Knick in Perspective: An Introduction

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I. The State of the Law Before *Knick*

The subject of takings—the government taking of an interest in real property, either through eminent domain or through the exercise of police power—has been the subject of continuous litigation for nearly a century. The extent to which overzealous exercise of the police power can sufficiently deprive a landowner of rights in property before the property has been "taken" by regulation has bedeviled us ever since Justice Holmes opined in *Pennsylvania Coal Co. v. Mahon* that a regulation that goes "too far" is a constitutionally-proscribed taking.[1]

It is in this area of regulatory taking that courts have added exponentially to the common law of takings, breaking a near half-century of silence following *Pennsylvania Coal*, during which state courts have chipped away at the doctrine nearly rendering it meaningless.[2] Although arguably commencing with its bizarre April Fool's Day decision in *Village of Belle Terre v. Boraas*,[3] the United States Supreme Court fully engaged the regulatory taking doctrine in 1978 with its historic preservation decision in *Penn Central Transportation Co. v. City of New York*.[4] *Penn Central* established the doctrine of partial regulatory takings dependent upon the landowner's economic loss (and in particular the extent of interference with distinct, and later

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[1] 260 U.S. 393 (1922).

[2] FRED BOSSELMAN, DAVID CALLIES & JOHN BANTA, THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL (1973).

[3] 416 U.S. 1 (1974).

[4] 438 U.S. 104 (1978).

reasonable, investment-backed expectations) and the character of the regulation—regulatory or physical. Fifteen years later, the Court set forth the so-called "per se" or categorical rule on "total" regulatory takings: If a regulation left a landowner with no economically beneficial use, then the regulation must be treated as an exercise of eminent domain unless the regulation codified the applicable law of nuisance, or a background principle of a state's law of property such as public trust or customary law.[5] In between, the Court turned back several regulatory takings challenges on the ground the controversy was not "ripe."

The question of when a regulatory takings claim is "ripe" for review arises because of tests the USSCT has articulated in deciding such claims. Unless a court can determine the extent of economic loss (whether partial or total), it cannot decide whether a regulatory taking has occurred. When the claimant sues under the US Constitution's Fifth Amendment, the issue of damages is critical since the amendment does not bar takings, but only takings without compensation. These considerations underlie the so-called "ripeness doctrine**"**, which is set out in the discussion of the Court's *Williamson County* decision below. Ever since, this "prudential" inquiry has become a virtually insuperable barrier to bringing regulatory takings claims, particularly because some courts converted the two-part test into a jurisdictional rather than a prudential doctrine. The application of the test has become a further dilemma for plaintiff landowners because of the element of preclusion that is introduced. Fortunately, the Court eliminated the state action prong this year in *Knick v. Township of Scott*.[6] Moreover, a wave of recent decisions recognize ripeness as primarily "prudential." As a prudential inquiry, courts may refuse to raise the ripeness barrier in egregious circumstances in which the plaintiff landowner has spent years in court simply attempting to get to the merits of a taking claim.

[5] *See generally* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[6] __ U.S. __ (2019).

Moreover, following the recent USSCT decision in *Knick v. Township of Scott*, the state action/litigation requirement is now history.

It all began with *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*.[7] In *Williamson County*, the Court barred Hamilton Bank, the owner of a parcel that was denied development approval by Williamson County, from bringing a regulatory taking claim in federal court because the claim was not "ripe." Ripeness, according to the Court, required the landowner to (1) obtain a "final decision" from the relevant state or county agencies on its application for development (in that case, subdivision approval)[8] and (2) seek and fail to obtain compensation for the regulatory taking in state court.[9] Noting that the property owner had sought neither a variance or similar land use exception for its project nor compensation for the alleged taking, the Court held that Hamilton Bank failed on both "prongs" of the ripeness test and therefore could not bring a substantive takings challenge in federal court. Both the final decision rule and the compensation requirement raised considerable barriers to the bringing of regulatory takings challenges to land use controls.[10]

The subsequent USSCT decision in *San Remo v. City and County of San Francisco*[11] demonstrates indirectly the efforts of applying the ripeness doctrine to regulatory takings disputes. However, *San Remo* deals directly with neither prong, but instead with the preclusion problem created for litigants whom federal courts direct to first seek relief in state court under either or both prongs of *Williamson County*. Such litigants dutifully bring their claims in state

[7] 473 U.S. 172 (1985).
[8] *Id.* at 186-194.
[9] *Id.* at 194-197.
[10] For critical comment on the insuperable barrier which *Williamson County* thus imposes, *see* Thomas E. Roberts, Ripeness and Forum Selection in Fifth Amendment Takings Litigation, 11 J. Land Use & Envtl. L. 37 (1995); *see also* Michael J. Berger, The "Ripeness" Mess in Federal Land Use Cases, or How the Supreme Court Converted Federal Judges into Fruit Peddlers, Ch. 7, Inst. On Plan., Zoning and Eminent Domain (1991).
[11] 545 U.S. 323 (2005).

court, are denied relief, and return to federal court, only to find that they are then precluded from "relitigating" the takings claims in the original federal court.[12]

The *San Remo* decision is important as much for what the Court addresses as for what it does not. Carefully noting what of the petition for certiorari it chooses to address, Justice Stevens, writing for five justices, set out the narrow question before the Court: "This case presents the question whether the federal courts may craft an exception to the full faith and credit statute, 28 U.S.C. § 1738, for claims brought under the Takings Clause of the Fifth Amendment."[13] The correctness or continued validity of the *Williamson County* ripeness test was not addressed.[14] The Court dealt only with the narrow question of remedy for preclusion under the full faith and credit statute.

In sum, the Court in *San Remo* narrowly ruled that federal courts may not carve out an exception to the federal full faith and credit statute, particularly for regulatory taking cases, unless Congress so allows, either explicitly or implicitly. Presumably a petitioner in San Remo Hotel's posture was precluded from raising regulatory taking issues litigated in federal court that it previously litigated in state court, despite being forced into state court in order to "ripen" the case under the rule of *Williamson County.* Language elsewhere in the opinion suggests it was likely the majority would permit preclusion under other circumstances as well, although a five-justice opinion of the Court is perhaps a slender reed upon which to rely for much beyond the holding itself.[15] Regardless, the Court makes it clear that there is no right to hear a regulatory taking claim in federal court, whether a landowner is forced into state court under preclusion

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[12] *See, e.g., Mitchell v. Mills County*, 673 F.Supp. 332 (S.D. Iowa 1887), aff'd., 847 F.2d 1988 (8th Cir. 1988), and *Kottschade v. City of Rochester*, 319 F.3d 1038 (8th Cir. 2003), cert. Denied, 124 S. Ct. 178 (2003). Thomas E. Roberts, Ripeness Principles of Res Judicata, 24 Urb. Law. 479 (1992).
[13] *San Remo*, 545 U.S. at 326.
[14] Neither was it addressed by the federal courts below nor raised before the Court by the parties, as correctly noted by Chief Justice Rehnquist in his concurring opinion.
[15] *San Remo*, 545 U.S. at 343 (quoting *Allen v. McCurry*, 449 U.S. 90, 103-04 (1980)).

principles or not. It is also clear that the *Williamson County* ripeness barrier to bringing regulatory takings claims remained intact. Chief Justice Rehnquist quite transparently signaled his intent to revisit at least the second prong requiring state action and wrote for concurring members of the Court.[16] As discussed below, a number of Federal appellate courts agreed with the suggestion of the late Chief Justice that the state action prong as a jurisdictional test lacked base.

The Court had, in recent decisions, used language that highlights the fact that *Williamson County* was "a discretionary, prudential ripeness doctrine."[17] For example, in the 2010 decision of *Stop the Beach Renourishment Inc. v. Florida Dept. of Environmental Protection*,[18] the Supreme Court considered a case in which beachfront landowners alleged an inverse condemnation after the state undertook a beach renourishment project that deprived them of their littoral rights and rights to accretion.[19] The Court made short work of the respondents' attempt to argue the taking claim was not ripe because the petitioners had not sought just compensation in state court, holding the ripeness objection, which was not raised in the writ for certiorari, was not jurisdictional and was therefore waived.[20] In the 2013 decision of *Horne v. US Department of Agriculture*,[21] the Court again clarified that "prudential ripeness" is "not, strictly speaking, jurisdictional."[22] In a footnote to the opinion, the Court further explained that a "[c]ase or [c]ontroversy exists once the government has taken private property without paying for it. Accordingly, whether an alternative remedy exists does not affect the jurisdiction of the federal

[16] *Id.* at 348 (Rehnquist, C.J., concurring).
[17] 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, 340 (2014).
[18] 560 U.S. 702 (2010).
[19] *Id.* at 730.
[20] *Id.* at 729.
[21] 133 S. Ct. 2053 (2013).
[22] *Id.* at 2062.

court."[23] Commentators correctly speculated that the Supreme Court, by emphasizing the prudential nature of the doctrine, had paved the way for lower federal courts to relax the ripeness requirements,[24] and to address challenged regulations directly.

Given the direction of a number of Federal Circuits following *San Remo*, *Stop the Beach*, and *Horne*, it is clear that the *Williamson County* ripeness rule had in fact been substantially diluted, with respect to the state action requirement. First, many courts recast the ripeness doctrine as mostly prudential rather than jurisdictional. Second, courts were increasingly loath to apply the state action prong, at least in part to avoid lengthy delays in getting to the merits of a regulatory taking claim.

II. *Knick v. Township of Scott, Pennsylvania*

In *Knick,* the Court first clarifies that the government violates the Takings Clause once it takes property without just compensation, which gives rise to the property owner's Fifth Amendment claim under § 1983.[25] By crystallizing the proper understanding of the Fifth Amendment right to just compensation, *Knick*'s holding follows logically: the state procedure prong of *Williamson County* ripeness is overruled because of its poorly-reasoned and unworkable effects in practice.[26] The first prong, finality, was left undisturbed because it was not at issue in *Knick.*[27]

The regulation underlying *Knick* involved a local ordinance that violated the fundamental right to exclude. Knick owned 90 acres of pastureland in Scott Township, a small community outside of Scranton, Pennsylvania. Her land was mostly used as grazing area for horses and other farm animals, except for Knick's single-family home and a small grave area where a

[23] *Id.* at n.6 (internal quotations omitted).
[24] Breemer, *supra note* 17 at 339.
[25] *Knick*, __ U.S. at __.
[26] *Id.* at __.
[27] *Id.* at __.

neighbor's ancestors were allegedly buried. Pennsylvania had a long history of permitting backyard burials. In 2012, the Township passed an ordinance requiring all cemeteries to maintain open public access during daylight hours. The ordinance also authorized Township officers to enter property to determine the existence and location of a cemetery on privately owned property. After an officer discovered several grave markers on Knick's property, Knick was notified that she was in violation of the ordinance for failure to open her property to public access during the day.[28]

Knick petitioned the state court for declaratory and injunctive relief on the ground that the ordinance effected a taking of her property. Upon the Township's stay of enforcement of the ordinance during state court proceedings, Knick was procedurally excluded from state remedy. The state court declined to rule on Knick's request for declaratory and injunctive relief because she could not demonstrate the irreparable harm component necessary for equitable relief without an ongoing enforcement action.[29] Knick then filed in District Court alleging the ordinance constituted a Fifth Amendment taking. Knick's claim was dismissed because Knick did not pursue an inverse condemnation action in state court.[30] Despite the Third Circuit noting the ordinance was "extraordinarily and constitutionally suspect," the court affirmed the dismissal of Knick's claim under the *Williamson County*.[31] The Supreme Court agreed that the contested ordinance clearly caused an uncompensated regulatory taking, and so accepted *Knick* on certiorari and eliminated the state procedure prong from the *Williamson County* two-prong test.[32] The *Knick* opinion opens by characterizing *Williamson County* as holding "a property owner whose property has been taken by a local government has not suffered a violation of his Fifth

[28] *Id.* at __.
[29] *Id.*
[30] *Id.* at __.
[31] *Id.* at __.
[32] *Id.* at __.

Amendment rights—and thus cannot bring a federal takings claim in federal court—until a state court has denied his claim for just compensation under state law."[33] The Court corrects this misconception of when the right for compensation arises that *Williamson County* is premised upon. According to *Knick*, the plaintiff's inability to pursue his federal claim due to *Williamson County* ripeness and the Court's subsequent decision in *San Remo* "rests on a mistaken view of the Fifth Amendment."[34]

Knick holds the availability of any particular compensation remedy under state law cannot infringe upon or restrict the property owner's federal constitutional claim. The existence of state procedure that may result in compensation does not affect nor deprive a property owner's right to just compensation.[35] *Knick* explains that the *Williamson County* Court created the state procedure prong under a different understanding of the Fifth Amendment. *Williamson County* explicitly held that the property owner "cannot claim" a violation of the Takings Clause until it has used the available state law procedure for compensation and been denied.[36] Under this view of the Takings Clause, the presence of a state remedy qualifies the right, preventing the right to compensation from vesting until exhaustion of state procedure proves unsuccessful.[37]

After citing a large body of cases that showed ambiguity in when the taking arises, *Knick* holds that plaintiffs may bring constitutional claims under the Takings Clause without first bringing any sort of state lawsuit, even when state court procedures to address the underlying contention are available.[38] *Knick* describes the state procedure prong as practically effectuating a state procedure exhaustion requirement.[39] Thus, the state procedure prong of *Williamson County*

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[33] *Id.* at __.
[34] *Id.*
[35] *Id.* at __.
[36] *Id.* (quoting *Williamson Cty.* 473 U.S. at 195).
[37] *Id.* at __.
[38] *Id.* at __ (quoting D. Dana & T. Merrill, Property: Takings 262 (2002)).
[39] *Id.* at __.

ripeness was based on a flawed interpretation of the Takings Clause.[40] *Knick* concludes that government violates the Takings Clause when it takes property without compensation, and that a property owner may then bring a Fifth Amendment claim at that time. Because the violation is complete at the time of the taking, the plaintiff's pursuit of remedy in federal court does not need to wait on subsequent state procedure.[41]

The *Knick* dissent defends the *Williamson County* rationale that a Fifth Amendment violation does not arise until the government denies the property owner compensation in a subsequent proceeding.[42] Nevertheless, after *Knick*, it is clear where the law stands: an unconstitutional Fifth Amendment taking arises as soon as the property owner suffers an uncompensated taking. From this conclusion, it necessarily follows that the state procedure prong rested on a misunderstanding of the now-clarified law.

III. The Circuits—Where We Were

Prior to *Knick*, the Circuits were trending toward treating *Williamson County* ripeness as a prudential measure, resulting in a circuit split. Both prongs softened prior to the overruling of the second prong. [43] The circuits divided on applying the second prong of ripeness as either a jurisdictional barrier or a prudential evaluation.[44] Five circuits made up the prudential group, all of which explicitly described the prudential nature of ripeness and reserved discretion in applying the state action prong accordingly. Three other circuits strictly adhered to *Williamson County*, requiring claims to satisfy the state action prong under all circumstances. Finally, two

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[40] *Id.*
[41] *Id.* at __.
[42] *Id.* at __ (Kagan, J. dissenting).
[43] David L. Callies, *Through a Glass Clearly: Predicting the Future in Land Use Takings Law*, 54 Washburn L.J. 43, 101, 97, 101 (2014).
[44] J. David Breemer, *The Decline of* Williamson County*'s State Litigation Ripeness Requirement in Federal Takings Cases*, Touro L.R. 235 (2013).

circuits recognized the second prong as prudential but had yet to use discretion to waive the state action prong.

The prudential circuits did not eliminate the second prong. Instead, those circuits viewed ripeness as a prudential measure that vested final discretion in its judges. The Ninth Circuit was first to shift to an unequivocal prudential view.[45] The Fifth Circuit overturned precedent construing ripeness as strictly jurisdictional, holding the two-prong requirements of ripeness were merely prudential.[46]

The Fourth Circuit published a thorough rationale for prudential ripeness in its 2013 decision of *Town of Nags Head v. Toloczko.*[47] In deciding the applicability of a local ordinance that prohibited reconstruction of private residences on state public trust lands within the coastal zone, the court narrowly approached ripeness in response to the defense raised by the town. The court first held that ripeness is a prudential rule not a jurisdictional one.[48] Therefore, a federal court can exercise discretion in requiring ripeness.[49] The court then exercised its discretion and declined to apply the second prong of the ripeness rule "in the interests of fairness and judicial economy."[50]

In *Town of Nags Head v. Sansotta*, the Fourth Circuit took a further step toward ending the use of the state action prong as means to avoid judgment on the merits.[51] The interaction of removal and preclusion under *Williamson County* ripeness as interpreted in state courts could be used to protect challenged land use controls from federal court review. Upon a plaintiff filing a

[45] *See* Guggenheim v. City of Goleta, 638 F.3d 1111, 1118 (9th Cir. 2010); *see also* MHC Find. Ltd. P'ship v. City of San Rafael, 714 F.3d 1118, 1130 (9th Cir. 2013) *cert. denied*, 134 S. Ct. 900 (2014) (exercising its discretion not to impose the "prudential requirement of exhaustion in state court").
[46] *Rosedale Missionary Baptist Church v. New Orleans City*, 641 F.3d 86 (5th Cir. 2013).
[47] *Town of Nags Head v. Toloczko*, 728 F.3d 391 (4th Cir. 2013).
[48] *Id.* at 399.
[49] *Id.*
[50] *Id.*
[51] *See* Town of Nags Head v. Sansotta, 724 F.3d 533 (4th Cir. 2013).

takings claim in state court, as required by *Williamson*, a defendant could simply remove to federal court and immediately unripen the removed claim in the new federal forum. The Fourth Circuit thwarted such removal maneuvering by holding in *Sansotta* that the town automatically waived ripeness arguments when it removed to federal court.[52]

The Second Circuit also reversed its position, holding *Williamson County* ripeness is prudential rather than jurisdictional, and reserving the right to exercise discretion to apply the doctrine or not in order to maintain power to decide a case.[53] The Sixth Circuit similarly joined the prudential group of circuits, noting that dismissing a case on ripeness grounds does a "disservice to the federalism principles embodied in [the] doctrine" upon upholding a state litigation requirement "clearly has no merit."[54]

Prior to *Knick*, the Third, Seventh, and Tenth Circuits appeared to be on the verge of treating the second prong as prudential. These circuits all recognized ripeness is prudential, but expressed hesitance in using discretion to apply the doctrine.[55] The Seventh Circuit noted that the prudential nature of the *Williamson County* requirements "do[es] not, however, give the lower federal courts license to disregard them."[56] The First, Eighth, and Eleventh Circuits continued to strictly apply ripeness as a jurisdictional rule that bars claims from federal review that fail the *Williamson County* ripeness requirements.[57]

The effect of the first prong of the ripeness doctrine (the finality requirement) was also mitigated by the courts below. To satisfy the finality prong, the government entity issuing the

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[52] *Id.*at 544.
[53] *Sherman v. Town of Chester*, 752 F.3d 554 (2d Cir. 2014).
[54] *Wilkins v. Daniels*, 744 F.3d 409, 418 (6th Cir. 2014).
[55] *See* Alto Eldorado Partnership v. County of Santa Fe, 734 F.3d 1170 (10th Cir. 2011); *see also* Peters v. Village of Clifton, 498 F.3d 727 (7th Cir. 2007); *see also* County Concrete Corp. v. Township of Roxbury, 442 F.3d 159 (3d. Cir. 2006).
[56] *Peters v. Village of Clifton*, 498 F.3d 727 (7th Cir. 2017).
[57] *See* Marek v. Rhode Island, 702 F.3d 650 (1st Cir. 2012); *see also* 126th Ave. Landfill, Inc. v. Pinellas Cnty., 459 F.App'x 896, 900 (11th Cir. 2012); *see also* Snaza v. City of Saint Paul, 548 F.3d 1178 (8th Cir. 2008).

offending regulation must first reach a final decision on the application of the subject regulation. Because the finality requirement allegedly serves a legitimate purpose it has been spared the criticism the state action requirement faced.[58] Federal courts had, however, imposed limitations on the finality requirement to avoid gamesmanship and repetitive, unfair, or futile efforts to pursue further administrative relief.

The Supreme Court addressed the finality requirement in *Palazzolo v. Rhode Island*, creating a protection against government abuse through a prohibition on "burden[ing] property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision."[59] *Palazzolo* also holds that a takings claim likely ripens once there is a reasonable degree of certainty that the government agency lacks further discretion to permit or deny development or use of land.[60] The reasonable measure test provided by the Court in *Palazzolo* reflects the observation by lower courts that some form of a "futility exception" exists to the ripeness finality requirement.[61]

In conclusion, *Knick* reduced ripeness to the finality prong, the strength of which has yet to be directly addressed by the Supreme Court. Nonetheless, the effects of *Williamson County* ripeness are not entirely resolved and, from its inception in 1985 to its overruling this year, the effects of the state action prong are not nearly forgotten. Ridding ripeness of the state action requirement is not the only work *Knick* accomplished. The ripeness doctrine is now clearly "prudential." *Knick* was unambiguous in clarifying the discretionary nature of the ripeness measure for entry to federal courts. Landowners facing ripeness challenges can at least beseech the court's discretion as ripeness can no longer serve a jurisdictional barrier to federal court.

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[58] *See* Kurtz v. Verizon N.Y. Inc., 758 F.3d 506, 512 (2d. Cir. 2014).
[59] *Palazzolo v. Rhode Island*, 533 U.S. 606, 620-21 (2001).
[60] *Id.* at 620.
[61] Callies, *supra* note 44, at 102 (citing *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990)).

Further, the preclusion issues raised in *San Remo* and removal game alleviated by *Sansotta* can now be avoided by landowners who patiently wait to satisfy the finality requirement and merely seek challenging land use controls on the merits. *Knick* contracted ripeness considerably in the regulatory taking landscape and the continued mitigation of the finality requirement will allow plaintiffs to press regulatory takings claims in federal court.[62]

[62] *See also* Brian Connolly, *Takings Precedent Overruled*, Planning, August-September 2019 at 12.