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## Justifying a Prudential Solution to the Williamson County Ripeness Puzzle

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# JUSTIFYING A PRUDENTIAL SOLUTION TO THE WILLIAMSON COUNTY RIPENESS PUZZLE

*Katherine Mims Crocker\**

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\* Associate, McGuireWoods LLP, Richmond, VA; J.D., 2012, University of Virginia School of Law. The thoughts expressed in this Article reflect solely my own views. I am grateful to Michael Collins for his detailed advice and feedback, to Kevin Walsh and Bill Mims for their helpful comments and suggestions, and to Aaron Tang and Matt Shapiro for their enduring encouragement. I am blessed by the support of my husband, Mark Crocker, which persists through even the most tedious of dinner-table conversations—about, say, *Williamson County* ripeness.

*[We fear that] this case will become another Jarndyce v. Jarndyce, with the participants “mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities, running their . . . heads against walls of words, and making a pretence of equity . . . .”*

—The Sixth Circuit, bemoaning the procedural complexities facing federal takings litigants<sup>1</sup>

## I. INTRODUCTION

In the 1985 case *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,<sup>2</sup> the Supreme Court articulated the requirement that in order to challenge a putative regulatory taking by a state or local entity under the Fifth Amendment in federal court, a claimant must first seek compensation in state court.<sup>3</sup> Twenty years later, in *San Remo Hotel, L.P. v. City and County of San Francisco*,<sup>4</sup> the Supreme Court acknowledged that, because of issue-preclusion principles, the *Williamson County* requirement could exile a large proportion of Fifth Amendment takings plaintiffs from federal court.<sup>5</sup>

This line of precedent opened a Pandora’s box of unforeseen complications, spawning many more questions than it purported to answer. Perhaps most important is what kind of requirement the rule actually is. I contend that a faithful reading of *Williamson County* as originally reasoned—instituting a rule of “ripeness” grounded in the Constitution—runs the risk of inflicting considerable (and unintentional) harm on litigants and the judicial system alike.

The rule, therefore, ought to be reconceptualized as a matter of merely “prudential” ripeness. In fact, the Supreme Court has taken a few steps in this direction, but its remarks on the matter

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<sup>1</sup> *Kruse v. Vill. of Chagrin Falls*, 74 F.3d 694, 701 (6th Cir. 1996) (quoting CHARLES DICKENS, *BLEAK HOUSE 2* (Oxford University Press 1989) (1853)).

<sup>2</sup> 473 U.S. 172 (1985).

<sup>3</sup> *Id.* at 195.

<sup>4</sup> 545 U.S. 323 (2005).

<sup>5</sup> *Id.* at 346.

have been largely conclusory. This Article seeks to supply a rationale for justifying that maneuver.

Part II provides background, summarizing the *Williamson County* and *San Remo Hotel* opinions. Part III outlines the emergence of the principal question explored here—whether *Williamson County*'s ripeness requirement derives from the Constitution itself or, instead, from mere prudential considerations—and examines the answers tendered by previous observers. Although a handful of courts and commentators have considered (or offered cursory comments on) this question, this Article is intended to do so in a comparatively comprehensive manner.

In order to offer a solution to this puzzle, I attempt in Part IV to demonstrate the superiority of a prudential reading of *Williamson County* with respect to four ongoing areas of uncertainty: (1) whether so-called “facial” Fifth Amendment takings claims are subject to the rule, (2) whether diversity and supplemental jurisdiction are available in federal court for prerequisite state causes of action, (3) whether litigants attempting to raise Fifth Amendment takings claims in state courts must satisfy the requirement, and (4) how claim preclusion could operate in this context, particularly in state courts. Because prudential justiciability rules, among other features, are amenable to exceptions where the policy rationales that they were intended to promote are not implicated or where countervailing concerns predominate, viewing the compensation prong in this light permits a comparison of competing considerations in the context of specific cases and, ultimately, allows courts to avoid some of the most surprising and senseless potential implications of alternative understandings.

## II. THE PIECES

This Part retraces the weaving of what any scholar of federal jurisdiction would recognize as a very tangled web. The Supreme Court first addressed the “ripeness” of Fifth Amendment regulatory-takings claims over twenty-five years ago in *Williamson County Regional Planning Commission v. Hamilton*

*Bank of Johnson City*,<sup>6</sup> discussed in Part II.A. In 2005, the Court answered a single follow-up question in *San Remo Hotel, L.P. v. City and County of San Francisco*,<sup>7</sup> addressed in Part II.B. Since then, the Court has largely left lower tribunals and academics to undertake the task of sifting through the intricacies and implications of those two brief but important forays into the field.

#### A. WILLIAMSON COUNTY

Voting seven to one, the Justices may have considered *Williamson County* a relatively simple case.<sup>8</sup> Time, however, would demonstrate that it was anything but.

The facts are fairly straightforward. A bank seeking to develop a swath of land into a subdivision alleged that the enforcement of various county zoning provisions constituted a regulatory taking under the Fifth Amendment.<sup>9</sup> The bank sued in federal court under 42 U.S.C. § 1983.<sup>10</sup> Although the lower courts reached the merits, ultimately ruling in the bank's favor, the Supreme Court—with Justice Blackmun writing for the majority—held that the claim was not ripe for adjudication.<sup>11</sup>

The Court outlined two bases for that conclusion. First, “a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.”<sup>12</sup> Here, although the county had denied the bank's development plan, the bank had not availed itself of further opportunities for administrative review. Specifically, the bank had

<sup>6</sup> 473 U.S. 172 (1985).

<sup>7</sup> 545 U.S. 323 (2005).

<sup>8</sup> Justice White dissented without opinion. Justice Powell took no part in the decision. 473 U.S. at 200. Indeed, the Court chose to dispose of the case on the ripeness grounds discussed anon rather than to answer directly the question on which it had granted certiorari: whether the Fifth Amendment's Takings Clause—as opposed to the Fifth and Fourteenth Amendments' Due Process Clauses—is the appropriate vehicle for challenging temporary regulatory takings. *Id.* at 185. The Court apparently found this question so difficult that it had left it undecided twice before and chose to do so again here. *Id.* (citing *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980)).

<sup>9</sup> *Id.* at 175.

<sup>10</sup> *Id.* at 182.

<sup>11</sup> *Id.* at 182, 200.

<sup>12</sup> *Id.* at 186.

failed to seek individualized variances from the generally applicable zoning ordinances under which its plan was blocked.<sup>13</sup>

Although the hook for that holding was apparently the textual principle that the government cannot commit a “taking” before reaching a final decision on the disposition of property, the Court explained its reasoning primarily in terms of its own precedent. Prior cases indicated that two of the most important factors for determining whether a taking has occurred are “the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations.”<sup>14</sup> Neither of those factors, the Court explained, can be adequately evaluated until the administrative body in question has arrived at a “final, definitive position” concerning the application of the relevant regulations to the challenger’s property.<sup>15</sup> I refer to this requirement as the *Williamson County* “takings” prong or requirement.<sup>16</sup>

The second reason that the claim was unripe, the Supreme Court explained, was that the bank had not sought compensation through the procedures provided by the state. “The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation,” the Court stated.<sup>17</sup> And compensation need not be tendered before or at the time of the taking, the Court concluded: “[A]ll that is required is that a ‘reasonable, certain and adequate provision for obtaining compensation’ exist.”<sup>18</sup> This Article calls the

<sup>13</sup> *Id.* at 187–88.

<sup>14</sup> *Id.* at 191 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978)).

<sup>15</sup> *Id.*

<sup>16</sup> The bank protested that requiring it to pursue administrative process flouted the holding of *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982), that § 1983 plaintiffs need not exhaust state administrative remedies before securing their day in federal court. *Williamson County*, 473 U.S. at 192. The Court responded by drawing a (perhaps arguable) distinction between finality and exhaustion: “the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury,” whereas “the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.” *Id.* at 193.

<sup>17</sup> *Id.* at 194.

<sup>18</sup> *Id.* (quoting Reg’l Rail Reorganization Act Cases, 419 U.S. 102, 124–25 (1974) (citation omitted) (internal quotation marks omitted)). The string of precedent on which the Court relied also included *Ruckelshaus*, 467 U.S. at 1016; *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18, 21 (1940); and *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932).

requirement that challengers pursue such procedures the *Williamson County* “compensation” prong or requirement.

The Court grounded the compensation requirement in the text of the Fifth Amendment, emphasizing that “no constitutional violation occurs until *just compensation* has been denied.”<sup>19</sup> The requirement was said to flow ineluctably from the very “nature of the constitutional right.”<sup>20</sup> Unlike the takings prong, however, the Court made clear that the compensation prong extends past the state administrative scheme, requiring an individual alleging a regulatory taking to seek payment before the state judiciary—at least, if that is where any pertinent procedural mechanisms are located, as is generally the case. Thus, in *Williamson County*, the Court rested its conclusion that the plaintiff’s claim was unripe on the fact that Tennessee law provided an inverse-condemnation cause of action that the bank had not pursued.<sup>21</sup>

*Williamson County*’s takings prong has met little resistance in lower courts or the academy. But the same cannot be said for the perennially controversial and confusing compensation prong.<sup>22</sup>

#### B. *SAN REMO HOTEL*

Following *Williamson County*, the Supreme Court largely avoided disputes over the ripeness of Fifth Amendment takings claims for twenty years. It returned to the topic in 2005 with *San Remo Hotel*,<sup>23</sup> which addressed whether federal courts could craft an exception to the so-called “Full Faith and Credit Statute,” 28 U.S.C. § 1738,<sup>24</sup> for issues that *Williamson County* caused to be

<sup>19</sup> *Williamson County*, 473 U.S. at 194 n.13 (emphasis added).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 196–97 (citing TENN. CODE ANN. § 29-16-123 (1980)).

<sup>22</sup> It may be worth specifying at the outset that although *Williamson County*’s compensation prong has been subject to sustained and often withering criticism—for recent examples, see, e.g., Michael M. Berger, *The Ripeness Game: Why Are We Still Forced to Play?*, 30 TOURO L. REV. 297 (2014); J. David Breemer, *The Rebirth of Federal Takings Review? The Courts’ “Prudential” Answer to Williamson County’s Flawed State Litigation Ripeness Requirement*, 30 TOURO L. REV. 319 (2014); Joshua D. Hawley, *The Beginning of the End? Horne v. Department of Agriculture and the Future of Williamson County*, 2013 CATO SUP. CT. REV. 245—this Article remains agnostic about whether the Supreme Court ought to overrule it and assumes that the doctrine is here to stay.

<sup>23</sup> 545 U.S. 323 (2005).

<sup>24</sup> “[J]udicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . . .” 28 U.S.C. § 1738 (2012).

decided in state court—such that regulatory-takings plaintiffs would be assured an opportunity for review before the federal bench.<sup>25</sup> The Court answered in the negative.<sup>26</sup>

The facts and procedural history of *San Remo Hotel* are fairly complex, making a somewhat detailed sketch helpful. In the late 1970s, San Francisco sought to combat a shortage of affordable housing by heavily regulating the conversion of “residential” hotel units to “tourist” units.<sup>27</sup> In order to commence such conversions, hotel owners were required to build new residential units, rehabilitate old ones, or pay “in lieu” fees. To facilitate the scheme, each hotel was required to report the number of residential and tourist units that it operated.<sup>28</sup> At the time, the San Remo Hotel operated as a bed and breakfast, but its management erroneously reported that it was entirely residential.<sup>29</sup> When the mistake came to light many years later, the hotel was required to apply for a conversion permit.<sup>30</sup> The city agreed to issue the permit, but only on the condition that the owners pay a \$567,000 in-lieu fee.<sup>31</sup>

The hotel owners filed suit under § 1983 in federal district court, asserting facial and as-applied regulatory-takings claims, among others.<sup>32</sup> The district court dismissed both, holding the facial claims barred by the applicable statute of limitations and the as-applied claims unripe under *Williamson County* because the hotel owners had not pursued an inverse-condemnation suit in state court.<sup>33</sup> The Ninth Circuit affirmed with respect to the as-applied claims.<sup>34</sup> As for the facial claims, the plaintiffs took the unusual step of urging the court to apply “*Pullman* abstention” to allow the parties to litigate a potentially dispositive state statutory question (concerning the propriety of the city’s initial classification of the hotel as residential) in state court.<sup>35</sup> The court agreed,

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<sup>25</sup> *San Remo Hotel*, 545 U.S. at 327.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 328.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 328–29.

<sup>30</sup> *Id.* at 328.

<sup>31</sup> *Id.* at 329.

<sup>32</sup> *Id.* at 330.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 331.

<sup>35</sup> *Id.* at 330. This sort of abstention was initially articulated in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941).



though it noted that its decision to abstain had nothing to do with ripeness, stating that the main facial claim was “‘ripe the instant the [challenged regulation] was enacted.’”<sup>36</sup> The Ninth Circuit instructed the plaintiffs that if they “wanted to ‘retain [their] right to return to federal court for adjudication of [their] federal claim, [they] must make an appropriate reservation in state court,’”<sup>37</sup> referring to the procedural device known as an “*England* reservation.”<sup>38</sup>

In state court, the hotel owners pursued the state statutory question, but they also raised broad takings claims under the California constitution while purporting to reserve their Fifth Amendment claims.<sup>39</sup> Despite acknowledging the reservation, the California Supreme Court observed that the takings provisions of the state and federal constitutions were “‘construed . . . congruently’” and then analyzed the state claims under Fifth Amendment jurisprudence, ruling in favor of the city.<sup>40</sup> The hotel owners then returned to federal district court, seeking to revive and amend the complaint from which the Ninth Circuit had abstained.<sup>41</sup> The district court held that their claims were barred not only by the statute of limitations but also by the doctrine of issue preclusion embodied in the Full Faith and Credit Statute, under which federal courts must accord dispositive effect to state judgments that would be preclusive in the courts of the judgment-rendering state.<sup>42</sup> The Ninth Circuit affirmed.<sup>43</sup>

The Supreme Court—with Justice Stevens writing for the majority—began its analysis by expounding the importance of the principles encoded in the Full Faith and Credit Statute, characterizing preclusion doctrine as critical to “‘the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination.’”<sup>44</sup> Unsurprisingly, the Court proceeded to

<sup>36</sup> *San Remo Hotel*, 545 U.S. at 330–31 (quoting 145 F.3d 1095, 1102 (9th Cir. 1998)).

<sup>37</sup> *Id.* at 331 (quoting 145 F.3d at 1106 n.7) (alterations in original).

<sup>38</sup> *Id.* at 331 n.6. This strategy for softening the effects of *Pullman* abstention was originally noted in *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411, 420–21 (1964).

<sup>39</sup> *San Remo Hotel*, 545 U.S. at 331–34.

<sup>40</sup> *Id.* at 332, 334 (quoting 41 P.3d 87, 100–01 (Cal. 2002)).

<sup>41</sup> *Id.* at 334.

<sup>42</sup> *Id.* at 334–35.

<sup>43</sup> *Id.* at 335.

<sup>44</sup> *Id.* at 337 (quoting *S. Pac. R.R. Co. v. United States*, 168 U.S. 1, 49 (1897)).

reject the hotel owners' entreaty for an exception where Fifth Amendment takings plaintiffs must start in state court by virtue of *Williamson County*, even where they seek to preserve federal claims under *England*.<sup>45</sup> The essence of the argument was that absent such an exception, issue preclusion would very often bar federal courts from hearing takings claims, thereby denying a federal forum for the vindication of a federal right.<sup>46</sup>

With regard to *England*, the Court explained that "[t]he purpose of [*Pullman*] abstention is not to afford state courts an opportunity to adjudicate an issue that is functionally identical to the federal question," but rather "to avoid resolving the federal question by encouraging a state-law determination that may moot the federal controversy."<sup>47</sup> Thus, because they chose to submit to the California courts state constitutional claims in addition to the statutory issue that had caused the Ninth Circuit to abstain, the plaintiffs could not claim the benefits of *England* for purposes of their facial Fifth Amendment claims.<sup>48</sup> Moreover, *England* provided even weaker support for federal-court adjudication of the plaintiffs' as-applied claims, the Court explained. Because the federal courts never possessed jurisdiction over those claims in the first place under *Williamson County* (and the Ninth Circuit therefore dismissed rather than abstained from them), "there was no reason to expect that they could be relitigated in full if advanced in the state proceedings."<sup>49</sup>

The Court explicitly rebuffed the policy argument that "[i]t would be both ironic and unfair if the very procedure that the Supreme Court required [plaintiffs] to follow before bringing a Fifth Amendment takings claim . . . also precluded [them] from ever bringing a Fifth Amendment takings claim" in federal court.<sup>50</sup> The Court denied that plaintiffs have an absolute right to vindicate federal claims in federal forums;<sup>51</sup> scoffed at the

<sup>45</sup> *Id.* at 338.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 339.

<sup>48</sup> *See id.* at 341 ("[P]etitioners effectively asked the state court to resolve the same federal issues they asked it to reserve. *England* does not support . . . any such right.").

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 342 (alterations in original).

<sup>51</sup> The Court asserted that inter-system-preclusion precedent had repeatedly rejected that assumption even as to litigants who are forced to air their claims first in state court. *See id.* (citing, inter alia, *Allen v. McCurry*, 449 U.S. 90, 103–04 (1980) (holding plaintiff

suggestion that “courts may simply create exceptions to . . . § 1738 wherever courts deem them appropriate,” even for arguably “laudable policy goal[s]”;<sup>52</sup> and noted the irony that the hotel owners were never required to ripen their facial claims in state court in the first place but voluntarily requested abstention.<sup>53</sup>

In closing, the Court briefly commended the federalism virtues furthered by *Williamson County*. The whole of the statement on the subject was that “[s]tate courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions relating to zoning and land-use regulations.”<sup>54</sup>

### III. THE PUZZLE

#### A. PARAMETERS OF THE INQUIRY

In one of his last opinions, Chief Justice Rehnquist concurred in the judgment of *San Remo Hotel*.<sup>55</sup> He wrote separately to state that *Williamson County*’s compensation prong “may have been mistaken” and should be reconsidered, despite his having joined the majority in that decision.<sup>56</sup> Specifically, he stated:

It is not clear to me that *Williamson County* was correct in demanding that, once a government entity has reached a final decision with respect to a claimant’s property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court. The Court in *Williamson County* purported to interpret the Fifth Amendment in divining this state-litigation requirement. *See, e.g.*, 473 U.S. at 194 (referencing

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precluded from raising Fourth Amendment challenge in federal court under § 1983 where state court had previously rejected same claim in exclusionary-rule context)).

<sup>52</sup> *Id.* at 344. Rather, “Congress must clearly manifest its intent to depart from § 1738” via “an express or implied partial repeal” in a later-enacted statute. *Id.* at 344–45 (internal quotation marks omitted).

<sup>53</sup> *Id.* at 345 (citing *Yee v. Escondido*, 503 U.S. 519, 534 (1992)).

<sup>54</sup> *Id.* at 347.

<sup>55</sup> *Id.* at 348 (Rehnquist, C.J., concurring in the judgment, joined by O’Connor, Kennedy, and Thomas, JJ.).

<sup>56</sup> *Id.* O’Connor’s joining the concurrence also represented a reversal of course.

“[t]he nature of the constitutional right”). More recently, we have referred to it as merely a prudential requirement. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733–34 (1997).<sup>57</sup>

Ultimately, Rehnquist concluded, “[i]t is not obvious that either constitutional or prudential principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim.”<sup>58</sup>

Rehnquist’s separate opinion brought to light an important question: what, precisely, are the underpinnings of *Williamson County*’s compensation prong? Does the Constitution actually command the rule, as intimated by *Williamson County* itself? Or is it better characterized as grounded in judicial conceptions of sound federalism policy? And why does it matter? That, in a nutshell, is the puzzle to which I hope to offer a solution.

The remainder of this Part fleshes out the puzzle’s parameters. Part III.B.1 outlines the doctrine of ripeness in its constitutional and prudential forms as pertinent to the takings context. Part III.B.2 follows with a descriptive overview of relevant jurisprudence and commentary. Of particular importance, the Supreme Court has recently spoken to this long-simmering debate, but it has purported to solve only a portion of the puzzle and provided nary a word of explanation about why or how it arrived at that solution.

This Article ultimately argues that it would be wise to classify the compensation requirement as prudential rather than constitutional. Recognizing a prudential solution to the ripeness puzzle both offers an analytical tool for beginning to break the impasse on a number of difficult doctrinal questions and provides the most—sometimes perhaps the only—sensible answers.

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<sup>57</sup> *Id.* at 349 (citations shortened).

<sup>58</sup> *Id.* As for the possibility that *Williamson County*’s compensation prong is justified by prudential principles, Rehnquist contended that the case simply had not been convincingly made—and that he doubted it could, given the costs to litigants of fulfilling the requirement. *Id.* at 350–52. Rehnquist pointed out that the majority’s statement that state courts are competent and experienced in adjudicating land-use issues does not distinguish takings claims from other constitutional challenges relating to land-use law—say, in the First Amendment context. *Id.* at 350–51 (citing, inter alia, *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 55 (1986) (holding that localities may prohibit adult theaters through content-neutral zoning regulations)). Rehnquist thus asked why “federal takings claims in particular should be singled out to be confined to state court.” *Id.* at 351.

## B. THREE SHADES OF RIPENESS

1. *In Theory.* Justiciability rules determine what matters are appropriate for decision in courts of law—as opposed to, perhaps, the political branches.<sup>59</sup> Justiciability encompasses the political-question and advisory-opinion doctrines, as well as standing, ripeness, and mootness.<sup>60</sup> Ripeness, generally stated, is the rule that the injury of which a plaintiff complains cannot be overly speculative.<sup>61</sup> Thus, the central concern is whether the case involves uncertain or “contingent future events that may not occur as anticipated, or indeed may not occur at all.”<sup>62</sup> To the extent that the doctrines are actually separable, whereas standing asks whether the party before the court has suffered a judicially cognizable injury and mootness asks whether the dispute remains live, “ripeness asks whether there yet is any need for the court to act.”<sup>63</sup>

Some justiciability principles, the Supreme Court has made clear, derive from Article III’s limitation of the federal judicial power to “Cases” and “Controversies.”<sup>64</sup> Those are traditionally known as “constitutional” justiciability doctrines. Others, in contrast, derive from the judiciary’s own notions of “prudent judicial administration”—that is, where “wise policy militates against judicial review,”<sup>65</sup> generally because certain cases “are more appropriately resolved in another forum.”<sup>66</sup> Those are “prudential” justiciability doctrines. The Supreme Court has described ripeness requirements in both constitutional and prudential terms depending on the context,<sup>67</sup> and the Second

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<sup>59</sup> See Alex Lees, Note, *The Jurisdictional Label: Use and Misuse*, 58 STAN. L. REV. 1457, 1481–84 (2006).

<sup>60</sup> ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 2.1 (5th ed. 2007).

<sup>61</sup> See *id.* § 2.4.1.

<sup>62</sup> *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 480 (1990) (quoting 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3532 (2d ed. 1984)).

<sup>63</sup> WRIGHT ET AL., *supra* note 62, § 3532.1.

<sup>64</sup> U.S. CONST. art. III, § 2, cl. 1; see CHERMERINSKY, *supra* note 60, § 2.1.

<sup>65</sup> CHERMERINSKY, *supra* note 60, § 2.1.

<sup>66</sup> Max Kidalov & Richard H. Seamon, *The Missing Pieces of the Debate over Federal Property Rights Legislation*, 27 HASTINGS CONST. L.Q. 1, 3 n.7 (1999).

<sup>67</sup> For examples of the Court invoking ripeness in Article III terms, see *Steffel v. Thompson*, 415 U.S. 452, 458 (1974), and *Ellis v. Dyson*, 421 U.S. 426, 433 (1975). For examples of the Court describing ripeness as a merely prudential requirement, see *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 670 n.2 (2010).

Circuit has offered the following helpful overview of the distinction between the two:

Constitutional ripeness is a doctrine that, like standing, is a limitation on the power of the judiciary. It prevents courts from declaring the meaning of the law in a vacuum and from constructing generalized legal rules unless the resolution of an actual dispute requires it. But when a court declares that a case is not prudentially ripe, it means that the case will be better decided later and that the parties will not have constitutional rights undermined by the delay. It does not mean that the case is not a real or concrete dispute affecting cognizable current concerns of the parties within the meaning of Article III. . . . Prudential ripeness is, then, a tool that courts may use to enhance the accuracy of their decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of, especially, constitutional issues that time may make easier or less controversial.<sup>68</sup>

Interestingly, the Supreme Court has quite recently thrown some quantity of cold water on the propriety of prudential ripeness (and, indeed, all prudential justiciability doctrines). In particular, *Susan B. Anthony List v. Driehaus*<sup>69</sup> presented, among other issues, a prudential-ripeness question. Writing for a unanimous Court, Justice Thomas's opinion stated that "[t]o the extent respondents would have us deem petitioners' claims nonjusticiable on grounds that are 'prudential,' rather than constitutional, '[t]hat request is in some tension with our recent reaffirmation of the principle that a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'" But the Court concluded that it "need not resolve the continuing vitality of the prudential ripeness doctrine" because immediate adjudication was

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<sup>68</sup> *Simmonds v. INS*, 326 F.3d 351, 357 (2d Cir. 2003).

<sup>69</sup> 134 S. Ct. 2334 (2014).

<sup>70</sup> *Id.* at 2347 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (internal quotation marks omitted)).

obviously appropriate in that case.<sup>71</sup> Whether the Court will continue down that path remains to be seen, but this Article assumes the doctrine's continued survival.

Some observers have posited that the compensation requirement may be more *sui generis* than the conventional dichotomy between constitutional and prudential ripeness rules suggests. In particular, Professor Gene Nichol makes a compelling argument that *Williamson County* invoked ripeness in a different sort of constitutional way—based not on Article III (which he argues should never form the basis of ripeness doctrines<sup>72</sup>) but on the Fifth Amendment itself.<sup>73</sup> As such,

ripeness doctrine [is] . . . used to measure the demands of substantive . . . constitutional causes of action. This application of the doctrine does not relate to jurisdictional power at all. Instead, it is an aspect of actionability analysis—that is, the determination of whether the litigant has stated a claim on which relief can be granted.<sup>74</sup>

Accordingly, Nichol contends that *Williamson County*'s “ripeness” requirements are actually merits-level prerequisites for stating a Fifth Amendment takings claim: they are “elements” of the cause of action.<sup>75</sup>

Key to this framing of *Williamson County* is the opinion's fundamentally textual analysis. As Justice Blackmun explained: “[B]ecause the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional

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<sup>71</sup> *Id.*

<sup>72</sup> See Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 156 (1987) (“I argue that a marriage of ripeness and article III is flawed. Not only is it inconsistent with the Court's depiction of the case or controversy requirement, it is a wrong turn analytically—both for ripeness and for article III.”); accord Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 608–10 (1992) (similar argument focusing on mootness).

<sup>73</sup> Nichol, *supra* note 72, at 162, 164–70.

<sup>74</sup> *Id.* at 162.

<sup>75</sup> *Id.* at 176.

right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.”<sup>76</sup>

All in all, therefore, there are two different ways in which *Williamson County*'s compensation prong can be understood as encoding a constitutional requirement—traditionally, as a component of the case-or-controversy constraint (what one might call “Article-III-based” ripeness), or idiosyncratically, as an elemental ingredient of what it takes to inflict injury under the text of the Takings Clause (what one might call “Fifth-Amendment-based” ripeness). To the extent that the compensation prong represents constitutional ripeness concerns whatsoever, Nichol quite likely has the better of the argument given the emphasis that *Williamson County* placed on the text of the Fifth Amendment.

2. *As Applied.* *Williamson County* did not describe its just-compensation requirement as prudential in any way; rather, the Court's reasoning was rooted in the Constitution through and through. As Chief Justice Rehnquist noted in his *San Remo Hotel* concurrence, however, the rationale behind the rule has become the subject of significant ambiguity over time.<sup>77</sup>

Rehnquist cited *Suitum v. Tahoe Regional Planning Agency*, in which the Court noted that “[t]he [government] does not question that [the plaintiff] properly presents a genuine ‘case or controversy’ sufficient to satisfy Article IIP” and then explicitly labeled the *Williamson County* requirements “two independent prudential hurdles to a regulatory-takings claim brought against a state entity in federal court.”<sup>78</sup> The Court did not, however, explain why the doctrine was abruptly deemed prudential or what policies it might advance.

Although Rehnquist did not cite it, others have noted that *Lucas v. South Carolina Coastal Council*<sup>79</sup> framed *Williamson County* in prudential terms as well.<sup>80</sup> There, Justice Scalia wrote the following for the majority:

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<sup>76</sup> *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 n.13 (1985).

<sup>77</sup> 545 U.S. 323, 349 (2005) (Rehnquist, C.J., concurring in the judgment).

<sup>78</sup> 520 U.S. 725, 733–34 & n.7 (1997).

<sup>79</sup> 505 U.S. 1003 (1992).

<sup>80</sup> See, e.g., *Guggenheim v. City of Goleta*, 582 F.3d 996, 1008 (9th Cir. 2009), *vacated*, 638 F.3d 1111 (9th Cir. 2010) (en banc); John Martinez & Karen L. Martinez, *A Prudential*



[Petitioner] has properly alleged Article III injury in fact in this case . . . . That there is a discretionary “special permit” procedure by which he may regain—for the future, at least—beneficial use of his land goes only to the prudential “ripeness” of [his] challenge, and for the reasons discussed we do not think it prudent to apply that prudential requirement here.<sup>81</sup>

In dissent, Justice Blackmun argued that *Williamson County*'s ripeness requirements—of which he was the original architect—are “not simply a gesture of good will to land-use planners.”<sup>82</sup> Rather, “[i]n the absence of ‘a final and authoritative determination of the type and intensity of development legally permitted on the subject property’ and the utilization of state procedures for just compensation, there is no final judgment, and in the absence of a final judgment there is no jurisdiction.”<sup>83</sup> “This rule,” Blackmun continued, quoting *Williamson County*, “is ‘compelled by the very nature of the inquiry required by the Just Compensation Clause.’”<sup>84</sup> And, he concluded, the rule (specifically, the takings prong) had not been satisfied in the case at bar.<sup>85</sup>

Although at least one lower-court opinion read the majority's statement in *Lucas* as definitively resolving the *Williamson County* ripeness puzzle,<sup>86</sup> Scalia's remark has not been interpreted that way by many observers. Nor was it viewed that way by the Supreme Court itself, as Rehnquist's *San Remo Hotel* concurrence made clear by criticizing the majority for “conspicuously leav[ing] open” the question whether *Williamson County*'s compensation prong “is merely a prudential rule, and not a constitutional mandate.”<sup>87</sup>

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*Theory for Providing a Forum for Federal Takings Claims*, 36 REAL PROP. PROB. & TR. J. 445, 468 (2001).

<sup>81</sup> *Lucas*, 505 U.S. at 1012–13.

<sup>82</sup> *Id.* at 1041 (Blackmun, J., dissenting).

<sup>83</sup> *Id.* (quoting *MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 348 (1986)) (other citations omitted).

<sup>84</sup> *Id.* (quoting 473 U.S. 172, 190 (1985)).

<sup>85</sup> *Id.* at 1041–43.

<sup>86</sup> See *Guggenheim v. City of Goleta*, 582 F.3d 996, 1008 (9th Cir. 2009) (“[T]he [Supreme] Court has explicitly held that the *Williamson* requirements are merely prudential requirements.”). Although that decision was vacated, see 638 F.3d 1111 (9th Cir. 2010) (en banc), the replacement opinion resolved the issue in the same way by combining *Suitum* and circuit precedent, see *id.* at 1117.

<sup>87</sup> See 545 U.S. 323, 352 n.2 (2005) (Rehnquist, C.J., concurring in the judgment).

To be specific, although relatively few academics devoted significant attention to the particular source of the compensation requirement, suppositions in the years following *Lucas* were decidedly mixed. “It is unclear whether the *Williamson County* [compensation] prong is a constitutional or prudential requirement,” one author noted, citing *San Remo Hotel*.<sup>88</sup> “[A]lthough ripeness decisions are often based on prudential considerations, the Court in *Williamson County* held that the [compensation] requirement is based on the text of Article III and the Fifth Amendment of the U.S. Constitution,” declared another author (pre-*San Remo Hotel*), despite citing *Suitum* and *Lucas*.<sup>89</sup>

Nevertheless, even before the Supreme Court’s most recent comments on the issue, the tide may have turned toward viewing the compensation prong as a prudential rule. One commentator, for example, contended that “there are several prudential issues wrapped up in the concern for ripeness that better explain the results” of *Williamson County*.<sup>90</sup> And a set of scholars similarly distinguished between “jurisdictional content,” apparently referring to Article III principles, and “takings-ripeness doctrine,” arguing that the Supreme Court has “consistently . . . refused” to mix the two.<sup>91</sup> Professor Stewart Sterk, for his part, accurately described the Court’s jurisprudential arc, stating that whereas “[t]he *Williamson County* opinion itself justified [the compensation] requirement primarily in formal [constitutional] terms,” *San Remo Hotel* “added a prudential justification.”<sup>92</sup>

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<sup>88</sup> See Scott A. Keller, Note, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the Williamson County State Litigation Requirement for Regulatory Takings Claims*, 85 TEX. L. REV. 199, 209 (2006) (ultimately arguing that *Williamson County* does not concern ripeness at all but instead constitutes “judicial jurisdiction stripping”).

<sup>89</sup> Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts’ Misguided Attempts to Avoid Preclusion Under Williamson County*, 26 ECOLOGY L.Q. 1, 9 (1999).

<sup>90</sup> Eric A. Lindberg, Comment, *Multijurisdictionality and Federalism: Assessing San Remo Hotel’s Effect on Regulatory Takings*, 57 UCLA L. REV. 1819, 1859–60 (2010).

<sup>91</sup> Martinez & Martinez, *supra* note 80, at 467.

<sup>92</sup> Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251, 284–85 (2006). Another thoroughgoing article presented a systematic argument for why the compensation prong should not be characterized as an Article-III-based rule. See Kidalov & Seamon, *supra* note 66, at 25–35. But because the article characterized the rule as articulating both a prudential preference and a Fifth-Amendment-based rule, *see id.* (calling the requirement both “a rule of prudence” and “an element of a cause of action”), it managed to avoid what amounts to an important distinction here.

In any event, the Supreme Court, again speaking through Justice Scalia, purported to solve a portion of the puzzle in the 2010 case *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*.<sup>93</sup> The questions before the Court were whether and, if so, under what standard *judicial* action can violate the Takings Clause. A plurality concluded that the judiciary can indeed effect an unconstitutional taking if it “declares that what was once an established right of private property no longer exists.”<sup>94</sup> Then, turning to the case at bar, a portion of the opinion joined by all eight of the participating Justices noted that “respondents raise [a] preliminary point[] which need not detain us long.”<sup>95</sup> Specifically, “[t]he city and the county [respondents] argue . . . that the claim is unripe because petitioner has not sought just compensation”—a *Williamson County* compensation-prong argument.<sup>96</sup> The Court declared that because “[n]either [this] objection [nor another] appeared in the briefs in opposition to the petition for writ of certiorari, and since *neither is jurisdictional*, we deem both waived.”<sup>97</sup> Ultimately, the unanimous Court held that no taking had occurred.<sup>98</sup>

As an initial matter, it bears noting that the Court’s declaration that the compensation prong is non-jurisdictional appears to have ended a long-simmering debate about whether defendants can eschew the compensation prong’s dictate to plaintiffs. Some commentators had encouraged courts to permit defendants to waive or forfeit the requirement in certain situations, thereby allowing Fifth Amendment takings claims to be heard in federal court in the first instance.<sup>99</sup> And some courts had done exactly that, especially in cases that had been removed from state systems.<sup>100</sup> In particular, some observers suggested that *City of*

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<sup>93</sup> 560 U.S. 702 (2010).

<sup>94</sup> *Id.* at 715 (plurality opinion).

<sup>95</sup> *Id.* at 729 (majority opinion).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* (emphasis added).

<sup>98</sup> *See id.* at 729–33 (concluding that Florida law did not recognize petitioner’s claimed property interest).

<sup>99</sup> *See, e.g.,* Lindberg, *supra* note 90, at 1871.

<sup>100</sup> *See, e.g.,* Guggenheim v. City of Goleta, 582 F.3d 996, 1009 (9th Cir. 1999), *vacated*, 638 F.3d 1111 (9th Cir. 2010) (en banc); Tapps Brewing Inc. v. City of Sumner, 482 F. Supp. 2d 1218, 1227 (W.D. Wash. 2007), *aff’d sub nom.* McClung v. City of Sumner, 548 F.3d 1219, 1224 (9th Cir. 2008) (assuming ripeness without deciding). *But see, e.g.,* Anderson v.

*Chicago v. International College of Surgeons*<sup>101</sup> had endorsed this practice.<sup>102</sup> There, a local-government defendant removed to federal court a suit presenting a hodge-podge of state and federal challenges, including both facial and as-applied Fifth Amendment takings claims, arising out of the denial of construction permits for the conversion of a historical landmark to high-rise condominiums.<sup>103</sup> The Supreme Court upheld removal without once mentioning *Williamson County* (apparently echoing the silence of the parties on the issue<sup>104</sup>), instead focusing on whether the district court's exercise of supplemental jurisdiction over the state administrative claims was proper.<sup>105</sup>

Of course, to the extent that any given ripeness rule represents a jurisdictional requirement, a federal court must dismiss claims that the rule renders underdeveloped, including those removed from state court.<sup>106</sup> It is for this reason, apparently assuming that the compensation prong was meant to be jurisdictional, that one commentator declared that "*Williamson County* and *City of Chicago* are in direct conflict" and that "[e]ither *City of Chicago* erroneously permitted removal, or [it] implicitly held that the regulatory takings claim was ripe—a *sub silentio* elimination of the *Williamson County* [compensation] prong."<sup>107</sup> *Stop the Beach* put an end to this debate by declaring the compensation prong non-jurisdictional and expressly endorsing the possibility of waiver or forfeiture.<sup>108</sup>

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Chamberlain, 134 F. Supp. 2d 156, 162 (D. Mass. 2001) ("The only exception to this doctrine is futility [of seeking state-court relief].").

<sup>101</sup> 522 U.S. 156 (1997).

<sup>102</sup> See, e.g., Lindberg, *supra* note 90, at 1871 n.322.

<sup>103</sup> *Int'l Coll. of Surgeons*, 522 U.S. at 159–60.

<sup>104</sup> See 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 Self-Parody Stage*, 36 URB. LAW. 671, 677 & n.26 (2004) ("In fairness to the Court, it appears that the briefs . . . did not call *Williamson County* to the Court's attention.").

<sup>105</sup> *Int'l Coll. of Surgeons*, 522 U.S. at 163 (ruling affirmatively).

<sup>106</sup> See 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3722 (4th ed. 2009) ("It also is well-settled that the federal right or immunity alleged by the state court plaintiff and argued to provide the basis for removal of the case must be the subject of a genuine and present controversy between the parties, not merely a possible or conjectural one.").

<sup>107</sup> Keller, *supra* note 88, at 220.

<sup>108</sup> 560 U.S. 702, 729 (2010). For an excellent recent discussion of the interaction between *Williamson County* and removal doctrine, see Breemer, *supra* note 22, at 332–38.

*Stop the Beach*, however, provided neither an explanation nor a relevant citation for why the compensation prong was deemed non-jurisdictional.<sup>109</sup> In attempting to elucidate an answer, we must be careful first to understand precisely what *Stop the Beach* said with respect to the source of the rule. That is, what did the Court mean by declaring the compensation prong non-jurisdictional?

As outlined above, there are three possible solutions to the *Williamson County* ripeness puzzle: the compensation prong could be an Article-III-based constitutional rule, a Fifth-Amendment-based constitutional rule, or a merely prudential rule. In a footnote, *Stop the Beach* made clear that it was the first of these possibilities that it intended to reject. Specifically, Justice Scalia stated that “the claim here is ripe insofar as Article III standing is concerned, since (accepting petitioner’s version of Florida law as true) petitioner has been deprived of property.”<sup>110</sup> Nor would a requirement based on either of the remaining possible foundations for the compensation prong naturally be described as “jurisdictional.” A Fifth-Amendment-based rule goes to the substantive merits of a takings cause of action (and is thus part and parcel of “actionability analysis”),<sup>111</sup> and a prudential rule arises from the judiciary’s own notions of wise policy rather than external limitations on its adjudicatory power.<sup>112</sup> Accordingly, whereas some observers view *Stop the Beach* as having declared the compensation requirement definitively prudential,<sup>113</sup> the matter does not appear to be quite so clear-cut: the Court’s remark

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<sup>109</sup> The only citations referred to the principle that non-jurisdictional objections are susceptible of waiver in the Supreme Court if not presented in a respondent’s opposition to a petition for certiorari. See *id.* (citing SUP. CT. R. 15; *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815–16 (1985)).

<sup>110</sup> *Id.* at 729 n.10.

<sup>111</sup> See Nichol, *supra* note 72, at 162; see also *supra* text accompanying notes 73–75. Nichol expressly notes that a Fifth-Amendment-based compensation requirement would be non-jurisdictional. Nichol, *supra* note 72, at 162 (“This application of the [ripeness] doctrine does not relate to jurisdictional power at all.”).

<sup>112</sup> See *supra* text accompanying note 68.

<sup>113</sup> See Breemer, *supra* note 22, at 342 (characterizing *Stop the Beach* as “holding that the [compensation prong] is a prudential rule”); Ian Fein, Note, *Why Judicial Takings Are Unripe*, 38 *ECOLOGICAL L.Q.* 749, 774 (2011) (“Over the years, there has been some uncertainty about the prudential or constitutional nature of the *Williamson County* ripeness rules. The Court provided a definitive answer in *Stop the Beach* when all eight Justices agreed that the [compensation prong] was not jurisdictional . . . . The unanimous prudential declaration is significant . . . .”). Fein later notes the possibility that the compensation prong may derive from the Fifth Amendment’s text but proceeds to reject it on the basis of the same assumption that *Stop the Beach* declared the requirement definitively prudential. See *id.* at 784.

could be consistent with a Fifth-Amendment-based understanding as well.

The Court followed with a similar statement in the 2013 case *Horne v. Department of Agriculture*.<sup>114</sup> The question there was whether raisin handlers whose crop was significantly burdened by a federal marketing order were permitted to raise a takings claim as an affirmative defense to an enforcement action under the Agricultural Marketing Agreement Act of 1937 (AMAA).<sup>115</sup> Invoking *Williamson County*, the government argued that the handlers were instead required to wait until the conclusion of the enforcement action and then pursue relief in the Court of Federal Claims.<sup>116</sup> The Supreme Court stated that “[a]lthough we often refer to this consideration as prudential ‘ripeness,’ we have recognized that it is not, strictly speaking, jurisdictional.”<sup>117</sup> For that proposition, the Court cited *Stop the Beach* and, just as there, included a footnote referring to the case-or-controversy requirement<sup>118</sup>—thus demonstrating that it was, again, the Article-III-based conception of the compensation prong that it meant to reject (albeit this time with a noncommittal nod toward a prudential underpinning as well).

In light of *Horne’s* subsequent conclusion that “[p]etitioners . . . have no alternative remedy” in the Court of Federal Claims (owing to the interaction between the Tucker Act and the AMAA), such that *Williamson County* posed no obstacle,<sup>119</sup> the statement about the character of that case’s ripeness requirements was arguably dictum.<sup>120</sup> But it also bears noting that the Court proceeded to declare that “it would make little sense to require the party to pay the fine in one proceeding and then turn around and sue for recovery of that same money in another proceeding”<sup>121</sup>—a remarkable statement in light of the fact that *Williamson County* requires a similar sort of piecemeal process. Although *Horne* did not note the relevance of *Williamson County* to this point, it is difficult to see how the Court’s conclusion

<sup>114</sup> 133 S. Ct. 2053 (2013).

<sup>115</sup> *Id.* at 2061.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 2062 (citation omitted) (internal quotation marks omitted).

<sup>118</sup> *Id.* at 2062 & n.6.

<sup>119</sup> *Id.* at 2063.

<sup>120</sup> *See id.*

<sup>121</sup> *Id.* at 2063.

could square with anything other than a prudential understanding of the compensation prong (such that it would not apply to, at least, some claims against the federal government). Indeed, some scholars have read the case in that manner.<sup>122</sup> Again, however, that inference is fairly opaque, and the Court's treatment of the issue was quite conclusory.

To sum up, following many years of confusion and some debate, the Supreme Court has recently stated that *Williamson County's* compensation requirement should not be conceptualized as a ripeness rule grounded in Article III. Instead, the Court has suggested, the rule should be viewed as a purely prudential mandate.<sup>123</sup> But in making those moves, the Court has mostly failed to explain why prudential considerations supply a better solution to the ripeness puzzle than does Article III—not to mention the text of the Fifth Amendment. The remainder of this Article offers some considerations for attempting to fill that gap.

#### IV. THE SOLUTION

*Williamson County* and *San Remo Hotel* opened a Pandora's box of unforeseen complications, spawning many more questions than they purported to answer. Worse still, several of these questions appear more or less unanswerable using the few and sometimes incompatible analytical tools supplied by the Supreme Court so far. Examples, discussed in turn below, include (1) whether so-called "facial" regulatory-takings claims are subject to the compensation prong, (2) whether diversity and supplemental jurisdiction are available in federal court for prerequisite state causes of action, (3) whether litigants attempting to raise Fifth Amendment takings claims in state courts must satisfy the

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<sup>122</sup> See, e.g., Breemer, *supra* note 22, at 339–40 (citing *Horne* as an example of Supreme Court's "le[ading] the way in the repositioning of *Williamson County* as a discretionary, prudential ripeness doctrine"); Michael W. McConnell, *Horne and the Normalization of Takings Litigation: A Response to Professor Echeverria*, 43 ENVTL. L. REP. NEWS & ANALYSIS d10749, 10751 (2013) (stating that if *Horne's* remark that "the takings claim logically must accrue . . . 'once the government has taken private property without paying for it' . . . is true, . . . [then] *Williamson County* . . . cannot be correct, at least on its own terms" and that, instead, "its justification must necessarily rest on federalism" (quoting *Horne*, 133 S. Ct. at 2062 n.6) (quoting another source) (some internal quotation marks omitted)).

<sup>123</sup> The circuit courts seem to be following suit. See Breemer, *supra* note 22, at 340–42.

requirement, and (4) how claim preclusion could operate in this context, particularly in state courts.

In attempting to justify the Supreme Court's recent statements on the subject, this Part explores these questions in light of all three potential sources of the compensation prong—Article III, the Fifth Amendment, and prudential considerations. I propose that resolving the *Williamson County* ripeness puzzle in favor of a prudential reading provides the best possible answers for these questions—and likely for other open questions as well. In this context, constitutional rules are incapable of adapting to the context of specific cases. Prudential rules, by contrast, are substantially more flexible. They are amenable to exceptions, for instance, where the policy rationales that they were intended to promote are not implicated or where countervailing concerns predominate.<sup>124</sup> Indeed, the questions outlined above largely turn on the possibility of exceptions, either actual or functional, to the compensation prong. Viewing the requirement as prudential permits a comparison of competing considerations in the context of specific cases and, ultimately, allows courts to avoid some of the most surprising and senseless potential implications of alternative understandings.<sup>125</sup>

#### A. JUSTIFYING A PRUDENTIAL COURSE

1. *Facial Claims.* Courts have long distinguished between facial and as-applied Fifth Amendment takings claims, as seen in *San Remo Hotel*.<sup>126</sup> Traditionally, as a Ninth Circuit panel explained in the takings context, “a facial challenge alleges that the statute or regulation is unconstitutional in the abstract: that ‘no set of circumstances exists under which the [a]ct would be valid,’”<sup>127</sup> whereas an as-applied challenge “asserts that a statute

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<sup>124</sup> See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1013 (1992) (“[W]e do not think it prudent to apply that prudential requirement here.”).

<sup>125</sup> For an insightful, recent, and related argument, see generally Breemer, *supra* note 22, which explores the distinction between Article-III-based and prudential understandings of the compensation prong in the contexts of removal and federal-court claim preclusion.

<sup>126</sup> See 545 U.S. 346, 346 (2005).

<sup>127</sup> *Guggenheim v. City of Goleta*, 582 F.3d 996, 1013–14 (9th Cir. 2009) (alteration in original) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)), *vacated*, 638 F.3d 1111 (9th Cir. 2010) (en banc).



or regulation ‘infringe[s] constitutional freedoms in the circumstances of the particular case.’”<sup>128</sup>

It has generally been thought that, *Williamson County* notwithstanding, takings plaintiffs remain free to raise facial Fifth Amendment challenges in federal courts in the first instance.<sup>129</sup> But a constitutional reading of the compensation prong may capture those litigants as well, thereby nullifying any shortcuts previously provided by attaching the “facial” label to certain theories of recovery.

As Professor Sterk explains, the federal judiciary has traditionally classified a number of distinct forms of takings claims as facial.<sup>130</sup> First is the claim that regulations “do[] not substantially advance legitimate government interests.”<sup>131</sup> For years, this constituted the predominant type of facial takings challenge, including in *San Remo Hotel*.<sup>132</sup> To the surprise of many observers, however, in *Lingle v. Chevron U.S.A., Inc.*, decided just a month before *San Remo Hotel*, the Supreme Court declared that previous opinions suggesting the validity of such claims had been mistaken.<sup>133</sup> Other categorical proscriptions viewed as giving rise to putatively facial regulatory-takings claims include,<sup>134</sup> first, permanent physical occupations of property.<sup>135</sup> Second are denials of all economically viable use of subject property.<sup>136</sup> Third are exactions in exchange for development

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<sup>128</sup> *Id.* at 1013 (quoting *United States v. Christian Echoes Nat’l Ministry, Inc.*, 404 U.S. 561, 565 (1972)).

<sup>129</sup> See, e.g., David Zhou, Comment, *Rethinking the Facial Takings Claim*, 120 YALE L.J. 967, 972–73 (2011).

<sup>130</sup> See Sterk, *supra* note 92, at 265–71.

<sup>131</sup> *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

<sup>132</sup> See 545 U.S. 323, 345 (2005) (calling this claim “the heart of [the] complaint”).

<sup>133</sup> See 544 U.S. 528, 545–48 (2005) (holding that this type of facial claim “is not a valid takings test”). Incidentally, the landmark takings case *Kelo v. City of New London*, 545 U.S. 469 (2005), was also decided that Term. A number of scholars have commented on the significance of the Court deciding three such monumental takings cases in quick succession. See, e.g., William A. Fletcher, Keynote Address, *Kelo, Lingle, and San Remo Hotel: Takings Law Now Belongs to the States*, 46 SANTA CLARA L. REV. 767, 770–72 (2006).

<sup>134</sup> See Sterk, *supra* note 92, at 267–68 (noting Supreme Court’s development of three per se rules).

<sup>135</sup> See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35 (1982).

<sup>136</sup> See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (finding such action a taking unless “the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with”).

approval that lack an adequate nexus to the justifications underlying review of the proposal at issue.<sup>137</sup>

As Professor Sterk explains, however, those groups of claims diverge from the traditional conception of facial challenges because they do not necessarily argue that the challenged governmental action is always and forever unconstitutional.<sup>138</sup> For example, it is not flatly illegal for the government to occupy your property, even on a permanent basis: it merely may not do so without affording you just compensation (and meeting the Fifth Amendment's public-use requirement). Rather, those categories are classified as facial because they are not thought to depend on the traditional primary factor for determining whether an as-applied regulatory taking has occurred—"[t]he economic impact of the regulation on the claimant."<sup>139</sup> In these suits, a court can find a taking and require the government to compensate the aggrieved property owner regardless of the magnitude of his economic injury.<sup>140</sup>

In *Yee v. City of Escondido*, the Supreme Court seemed definitively to declare that facial takings claims are not subject to *Williamson County's* ripeness requirements: "While respondent is correct that a claim that the ordinance effects a regulatory taking *as applied* to petitioners' property would be unripe [under *Williamson County*], petitioners mount a *facial* challenge to the ordinance."<sup>141</sup> The matter is not so simple, though.

The claim at issue in *Yee* was of the "substantially advances" type dispatched by *Lingle*.<sup>142</sup> The *Yee* Court thus declared that "[a]s this allegation does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated, petitioners' facial challenge is ripe" under *Williamson County*.<sup>143</sup> The three types of claims that

<sup>137</sup> See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987). In *Stop the Beach*, the Supreme Court listed three types of regulatory-takings claims—the first two above and the "recharacteriz[ation] as public property what was previously private property." 560 U.S. 702, 713 (2010) (citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163–65 (1980)).

<sup>138</sup> Sterk, *supra* note 92, at 268.

<sup>139</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

<sup>140</sup> Sterk, *supra* note 92, at 268.

<sup>141</sup> 503 U.S. 519, 533–34 (1992).

<sup>142</sup> *Id.* at 534 ("[Petitioners] allege in this Court that the ordinance does not substantially advance a legitimate state interest . . ." (internal quotation marks omitted)).

<sup>143</sup> *Id.* (emphasis added).

survived *Lingle* (permanent physical occupations, denials of all economically viable use, and attenuated exactions) are “facial” “in one sense,” Sterk notes, because their “success . . . does not depend on the economic impact visited on the particular landowner,” thus satisfying *Yee*’s first rationale for eschewing initial state-court adjudication under *Williamson County*.<sup>144</sup> But they would appear to fail the second rationale—that the claim does “‘not depend on . . . the extent to which the[] particular petitioners are compensated.’”<sup>145</sup>

The question thus stands whether the remaining classes of “facial” claims are subject to *Williamson County*’s compensation prong, requiring routing through state-court systems (and thus rendering any advantages of labeling such claims facial for jurisdictional purposes nugatory).<sup>146</sup> The circuits have split over the issue,<sup>147</sup> for the most part answering initially in the negative<sup>148</sup> and subsequently in the affirmative.<sup>149</sup> The Supreme Court has not addressed the matter directly, and *San Remo Hotel* sheds little light on the question, despite suggesting that filing facial takings claims in federal court in the first instance may be proper.<sup>150</sup> That is because the facial claims at issue there were of the “substantially advances” type declared ripe by *Yee* but void by *Lingle*, as the Court noted.<sup>151</sup>

<sup>144</sup> Sterk, *supra* note 92, at 268.

<sup>145</sup> *Id.* at 266 (quoting *Yee*, 503 U.S. at 534).

<sup>146</sup> *See id.* at 269–70.

<sup>147</sup> *See id.* at 269 n.105.

<sup>148</sup> *See Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 92–100 (2d Cir. 1992); *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1281 n.28 (9th Cir. 1986).

<sup>149</sup> *See, e.g., Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 91–92 (1st Cir. 2003); *Daniel v. Cnty. of Santa Barbara*, 288 F.3d 375, 382 (9th Cir. 2002), *withdrawn*, 282 F.3d 1196 (2002); *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997); *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 380 (2d Cir. 1995); *see also S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 506 (9th Cir. 1990).

<sup>150</sup> *See San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323, 345–46 (2005) (“Petitioners were never required to ripen the heart of their complaint—the claim that the [regulation at issue] was facially invalid because it failed to substantially advance a legitimate state interest—in state court. Petitioners therefore could have raised most of their facial takings challenges . . . directly in federal court.” (citation omitted)).

<sup>151</sup> *Id.* at 345 n.25 (“In all events, petitioners may no longer advance such claims given our recent holding that the ‘substantially advances formula is not a valid takings test, and indeed . . . has no proper place in our takings jurisprudence.’” (quoting *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 548 (2005))). In fact, the Court’s phrasing that “most” (and therefore assumedly not all) of the hotel owners’ facial challenges “by their nature requested relief distinct from the provision of ‘just compensation’” and could therefore have been raised “directly in federal court,” *id.* at 345–46, may support the reading that post-

The answer to this question turns on where the compensation prong comes from. Because the post-*Lingle* categories of facial regulatory-takings claims hinge to some extent on whether the plaintiff has received just compensation, he simply does not have a mature claim, jurisdictionally or on the merits, under a reading grounded in Article III or the Fifth Amendment, respectively, until he has sought compensation in state court. But given a prudential understanding of the compensation prong, we are free to take up Professor Sterk's suggestion that whether such challenges satisfy *Williamson County* "should ultimately be determined by reference to the purposes of those requirements."<sup>152</sup>

Specifically, Sterk explains, "because takings jurisprudence depends so heavily on state property law, the Supreme Court has effectively—if implicitly—delegated development of takings doctrine to the state courts."<sup>153</sup> On the one hand, facial federal takings claims generally do not trigger that federalism concern because they do not rest on any intimate understanding of state law.<sup>154</sup> Accordingly, "one may reasonably argue for dispensing with the [compensation prong] and permitting a landowner to proceed directly to federal court."<sup>155</sup> On the other hand, Sterk identifies a number of countervailing concerns that push in the opposite direction, including the existence of an exception to one of the rules that requires an examination of background property law<sup>156</sup> and, more generally, the difficulty of accurately characterizing certain takings claims before engaging in extensive factual development (and the waste of resources that postponing a decision on the appropriate forum could accordingly entail).<sup>157</sup>

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*Lingle* facial claims are indeed subject to the *Williamson County* compensation requirement.

<sup>152</sup> Sterk, *supra* note 90, at 270.

<sup>153</sup> *Id.* at 286.

<sup>154</sup> *See id.* at 299 ("Consider, for instance, the rule that permanent physical occupations always require compensation. Application of the rule requires no investigation of background state law. Similarly, the *Nollan/Dolan* nexus rule requires little understanding of background state law. *Nollan* and *Dolan* require a court to evaluate whether the exaction demanded by the municipality as a condition for development is reasonably related to the justification that entitled the municipality to restrict development in the first place. That evaluation is entirely independent of background state law." (footnote omitted)).

<sup>155</sup> *Id.*

<sup>156</sup> *See id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027–31 (1992)).

<sup>157</sup> *See id.* at 299–300.

Balancing these and other concerns—whether as a categorical matter or in any given case—may amount to a difficult task. But my point is that only by characterizing the compensation prong as prudential in nature can courts perform this task, which may prove valuable in providing a federal-court backstop for the consideration of certain takings claims, at all.

2. *Diversity and Supplemental Jurisdiction.* Two common ways for plaintiffs who would otherwise find themselves confined to state court to gain access to the federal judiciary are via the exercise of diversity jurisdiction<sup>158</sup> and the assumption of supplemental jurisdiction over a state cause of action attached to another claim cognizable in a federal forum.<sup>159</sup> Is it possible for would-be federal takings litigants functionally (though not formally) to circumvent *Williamson County's* compensation prong by submitting the required predicate state claims to a federal tribunal through one of those mechanisms?

One scholar has expressly posed this “difficult question” as it relates to diversity jurisdiction.<sup>160</sup> Of course, in order to avail themselves of this possibility, plaintiffs would have to meet the amount-in-controversy and citizenship requirements, but those obstacles would seem surmountable in a great many cases, especially those involving corporations. And although federal courts would be bound by state property law under the Rules of Decision Act,<sup>161</sup> plaintiffs may nevertheless believe that a federal court would provide a more sympathetic forum—either on account of the general rationales underlying diversity jurisdiction or

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<sup>158</sup> See generally 28 U.S.C. § 1332(a) (2012) (“The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different States . . .”).

<sup>159</sup> See generally *id.* § 1367(a) (“Except as . . . expressly provided otherwise by [later provisions of this statute or another], in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.”).

<sup>160</sup> See Lindberg, *supra* note 90, at 1868–70 (arguing that diversity jurisdiction should not be exercised in this context).

<sup>161</sup> 28 U.S.C. § 1652 (2012) (“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”); see also *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.”).

because some may think that federal judges are more willing to vindicate private-property rights than are their state counterparts.<sup>162</sup>

As a number of cases reflect, whether a federal court's exercise of diversity jurisdiction over the initial claims required by *Williamson County* runs afoul of the spirit of the compensation prong remains uncertain.<sup>163</sup> Given that such claims do indeed press the required state causes of action, the answer may appear to be an obvious "no." But allowing plaintiffs to evade *Williamson County* in this manner could undercut the state-protective concerns articulated in *San Remo Hotel* to a significant degree, subtracting what might amount to a great many local land-use disputes from the dockets of the reportedly more competent state courts.<sup>164</sup>

Similar issues attend the prospect of a federal court exercising supplemental jurisdiction over the state causes of action required by *Williamson County* in conjunction with sufficiently related claims with independent bases for federal jurisdiction.<sup>165</sup> Consider, for instance, that a clever plaintiff could attempt to append a state compensation claim to a facial federal takings claim (assuming that the latter can be brought in federal court in the first instance, as discussed above). Any preclusive consequences caused by deciding the state cause of action prior to an as-applied federal claim would be generated by the federal court where the plaintiff wanted to litigate in the first place. Like with respect to diversity jurisdiction, therefore, the exercise of supplemental jurisdiction over the class of state claims required by *Williamson County* would come at the cost of the state-court expertise that *San Remo Hotel* regarded as so important.

Turning to the puzzle we hope to solve here, a constitutional reading of the compensation prong would appear to admit of no

<sup>162</sup> See Lindberg, *supra* note 90, at 1869 (suggesting that federal judges may be more willing to protect private-property rights for ideological reasons).

<sup>163</sup> Compare, e.g., *SK Fin. SA v. La Plata Cnty.*, 126 F.3d 1272, 1276 (10th Cir. 1997) (concluding that it does not), with *CBS Outdoor Inc. v. N.J. Transit Corp.*, No. 06-2428 (HAA), 2007 WL 2509633, at \*23 (D.N.J. Aug. 30, 2007) (declining to decide issue where diversity was improperly pleaded for other reasons).

<sup>164</sup> See Lindberg, *supra* note 90, at 1869–70.

<sup>165</sup> Cf. *id.* at 1870 n.317 (citing *Samaad v. City of Dallas*, 940 F.2d 925, 934 (5th Cir. 1991) (dismissing supplemental state inverse-condemnation claims where appended to unripe federal takings claim); *CBS Outdoor*, 2007 WL 2509633, at \*23 (holding supplemental jurisdiction over regulatory-takings claims improper after dismissal of diversity claims)).

preference as to where the predicate state suits required by *Williamson County* are heard. Under an Article-III-based or Fifth-Amendment-based understanding of the compensation prong, federal courts should be able to exercise diversity and supplemental jurisdiction over those suits whenever the statutory requirements for doing so have been satisfied, paying little or no mind to the state-respecting sentiments expressed by *San Remo Hotel*. A prudential understanding of the requirement, in contrast, provides a more nuanced range of options for courts to consider.

The exercise of diversity jurisdiction over the initial state claims required by *Williamson County* presents, in a sense, the trickiest issue examined here. On the one hand, the entire point of forcing plaintiffs into state court, on a prudential view of the compensation prong, is to allow the supposedly better-suited state judiciary to take the first pass at disputes intimately intertwined with local land-use law. That objective falls flat where such claims are heard in federal court under diversity jurisdiction, despite the fact that state property law still governs. On the other hand, our judicial system has long accorded great respect to the justifications undergirding diversity jurisdiction, and litigants are traditionally not required to prove an actual need for the protections that such jurisdiction provides.<sup>166</sup> To the extent that certain subject areas could be carved out of the scope of diversity jurisdiction, the state causes of action required by *Williamson County* would be plausible candidates. But, more realistically, such claims appear fully open to federal-court adjudication. A prudential view of the compensation prong perhaps renders abstention or certification to state high courts appropriate alternatives for federal courts to consider in some cases. But how frequently federal courts can properly invoke abstention doctrines when confronted with run-of-the-mill takings claims is itself a hotly contested issue.<sup>167</sup>

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<sup>166</sup> See, e.g., *Firststar Bank, N.A. v. Faul*, 253 F.3d 982, 993 (7th Cir. 2001) (“The courts should not use our own judgments about when the purposes of diversity jurisdiction are met . . . .”); *Bianca v. Parke-Davis Pharm. Div. of Warner-Lambert Co.*, 723 F.2d 392, 396 (5th Cir. 1984) (“[W]e may not bar a plaintiff . . . from access to the federal courts because we conclude that he is unlikely to encounter any bias in state court . . .”).

<sup>167</sup> Compare, e.g., *Int'l Coll. of Surgeons v. City of Chicago*, 153 F.3d 356, 362 (7th Cir. 1998) (“[E]ven in cases involving state land use issues, a district court must not decline jurisdiction where its exercise ‘would . . . not require the District Court to guess at the resolution of uncertain and difficult issues of state law.’” (quoting *Cnty. of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 187 (1959))), *on remand from* 522 U.S. 156 (1997), *with Pomponio v. Fauquier Cnty. Bd. of Supervisors*, 21 F.3d 1319, 1327 (4th Cir. 1994) (“Over

The possibility that federal courts could exercise supplemental jurisdiction over the state-law claims mandated by *Williamson County* presents a similar mix of concerns but ultimately appears amenable to a simpler solution. Federal courts have a strong interest in adjudicating disputes that implicate federal rights in some fundamental way, both in the first instance and as unified sets. Like with respect to diversity, however, granting the predicate state suits required by the compensation prong easy access to federal court may undermine the rule's federalism-based justifications to a considerable extent. It is significant, therefore, that (unlike with respect to diversity) federal courts have fairly broad discretion to decline to exercise supplemental jurisdiction.<sup>168</sup> Hence, a prudential understanding of the compensation prong may point in favor of permitting the exercise of supplemental jurisdiction over *Williamson County's* required state claims only occasionally, while relegating the majority to state court. In particular, in order to prevent the sort of circumvention mentioned previously, supplemental jurisdiction would be most appropriate where the state claims in question interconnect with issues implicating federal rights that are neither limited to nor dominated by takings claims.

3. *State-Court Litigants.* *San Remo Hotel* recognized and accepted the fact that its holding might prevent a large proportion of Fifth Amendment litigants from ever reaching federal court.<sup>169</sup>

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frequent objections and challenges and in practically every instance, we have held that, absent unusual circumstances, a district court should abstain . . . from exercising its jurisdiction in cases arising solely out of state or local zoning or land use law, despite attempts to disguise the issues as federal claims.”), *overruled on other grounds by Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728–31 (1996).

<sup>168</sup> See 28 U.S.C. § 1367(c) (2012) (“The district courts may decline to exercise supplemental jurisdiction over a claim . . . if—(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.”).

<sup>169</sup> To be clear, as suggested with respect to *Horne*, it is generally assumed that plaintiffs challenging a putative taking by the federal government (as opposed to a state or local entity) can bring suit under the Fifth Amendment in the first instance in the Court of Federal Claims. See, e.g., Fein, *supra* note 113, at 783. But see McConnell, *supra* note 122, at 10750–51 (“It makes no sense to say that the constitutional violation does not occur until after the party seeks and is denied compensation in the Court of Federal Claims, because the claimant cannot sue under the Tucker Act except for a constitutional violation, which must have occurred before he can sue. Instead, the takings claim logically must accrue, as



But the Court assumed—clearly in dictum—that parties could raise their federal takings claims in state systems, unhampered by *Williamson County*. Specifically, the majority stated that it “reject[ed] petitioners’ contention that *Williamson County* prohibits plaintiffs from advancing their [as-applied] federal claims in state courts.”<sup>170</sup> State courts are not necessarily barred from “hearing simultaneously a plaintiff’s request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment,” Justice Stevens stated, concluding that a contrary determination would require property owners to “‘resort to piecemeal litigation or otherwise unfair procedures.’”<sup>171</sup>

But how, doctrinally, could that be so? Is it not the case that, as one scholar has put it, “[t]he federal takings claim simply does not exist before the state inverse condemnation claim is resolved”?<sup>172</sup> For the reasons explained below, it appears that if the *Williamson County* compensation prong were considered constitutional in nature (again, as springing from either Article III or the Fifth Amendment), it would likely apply to all or many state-court plaintiffs in the same manner as it applies to federal-court plaintiffs—making Fifth Amendment claims unfit for even state courts prior to a separate suit seeking just compensation.

To understand why this is so with respect to an Article-III-based understanding of the compensation prong, we must first ask whether and how justiciability doctrines control the adjudication of federal causes of action heard under concurrent jurisdiction in state courts.<sup>173</sup> While state justiciability law is generally thought to predominate even where the claim is federal, that proposition

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the *Horne* Court explained, ‘once the government has taken private property without paying for it.’” (quoting 133 S. Ct. 2053, 2062 n.6 (2013)).

<sup>170</sup> *San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323, 346 (2005).

<sup>171</sup> *Id.* (quoting *MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 350 n.7 (1986)). Incidentally, it seems somewhat ironic for the majority to lament forcing plaintiffs to “resort to piecemeal litigation or otherwise unfair procedures” when that is precisely what the petitioners, *id.* at 338, and the separate opinion, *id.* at 350–51 (Rehnquist, C.J., concurring in the judgment), argued that the majority’s result did.

<sup>172</sup> *Kovacs*, *supra* note 89, at 18.

<sup>173</sup> Litigants bringing federal takings claims in state court will generally use § 1983 as a vehicle. The Supreme Court recognized concurrent state jurisdiction over such claims in *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980).

has generated significant controversy,<sup>174</sup> with several scholars arguing—on the strength of Article III and/or the Supremacy Clause—that state jurisdiction over federal causes of action cannot be broader than the scope of the Supreme Court’s appellate jurisdiction as shaped by federal justiciability principles.<sup>175</sup> The question whether federal law (including *Williamson County*) controls of its own force, at least at the margins, thus remains subject to debate.

Even if state justiciability law governs, a range of approaches would be possible. First, a state could choose to borrow federal justiciability doctrine as the measure of its own.<sup>176</sup> Second, a state’s justiciability requirements could equal or exceed those set by federal law, shutting out the same or a broader range of plaintiffs.<sup>177</sup> Or, finally, state justiciability law could be more lenient than its federal counterpart, affording a greater number of litigants their day in court.<sup>178</sup> Only in the last scenario would it be possible that a state court could assume jurisdiction over a federal takings claim that did not satisfy *Williamson County*.

Alternatively, the compensation prong could be a Fifth-Amendment-based ripeness requirement. In essence, it could articulate a necessary element of a claim that the Takings Clause

<sup>174</sup> See Matthew I. Hall, *Asymmetrical Jurisdiction*, 58 UCLA L. REV. 1257, 1259 (2011) (“One of the principal tensions in federal jurisdiction is between the U.S. Supreme Court’s role as guardian of federal supremacy and the independent authority of state courts to adjudicate federal substantive rights without having to heed federal jurisdictional constraints.”).

<sup>175</sup> See, e.g., William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 282–84 (1990); Paul J. Katz, Comment, *Standing in Good Stead: State Courts, Federal Standing Doctrine, and the Reverse-Erie Analysis*, 99 NW. U. L. REV. 1315, 1340–49 (2005).

<sup>176</sup> See Christopher S. Elmendorf, Note, *State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs*, 110 YALE L.J. 1003, 1008 (2001) (“Surely some states follow Article III standing . . .”).

<sup>177</sup> See, e.g., *id.* at 1006 (noting that state “courts customarily decline to rule on questions of law absent something like a case or controversy” (citing *Brown Mech. Contractors v. Centennial Ins. Co.*, 431 So. 2d 932 (Ala. 1983); *Estes v. Walters*, 601 S.W.2d 252 (Ark. Ct. App. 1980); *Washakie Cnty. Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980)); Maria Farinella, Comment, *The Clean Air Act of 1990: Title V’s Operating Permit Provision for Citizen Access to State Court Judicial Review*, 8 ADMIN. L.J. AM. U. 67, 84–87 (1994) (recounting Virginia legislature’s imposition of standing requirements more restrictive than those of Article III on certain environmental plaintiffs).

<sup>178</sup> See, e.g., *Me. Ass’n of Interdependent Neighborhoods v. Comm’r*, 876 F.2d 1051, 1054 (1st Cir. 1989) (stating that Maine’s standing law is more liberal than federal standing law); *Langford v. Superior Court*, 729 P.2d 822, 833 n.6 (Cal. 1987) (“California’s [standing] requirements are less stringent than those imposed by federal law.”).

has been violated: without a denial of just compensation in state court, the plaintiff does not have a full-fledged cause of action. Here there is little room for disputing that state as well as federal courts would be constitutionally disempowered from entertaining federal regulatory-takings claims absent pursuit of a predicate state cause of action. If the Supreme Court has declared certain procedures mandated by the very text of the Fifth Amendment, inferior courts may not disagree. While states are free to enshrine greater protections for private-property rights in their own constitutions, they cannot formulate their own elements for federal Fifth Amendment claims—nor may they disregard elements established by the Supreme Court.

How would viewing the compensation prong as prudential change the scenario? The prudential purpose of the rule, as stated in *San Remo Hotel*, is to provide state courts a first pass at takings challenges prior to their potential adjudication in federal court. This rationale does not justify requiring plaintiffs who wish (or are, as a consequence of *San Remo Hotel*, effectively required) to litigate both their federal and state takings claims in state court to pursue two distinct sets of claims. If such a litigant asserts the state cause of action mandated by the compensation prong simultaneously with her ultimate Fifth Amendment claim, the policy principles expressed in *San Remo Hotel* are still obtained, as state courts will continue to “bear primary responsibility for policing land-use regulations.”<sup>179</sup> And the savings to judicial and litigant resources nearly go without saying.

Indeed, Chief Justice Rehnquist appears to have endorsed this point in his *San Remo Hotel* concurrence, albeit very briefly. In a footnote responding to the majority’s assertion that *Williamson County* does not require state litigants to proceed in piecemeal fashion, Rehnquist stated that plaintiffs would be permitted to raise federal takings claims simultaneously with state causes of action only if *Williamson County*’s compensation prong “is merely a prudential rule, and not a constitutional mandate”—a question he criticized the majority for “conspicuously le[aving] open.”<sup>180</sup>

4. *Claim Preclusion.* *San Remo Hotel* focused exclusively on issue preclusion (or “collateral estoppel,” in common-law

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<sup>179</sup> Sterk, *supra* note 92, at 286.

<sup>180</sup> 545 U.S. 323, 351–52 n.2 (2005) (Rehnquist, C.J., concurring in the judgment); see *supra* text accompanying note 87.

speak)<sup>181</sup>—the rule that “once a court has decided an issue of fact or law necessary to its judgment, that decision . . . preclude[s] relitigation of the issue in a suit on a different cause of action involving a party to the first case.”<sup>182</sup> Several perceptive scholars, however, have noted that *San Remo Hotel*’s reasoning, with its categorical hostility to judicially crafted exceptions to the Full Faith and Credit Statute, must extend to the blunter instrument of claim preclusion (or “res judicata”) as well,<sup>183</sup> given that inter-system claim-preclusion principles also derive from § 1738.<sup>184</sup> Under claim preclusion, “a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.”<sup>185</sup>

As an initial matter, it is worth exploring whether the distinction between claim and issue preclusion is one without a difference in this context. That is, would issue preclusion by itself effectively foreclose later federal-court adjudication of Fifth Amendment takings claims, or would there still be room left for claim preclusion to operate?

Professor Sterk argues the latter position.<sup>186</sup> He begins by demonstrating that the issue-preclusive effects of a state-court denial of just compensation will generally require outright dismissal of subsequent federal takings claims only where issues of “ultimate fact”—that is, the application of law to fact—are sufficiently similar in the state and federal proceedings.<sup>187</sup> That condition obviously obtained in *San Remo Hotel* itself, where the

<sup>181</sup> *San Remo Hotel*, 545 U.S. at 327 n.1 (“[O]ur grant of certiorari was limited exclusively to [a] question [concerning] issue preclusion . . .”).

<sup>182</sup> *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

<sup>183</sup> See, e.g., *Breemer*, *supra* note 22, at 328–32; *Fletcher*, *supra* note 133, at 775; *Kovacs*, *supra* note 89, at 14; *Lindberg*, *supra* note 90, at 1841; *Sterk*, *supra* note 92, at 276–83.

<sup>184</sup> See *Allen*, 449 U.S. at 96.

<sup>185</sup> *Id.* at 94.

<sup>186</sup> See *Sterk*, *supra* note 92, at 271–83.

<sup>187</sup> Issue-preclusion doctrine generally applies to three types of determinations: evidentiary fact, law, and “ultimate fact.” *Id.* at 273 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. c (1982)). As Sterk explains,

Issue preclusion presents the greatest threat to federal takings claims when the state court has made a determination of ultimate fact, for instance, a determination that the fee imposed on the hotel’s owner was reasonably related to the number of units designated for conversion. When a determination of ultimate fact is critical—as it was in *San Remo*—for both the state and the federal takings claim, issue preclusion doctrine could require . . . outright dismissal of the federal takings claim.

*Id.* at 274.

California Supreme Court interpreted the state constitution's takings provision as "congruent" with its federal counterpart.<sup>188</sup> As Sterk explains, however, many state takings causes of action are resolved on state-specific grounds that do not require courts to consider issues of ultimate fact paralleling Fifth Amendment analysis.<sup>189</sup> "As a result, issue preclusion doctrine . . . would leave many federal takings claims open to federal litigation even after the state courts have finally rejected state takings claims."<sup>190</sup>

Nevertheless, Sterk contends, "the gaps left open by issue preclusion doctrine will quickly be closed by claim preclusion principles."<sup>191</sup> Because the measure of preclusion under § 1738 is the law of the judgment-rendering state, the question becomes whether state preclusion rules tolerate bifurcated (or "split," as the terminology goes) actions: first, an inverse-condemnation or other claim seeking compensation under state law and, second, a federal takings claim.<sup>192</sup> While the contours of preclusion law may vary from state to state, the majority standard would seem to be the "transactional" test outlined in § 24 of the *Restatement (Second) of Judgments*, which provides that claim preclusion extinguishes "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the [initial] action arose."<sup>193</sup> The *Restatement's* commentary explains that "the concept of a transaction is here used in [a] broad sense" as "connot[ing] a natural grouping or common nucleus of operative facts."<sup>194</sup>

Federal takings claims and the state predicates required by *Williamson County* will obviously arise out of a common nucleus of operative facts, rendering the latter potentially preclusive of the former in states that subscribe to the majority approach. Consequently, Sterk concludes, claim preclusion should keep more takings challenges out of federal court than would the issue-

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<sup>188</sup> See *San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323, 332 (2005) (quoting 41 P.3d 87, 100–01 (Cal. 2002)).

<sup>189</sup> As examples, Sterk mentions a New York doctrine barring challenges to restrictions in place at the time the relevant property was purchased by the challenger, as well as a New Jersey principle holding that no taking has occurred where the application of a regulation to the plaintiff's property is invalidated for arbitrariness. Sterk, *supra* note 92, at 275–76.

<sup>190</sup> *Id.* at 254.

<sup>191</sup> *Id.*

<sup>192</sup> See *id.* at 281.

<sup>193</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982).

<sup>194</sup> *Id.* § 24 cmt. b.

preclusion principles on which *San Remo Hotel* relied.<sup>195</sup> The rule articulated there is accordingly broader than it initially appears. The ominous result, says Sterk: “a nearly insurmountable obstacle for claimants seeking federal court litigation of federal takings claims.”<sup>196</sup>

The foregoing is by now relatively uncontroversial with respect to federal courts. Further issues concerning whether and how claim preclusion ought to operate in state systems confronted with federal regulatory-takings claims, however, have gone largely unexamined. In particular, if state litigants are subject to the compensation prong, such that they must seek payment under state causes of action in an initial round of litigation before pressing their federal claims in a subsequent round, how might claim preclusion operate on the second suit? If claim preclusion could block assertion of follow-up Fifth Amendment claims in both state and federal court, could it be that some “[f]ederal takings claims . . . go from green to rotten without ever being ripe”?<sup>197</sup>

Because the measure of inter-system preclusion under § 1738 is the intra-system preclusion law of the judgment-rendering state, claim-preclusion principles ought to operate against federal takings challenges brought subsequent to the claims mandated by *Williamson County* in state courts to the same extent as in federal courts. And therein lies the little-noticed rub—perhaps one of the ultimate jurisprudential Catch-22s: bifurcation could be simultaneously required and verboten in both federal and state systems for the reasons described above.<sup>198</sup>

In assessing this hypothesis, two qualifications to the general principles of claim preclusion warrant scrutiny. For the sake of

<sup>195</sup> Moreover, a state court cannot attempt to soften this sort of blow by stating that its judgments should have less preclusive effect in federal courts. See *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 285–86 (1980); see also Sterk, *supra* note 92, at 282.

<sup>196</sup> Sterk, *supra* note 92, at 276–77. That possibility has been labeled “certiorari only” because of the prospect that litigating a federal takings claim from a state system up to the U.S. Supreme Court may be the only avenue to federal review. Lindberg, *supra* note 90, at 1841.

<sup>197</sup> Martinez & Martinez, *supra* note 80, at 451 (stating hypothetical but rejecting it as incorrect interpretation of precedent).

<sup>198</sup> Alternate, minority standards may or may not capture such closely related claims, but it stands to reason that many would. Moreover, under general “reverse-*Erie*” principles, so long as states apply procedural rules (such as the law of claim preclusion) evenhandedly between state and federal causes of action, the fact that an entire class of federal claims may be barred from state courts does not present any particular federalism concern. See *Felder v. Casey*, 487 U.S. 131, 138, 141–46 (1988).

simplicity, I discuss these issues as they are framed in the *Restatement (Second) of Judgments*. First, § 26(1)(c) provides that if “[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts,” § 24’s general rule “does not apply to extinguish the claim.”<sup>199</sup> Accordingly, if *Williamson County*’s compensation requirement could be deemed to articulate a subject-matter-jurisdiction rule, claim preclusion might not bar the litigation of a federal takings challenge after the litigation of a prerequisite state cause of action.<sup>200</sup> As discussed above, if the requirement arises from the Constitution in the first place, it could fairly be considered “jurisdictional” only if the specific source were Article III rather than the Fifth Amendment.<sup>201</sup> The question, then, becomes whether Article III justiciability doctrines, including ripeness rules, are limitations on *subject-matter jurisdiction*.

Justiciability need not be treated as an aspect of subject-matter jurisdiction.<sup>202</sup> Both inquiries can be described as “jurisdictional” because they relate to whether a given tribunal has the authority to adjudicate a given dispute. But whereas justiciability doctrines “define the institutional role of the . . . judiciary with respect to . . . the other branches of . . . government” and thus “preserve the ideal of separation of powers,”<sup>203</sup> subject-matter jurisdiction defines the institutional roles of various courts within the

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<sup>199</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (1982) (emphasis added).

<sup>200</sup> In full, § 26(1)(c) applies to claims that were initially foreclosed by “the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action.” *Id.* (emphasis added). The comments make clear that the latter portion denotes the possible persistence of “formal inhibitions imposed by the historical division between ‘law’ and ‘equity,’ or the forms of action, or related procedural modes.” *Id.* at cmt. c(2). All that remains is the catch-all exception for situations in which a plaintiff can “clearly and convincingly” demonstrate that “the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy.” *Id.* § 26(1)(f).

<sup>201</sup> See *supra* Part III.B.2.

<sup>202</sup> See *Oryszak v. Sullivan*, 576 F.3d 522, 526–27 (D.C. Cir. 2009) (Ginsburg, J., concurring) (“That a plaintiff makes a claim that is not justiciable because committed to executive discretion does not mean the court lacks subject matter jurisdiction over his case, as the opinion of the court helps to clarify. Upon a proper motion, a court should dismiss the case for failure to state a claim. . . . [T]his court has been careful to distinguish between the two concepts.”).

<sup>203</sup> *Lees*, *supra* note 59, at 1481, 1488.

judiciary, federal or state, vis-à-vis each other.<sup>204</sup> Justiciability can thus be thought of as a threshold concern with whether *courts in general* are equipped to resolve a dispute in the abstract,<sup>205</sup> whereas subject-matter jurisdiction can be viewed as a logically subsequent inquiry into whether *a particular court* can actually do so.<sup>206</sup>

But the matter is by no means clear-cut. Courts often treat justiciability as part and parcel of subject-matter jurisdiction,<sup>207</sup> and some states may actually define subject-matter jurisdiction to include issues traditionally seen as questions of justiciability.<sup>208</sup> Moreover, one could argue that this distinction is overly formalistic—particularly given the apparent functional motivation of § 26(1)(c), to dilute the strong medicine of claim preclusion where the first court simply had no authority to hear the second claim.<sup>209</sup>

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<sup>204</sup> See *id.*; see generally RESTATEMENT (SECOND) OF JUDGMENTS § 11 (1982). Under federal law, the concepts of justiciability and subject-matter jurisdiction can be seen as stemming from textually distinct sources, too. Constitutional justiciability doctrines derive from Article III's limitation of "[t]he judicial power" to "cases" and "controversies." *Flast v. Cohen*, 392 U.S. 83, 94 (1968); U.S. CONST. art. III, §§ 1, 2. By contrast, subject-matter jurisdiction derives from the nine specific categories—or subject matters—of cases and controversies listed in Article III, as well as from various federal statutes further delimiting the jurisdiction of federal courts. See CHEMERINSKY, *supra* note 60, § 5.1.

<sup>205</sup> See BLACK'S LAW DICTIONARY 943 (9th ed. 2009) (defining "justiciability" as "[t]he quality or state of being appropriate or suitable for adjudication by a court"); WRIGHT ET AL., *supra* note 62, § 3529 ("Concepts of justiciability have been developed to identify appropriate occasions for judicial action.").

<sup>206</sup> See BLACK'S LAW DICTIONARY, *supra* note 205, at 931 (defining "subject-matter jurisdiction" as "[j]urisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things").

<sup>207</sup> See, e.g., *Naso v. Sun Ref. & Mktg. Co.*, 582 F. Supp. 1566, 1567 (N.D. Ohio 1983) ("A federal district court lacks subject matter jurisdiction to express a legal opinion in an action which lacks a justiciable case or controversy."). Practically, this may occur in part because of the (arguably artificially) limited nature of the categories of so-called "jurisdictional" defects for challenging a complaint by motion under the Federal Rules of Civil Procedure. See FED. R. CIV. P. 12(b) ("[A] party may assert the following defenses by motion: (1) lack of subject-matter jurisdiction; (2) lack of personal jurisdiction . . ."); see also *Oryszak*, 576 F.3d at 526–27 (Ginsburg, J., concurring) (contending that non-justiciable claims should be dismissed under Rule 12(b)(6) for "failure to state a claim").

<sup>208</sup> See, e.g., *State v. 2018 Rainbow Drive*, 740 So. 2d 1025, 1028 (Ala. 1999) ("Standing is a necessary component of subject matter jurisdiction." (quoting *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 626 (Tex. 1996))).

<sup>209</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 26 cmt. c (1982) (referring to "formal barriers in the way of a litigant's presenting to a court in one action the entire claim" but then proceeding to specify the two sources of such barriers discussed above).



The second potentially relevant qualification may harken back to the common conception of claim preclusion as extending to claims that were or “could have been” raised in the initial suit, depending on the meaning of that phrase.<sup>210</sup> Section 20(2) of the *Restatement* provides, in pertinent part, that “[a] valid and final personal judgment for the defendant, which rests on the prematurity of the action or on the plaintiff’s failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or the precondition has been satisfied.”<sup>211</sup> By its terms, § 20(2) applies only to a plaintiff who has suffered a “final personal judgment for the defendant,” not to one who did not attempt to assert the later claim in the first instance. This raises the somewhat odd possibility that a plaintiff who has lost her Fifth Amendment claim may be better off than one who has failed to litigate it at all.<sup>212</sup>

In any event, what really matters is the practical question whether there is a meaningful risk that courts would take the approach posited as possible here. In light of at least one state high-court decision, the answer seems to be “yes.”

The plaintiff in *Hallco Texas, Inc. v. McMullen County*<sup>213</sup> began by attempting to raise a Fifth Amendment regulatory-takings claim in the federal system. The district court dismissed the case without prejudice for failure to satisfy the compensation

<sup>210</sup> See *supra* note 185 and accompanying text.

<sup>211</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 20(2) (1982).

<sup>212</sup> Perhaps someone would argue that a notice function could be served by that possibility. It is also worth noting that a broad reading of § 20(2) may conflict with the plain text of Federal Rule of Civil Procedure 41(b), which provides that “[u]nless the dismissal order states otherwise, . . . any dismissal . . . except one for lack of jurisdiction . . . operates as an adjudication on the merits.” FED. R. CIV. P. 41(b). The Reporter’s Note to § 20(2) recognized that those provisions are in tension but notes that in 1961, “the Supreme Court stated that a dismissal for ‘failure of the plaintiff to satisfy a precondition’ was . . . a dismissal for lack of ‘jurisdiction’ within the meaning of [Rule 41(b)].” RESTATEMENT (SECOND) OF JUDGMENTS § 20(2) Reporter’s Note (1982) (quoting *Costello v. United States*, 365 U.S. 265, 284–88 (1961)). *Costello*, however, has been subject to a great deal of criticism and a number of carve-outs. See, e.g., 18A WRIGHT ET AL., *supra* note 106, § 4437 (“[*Costello*’s] method of manipulating Rule 41(b) is unsatisfactory on several counts [and] should be avoided in reasoning about any particular question.”). It also seems inconsistent with the Court’s recent efforts “[t]o ward off profligate use of the term ‘jurisdiction.’” *Sebelius v. Auburn Reg’l Med. Ctr.*, 133 S. Ct. 817, 824 (2013). Perhaps, therefore, § 20(2) should carry the most force where the relevant precondition is truly jurisdictional. Then again, we ought to be wary about allowing the tail of a modern rule to wag the dog of what may be a long common-law tradition.

<sup>213</sup> 221 S.W.3d 50 (Tex. 2006).

prong.<sup>214</sup> The plaintiff, a corporation, then proceeded to state court, where it lost a facial state regulatory-takings challenge. It then again filed suit in state court, this time asserting as-applied state and federal takings claims.<sup>215</sup> The Supreme Court of Texas noted that “[w]e apply the transactional approach to res judicata” and held that the pending state claim was precluded by the first state case.<sup>216</sup> It then extended that holding to the federal claim by expressly expanding *San Remo Hotel* to claim preclusion.<sup>217</sup> And although the court did not explicitly state whether the compensation prong applied in the state system, it noted and expressed no disagreement with the lower court’s assumption that the federal claim “was not ripe at the time [the plaintiff] filed [its] first [state] suit.”<sup>218</sup>

Again, what difference would viewing the compensation prong as prudential in nature make? As it turns out, the problem posed by claim preclusion where a plaintiff attempts to sue *seriatim* would likely remain unchanged by a prudential understanding. But, as discussed above, the antecedent requirement that state litigants must satisfy the compensation prong, and therefore attempt multiple rounds of litigation in the first place, could be lifted. Accordingly, the most senseless possible consequences of claim preclusion in state systems—that bifurcation could be both mandatory and forbidden—could be avoided via a prudential solution to the *Williamson County* ripeness puzzle. The same, of course, goes for federal courts, although because the consequences of claim preclusion are not as bleak in that context (assuming that state forums remain open to federal takings claims), the arguments for softening the dictates of the compensation prong may be less convincing.

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<sup>214</sup> *Id.* at 53–54.

<sup>215</sup> *Id.* at 54–55.

<sup>216</sup> *Id.* at 58–60.

<sup>217</sup> *Id.* at 61–62. One could argue that the *Hallco* court was focused more closely on the takings prong of *Williamson County*, which may have been satisfied at the time of the initial state filing. But that seems overly simplistic given that the court plainly discussed both the takings and compensation requirements and repeatedly recognized that the federal court had rested its dismissal on the latter.

<sup>218</sup> *Hallco Tex., Inc. v. McMullen Cnty.*, 94 S.W.3d 735, 739 (Tex. Ct. App. 2002), discussed in 221 S.W.3d at 56. Among other colorful quotes, the dissent stated that “[r]ipening a regulatory-takings claim [has] become[] a costly game of ‘Mother, May I’, in which the landowner is allowed to take only small steps forward and backwards until exhausted.” 221 S.W.3d at 63 (Hecht, J., dissenting).

## B. CONSIDERING A COUPLE OF COUNTERARGUMENTS

Two potential, not-yet-discussed counterarguments to the conclusion that the mystery surrounding the nature of the compensation prong should be resolved in favor of a prudential solution come to mind. The first is textual and relates to the argument as a general matter; the second is structural and relates to the special concern of closing all courthouse doors in the face of some federal takings claimants.

1. *Due-Process Parallels.* The Fifth Amendment's Takings Clause is worded in a strikingly similar manner to its next-door neighbor, the Due Process Clause. "No person shall . . . be deprived of life, liberty, or property, without due process of law," commands the Due Process Clause; "nor shall private property be taken for public use, without just compensation," echoes the Takings Clause.<sup>219</sup> Each can be read as first stating a substantive proscription followed by a (logically precedent) procedural prescription. So, from a textualist perspective, it would perhaps be appealing to set up parallel analytical frameworks for evaluating claims under the two provisions.

For this reason, the Supreme Court stated in *Williamson County*, "[t]he recognition that a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining just compensation is analogous to the Court's holding in *Parratt v. Taylor*."<sup>220</sup> *Parratt*, as described in *Williamson County*, ruled that "a person deprived of property through a random and unauthorized act by a state employee does not state a claim under the Due Process Clause merely by alleging the deprivation of property"; rather, he must also show that the state affirmatively denied him whatever process he was due.<sup>221</sup> The counterargument, therefore, is that treating the compensation prong as merely prudential destroys this parallelism because the denial of just compensation would not necessarily be viewed as part and parcel of the constitutional violation (as it is in the Fifth-Amendment-based formulation).

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<sup>219</sup> U.S. CONST. amend. V.

<sup>220</sup> 473 U.S. 172, 195 (1985) (describing *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled on other grounds* by *Daniels v. Williams*, 474 U.S. 327 (1985)).

<sup>221</sup> *Id.* (permitting due process to occur "postdeprivation").

Two rejoinders suggest themselves. First, perhaps the substantive-proscription/procedural-prescription view is itself faulty. While that description clearly fits the Due Process Clause, the Takings Clause is more amenable to being read as substantive through and through. That is, the Takings Clause can be—and, it appears, long was<sup>222</sup>—understood as enshrining a right not to have your property appropriated unless the government pays for it—regardless of the procedural protections provided. That observation supports the second, more functionalist rejoinder. Whereas the *Parratt* rule rests on a compelling policy foundation, there exists no rationale of comparable strength for dividing the time dimension over which a regulatory-takings injury occurs by characterizing the burdening of property as a separate event from the denial of just compensation. The Supreme Court undermined its reliance on *Parratt* by essentially admitting as much in a *Williamson County* footnote,<sup>223</sup> and others have made the point in various contexts.<sup>224</sup>

Basically, *Parratt* permits post-deprivation process to suffice only where government action is “random and unauthorized.”<sup>225</sup> *Williamson County*, in contrast, permits post-deprivation process to suffice in all situations.<sup>226</sup> There is a strong justification for tolerating that sort of process in the former context. As the Court

<sup>222</sup> See Hawley, *supra* note 22, at 252–54.

<sup>223</sup> “The analogy to *Parratt* is imperfect because *Parratt* does not extend to situations . . . in which the deprivation of property is effected pursuant to an established state policy or procedure, and the State could provide predeprivation process.” *Williamson County*, 473 U.S. at 195–96 n.14. But the ensuing distinction is question-begging in light of the Court’s evident desire to interpret the two clauses in tandem: “Unlike the Due Process Clause, however, the Just Compensation Clause has never been held to require pretaking process or compensation. Nor has the Court ever recognized any interest served by pretaking compensation that could not be equally well served by post-taking compensation.” *Id.* (citation omitted).

<sup>224</sup> See *San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323, 349 n.1 (2005) (Rehnquist, C.J., concurring in the judgment) (“In creating the [compensation prong], the Court [in *Williamson County*] . . . analogized to . . . *Parratt v. Taylor*. As several of petitioners’ amici in this case have urged, th[at] case[] provided limited support for the . . . requirement.” (citations omitted)); J. 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 J. LAND USE & ENVT. L. 209, 229–30 (2003); Keller, *supra* note 88, at 218 (“*Parratt* should not have been extended to takings claims because the predicate for invoking *Parratt* . . . is never involved in regulatory takings claims.”).

<sup>225</sup> 451 U.S. at 541.

<sup>226</sup> 473 U.S. at 195–96 n.14.

stated in *Parratt*, “[i]n such a case, . . . the State cannot predict precisely when the loss will occur,” rendering it “not only impracticable, but impossible, to provide a meaningful hearing before the deprivation.”<sup>227</sup> No similar justification supports the compensation prong, as regulatory takings are never random and unauthorized; nor are they unforeseeable in light of the fact that no constitutional violation can occur absent quasi-exhaustion of administrative remedies per *Williamson County’s* takings prong.<sup>228</sup>

2. *Unreviewable Constitutional Claims.* With respect to the particular worry that a constitutional reading of the compensation prong could render some Fifth Amendment claims unfit for adjudication in both state and federal judicial systems by virtue of claim preclusion (or other doctrinal wrinkles<sup>229</sup>), one might point out that there are plenty of potential constitutional claims that cannot be vindicated in courts of law. Among other examples in his dissent in *Webster v. Doe*,<sup>230</sup> Justice Scalia pointed to claims butting up against the requirement that “[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members.”<sup>231</sup> The response to this argument should be that litigating the kinds of claims barred from courts altogether would generally run the risk of compromising critical structural principles of separation of powers or, perhaps, federalism.<sup>232</sup> Those concerns simply are not in play when it comes to disabling state courts from deciding federal regulatory-takings claims, especially given the well-established principle that such courts are perfectly capable of doing so in conformity to federal law.<sup>233</sup>

Moreover, with the exception of the highly idiosyncratic and vague Ninth Amendment,<sup>234</sup> I am unaware of any portion of the

<sup>227</sup> 451 U.S. at 541.

<sup>228</sup> Incidentally, the Court has never explained why the administrative procedures contemplated by the takings prong are insufficient for deciding the payment question and, consequently, why a taking itself and the denial of just compensation associated with that taking should be treated as temporally distinct elements of a Fifth Amendment claim.

<sup>229</sup> With respect to removal from state to federal court, see Breemer, *supra* note 22, at 332–37.

<sup>230</sup> 486 U.S. 592, 612–13 (1988) (Scalia, J., dissenting).

<sup>231</sup> U.S. CONST. art. I, § 5.

<sup>232</sup> 486 U.S. at 612–13 (Scalia, J., dissenting).

<sup>233</sup> See Fein, *supra* note 113, at 786–87 (explaining assumption and collecting arguments on both sides).

<sup>234</sup> See *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) (“[T]he Constitution’s refusal to ‘deny or disparage’ other rights is far removed from affirming any

Bill of Rights that is regarded as wholly unfit for adjudicative enforcement. There is little reason to believe that the Takings Clause should be an outlier among these basic liberties—or that the Supreme Court meant to make it one.<sup>235</sup> Indeed, the Court has made clear in another context that there is “no reason why” that provision, “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.”<sup>236</sup>

## V. CONCLUSION

The expressions that various observers have conjured to describe this complex corner of the law would be utterly comical if they were not so incisive. Takings doctrine is a “crazy-quilt pattern,” a “muddle,” a “welter of confusing and apparently incompatible results,” and a “farrago of fumbings which have suffered too long from a surfeit of deficient theories,” some commentators have said; the area is “liberally salted with paradox,” another has remarked.<sup>237</sup> More particularly, the so-called “*Williamson County* compensation prong”—a rule that generally forces plaintiffs pursuing Fifth Amendment regulatory-takings challenges first to seek compensation in state court—has been called “deceptive, inherently nonsensical, draconian, and a Kafkaesque maze, among other unflattering things.”<sup>238</sup>

Seeking a modest measure of order in the midst of all this chaos, this Article has proposed a solution to the “ripeness puzzle” underlying the compensation prong. For decades, judges and scholars have questioned whether this rule should be

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one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges’ list against laws duly enacted by the people.”)

<sup>235</sup> Cf. J. David Breemer, *Ripeness Madness: The Expansion of Williamson County’s Baseless “State Procedures” Takings Ripeness Requirement to Non-Takings Claims*, 41 URB. LAW. 615, 626 (2009) (“[T]he barring of the federal courthouse door to takings litigants seems an unanticipated effect of *Williamson County* . . .” (quoting *DLX, Inc. v. Kentucky*, 381 F.3d 511, 521 (6th Cir. 2004))); Fein, *supra* note 113, at 784 (“I do not mean to suggest that Justices intended something other than what they wrote in *Williamson County*; more likely they simply failed to foresee the complex doctrinal and jurisdictional implications that the new rule would create.”).

<sup>236</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) (making point that so-called “business regulations” are not immune from constitutional scrutiny in any of those areas).

<sup>237</sup> Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1078 n.2 (1993) (collecting “characteristic characterizations of takings doctrine”) (internal quotation marks omitted).

<sup>238</sup> Fein, *supra* note 113, at 773 (collecting descriptions) (internal quotation marks omitted).

characterized as stemming from the Constitution itself—either from Article III or the Fifth Amendment—or simply from the judiciary’s notions of prudent policy. While the Supreme Court has recently commented on the matter, its statements endorsing a prudential framing of the requirement have provided only a partial and largely unexplained solution. This Article has attempted to expand on and justify those remarks in order to elucidate an analytically sturdier understanding of the compensation prong.

Specifically, I have examined the *Williamson County* ripeness puzzle through the lens of several vexing questions, arguing that they are best accessed through and answered by a prudential solution. Viewing the compensation prong as prudential in nature demonstrates why so-called “facial” federal takings challenges have been seen as appropriately laying claim to a federal forum in the first instance and allows for the continuation of this tradition in the manner most respectful of the state-regarding concerns expressed in *San Remo Hotel*. A prudential view also allows courts to consider the propriety of exercising supplemental—and, to a lesser extent, diversity—jurisdiction over the predicate state claims required by the compensation prong on a case-by-case basis with pertinent federalism principles in mind.

Moreover, a constitutional reading of the compensation prong could bind state-court claimants just as if they were in federal court. They would therefore be required to attempt to engage in two rounds of litigation in order to pursue a Fifth Amendment regulatory-takings challenge—an initial state compensation claim followed by the federal claim, both in state court. And, also just as in the federal-court system, claim-preclusion principles could kick in to bar the latter round of state litigation from actually occurring, thereby rendering some Fifth Amendment claims effectively forum-less. A prudential solution to the ripeness puzzle could eliminate the unintended potential consequences of wasting resources and closing essentially all courthouse doors in the face of some would-be Fifth Amendment litigants.

Much more work remains to be done in this murky area. Perhaps for now, though, we have moved one step closer to better understanding—and even beginning to solve—the *Williamson County* ripeness puzzle.