand*); Planned Parenthood v. Casey, 505 U.S. 833, 992–95 (1993) (Scalia, J., dissenting) (advocating overruling of *Roe v. Wade*, 410 U.S. 113 (1973)).

146. Scalia, *supra* note 142, at 861.

147. *See supra* Part I.

148. Robert H. Bork, *The Case Against Political Judging* (1989), *in* ROBERT H. BORK, A TIME TO SPEAK: SELECTED WRITINGS AND ARGUMENTS 277 (2008).

effectively been taken out of judicial hands by "the people," and thus cannot be reversed.[149] These positions resemble the view we have extrapolated from Scalia's writings, and also partly prefigure McGinnis and Rappaport's theory that originalist judges should not reverse "entrenched" precedents.[150] It seems obvious that *Williamson County* does not qualify as such a "thoroughly embedded" precedent.[151]

Retaining *Williamson County* might have been justified under theories holding that long-established precedent should almost always trump original meaning, even if the precedent in question is seriously wrong.[152] But this approach is at odds with the views of most prominent originalists. And it would require condemning nearly all efforts to reverse non-originalist precedents that originalists decry, not just *Williamson County*.

Even some of those who advocate a strong form of deference to erroneous precedent nonetheless concede that overruling might be justified in situations where a precedent "has become unworkable or . . . conflicts with other precedent."[153] As we have seen, *Williamson County* suffers from both these flaws.[154]

IV. ASSESSING *KNICK* UNDER LIVING-CONSTITUTION THEORIES OF PRECEDENT

Overruling *Williamson County* would also be compatible with the living Constitution theories of precedent. Originalism has been described as "the antithesis of the idea that we have a living constitution."[155] However, examining how living-constitution theories apply to what we assume was an erroneous decision in *Williamson County* reveals common ground. For purposes of this analysis, we use the term "living constitution" to describe all relevant non-originalist theories of precedent, though we recognize that such theories differ among themselves on the extent of change in constitutional

149. *See* Barrett, *supra* note 119, at 1733–36; *cf.* Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204 (2006) (describing this concept).

150. *See supra* notes 122–29, 140–47.

151. *See supra* notes 122–150 and accompanying text.

152. *See, e.g.*, Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509 (1996); Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 Const. Comment. 271 (2005) [hereinafter Merrill, *Originalism*]; Thomas W. Merrill, *The Conservative Case for Precedent*, 31 HARV. J.L. & PUB. POL'Y 977 (2008); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988).

153. Merrill, *Originalism*, *supra* note 152, at 272.

154. *See* Section II.A.

155. DAVID A. STRAUSS, THE LIVING CONSTITUTION 3 (2010).

interpretation that their advocates consider appropriate. We consider *Knick* under the influential living-constitution approach to precedent derived from the common-law method, and also a number of other living-constitution approaches. We first explore the common-law method primarily as advocated by Professor David Strauss. We then go on to discuss additional living-constitution approaches as they relate to *Knick*. These theories include Professor Lawrence Lessig's theory of constitutional fidelity through translation, Professor Richard Fallon's call for legal legitimacy using the reflective equilibrium theory, Professor Randy Kozel's "second-best *stare decisis*" theory, and Professor Michael J. Gerhardt's "reasoned elaboration" theory for overruling.

While these theories have their differences, all place substantial value on the workability of the precedent in question, the quality of the Court's reasoning, and the extent to which it has engendered strong "reliance" interests. On these criteria, *Williamson County* was a precedent ripe for reversal.

A. The Common-Law Approach

The common-law approach to precedent as it relates to the overruling of *Williamson County* by *Knick* is described in this subsection. First, we discuss the general concept of precedent that is based on common-law tradition. We then apply the virtues identified by Strauss as found in the common-law approach to constitutional interpretation. The concept of precedent is said to be "'[t]he most distinctive characteristic of English law and American law'" based on the common-law tradition.[156] Common-law constitutionalism — which holds that courts should interpret the Constitution by using methods similar to those used by judges in developing the common-law — is one of the most significant living-constitution approaches to constitutional interpretation.[157]

The common-law method requires balancing the value of adhering to tradition and precedent against retaining a rule of law that is mistaken or unworkable.[158] This tension was described by Justice

156. GARNER ET AL., *supra* note 14, at 16.

157. *See* STRAUSS, *supra* note 155, at 3 (noting that a "common law constitution is a 'living' constitution, but it is also one that can protect fundamental principles against transient public opinion").

158. *See id.* at xii, 77–97. *See generally* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996). *But see* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 59 (2013) (noting that "constitutional

Louis Brandeis as "reflecting the competing values of leaving the law 'settled' and getting the law 'right.'"[159]

For reasons discussed earlier in this Article,[160] *Williamson County* got the law "wrong." However, the ripeness requirement found in the second prong of *Williamson County* was not really "settled" such that takings claim litigants had adapted to this requirement, and its overruling would disrupt the application of the law in practice. In fact, litigants, judges, and scholars continued to criticize the ripeness requirement and attempted to find ways to work around the law.[161] Therefore, the tension between leaving the law settled and getting it right was less severe than might have been the case with more widely accepted precedents.

Relevant to Knick's claim that her property had been "taken" by the Township ordinance, regard for precedent is particularly strong in property rights, contractual obligations, and commercial transactions based on the likelihood of precedential reliance.[162] Overruling a rule of property precedent "may raise both reliance-based hardship and takings concerns that are not present (or not as strongly present) in the run-of-the-mill case."[163]

Unlike the concerns animating the robust application of precedent in cases where an owner may be deprived of a property interest by overturning a prior decision, the overruling of *Williamson County* actually increased the protection of private property rights. After *Knick*, property owners are able to file a takings claim in federal court without being required to first exhaust their claim in state court and face preclusion in a federal forum.

How then does a common-law living constitutionalist deal with the problem of precedent at issue in *Knick* where the Court must decide whether to follow its earlier ruling in *Williamson County*? Professor David Strauss, the leading academic proponent of common-law constitutionalism, explains that the living Constitution should not be viewed as "an invitation to the people in power to do what they want," but instead can "be based on an important set of virtues: intellectual

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interpretation cannot be as consistent as case-law development or the application of statutes").

159. KOZEL, *supra* note 15, at 23 (citing Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

160. *See supra* Part I.

161. *See* Thomas Merrill, *Anticipatory Remedies for Takings*, 1289 HARV. L. REV. 1630, 1647–49 (2015).

162. KOZEL, *supra* note 15, at 28.

163. GARNER ET AL., *supra* note 14, at 434.

humility, a sense of the complexity of the problems faced by our society, a respect for the accumulated wisdom of the past, and a willingness to rethink when necessary and when consistent with those virtues."[164]

These virtues can be found in the common-law approach to constitutional interpretation, which relies on "over two centuries of experience grappling with the fundamental issues — constitutional issues — that arise in a large, complex, diverse, changing society."[165] Although some of the lessons learned may become part of the text of the Constitution through amendments, the "precedents, traditions, and understandings" from our experience informs how the Constitution operates in practice as our living Constitution.[166] Strauss also emphasizes the importance of the workability of the precedent in question, and its consistency with other, more recent precedents.[167] In addition, he argues that common-law constitutional jurists can sometimes take account of considerations of "fairness" and "social policy," albeit only in limited ways.[168]

Strauss also points out some areas of practice in which constitutional law contradicts the text of the Constitution.[169] For example, he claims that following the text of the Constitution would allow: a state to have an established church; states to disenfranchise certain people based on being poor or gay because the right to vote is not protected by the Equal Protection Clause; the federal government to discriminate on the basis of race or sex because the Equal Protection clause only applies to the states; and several other anomalies.[170] Instead, Strauss argues that "[i]n most litigated cases, constitutional law resembles the common-law much more closely than it resembles a text-based system" and that the text of the Constitution "will be most important when there are not a lot of subsequent precedents 'interpreting' it."[171] Therefore, Strauss believes "that provisions of the Constitution function roughly in the same way as precedents in a common-law

164. STRAUSS, *supra* note 155, at 139.
165. *Id.* at 34–35.
166. *Id.* at 35.
167. *Id.* at 83
168. *Id.* at 38–39.
169. David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 3 (2015).
170. *Id.* at 3.
171. *Id.* at 4–5.

system" and thus allows for an evolutionary understanding of constitutional law based on the common-law approach.[172]

The Straussian virtues of "intellectual humility" and a "willingness to rethink when necessary"[173] were on full display when the justices who joined the *Williamson County* decision voiced criticism of the state exhaustion requirement in a subsequent opinion, *San Remo Hotel*. As discussed in Section II.A, in a concurring opinion in *San Remo Hotel*, then-Chief Justice Rehnquist noted that *Williamson County* had severe flaws, was inconsistent with the Court's treatment of other constitutional rights, and "ha[d] created some real anomalies, justifying our revisiting the issue."[174] Justice Rehnquist wrote that although he had joined the majority in *Williamson County*, he had since come to believe that the state-litigation requirement of that ruling "may have been mistaken."[175] Justice Rehnquist's concurrence was joined by three other members of the Court: Justices Anthony Kennedy, Sandra Day O'Connor, and Clarence Thomas.[176] Justice O'Connor had also joined the *Williamson County* majority in 1985.[177] Thus, the virtues underpinning the common-law constitutionalist theory of precedent support the overruling of *Williamson County*.

Strauss's criterion of workability also supports overruling *Williamson County*. The *Knick* Court recognized the complexity of the problems faced by litigants bringing takings claims and gave respect for the accumulated wisdom of the past three decades as the *Williamson County* ruling has been the object of widespread criticism by legal scholars.[178] The Catch-22 problem created by *Williamson County* and subsequent rulings demonstrated the fundamentally unworkable nature of the decision.[179] The fact that takings defendants could "remove" cases to federal court and then use the *Williamson County* ripeness rule to get them dismissed further underscored its unworkability.[180]

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172. *Id.* at 5.

173. STRAUSS, *supra* note 155, at 139.

174. San Remo Hotel, L.P. v. City & County of San Francisco, 545 U.S. 323, 351 (2005) (Rehnquist, C.J., concurring).

175. *Id.* at 348.

176. *Id.*

177. 473 U.S. 172 (1985).

178. For examples of the many critiques, see Berger & Kanner, *supra* note 68, at 673; Berger, *supra* note 68, at 102–03; Breemer, *supra* note 68; Buchsbaum, *supra* note 68, at 47–74; Hawley, *supra* note 68; Radford & Thompson, *supra* note 68; Somin, *Supreme Court*, *supra* note 68.

179. *See supra* Part I.

180. *See supra* Part I.

The ripeness requirement in *Williamson County* created a complex litigation problem for those trying to bring an inverse condemnation claim under the Fifth Amendment. As noted above, the pre-*Williamson County* cases cited by Justice Kagan in her dissent were cases where compensation was "certain" because the government had already conceded that a taking had occurred and payment was due.[181] By contrast, inverse condemnation litigation requires a court to determine whether a regulatory taking has occurred.[182] It is the federal court system that has developed a uniform approach to determining whether a regulation has gone "too far" such that it is a taking requiring just compensation.[183]

Finally, to the extent that considerations of "fairness" and "social policy" are relevant to the overruling of precedent, these too weigh in favor of the result in *Knick*. Barring an entire category of federal constitutional claims from access to federal court was manifestly unfair, and also put many takings plaintiffs at risk of being the victims of biased or otherwise flawed state courts.[184] It also undermined the fundamental principle of ensuring a nation-wide minimum floor for constitutional rights protected by the Bill of Rights.[185]

In so far as reliance interests should be considered as elements of fairness or social policy, those protected by *Williamson County* were nowhere near strong enough to justify retaining a seriously flawed precedent.[186] The reliance interests impacted by *Knick* could only be claimed by the government in its attempt to regulate property owners without paying just compensation.[187] By requiring litigants asserting inverse condemnation claims to seek a remedy in state court before proceeding to federal court, state and local officials could delay or avoid paying just compensation for excessive regulation by arguing for dismissal on ripeness grounds if the plaintiff brought a claim in federal court, or removing the case from state to federal court and *then* moving to dismiss.[188] If we accept the view that state courts will often be friendlier to local government and officials based on political affinity, property owners may prefer to have their claims heard in federal court,

181. *See supra* Section II.B.
182. Merrill, *supra* note 161, at 1637.
183. *See, e.g.*, Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).
184. *See supra* Part I.
185. *See* Somin, Knick, *supra* note 2, at 181–83.
186. *See supra* Section II.A.
187. *See supra* Section II.A.
188. *See* Merrill, *supra* note 161, at 1667–68.

particularly since the contours of regulatory takings law has been developed in the federal system.[189]

B. Other Living-Constitution Approaches to Overruling Precedent

Other living-constitution approaches to overruling precedent also weigh in favor of the Court's decision in *Knick*. The next four subsections explore how these four approaches support the overruling of *Williamson County* and include Professor Lawrence Lessig's theory of constitutional fidelity through translation, Professor Richard Fallon's call for legal legitimacy using the reflective equilibrium theory, and Professor Randy Kozel's "second-best *stare decisis*" theory. The Section concludes with a discussion of Professor Michael J. Gerhardt's "reasoned elaboration" theory for overruling as applied to *Knick*.

i. Interpretive Fidelity to Constitutional Meaning

Professor Lawrence Lessig argues that constitutional interpretation must be grounded in fidelity. On this view, "the Court [should] read the Constitution in light of the current interpretive context so as to preserve its original meaning."[190] Translating a text into the current context requires interpretive fidelity to constitutional meaning.[191] Constitutional interpretation also requires fidelity to role, which originated in the early constitutional law cases of *Marbury v. Madison* (1803) and *McCulloch v. Maryland* (1819).[192] In *Marbury*, according to Lessig, Chief Justice John Marshall understood that in order to secure the Supreme Court's authority "to hold Congress to the Constitution, and the president to the law and Constitution," it would need to set precedents to secure its power over time.[193] This protection of the Court into the future illustrates fidelity to role.[194] In *McCulloch*, the fidelity to role differs from the "external and foundational" concern of *Marbury* and instead addresses the "internal and pragmatic" concern that the Court should not be in the "business of evaluating whether a law is really necessary or not."[195]

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189. *See supra* Part I.

190. LAWRENCE LESSIG, FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION 212 (2019) (noting that this is "different from saying the Court should read the Constitution as the Framers would have").

191. *Id.* at 71.

192. *Id.* at 19.

193. *Id.* at 36.

194. *Id.*

195. *Id.* at 42.

Chief Justice Marshall broadly interpreted the Constitution's Necessary and Proper Clause to allow Congress to establish a national bank.[196] Here, on Lessig's account, fidelity to role was served by ensuring the Court would be able to apply the law consistently. By allowing Congress to decide what is necessary, the Court avoids drawing the lines between what is "really necessary" and what is not, thus reducing the possibility of artificial distinctions that make precedent difficult to follow.[197]

The Court adheres to fidelity of role "internally" by avoiding conflicting decisions and "externally" by maintaining a stable institution to decide future cases.[198] The external constraints on fidelity to role dictate that courts should proceed cautiously when tracking the "evolution of social meanings so as not to lead a trend, even if they believe the trend is correct, such as in the case of marriage."[199] Recognizing that "our tradition has allowed the Supreme Court a jurisdiction to say what the social meaning is," Lessig argues that "social and political context inevitably and appropriately plays a significant role, especially for courts within a democracy."[200] This context is a constraint on constitutionalism as well as "an ongoing assurance that the Constitution will not become too remote."[201]

As discussed above in Part III, *Williamson County* did not present a significant constitutional interpretation problem because the Court failed to attempt to square the state-exhaustion requirement with the text of the Fifth Amendment. Both in the Court's opinion and in justifications put forward subsequently by defenders of the ruling, the only rationales offered are pragmatic concerns and non-originalist doctrinal considerations.[202] Thus, Lessig's call for fidelity to meaning is not relevant to *Knick*'s overruling of precedent. However, Lessig's call for fidelity to role presents external constraints on courts and encourages them to go slow in tracking changes occurring in the social and the political context.

The *Williamson County* precedent from 1985 prevailed for decades, frustrating property owners and critics of the state exhaustion ripeness

196. *Id.* at 38–42.
197. *Id.* at 41–42.
198. *Id.* at 451–52.
199. *Id.* at 452–53.
200. *Id.* at 447–54.
201. *Id.* at 456.
202. For an overview and critique of these rationales, see Somin, Knick, *supra* note 2, at 157–71, 180–86.

requirement.[203] It was questioned by four justices in 2005 in the *San Remo Hotel* decision, when the logical outcome of the requirement resulted in the Court holding that a final decision in a takings case from a state court precluded re-litigation of the same issue in federal court.[204] In 1997 and again in 2013, the Court recast the state exhaustion requirement as a "prudential" ripeness rule, rather than as an element of a takings claim.[205] To make matters worse, some state and local governments defended against takings claims by removing the state case to federal court and then successfully moving for dismissal based on the property owner's failure to "exhaust" state court remedies — a failure caused by the defendant's own decision to remove the case.[206] With over 30 years of litigation frustration for property owners, removal mischief perpetrated by state and local government defendants, and criticism from scholars and practitioners, the *Knick* Court was true to its fidelity to role. It allowed the mistaken precedent to evolve over three decades before overturning it, thus promoting the external aspects of maintaining a stable institution to decide future cases.

ii. The Supreme Court's Legitimacy: The Reflective Equilibrium Theory

In reframing the debates propounded by "originalists" and "living constitutionalists," Professor Richard H. Fallon focuses on the legitimacy of the Supreme Court's authority and states "the Court's principal function is to determine what prior authorities — and, in particular, the Constitution — have decided or established, and to apply the dictates of prior authorities to the cases that come before it."[207] Fallon identifies three major considerations that bear on the Court's legitimacy in cases where we believe the justices have made a mistake. First, the justices must "exhibit reasonable judgment about

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203. *See supra* Part I.

204. San Remo Hotel, L.P. v. City & County of San Francisco, 545 U.S. 323 (2005).

205. Knick v. Township of Scott, 139 S. Ct. 2162, 2178(2019) (citing Horne v. Dep't of Agric., 569 U.S. 513, 525–26 (2013)); Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 733–34 (1997)).

206. *See, e.g.*, Warner v. City of Marathon, 718 F. App'x 834, 388 (11th Cir. 2017) (removed takings claim dismissed under *Williamson County*); Reahard v. Lee County, 30 F.3d 1412, 1414 (11th Cir. 1994) (same). The Supreme Court ruled that such "removal" shenanigans were permissible, despite the fact that the removed claim would not be "ripe" under *Williamson County*. *See* City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 163–66 (1997).

207. RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 10 (2018).

what they can do within the bounds of the law. Second, the [j]ustices must exhibit good, or at least reasonable, practical[,] and moral judgment."[208] Third, the justices must "support their judgments with arguments that they advance in good faith."[209]

In the *Knick* decision, Justice Roberts analyzed several factors that are similar to the considerations Fallon identified to support the Court's legitimacy in overruling a mistaken precedent.[210] In Part IV of the opinion, Justice Roberts addressed the question of "whether we should overrule *Williamson County*, or whether *stare decisis* counsels in favor of adhering to the decision, despite its error."[211] Chief Justice Roberts exhibited reasonable judgment about what the Court can do within the bounds of the law by using factors identified by the Court to decide whether to overrule a past decision.[212] These factors included "the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision."[213]

The Court analyzed each factor in detail and concluded with the statement, "[i]n light of all the foregoing, the dissent cannot, with respect, fairly maintain its extreme assertions regarding our application of the principle of stare decisis."[214] This concluding statement indicates that the majority justices believed they were exhibiting good practical and moral judgment in overruling *Williamson County* and that they had supported their judgment with strong, good-faith arguments sufficient to address the dissent's concerns.

Building on the practice-based theory of law from Professor H.L.A. Hart, Fallon sets out seven rules of constitutional practice that bind the Supreme Court as follows[215]:

> 1. The Justices' rulings must be "mandated by or consistent with" the authority of the Constitution but understanding that the Constitution requires interpretation.[216] As we expressed previously, we believe that the *Knick* decision is consistent with the Fifth Amendment and that overruling

208. *Id.* at 11.
209. *Id.* at 11.
210. *See* Knick v. Township of Scott, 139 S. Ct. 2162, 2177–78 (2019).
211. *Id.*
212. *See id.* at 2178.
213. *Id.* (citing Janus v. AFSCME, 138 S. Ct. 2448, 2478 (2018)).
214. *Id.* at 2179.
215. *See* FALLON, JR., *supra* note 207, at 98–102.
216. *Id.* at 98.

Williamson County did not require constitutional interpretation.

2. The justices must sometimes choose from various rules of interpretation to achieve legal validity, such as choosing precedential meaning over original meaning.[217] The *Knick* decision did not require the justices to choose precedential meaning over original meaning as the state-exhaustion doctrine from *Williamson County* was not a constitutional interpretation of the Fifth Amendment.

3. The justices "should maintain reasonable stability in constitutional doctrine" even when they do not agree with the reasoning and the resulting rule.[218] The ripeness doctrine espoused by the *Williamson County* decision caused instability in litigating Fifth Amendment constitutional claims over the last three decades, and its overruling should return stability to takings claims.

4. The justices must maintain stability and sometimes forgo their view as to what would be constitutionally best in the interest of achieving legal clarity.[219] *Knick*'s decision to overrule the state-exhaustion ripeness doctrine will promote legal clarity in the litigation of takings claims by eliminating the "Catch-22" experienced by property owners in seeking just compensation under the Fifth Amendment.

5. Justices are obligated to maintain stable understandings unless "sufficiently powerful legal or moral considerations call for a different course."[220] The multifactor test used by the Supreme Court to determine whether to overrule its precedent does not help discern "the central consideration, which involves the egregiousness of the alleged error — as measured in both moral and legal terms — as well as the costs of correcting it."[221] Justice Roberts aptly characterized the egregiousness of the error in *Williamson County* as "not just wrong. Its reasoning was exceptionally ill-founded and conflicted with much of our takings jurisprudence."[222]

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217. *See id.* at 98–99.
218. *Id.* at 99.
219. *See id.* at 99–100.
220. *Id.* at 100.
221. *Id.*
222. Knick v. Township of Scott, 139 S. Ct. 2162, 2178 (2019).

6. Justices should accept historical precedent that is reasonably just and practical. However, if adhering to precedent produces a result that is not reasonably just, the justices should reconsider the question of the precedent's validity.[223] *Williamson County* produced results that were not just by requiring adherence to a ripeness doctrine that precluded many takings plaintiffs from pursuing their takings claims in federal court as provided by 42 U.S.C. § 1983.[224]

7. "Justices should resolve doubts about proper interpretations and priorities of authority" with an eye to legitimacy concerns that may require them to make partly moral judgments.[225] Justice Roberts noted that "the force of *stare decisis* is 'reduced' when rules that do not 'serve as a guide to lawful behavior' are at issue" and "holding that uncompensated takings violate the Fifth Amendment will not expose governments to new liability."[226] Just compensation requires some moral judgment about what is "just" and allowing a property owner to bring a takings claim under § 1983 will provide them the opportunity to receive just compensation under federal takings jurisprudence.

Fallon proposes the "reflective equilibrium theory," grounded in existing practice, to transcend the existing constitutional theories of originalism and living constitutionalism and sharpen our "thinking about how Supreme Court decision making could best promote legal and moral legitimacy while simultaneously exemplifying an ideal of constitutional argument in good faith."[227] The reflective equilibrium model, drawn from moral and political philosophy elaborated by John Rawls in *A Theory of Justice*, provides insights for constitutional law in so far as it aims for principled consistency.[228] Fallon proposes that we "recognize the need to balance adaptability with argumentative good faith" and allow justices to clarify, refine, or even change their interpretive methodology based "upon further reflection triggered by the facts or imperatives of an unanticipated case."[229] In other words, the Court's legitimacy is strengthened by using good practical and moral judgment when questioning precedent and by supporting its

223. *See* FALLON, JR., *supra* note 207, at 101.
224. *See Knick*, 139 S. Ct. at 2179.
225. FALLON, JR., *supra* note 207, at 101.
226. *Knick*, 139 S. Ct. at 2179.
227. FALLON, JR., *supra* note 207, at 125–27.
228. *See id.* at 143–44. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971).
229. FALLON, JR., *supra* note 207, at 153–54.

judgment with strong and good-faith arguments that demonstrate adaptability and reflection based on the facts of the case before them.

Justices Rehnquist and O'Connor joined the majority opinion in *Williamson County*. While they were not present for its overruling in *Knick*, they called for its eventual reversal in their *San Remo Hotel* concurrence, also joined by Justices Thomas and Kennedy.[230] We doubt there are many Supreme Court decisions where two of the justices who decided the original precedent later admitted their decision might well have been mistaken. These justices in the *San Remo Hotel* concurrence exemplify the reflective equilibrium model by showing a willingness to question precedent in good faith. In the unanticipated case of *San Remo Hotel*, the plaintiffs were precluded from relitigating their takings claims in a Section 1983 action because the issues were already adjudicated by the state court.[231] The facts and resulting imperative of res judicata in the *San Remo Hotel* case triggered further reflection by the justices to revisit the issue because of the real anomalies the state-litigation rule created.[232] Justice Rehnquist noted that he joined the *Williamson County* opinion "[b]ut 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."[233] What better illustration of using Fallon's reflective equilibrium theory to transcend the existing constitutional theories of originalism and living constitutionalism?

iii. The "Second-Best Stare Decisis *" Theory*

In his book, *Settled Versus Right: A Theory of Precedent*, Professor Randy J. Kozel develops a "theory of precedent designed to enhance the stability and impersonality of constitutional law" by rethinking how stare decisis interacts with constitutional theory.[234] In his "second-best *stare decisis*" theory, which is intended to appeal to both originalists and living constitutionalists,[235] Kozel attempts to narrow the factors relevant to deciding whether to retain or overrule a precedent to include only those that could be applied by justices who have distinctly different theories of constitutional interpretation.[236]

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230. *See* San Remo Hotel, L.P. v. City & County of San Francisco, 545 U.S. 323, 348 (2005) (Rehnquist, J., concurring).

231. *See id.* at 347–48.

232. *See id.* at 351.

233. *Id.* at 352.

234. KOZEL, *supra* note 15, at 6.

235. *Id.* at 94–99.

236. *See id.* at 13.

Recognizing that his approach "has some features in common with the doctrine of stare decisis that currently operates at the Supreme Court," Kozel identifies these factors to include "a decision's procedural workability, the accuracy of its factual premises, and the reliance it has yielded."[237] *Knick* addresses all three of these factors. It found that the *Williamson County* state-litigation requirement is "unworkable in practice" because of the preclusive effect of a state court's decision resolving a takings claim in a subsequent federal forum.[238] The Court also determined that the factual accuracy or quality of the precedent's reasoning was lacking, in that the reasoning in *Williamson County* "was exceptionally ill-founded and conflicted with much of our takings jurisprudence."[239] Finally, the Court found "no reliance interests on the state-litigation requirement,"[240] a conclusion supported by the likely practical impact of overruling *Williamson County*.[241]

The most significant departure from current practice that Kozel proposes relates to a precedent's substantive effects, the relevance of which depends on a Justice's theory of constitutional interpretation. Kozel asserts that the decision whether or not to follow precedent should not include the substantive effects unless the judge in question views the precedent as "extraordinarily harmful."[242] Ignoring the substantive effects of *Williamson County* is difficult given that the effect of the ripeness requirement is to preclude a plaintiff from litigating a takings claim in federal court. It is the substantive effect of this rule that makes it mistaken. Thus, at least in the *Knick* case, we would argue that substantive effects should not be excluded because they must be considered as part of the process of examining the accuracy of the precedent's factual premises. It might also be possible to interpret Robert's language in *Knick* to conclude that he indeed views the precedent as extraordinarily harmful.[243] But, even if we

237. *Id.*

238. Knick v. Township of Scott, 139 S. Ct. 2162, 2178–79 (2019).

239. *Id.* at 2178.

240. *Id.* at 2179.

241. *See supra* Section II.A (discussing reliance interests).

242. KOZEL, *supra* note 15, at 14.

243. *See Knick*, 139 S. Ct. at 2167 (concluding "that the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled"); *see also id.* at 2169–70 (holding that "the state-litigation requirement relegates the Takings Clause 'to the status of a poor relation' among the provisions of the Bill of Rights . . . ." and that " [f]idelity to the Takings Clause and our cases construing it requires overruling *Williamson County* and restoring takings claims to the full-fledged constitutional status the Framers envisioned

completely ignore substantive effects, the overruling of *Williamson County* was amply justified under Kozel's criteria of workability, factual accuracy, and lack of strong reliance interests.

Alternatively, Kozel proposes an approach focused on the structure of Supreme Court decision-making that would require a supermajority vote to overrule a precedent.[244] Such a requirement would compel cooperation among the justices and "lower the chances that a precedent will be jettisoned due to nothing more than personnel shifts — and accompanying changes in the Court's interpretive locus."[245] It is unclear whether the *Knick* Court could have obtained a supermajority vote through compromise, particularly because it followed so quickly after the overruling of another precedent in *Franchise Tax Board v. Hyatt*.[246]

iv. Reasoned Elaboration of the Criteria Used for Overruling

Professor Michael J. Gerhardt observes that there continues to be confusion over the Court's criteria for overruling prior cases.[247] He discounts Professor Jerrold Israel's findings from his classic 1963 study on overruling prior cases that the reasons given by the justices "fell into three categories: changed conditions, the lessons of experience (including unworkability), and conflicting precedents."[248] While Gerhardt accepts that the Court has "generally grounded its overrulings on one or more of these reasons," he argues that these criteria may be manipulated too easily.[249] Some justices may use changed conditions to overrule a decision, and others argue that it is the legislature that should take these conditions into account.[250] In addition, conflicting precedents have not necessarily yielded overrulings, and the justices have disagreed over "what would qualify as a lesson of experience requiring an explicit overruling."[251]

Applying the criteria identified by Israel would give minimal guidance to the Court in deciding whether to overrule *Williamson*

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when they included the Clause among the other protections in the Bill of Rights" (quoting Dolan v. City of Tigard, 512 U.S. 374, 392 (1994)).

244. *See* KOZEL, *supra* note 15, at 15–16.

245. *Id.* at 16.

246. *See* 139 S. Ct. 1485 (2019).

247. *See* Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 109 (1991).

248. *Id.* at 109 (citing Jerrold H. Israel, Gideon v. Wainwright*: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 219–23 (1963)).

249. *Id.* at 110–11.

250. *See id.*

251. *Id.* at 111.

County. First, the conditions involved in asserting an inverse condemnation claim have undergone only limited change since the Court recognized a regulatory taking in *Pennsylvania Coal Co. v. Mahon*.[252] Granted, there have been multiple Supreme Court cases guiding litigants and judges in determining whether "the regulation goes too far," but the refinement of theory has not changed the basic idea that an individual property owner should not have to bear the burdens of regulation that should be borne by the public as a whole.[253]

Williamson County created a ripeness rule that denied regulatory taking claimants the opportunity to bring their claims in federal court.[254] Few other conditions have changed regarding the efficacy of regulatory takings claims, though post-*Williamson County* decisions have revealed additional flaws in the workability of the state-exhaustion requirement, and exacerbated the "Catch-22" it creates.[255] Similarly, there are no conflicting precedents regarding the state exhaustion requirement from *Williamson County*, only widespread criticism of the decision by lawyers, judges (including the original justices who decided the case), and scholars.[256] The main grounds that would support *Knick*'s overruling of precedent, under the Israel criteria, are the lessons of experience (including unworkability) after more than three decades of litigation frustration from the "Catch-22" created by *Williamson County*.[257]

Gerhardt also disagrees with the approach suggested by Chief Justice Rehnquist, which calls for less than the usual deference to precedents when the prior decisions were the result of a 5–4 vote with vigorous dissents.[258] The *Williamson County* decision would not have qualified for a less than deferential approach to precedent under Justice Rehnquist's theory as it was a 7–1 vote with Justice Harry Blackmun's majority decision joined by Justices Rehnquist, Stevens, and O'Connor and concurrences by Justice Brennan, joined by Justices Marshall and Stevens.[259] Justice Byron White dissented on the grounds

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252. 260 U.S. 393, 415 (1922) (noting that 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").

253. *See* Armstrong v. United States, 364 U.S. 40, 48 (1960).

254. *See* Knick v. Township of Scott, 139 S. Ct. 2162, 2178 (2019).

255. *See supra* Part I.

256. *See Knick*, 139 S. Ct. at 2178.

257. *See id.* at 2177–78.

258. *See* Gerhardt, *supra* note 247, at 112 (citing Payne v. Tennessee, 501 U.S. 808, 826 (1991)).

259. *See* Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

that the issues were not ripe for decision, and Justice Lewis Powell did not take part in the decision.[260]

Instead, Gerhardt calls for a reasoned elaboration of the criteria the Court uses for overruling, including the reasoning of the individual justices as to why they rejected or adhered to the precedent.[261] By openly and fully discussing their reasoning, the justices will help assure people the Court takes precedent seriously for the purpose of preserving "social or institutional values of stability and continuity in constitutional law."[262] In *Knick*, both the majority and the dissent fully discussed their reasoning in rejecting or upholding *Williamson County*.[263] Even though *Knick* was a 5–4 decision, the overruling of precedent came after allowing three decades of litigation experience to test the workability of the state ripeness doctrine.[264]

Two of the justices who originally joined in the *Williamson County* decision later recognized the wrongness of the state-exhaustion requirement, and there were many critics of the holding because it denied property owners the right to litigate their Fifth Amendment challenges in federal court.[265] Justice Roberts clearly stated his reasoning as to why the precedent was erroneous and why it deserved to be overruled under the criteria established by the Court's jurisprudence.[266] The dissent similarly outlined its reasoning as to why the precedent was correct and should be sustained.[267] Based on the Court's full and open discussion of its reasoning, observers should take heart in the Court's thorough attempt to preserve the rule of law and recognize the importance of constraint and stability.

CONCLUSION

If, as the Supreme Court concluded in *Knick*, *Williamson County* was wrongly decided, the doctrine of stare decisis did not justify retaining it. That is true under the Supreme Court's current criteria for overruling precedent. It is also true under leading originalist and living

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260. *See, e.g.*, James G. Wilson, *Taking Stare Decisis Seriously, A Cautionary Tale for a Progressive Supreme Court*, 10 J. JURIS. 327, 330 (2011) (discussing initial distribution of votes in the Supreme Court as well as concurrences).

261. *See* Gerhardt, *supra* note 247, at 147.

262. *Id.*

263. *See generally* Knick v. Township of Scott, 139 S. Ct. 2162 (2019).

264. *See id.* at 2178.

265. *See supra* Section IV.B.ii (discussing the *San Remo* decision).

266. *See Knick*, 139 S. Ct at 2177–79.

267. *See id.* at 2183–90 (Kagan, J., dissenting).

constitutionalist theories of precedent, except perhaps those that require near-absolute deference to established doctrine.

Other recent Supreme Court decisions may, perhaps, raise legitimate concerns about the extent to which the Court might embark on unjustified reversals of precedent. However, such fears are misplaced when it comes to *Knick*'s reversal of *Williamson County*.

It is still possible to argue that *Williamson County* should have been retained in order to forestall reversal of other, more defensible precedents. Perhaps any reversal of precedent risks creating a dangerous slippery slope. But, unless we are committed to the idea that all precedents should be left undisturbed, no matter how problematic they are, it makes little sense to argue for maintaining a precedent whose overruling is amply justified merely because the Court might later go on reverse better precedent. If the justices are willing and able to apply criteria for overruling precedent impartially, then they should be able to tell the difference between a case that easily fits the relevant criteria — as *Williamson County* did — and one that does not. Overruling *Williamson County* was an easy case because it was justified on a wide range of different criteria.

If, on the other hand, invocations of stare decisis are merely smokescreens for the justices' jurisprudential or political objectives, then it still makes little sense to keep dubious precedents in place merely to protect others whose retention is proper. If the justices are willing to set aside stare decisis whenever it is convenient to do so,[268] then leaving *Williamson County* on the books would not prevent them from overruling other precedents in the future, especially if getting rid of them is an important priority of their judicial philosophy or their wing of the court.

This Article does not attempt to resolve the issue of what is ultimately the best approach to stare decisis. Nor do we attempt to determine whether the justices genuinely care about stare decisis, to the extent of being willing to leave in place precedents they believe are seriously misguided.[269] We do, however, conclude that *Knick's*

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268. For a recent argument that the conservative justices do not genuinely care about stare decisis, see Aaron Belkin & Sean McElwee, *Don't Be Fooled. Chief Justice Roberts Is as Partisan as They Come*, N.Y. TIMES (Oct. 7, 2019), https://www.nytimes.com/2019/10/07/opinion/john-roberts-supreme-court.html [https://perma.cc/LM78-9XA5].

269. One of us recently expressed skepticism about both the claim that wrong constitutional precedent should routinely be protected from reversal, and the idea that either liberal or conservative justices are routinely willing to support precedents they consider to be badly misguided, as opposed to relatively minor mistakes. *See* Ilya Somin, *The Rights and Wrongs of Overruling Precedent*, REASON: VOLOKH

overturning of *Williamson County* was justified under a wide range of jurisprudential theories of precedent.

CONSPIRACY (June 26, 2019), https://reason.com/2019/06/26/the-rights-and-wrongs-of-overruling-precedent/ [https://perma.cc/S6VR-A6ZS].