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Catch-22: The United States Supreme Court's Overruling of Fifth Amendment Takings Precedent to Resolve a Takings Claim Predicament; Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019)

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CASE NOTE

Catch-22: The United States Supreme Court's Overruling of Fifth Amendment Takings Precedent to Resolve a Takings Claim Predicament; *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019).

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I. INTRODUCTION

In the fictional novel, *Catch-22*, World War II soldiers found themselves in an impossible situation—a catch-22—when the military required them to fly dangerous combat missions.[1] The only way a soldier could escape flying perilous missions was to claim insanity.[2] But if a soldier claimed insanity for the sake of self-preservation, then it was only logical to conclude the soldier was of sound mind—only a crazy person would embrace the risk to life and limb.[3] As the novel said, "[i]f he flew [the combat missions] he was crazy and didn't have to; but if he didn't want to he was sane and had to."[4] In 2016, Rose Mary Knick found herself in a catch-22 when prior U.S. Supreme Court decisions, along with the Full Faith and Credit Statute, barred her from making a Fifth Amendment takings claim in federal court.[5] Those long-standing precedents placed her in this position because they held a plaintiff making a Fifth Amendment takings claim must first litigate in state court.[6] At the same time, the Full Faith and Credit Statute prevented a plaintiff who lost her suit in state court from making the claim again in federal court.[7] That statute provides in part:

> Acts, records and judicial proceedings or copies thereof . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by

[1] *See* JOSEPH HELLER, CATCH-22 56–57 (Alfred A. Knopf ed., 1961).

[2] *See id.* at 56.

[3] *See id.*

[4] *Id.* at 57.

[5] *See generally* Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019)*; see also* U.S. CONST. amend. V ("[P]rivate property [shall not] be taken for public use without just compensation.").

[6] *See Knick*, 139 S. Ct. at 2167. The U.S. Supreme Court has held there is no violation of the Takings Clause until a state court denies a claim for just compensation. *See* Williamson Cty. Reg'l. Planning Comm'n. v. Hamilton Bank, 473 U.S. 172, 194 (1985).

[7] *See Knick*, 139 S. Ct. at 2167; 28 U.S.C. § 1738 (2018); *see also* San Remo Hotel, L.P. v. City and Cty. of San Francisco, 545 U.S. 323, 347 (2005) (explaining that a state court's decision on a just compensation claim has a preclusive effect on a subsequent federal claim under the Full Faith and Credit Statute).

> law or usage in the courts of such State, Territory or Possession from which they are taken.[8]

The conflict caused by this statute combined with recent court decisions meant plaintiffs like Knick were unable to access the federal court system for takings claims.[9]

In *Knick v. Township of Scott*, the U.S. Supreme Court addressed Rose Mary Knick's catch-22.[10] To resolve Knick's impossible situation, the Court overruled *Williamson County Regional Planning Commission v. Hamilton Bank*.[11] *Williamson County* held a takings plaintiff did not have a ripe federal takings claim until she exhausted all state procedures and the government denied her compensation.[12] In overruling *Williamson County*, the *Knick* Court reasoned that a violation of the Fifth Amendment occurs at the moment the government takes property without just compensation, rather than upon the government's denial of just compensation.[13] Though seemingly a slight difference, because of *Knick*, the courts no longer require a takings plaintiff to pursue a state action prior to pursuing a federal suit.[14]

The *Knick* holding allows takings plaintiffs greater access to the federal courts and influences forum decisions in every jurisdiction within the United States.[15] However, Congress, not the courts, should have addressed the problem exposed in *Knick* to avoid damaging consequences.[16] Every plaintiff in the country now has the ability to access federal courts in takings cases, but at a significant cost to the capacity of these courts.[17] In addition to the negative effect on the federal courts, the *Knick* decision will result in adverse consequences for governments.[18] Governmental agencies seeking to implement beneficial regulations are now subject to constitutional claims with no way of determining in advance whether

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[8] § 1738 (2018).

[9] Leading Case, *Fifth Amendment – Taking Clause – State Litigation Requirement – Knick v. Township of Scott*, 133 HARV. L. REV. 322, 322 (2019) [hereinafter *Fifth Amendment*]; *see Knick,* 139 S. Ct. at 2167.

[10] *See generally Knick*, 139 S. Ct. at 2167.

[11] *Id.* at 2179.

[12] *See* Williamson Cty. Reg'l. Planning Comm'n. v. Hamilton Bank, 473 U.S. 172, 194–95 (1985).

[13] *See Knick,* 139 S. Ct. at 2168.

[14] *See id.* at 2167.

[15] *See generally Fifth Amendment*, *supra* note 9, at 322 (explaining that the state-litigation requirement restricted access to federal courts).

[16] *See infra* notes 352–71 and accompanying text.

[17] *See infra* notes 363–71 and accompanying text.

[18] *See infra* notes 354 – 62 and accompanying text.

the regulations will constitute a taking.[19] Though Congress should have prevented the problem prior to *Knick*, an amendment to the Full Faith and Credit Statute is still warranted to alleviate concerns and problems which will follow the *Knick* decision.[20]

This Case Note focuses on the *Knick* Court's reasoning for overruling prior case law and describes how the Court's reasoning was flawed.[21] First, it recounts case law which caused the catch-22 the Court addressed in *Knick*.[22] Second, it summarizes the facts of the case and the majority and dissenting opinions.[23] Third, it argues that the Court's interpretation of the Fifth Amendment Takings Clause and its holding were incorrect and will cause damaging consequences.[24] Fifth, it recommends that Congress should amend the Full Faith and Credit Statute to allow property owners to bring a claim in federal court and proposes specific language for an amendment to the Full Faith and Credit Statute.[25]

II. BACKGROUND

The Fifth Amendment Takings Clause of the United States Constitution provides "private property [shall not] be taken for public use, without just compensation."[26] The Court has grappled with the application of this clause in many instances.[27] Specifically, in *Knick*, the Court addressed the moment at which a government has violated the Takings Clause.[28] Therefore, an understanding of the Takings Clause will illuminate why the Court incorrectly interpreted the clause in *Knick*.[29] The Takings Clause does not create property rights; it protects them by preventing the government from forcing private citizens to bear public burdens alone.[30] Although the Takings Clause applies to the federal government under the Fifth Amendment, it also applies to state governments through

[19] *See infra* notes 354–62 and accompanying text.

[20] *See infra* notes 411–53 and accompanying text.

[21] *See infra* notes 267–341 and accompanying text.

[22] *See infra* notes 38–124 and accompanying text.

[23] *See infra* notes 125–257 and accompanying text.

[24] *See infra* notes 267–410 and accompanying text.

[25] See *infra* notes 411–53 and accompanying text.

[26] U.S. CONST. amend. V.

[27] *See* Agins v. City of Tiburon (*Agins I*), 447 U.S. 255, 260–61 (1980) ("[N]o precise rule determines when property has been taken . . . ." (citing Kaiser Aetna v. United States, 444 U.S. 164, (1979))).

[28] *See* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2170 (2019).

[29] *See infra* notes 30–37, 267–351 and accompanying text.

[30] *See* Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998); Armstrong v. United States, 364 U.S. 40, 49 (1960); *see also* Joseph William Singer, *Justifying Regulatory Takings,* 41 OHIO N.U. L. REV. 601, 606–07 (2015); Ann K. Wooster, Annotation*, What Constitutes Taking of Property Requiring Compensation Under Takings Clause of Fifth Amendment to United States Constitution–Supreme Court Cases,* 10 A.L.R. Fed. 2d 231, § 4 (2006).

incorporation by the Fourteenth Amendment.[31] The U.S. Supreme Court has held there is a taking any time the government physically occupies private property, regardless of the size of the occupation or how burdensome the occupation is to the landowner.[32] It has instructed that these physical occupations include things such as cable lines, telegraph poles, and underground pipes.[33] Furthermore, the Court has previously found land use regulations may also constitute takings.[34] However, the Court will not consider a regulation to be a taking unless the regulation "goes too far."[35] In determining whether there has been a taking, courts consider various factors such as landowners' "investment-backed expectations" and the character of the regulation.[36] The following cases illustrate how takings precedent has further evolved.[37]

A. The State-Litigation Requirement: Williamson County v. Hamilton

In *Williamson County*, the U.S. Supreme Court defined what constitutes a violation of the Takings Clause.[38] In this case, a developer sought approval from the Williamson County Regional Planning Commission to develop a tract of land.[39] After the Commission approved the preliminary plat, the County changed various zoning ordinances and the Commission asked the developer to submit a revised plat.[40] After the Commission disapproved the plat, the developer appealed to the County Board of Zoning Appeals, arguing the original zoning

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[31] U.S. CONST. amend. XIV; *see* Dolan v. City of Tigard, 512 U.S. 374, 383–84 (1994); Wooster, *supra* note 30, at § 2.

[32] *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427–39 (1982); *see also* John J. Constonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465, 471 (1983).

[33] *See, e.g.*, St. Louis v. Western Union Tel. Co., 148 U.S. 92, 100–02 (1893); *Loretto,* 458 U.S. at 430, 438.

[34] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

[35] *Id.* The question of whether a regulation constitutes a taking is one of degree and is evaluated on a case-by-case basis. *See* Pa. Cent. Transp. Co. v. New York City, 438 U.S. 104, 123–24 (1978) ("While this Court has recognized that the 'Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,' this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government . . . .") (first quoting Armstrong v. United States 364 U.S. 40, 49 (1960); then quoting Goldblatt v. Hempstead, 368 U.S. 590, 594 (1962); then quoting *Armstrong*, 364 at 49).

[36] *Pa. Cent.*, 438 U.S. at 124.

[37] *See infra* notes 38–124 and accompanying text.

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

[39] *See id.* at 177.

[40] *Id.* at 177–79.

ordinances should apply, and the Board agreed.[41] Respondent, Hamilton Bank, then acquired the undeveloped parcels from the developer through foreclosure and submitted preliminary plats to the Commission for approval.[42] The Commission declined to follow the decision of the Board, stating the Board lacked appellate jurisdiction.[43] The Commission, therefore, decided it would not evaluate the plat under the original zoning ordinance, and must, instead, evaluate it under the new ordinance.[44]

Hamilton Bank filed suit, alleging the Commission's denial constituted a taking of "its property without just compensation."[45] After the lower courts' disagreement regarding whether the Commission had taken the bank's property, the U.S. Supreme Court granted certiorari.[46] However, rather than determining whether a taking occurred, the Court held the claim was premature because a plaintiff must first pursue the available state procedures before bringing a claim in federal court.[47] In this case, the claim was premature because Tennessee state law provides landowners with the ability to bring an inverse condemnation action to receive compensation for a taking, yet Respondent did not seek relief though that procedure.[48] The *Williamson County* Court reasoned, if legislation provides an adequate procedure for compensation, the claimant must use it.[49] Claimants cannot make a constitutional takings claim until the government has denied just compensation through the available state procedure.[50] Therefore, the U.S. Supreme Court held the claim was not ripe because Hamilton Bank failed to seek compensation through the proper state procedures.[51]

In its decision, the *Williamson County* Court sought guidance from *Cherokee Nation v. Southern Kansas Railway Co.*, which held that the government need not pay just compensation in advance of a taking.[52] Prior to a taking, it is sufficient

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[41] *See id.* at 180–81.

[42] *Id.* at 181.

[43] *Id.* at 181–82.

[44] *See id.*

[45] *Id.* at 182.

[46] *Id.* at 185.

[47] *Id.* at 194–97.

[48] *Id.* at 196–97

[49] *Id.* at 195.

[50] *Id.*

[51] *Id.* at 194–97. The Court held the takings claim was also premature because Respondent had not sought a variance to the zoning ordinance. *Id.* at 186–94. Therefore, because a variance procedure was available, Respondent had not yet received a decision on what zoning ordinance and subdivision would apply to its property. *Id.* This part of the holding was not included here because it was not at issue in *Knick. See generally* Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019).

[52] *See Williamson Cty.*, 473 U.S. at 194; *see also* Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641, 659 (1890).

that the property owner is entitled to "reasonable, certain, and adequate" methods for seeking compensation.[53] In *Cherokee Nation*, Congress passed an act allowing the Kansas Railway Company to construct and operate a railway and telephone line through Indian Territory.[54] The Cherokee Nation did not want the railway or telephone line on their land, so they requested an injunction; in addition, they requested just compensation for the taking in the event the court refused to grant the injunction.[55] After the lower court denied both an injunction and a hearing on damages, the Cherokee Nation appealed to the United States Supreme Court.[56] The Cherokee Nation argued the Act violated the Constitution because it did not require the government to provide compensation before occupying the land.[57] However, the Supreme Court held, because the Act included procedures for providing compensation, it did not violate the Constitution.[58] Therefore, a claim for a violation of the Fifth Amendment would not arise until the government denied the Cherokee Nation just compensation through the procedures within the Act.[59]

The *Williamson County* Court also based its holding upon *Ruckelshaus v. Monsanto, Co*.[60] In *Monsanto,* the plaintiff company brought suit claiming the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) effected a taking of its property.[61] Monsanto brought this claim without availing itself of an arbitration proceeding first, as the Act required.[62] The district court held FIFRA was unconstitutional, and the Supreme Court reviewed the decision.[63]

The U.S. Supreme Court held the plaintiff's takings claim was premature.[64] The Court explained a plaintiff would not have a takings claim if he received just compensation through the arbitration proceeding.[65] Therefore, the Court could not determine whether the Act effected a taking of Monsanto's property

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[53] *Williamson Cty.,* 473 U.S. at 194 (quoting Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 124–25 (1974)); *see also Cherokee Nation*, 135 U.S. at 659 (1890).

[54] *See Cherokee Nation,* 135 U.S. at 642.

[55] *See id.* at 651.

[56] *Id.* at 642, 651.

[57] *See id.* at 658.

[58] *Id.* at 659.

[59] *See id.* at 658–60.

[60] *See* Williamson Cty. Reg'l Planning Comm'n. v. Hamilton Bank*,* 473 U.S. 172, 194–95 (1985); *see also* Ruckelshaus v. Monsanto, Co., 467 U.S. 986, 1013–20 (1984).

[61] *See Monsanto,* 467 U.S. at 998–99; 7 U.S.C. § 136 (2018).

[62] *Monsanto,* 467 U.S. at 1013.

[63] *Id.* at 990.

[64] *Id.* at 1013.

[65] *Id.*

without an arbitration proceeding first.[66] Only after the claimant has exhausted the arbitration requirement may it then bring a takings claim.[67]

The Court held such a claim could then be brought under the Tucker Act.[68] However, because the Tucker Act was available for the plaintiff to seek compensation, the claim was not yet ripe.[69] The Tucker Act gives jurisdiction to the Court of Federal Claims to hear certain claims founded upon the Constitution; therefore, a plaintiff claiming the United States has violated the Takings Clause can seek compensation through the Tucker Act.[70] The Court held the arbitration proceeding was simply an exhaustion requirement the plaintiff was required to fulfill prior to bringing a claim under the Tucker Act.[71] Therefore, because the Tucker Act was available for the plaintiff to seek compensation, the plaintiff's constitutional challenge to the arbitration provision was premature.[72] Only after Monsanto participates in an arbitration proceeding will Monsanto's constitutional challenges to the arbitration provision become mature.[73]

After *Williamson County*, many courts found the state-litigation requirement was a jurisdictional rule.[74] Therefore, if plaintiffs failed to avail themselves of the relief their respective state provided, the claim was not yet ripe for the federal courts, leaving them without subject matter jurisdiction.[75] This rule eventually evolved from a jurisdictional rule to a prudential rule, meaning, rather than viewing the state-litigation requirement as a constitutional requirement,

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[66] *Id.*

[67] *See id.*

[68] *See id.* at 1019.

[69] *Id.*

[70] *See id.* at 1017–18. The Tucker Act states the "United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (2018).

[71] *Monsanto,* 467 U.S. at 1018.

[72] *Id.* at 1019.

[73] *Id.* at 1020.

[74] *See* J. David Breemer, *The Rebirth of Federal Takings Review? The Court's "Prudential" Answer to Williamson County's Flawed State Litigation Ripeness Requirement*, 30 TOURO L. REV. 319, 338–39 (2014). *See also* Bigelow v. Mich. Dep't. Nat. Res., 970 F.2d 154, 157 (1992) (explaining under *Williamson County*, if a takings plaintiff had not first sought recovery through state procedures, the claim was not ripe and federal courts would not have subject matter jurisdiction). *See generally* Reahard v. Lee Cty., 30 F.3d 1412, 1418 (11th Cir. 1994); Samaad v. Dallas, 940 F.2d 925, 934–35 (5th Cir. 1991).

[75] *See* S. Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498, 502 (9th Cir. 1990) ("Ripeness is more than a mere procedural question; it is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the claim must be dismissed.").

courts instead interpreted it as a discretionary rule.[76] This change allowed federal courts to decide whether to hear a takings case prior to the plaintiff exhausting state remedies.[77] The federal courts' new discretion allowed some cases to escape the catch-22, while others were still subject to the preclusion trap.[78]

B. The Preclusion Trap: San Remo v. San Francisco

Twenty years after *Williamson County*, another case laid further foundation for the quandary exposed in *Knick*.[79] In *San Remo v. San Francisco,* the U.S. Supreme Court applied the Full Faith and Credit Statute to a Fifth Amendment takings claim.[80] In 1979, San Francisco passed the San Francisco Residential Hotel Unit Conversion and Demolition Ordinance (HCO).[81] The HCO regulated hotel conversion by only allowing an owner to convert residential units into tourist units if the owner obtained a permit.[82] Applicants could only obtain a permit by "constructing new residential units, rehabilitating old ones, or paying an 'in lieu' fee."[83] Based upon a mistaken report, the city erroneously classified the San Remo Hotel as a residential hotel, despite its continued use as a tourist hotel.[84] Therefore, petitioners, the owners of San Remo Hotel, had to apply for and acquire a permit to continue its business as a tourist hotel.[85] The City Planning Commission issued the permit after imposing an "in lieu" fee of $567,000.[86]

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[76] *See* Breemer, *supra* note 74, at 339; *see also* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2178 (2019); Horne v. Dep't of Agriculture, 569 U.S. 513, 525–26 (2013) ("[A] Fifth Amendment claim is premature until it is clear that the Government has both taken property *and* denied just compensation. Although we often refer to this consideration as prudential ripeness, we have recognized that it is not, strictly speaking, jurisdictional.") (citation omitted); Stop the Beach Renourishment, Inc., v. Fla. Dep't. Envtl. Prot. 560 U.S. 702, 729 (2010) (holding that an argument that a claim is unripe because "petitioner has not sought just compensation" is not jurisdictional). "Prudential standing is a form of justiciability per se." *Standing in court*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY, COMPACT EDITION 1048 (Stephen Michael Sheppard, ed., 2011). "[J]usticiability per se is an exercise of pure discretion by the court . . . ." *Justiciability (Justiciable or Non-justiciable or Non-justiciability or Prudential Rules),* THE WOLTERS KLUWER BOUVIER LAW DICTIONARY, COMPACT EDITION 602 (Stephen Michael Sheppard, ed., 2011).

[77] *See* Breemer, *supra* note 74, at 339.

[78] *See supra* notes 76–77 and accompanying text.

[79] *See generally* San Remo Hotel L.P., v. City and Cty. of San Francisco, 545 U.S. 323 (2005).

[80] *See id.* at 347; *see also* 28 U.S.C. § 1738 (2018).

[81] *San Remo,* 545 U.S. at 328.

[82] *Id.*

[83] *Id.*

[84] *Id.* at 328–29.

[85] *Id.* at 329.

[86] *Id.*

Petitioners filed suit in federal court alleging the HCO was a violation of the Takings Clause both facially and as-applied.[87] The district court held the as-applied takings claim was not ripe under *Williamson County*.[88] On appeal to the Ninth Circuit, petitioners asked the court to apply *Pullman* abstention, a mechanism which allows a party to ask the federal court to abstain so the state court can address an underlying state law question which could potentially render it unnecessary to address the federal law question.[89] The Ninth Circuit agreed to abstain from ruling on the facial attack on the HCO because the claim rested on the propriety of the city's determination of the hotel's classification as a residential hotel.[90] Although petitioners attempted to reserve the federal questions in the state court litigation through its request regarding *Pullman* abstention, it advanced claims that appeared to touch on these federal issues.[91] Despite recognizing that petitioners had attempted to reserve the federal claims, the California Supreme Court made the decision to analyze both the state constitution and federal constitution congruently, upholding the HCO on its face and as-applied.[92]

Petitioners then returned to federal district court so it could address the remaining federal questions.[93] The federal district court held the Full Faith and

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[87] *Id.* at 330. The district court held the statute of limitations prevented the facial takings claim from proceeding. *Id. See also* Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U.L. REV. 359, 360 (1998) ("Litigants in the federal courts can attack the constitutionality of legislative enactments in two ways: they can bring a facial challenge to the law, alleging that it is unconstitutional in all of its applications, or they can bring an as-applied challenge, alleging that the law is unconstitutional as applied to the particular facts that their case presents.").

[88] *See San Remo,* 545 U.S. at 330.

[89] *Id*. The courts use *Pullman* abstention if a question of state law could be resolved to render the constitutional question irrelevant, with the understanding that the plaintiff can resume federal litigation if the plaintiff does not receive relief in the state court litigation. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 10 (1983). *See generally* Railroad Comm'n Tex. v. Pullman Co., 312 U.S. 496 (1941). This practice was upheld in *England v. Louisiana State Bd. of Medical Examiners* when the Supreme Court held a federal court could abstain from deciding a constitutional question while a state court addresses a preceding state law question. *See* England v. La. State Bd. Med. Examiners, 375 U.S. 411, 421–22 (1964). The plaintiff may also reserve the right to have a federal court address the remaining constitutional questions following the state court proceedings. *Id.*

[90] *See San Remo,* 545 U.S. at 330–31. The Court agreed to apply abstention to the facial attack on the HCO because it was ripe at the moment the city implemented the HCO. *Id.* The Court explained that the facial challenge "hinged [solely] on the propriety of the planning commission's zoning designation . . . ." *Id.* at 331. However, the Court declined to apply abstention to the as-applied challenge regarding the HCO because it was unripe under *Williamson County*. *Id*. Because the as-applied challenge was unripe, it was not properly in federal court and was not eligible for abstention. *See* Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251, 280 (2006) [hereinafter *The Demise of Federal Takings Legislation*].

[91] *See San Remo,* 545 U.S. at 331.

[92] *Id.* at 332–34.

[93] *Id.* at 334.

Credit Statue barred the facial attack on the HCO because the California courts interpreted the takings claims under both federal and state law.[94] The court of appeals affirmed and petitioners appealed to the U.S. Supreme Court, arguing there should be an exception to the Full Faith and Credit Statute allowing federal courts to disregard the statute when it requires plaintiffs to bring a claim in state court pursuant to *Williamson County*.[95] The U.S. Supreme Court rejected this argument, reasoning plaintiffs are not entitled to relitigate valid state-court judgments in a federal forum.[96] Additionally, federal courts would not recognize such an exception unless Congress created one.[97]

C. The Timing of a Fifth Amendment Taking

Another significant case revolved around the issue of timing in relation to the Takings Clause.[98] In *Jacobs v. United States*, the petitioner, Jacobs, owned property along a creek which was a tributary of the larger Tennessee River in Alabama.[99] Under the authority of Congress, the United States built a dam across the Tennessee River, causing Jacob's land to frequently flood.[100] The government offered settlements to Jacobs, but he was dissatisfied and brought suit pursuant to the Tucker Act, seeking just compensation for the taking.[101] The district court found Jacobs was entitled to compensation including interest from the date of the dam's completion.[102] On appeal, the Fifth Circuit held Jacobs could not recover interest, explaining Jacobs did not base his claim upon the Constitution, but rather an "implied promise" to provide compensation.[103] In this situation, litigants cannot claim interest against the government unless it is expressly stipulated by contract.[104] The U.S. Supreme Court granted certiorari to

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[94] *Id.* at 334–35.

[95] *Id.* at 335.

[96] *Id.* at 342.

[97] *Id.* at 344.

[98] *See generally* Jacobs v. United States (*Jacobs II*), 290 U.S. 13 (1933).

[99] *Id.* at 15. There was a second petitioner in this suit, Gunter. *Id.* The testator of Gunter also owned land along this tributary and similarly brought suit under the Tucker Act. *Id.* Jacobs first brought suit in the district court, the court of appeals then reversed that decision and held that Jacobs was entitled to compensation, the two suits were then combined. *Id.* Only the consolidated case is addressed in this discussion.

[100] *Id.*

[101] *Id.* The Tucker Act gives jurisdiction to the Court of Federal Claims to hear certain claims founded upon the Constitution. 28 U.S.C. § 1491(a)(1) (2018).

[102] *Jacobs II,* 290 U.S. at 15.

[103] Jacobs v. United States (*Jacobs I*), 63 F.2d 326, 327 (5th Cir. 1933).

[104] *See Jacobs I*, 63 F.2d at 327. The Fifth Circuit Court of Appeals distinguished this claim from government-initiated condemnation proceedings, in which interest is measured from the time of the taking as a portion of the just compensation. *Id.*

determine whether Jacobs could recover interest.[105] The Court reasoned Jacobs founded his claims upon the constitutional right to recover just compensation for the government's taking of his property.[106] The fact the government instituted no condemnation proceedings was immaterial to the issue of interest because the claim was founded upon the Constitution.[107] The government's implied promise to pay just compensation was founded in the Fifth Amendment which guarantees the right to just compensation for a taking.[108] Therefore, the Court ultimately required the government to pay interest to Jacobs.[109]

The U.S. Supreme Court further explained the timing of a taking in *First English Evangelical Lutheran Church v. County of Los Angeles*.[110] In *First English*, appellant, First English Evangelical Lutheran Church, purchased land along the banks of a natural drainage channel in the Angeles National Forest.[111] On this land, the church operated a campsite called Lutherglen.[112] Following a large forest fire, a massive flood overflowed the channel and destroyed Lutherglen's buildings.[113] In response, the County of Los Angeles passed an interim ordinance prohibiting the construction or reconstruction of any building or structure within the flood area.[114] The church brought an action claiming the ordinance denied it all use of Lutherglen, and sought to recover on an inverse condemnation theory.[115]

The California Supreme Court previously held that a court must first deem an ordinance excessive in a declaratory relief action and the government must then continue to enforce the regulation before the Court will require the government to provide compensation.[116] The California Supreme Court's previous holding effectively denied damages for any temporary regulatory taking because landowners would be able to recover only after two things occur: (1) the court deemed the ordinance unconstitutional and (2) the county continued to enforce it following

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[105] *Jacobs II,* 290 U.S. at 16.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.* at 17.

[110] *See generally* First English Evangelical Lutheran Church v. Cty. of Los Angeles, 482 U.S. 304 (1987).

[111] *See id.* at 307.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* at 308. The church also sought to recover under the California statute for dangerous conditions on property, as well as under tort law for the Los Angeles County Flood Control District "engaging in cloud seeding during the storm that flooded Lutherglen." *Id.* These issues are not applicable to the takings claims and are, therefore, omitted.

[116] *Id.* at 308–09; *see also* Agins v. City of Tiburon (*Agins II*), 598 P.2d 25, 29–31 (Cal. 1979).

that determination.[117] Relying on this precedent, the Superior Court of California granted the County of Los Angeles' motion to strike the claim, reasoning the church should have sought declaratory relief first.[118] The church appealed, but the California Court of Appeals was obligated to follow the California Supreme Court's precedent, and affirmed the superior court's decision.[119]

The church appealed to the U.S. Supreme Court, asking it to find error in the California Supreme Court's decision denying compensation for temporary takings the court later finds to be unconstitutional.[120] The U.S. Supreme Court held temporary takings are no different from permanent takings.[121] It explained that it is not an adequate remedy for a government to amend a regulation that a court finds unconstitutional.[122] If a court invalidates an ordinance, a landowner is entitled to just compensation for the temporary taking.[123] Therefore, the Court held the ordinance deprived the church of all use of its property for numerous years and, therefore, the church was entitled to just compensation for those years.[124]

III. PRINCIPAL CASE

A. Factual Background

Rose Mary Knick lived in a single-family home on ninety acres of land in Scott Township (the Township), Pennsylvania.[125] Knick used the land as pasture for various farm animals, as well as an area that included a small graveyard.[126] These backyard or homestead cemeteries are common throughout Pennsylvania.[127] In 2012, the Township passed an ordinance requiring those with cemeteries on their land to keep them "open and accessible to the general public during daylight hours."[128] The ordinance defined a cemetery as "[a] place or area of ground, whether contained on private or public property, which has been set apart or otherwise utilized as a burial place for deceased human beings."[129] The ordinance

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[117] *See First English,* 482 U.S. at 308–09; *see also Agins II*, 598 P.2d at 29–31.

[118] *See First English,* 482 U.S. at 308–09; *see also Agins II*, 598 P.2d at 29–31.

[119] *First English,* 482 U.S. at 309.

[120] *Id.* at 310.

[121] *Id.* at 318.

[122] *Id.* at 319.

[123] *Id.*

[124] *Id.* at 322.

[125] Knick v. Twp. of Scott, 139 S. Ct. 2162, 2168 (2019).

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

allowed officers who enforced the code to "enter upon any property" to discover the presence and location of a cemetery.[130]

In 2013, a local officer entered Knick's property and discovered the cemetery.[131] The officer notified Knick she was in violation of the ordinance because the cemetery on her land was not open to the public during daylight hours due to the fence and various boundary markers restricting access.[132] Knick sought declaratory and injunctive relief in Pennsylvania state court, alleging the ordinance effected a taking of her property in violation of the Fifth Amendment.[133] However, Knick did not seek compensation through an inverse condemnation action which would have only awarded her compensation rather than enjoining enforcement of the ordinance.[134]

In response, the Township agreed to stay enforcement of the ordinance while the state court proceedings were pending.[135] Paradoxically, the state court declined to rule on the suit because the Township stayed enforcement of the ordinance.[136] Since the Township chose not to enforce the ordinance, Knick's claim for injunctive relief was rendered moot, so the parties decided to only litigate the declaratory action.[137] However, the court declined to rule on the declaratory action after the Township argued that the court lacked equity jurisdiction.[138]

Consequently, Knick brought suit in federal district court claiming a violation of the Takings Clause.[139] The district court dismissed the suit citing the state-

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[130] *Id.*

[131] *Id.*

[132] *Id.*; *see also* Knick v. Scott Twp., 2016 U.S. Dist. LEXIS 121220 at *2–3 (M.D. Pa. 2016).

[133] *Knick,* 139 S. Ct. at 2168.

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] Joint Appendix, at 31, Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019) (No. 17-647).

[138] *See id.* at 33. "[T]he Township . . . [argued] that a person facing potential prosecution is barred from having a court exercise equity jurisdiction to 'adjudicate his guilt or innocence via a suit to enjoin his prosecution . . . ." *Id.* at 32–33 (citing Pa. Soc'y for Prevention of Cruelty to Animals v. Bravo Enter., Inc. 237 A.2d 342, 346 (Pa. 1968)). However, an exception exists which allows courts to grant equity jurisdiction "if an ordinance is unconstitutional" and the plaintiff's property will suffer irreparable harm. *See* Joint Appendix (No. 17-647) at 33; *Bravo Enter.*, 237 A.2d at 346. In this case, the Township argued the suit was brought to simply prevent the Township from enforcing the ordinance and that Knick could not show the irreparable harm necessary to allow the court to find an exception and grant equity jurisdiction. *See* Joint Appendix (No. 17-647) at 33. Rather, Knick should have brought her constitutional challenge in connection with a civil enforcement action. *Id.*

[139] *See Knick,* 139 S. Ct. at 2168.

litigation requirement from *Williamson County*.[140] It held that because Knick did not pursue an inverse condemnation action, she did not satisfy *Williamson County*'s state-litigation requirement.[141] Knick appealed to the Third Circuit, which affirmed the lower court's decision.[142] Ultimately, the U.S. Supreme Court granted certiorari to reconsider *Williamson County*.[143]

B. Majority Opinion

In *Knick*, the U.S. Supreme Court considered whether property owners must first seek just compensation under state law in state court prior to bringing a Fifth Amendment takings claim in federal court.[144] The Court ultimately held a violation of the Takings Clause occurs at the very moment the government takes property without just compensation, thus permitting litigants to enter federal court prior to exhausting any state court remedies.[145] In so holding, the Court overruled *Williamson County*.[146]

1. A Violation of the Takings Clause Occurs at the Time of Taking

The *Knick* Court first considered the exact time in which a takings violation occurs.[147] The Court stated that it has long held a violation of the Fifth Amendment occurs at the moment a government takes property without providing just compensation.[148] Therefore, at that moment, a plaintiff has a claim against the government for a constitutional violation.[149] The Court explained that the Tucker Act provides the procedure for bringing such a claim because at the moment of taking, the plaintiff has a claim founded upon the Constitution.[150]

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[140] *Id.* at 2169; *see also* Knick v. Scott Twp., 2016 U.S. Dist. LEXIS 121220 at *14–15 (Penn. 2016). *See generally* Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194–95 (1985).

[141] *See Knick,* 139 S. Ct. at 2169; *see also* Knick v. Scott Twp., 2016 U.S. Dist. LEXIS 121220 at *14–15 (Penn. 2016).

[142] *See Knick,* 139 S. Ct. at 2169.

[143] *Id.*

[144] *Id.* Chief Justice Roberts authored the majority opinion, joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh. *Id.* at 2166. Justice Thomas also filed a concurring opinion which is not discussed in this article. *Id.*

[145] *Id.* at 2170.

[146] *Id. See generally* Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

[147] *Knick,* 139 S. Ct. at 2170.

[148] *Id.*

[149] *Id.*

[150] *Id.*

To support the notion that a constitutional violation occurs at the moment of taking, the Court looked to *Jacobs*, where it previously recognized the right to just compensation arises at the time of the taking regardless of any subsequent remedies.[151] The *Jacobs* Court reasoned that regardless of procedures available under statute or promises by the government to pay, the framers founded a claim for just compensation upon the Fifth Amendment.[152] Accordingly, the *Knick* Court held any state remedy must not restrict a property owner's right to bring a federal constitutional claim.[153] The *Knick* Court analogized a Fifth Amendment takings claim to a Fourth Amendment claim, explaining how a Fourth Amendment claim for excessive force exists regardless of whether a plaintiff first files suit in state court alleging battery.[154] Likewise, a Fifth Amendment takings claim exists at the time of the taking and a court cannot qualify the right of a plaintiff to make that claim by first requiring exhaustion of state remedies.[155] The existence of a state procedure for a plaintiff to obtain just compensation cannot deprive a plaintiff of her Fifth Amendment right and leave her with only state law remedies.[156] The Court ultimately held that when the government deprives a citizen of a constitutional right, 42 U.S.C. § 1983 allows a plaintiff to proceed directly to federal court.[157]

The Court then turned to *First English* to support the assertion that a Fifth Amendment claim arises at the time the government takes property.[158] The *First English* Court held a plaintiff acquires the right to payment at the time of the taking, and a landowner is entitled to payment for a temporary taking.[159] In its reasoning, the *First English* Court relied on a previous dissent by Justice Brennan to conclude the government is required to compensate for both temporary and permanent takings.[160] The Court reasoned that *First English* adopted Justice

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[151] *Id.*; *see also* Jacobs v. United States (*Jacobs II*), 290 U.S. 13, 17 (1933) ("The [property] owner . . . 'is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.'" (quoting Seaboard Air Line R. v. United States, 261 U.S. 299, 306 (1923))).

[152] *Jacobs II,* 290 U.S. at 16.

[153] *Knick,* 139 S. Ct. at 2171.

[154] *Id.* "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

[155] *Knick,* 139 S. Ct. at 2171.

[156] *Id.*

[157] *Id.* This statute allows takings plaintiffs to make a claim for a violation of their rights protected under the Fifth Amendment or any other constitutional provision. *Id.* at 2170. This statute provides that any person who deprives another of a right shall be held liable for such injury. 42 U.S.C. § 1983 (2018).

[158] *Knick,* 139 S. Ct. at 2171–72 (citing First English Evangelical Lutheran Church v. Cty. of Los Angeles, 482 U.S. 304 (1987)).

[159] *First English,* 482 U.S. at 318–19.

[160] *Id.* at 318 (comparing San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting)).

Brennan's view when it held the government must provide just compensation regardless of any subsequent governmental action.[161] The *Knick* Court further adopted Justice Brennan's view when it explained a constitutional violation occurs when the government takes property.[162] Additionally, the Court likened a Fifth Amendment taking to a bank robber who "might give the loot back, but he still robbed the bank."[163] Ultimately, the Court explained, a constitutional violation can occur regardless of whether compensation is available because the compensation is merely a remedy for the violation.[164] Like a bank robber who returns the stolen money, a government that pays belated compensation is still guilty of breaking the law.[165]

The Court reasoned the holding in *Williamson County* contravened *Jacobs*, *First English*, and other precedent because *Williamson County* required a litigant to participate in a state court proceeding before they can make a Fifth Amendment takings claim.[166] The Court further reasoned the state-litigation requirement defeated the purpose of 42 U.S.C. § 1983.[167] The *Knick* majority then articulated a new rule that plaintiffs are not required to bring an available state claim before bringing a constitutional claim pursuant to § 1983, therefore overruling *Williamson County*.[168] This decision means both state and federal remedies are available, and a claimant does not need to invoke one before the other.[169]

The *Knick* Court also argued *Williamson County* improperly relied on *Cherokee Nation*.[170] It explained *Cherokee Nation* and the cases which followed are not applicable to *Knick*.[171] The Court distinguished those cases because they involved plaintiffs seeking equitable relief and they all held that because compensation was available, equitable relief was not.[172] The *Knick* Court explained that those cases simply focused on the available remedy, not whether a taking had occurred.[173] The *Knick* Court reasoned, even if equitable remedies

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[161] *Knick*, 139 S. Ct. at 2172.

[162] *Id.* (quoting *San Diego*., 450 U.S. at 654 (Brennan, J., dissenting).

[163] *Knick*, 139 S. Ct. at 2172.

[164] *Id.*

[165] *Id.*

[166] *Id.* at 2170–73.

[167] *Id.* at 2173.

[168] *Id.* at 2172–73 ("[O]bserving that it would defeat the purpose of § 1983 'if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in state court.'" (quoting Mcneese v. Bd. of Ed. for Cmty. Unit Sch. Dist. 187, 373 U.S. 668, 672 (1963))).

[169] *See id.* at 2171–73.

[170] *Id.* at 2175. *See generally* Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641 (1890).

[171] *Knick,* 139 S. Ct. at 2175–77.

[172] *Id.*

[173] *Id.*

are not available, a takings violation can still occur.[174] Further, because *Cherokee Nation* and its progeny are not applicable to *Knick*, the Court was only overruling *Williamson County*.[175] The Court stated each case would still have the same result: the Court would deny a request for injunctive relief when a claim for compensation becomes available.[176] However, their claim for just compensation is grounded upon a violation of the Fifth Amendment.[177]

2. *The Doctrine of Stare Decisis Did Not Preclude the* Knick *Court from Overruling* Williamson County

The U.S. Supreme Court considered whether the doctrine of stare decisis precluded its decision to overrule *Williamson County*.[178] Stare decisis is the long-standing legal doctrine that compels courts to follow precedent absent a compelling reason not to.[179] This doctrine ensures that courts implement the law consistently and predictably.[180] Courts have long adhered to previous decisions because it is better that the law be established rather than be correct.[181]

The Court explained the doctrine of stare decisis is weaker in constitutional matters because U.S. Supreme Court decisions are only changed by the U.S. Supreme Court itself or by a constitutional amendment.[182] It also recognized several factors to consider in deciding whether to overrule a previous decision.[183] The Court used the following factors to determine if overruling a past decision was appropriate: "the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision."[184]

The Court found all factors weighed in favor of overruling the *Williamson County* decision.[185] The Court first looked at the quality of *Williamson County*'s

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[174] *Id.*

[175] *Id.* at 2177.

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *See* Amy L. Padden, *Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age, and Subject Matter in the Application of Stare Decisis After Payne v. Tennessee,* 82 GEO. L. J. 1689, 1689 (1994).

[180] *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991).

[181] *Id.* (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

[182] *Knick,* 139 S. Ct. at 2177–78 (quoting Agostini v. Felton, 521 U.S. 203, 235 (1997)).

[183] *Id.* at 2178.

[184] *Id.* (quoting Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2478–79 (2018)).

[185] *Id.*

decision along with its consistency with other decisions.[186] The Court stated its reasoning was not only wrong, but "ill founded" because it conflicted with many other takings decisions.[187] The Court explained *Williamson County* based its holding on a misinterpretation of the language of prior decisions.[188] The *Williamson County* Court incorrectly concluded a takings violation occurs at the moment the government denies just compensation rather than at the moment of the taking.[189] Because of *Williamson County*'s misinterpretation, it was inconsistent with other decisions that held a government is obligated to provide just compensation at the moment it takes property.[190] *Williamson County* also received widespread criticism from some justices of U.S. Supreme Court and legal commentators.[191] For example, the concurring justices in *San Remo* noted it may not have been necessary for the *Williamson County* Court to hold a plaintiff must bring a state action first.[192] Next, the Court looked to the workability of the state-litigation requirement and explained the *Williamson County* decision is unworkable because it deprives many takings plaintiffs of the opportunity to litigate in federal court, contradicting the purpose of 42 U.S.C. § 1983.[193] The Court also justified straying from stare decisis because the justification for the state-litigation requirement has continued to evolve.[194] Finally, the Court stated that no reliance interests on the state-litigation requirement existed; therefore, reducing the force of stare decisis.[195] Reliance interests are found when a decision "serve[s] as a guide to lawful behavior."[196] In this case, governments did not rely on *Williamson County* because, following *Knick*, they may still implement regulations without being subject to increased liability.[197] Rather than increasing liability for governments, there is simply another forum option: plaintiffs may bring a takings claim in federal court rather than solely through an inverse condemnation

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[186] *See id*.

[187] *Id.*

[188] *See id.*

[189] *See id.*

[190] *See id.*

[191] *Id. See generally* Arrigoni Enter., LLC v. Town of Durham, 136 S. Ct. 1409 (2016) (Thomas, J., dissenting); San Remo Hotel, L.P. v. City and Cty. of San Francisco, 545 U.S. 323, 348 (2005) (Rehnquist, J., concurring); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1264 (2004); Thomas W. Merrill, *Anticipatory Remedies for Takings*, 128 HARV. L. REV. 1630, 1647–49 (2015); Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment,* 86 COLUM. L. REV. 979, 989 (1986).

[192] *See San Remo,* 545 U.S. at 348–49 (Rehnquist, J., concurring).

[193] *See Knick,* 139 S. Ct. at 2178–79.

[194] *See Knick*, 139 S. Ct. at 2178.

[195] *Id*. at 2179.

[196] *Id.* (quoting United States v. Gaudin, 515 U.S. 506, 521 (1995)).

[197] *Id.*

action in state court.[198] The Court also posited that allowing suit in federal court will not lead federal courts to invalidate more regulations because injunctive relief will not be available as long as plaintiffs can seek compensation.[199] Therefore, because the plaintiffs can seek compensation through a takings claim brought under the Tucker Act, federal courts will not enjoin those regulations.[200] For these reasons, the majority concluded that it was justified in overruling *Williamson County* despite the doctrine of stare decisis.[201] The result of the Court's overruling of *Williamson County* thus allows all takings plaintiffs to proceed directly to federal court.[202]

C. Dissenting Opinion

Justice Kagan, joined by Justice Ginsburg, Justice Breyer, and Justice Sotomayor, argued the Takings Clause should not be read to indicate a violation occurs immediately upon a taking without just compensation; rather, a violation occurs upon the government's denial of just compensation.[203] The dissent also highlighted the likely consequence that multitudes of state officials will unwittingly become constitutional violators.[204] It further extrapolated that the majority's interpretation will result in an increase in the number of federal court cases which are better suited for state court.[205] Finally, the dissent rejected the majority's conclusion that overruling *Williamson County* was justified in spite of stare decisis.[206]

1. A Violation of the Takings Clause Does Not Occur at the Time of Taking

The dissent first looked at the plain language of the Fifth Amendment and emphasized a takings claim requires two elements.[207] First, there must be a taking

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[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *Id.; see also supra* notes 182–200 and accompanying text.

[202] *See Knick*, 139 S. Ct. at 2179.

[203] *See Knick,* 139 S. Ct. at 2182–83 (Kagan, J., dissenting); *see infra* notes 207–32 and accompanying text.

[204] *Knick,* 139 S. Ct. at 2187 (Kagan, J., dissenting); *see infra* notes 236–41 and accompanying text.

[205] *Knick,* 139 S. Ct. at 2187 (Kagan, J., dissenting); *see infra* notes 242–47 and accompanying text.

[206] *Knick,* 139 S. Ct. at 2189–90 (Kagan, J., dissenting); *see infra* notes 248–57 and accompanying text.

[207] *Knick*, 139 S. Ct. at 2181 (Kagan, J., dissenting).

of property, and second, there must be a denial of just compensation.[208] Using this principle, the dissent demonstrated the error in the majority's analogy to the Fourth Amendment.[209] It contrasted the two amendments by first explaining that if an officer uses excessive force, the victim experiences a constitutional violation regardless of whether he recovers damages because recovery is not an element of a Fourth Amendment claim.[210] Without qualification, the Constitution forbids the use of excessive force.[211] However, the Constitution does not prohibit the taking of land, it instead prohibits the taking of land *without* just compensation.[212] The dissent further explained the Takings Clause only requires the government make available a "reasonable, certain and adequate provision for obtaining compensation."[213] Courts have generally found compensation to be adequate if there is a statutory right to obtain that compensation from the government.[214] Therefore, the dissent argued that the government had not yet violated the Constitution because Knick did not seek compensation through the available state procedure.[215] Furthermore, Knick did not argue that Pennsylvania's inverse condemnation proceeding was inadequate; therefore, her claim was premature and she should have brought an inverse condemnation proceeding before making a claim in federal court.[216] Thus, a contrary holding does not defeat the purpose of 42 U.S.C § 1983, which allows a plaintiff to bring suit if one of their rights is deprived, because Knick was not deprived of constitutional right yet.[217] In sum, the dissent concluded the government does not commit a violation until it denies just compensation, and only at that point may plaintiffs raise a claim under § 1983.[218]

The dissent also rejected the majority's view that a Tucker Act claim is the process by which a plaintiff makes a claim for a Fifth Amendment violation.[219] The dissent argued that, rather, it is the equivalent of an inverse condemnation claim which a plaintiff could make under state law.[220] All the Tucker Act does is

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[208] *Id.* (Kagan, J., dissenting).

[209] *Id.* (Kagan, J., dissenting).

[210] *Id.* (Kagan, J., dissenting).

[211] *Id.* (Kagan, J., dissenting).

[212] *Id.* (Kagan, J., dissenting)

[213] *Id.* at 2182 (Kagan, J., dissenting) (quoting Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641, 659 (1890)).

[214] *Id.* (Kagan, J., dissenting). *See generally* Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18, 20–21 (1940); Williams v. Parker, 188 U.S. 491, 502 (1903).

[215] *Knick*, 139 S. Ct. at 2183 (Kagan, J., dissenting).

[216] *Id.* (Kagan, J., dissenting).

[217] *Id.* (Kagan, J., dissenting); *see also* 42 U.S.C. § 1983 (2018).

[218] *Knick*, 139 S. Ct. at 2183 (Kagan, J., dissenting).

[219] *Id.* at 2186 (Kagan, J., dissenting).

[220] *Id.* (Kagan, J., dissenting).

provide a method for an owner to seek compensation for taken property.[221] Unlike the majority, the dissent felt the Tucker Act affords property owners a reasonably sufficient mechanism to obtain just compensation.[222] The availability of the Tucker Act, therefore, precludes a claim of a takings violation until a litigant has availed herself of its provisions and the government denies just compensation.[223]

Finally, the dissent specifically addressed the question regarding what moment the government has violated the Takings Clause by denying a property owner just compensation.[224] It noted the Supreme Court's precedent that the government need not pay compensation prior to a taking as long as a procedure is available to obtain just compensation.[225] It explained the Court first held pre-deprivation compensation was not required in *Cherokee Nation*, and subsequent cases affirmed that principle.[226] The dissent then explained how the *Williamson County* Court also based its decision upon this principle that the government need not pay compensation prior to a taking, so long as the government provides a property owner with a mechanism for obtaining just compensation.[227] Thus, the dissent pointed out that *Williamson County* properly held there was not a takings violation because there was an adequate procedure for obtaining just compensation.[228] Furthermore, *Williamson County* held plaintiffs cannot bring an action under 42 U.S.C. § 1983 before seeking compensation through the state procedure.[229] The dissent further clarified a plaintiff can only bring a § 1983 claim if the plaintiff alleges a constitutional violation.[230] In *Knick*, Pennsylvania's inverse condemnation proceeding was an adequate procedure for obtaining compensation.[231] Therefore, because it was available, the government had not yet violated the Constitution and there was not yet an actionable claim under § 1983.[232]

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[221] *Id.* (Kagan, J., dissenting).

[222] *Id.* (Kagan, J., dissenting).

[223] *Id.* (Kagan, J., dissenting).

[224] *Id.* at 2181–82 (Kagan, J., dissenting).

[225] *Id.* at 2182 (Kagan, J., dissenting).

[226] *Id.* (Kagan, J., dissenting) ("The Takings Clause does not demand 'that compensation should be made previous to the taking' so long as 'adequate means [are] provided for a reasonably just and prompt ascertainment and payment of the compensation.'" (quoting Crozier v. Fried. Krupp Aktiengesellschaft, 224 U.S. 290, 306 (1912))). *See also* Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18, 20–21 (1940); Williams v. Parker, 188 U.S. 491, 502 (1903).

[227] *Knick,* 139 S. Ct. at 2182–83 (Kagan, J., dissenting).

[228] *Id.* (Kagan, J., dissenting).

[229] *Id.* at 2183 (Kagan, J., dissenting).

[230] *Id.* (Kagan, J., dissenting).

[231] *Id.*

[232] *Id.* at 2182 (Kagan, J., dissenting).

2. Damaging Consequences

The dissent highlighted two consequences which will likely result from *Knick*.[233] First, government officials will inevitably become constitutional violators.[234] Second, litigants will fill federal courts with questions which state courts are more suited to address.[235]

The former problem arises because there is no method for determining whether a regulation will constitute a taking.[236] Therefore, legislative or administrative bodies will not know whether a law or regulation will constitute a taking prior to passing it.[237] Until the majority's decision, governmental officials could enforce regulations without inevitably violating the Constitution.[238] Even if a court later found a regulation to be a taking, so long as the government had provided a method for property owners to obtain just compensation, the government had satisfied the Fifth Amendment requirement.[239] This is no longer the case because the majority has stated a takings violation occurs at the moment the property is taken.[240] Consequentially, when an administrative body implements a rule that constitutes a taking, the responsible actors will automatically become constitutional violators.[241]

The dissent also contended the majority's decision will flood federal courts with state-law issues.[242] The analysis of whether a taking occurs typically turns upon complex state law and requires courts to determine the interests of the parties and their individual property rights under such law.[243] A takings analysis is distinct from other constitutional violations which require the court only to determine whether constitutional standards are met.[244] Conversely, the analysis of whether a constitutional violation has occurred rests first upon the underlying

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[233] *Id.* at 2187 (Kagan, J., dissenting).

[234] *Id.* (Kagan, J., dissenting).

[235] *Id. (*Kagan, J., dissenting).

[236] *Id.* (Kagan, J., dissenting)*; see also* Ark. Game and Fish Comm'n v. United States, 568 U.S. 23, 31 (2012).

[237] *Knick,* 139 S. Ct. at 2187 (Kagan, J., dissenting).

[238] *Id.* (Kagan, J., dissenting).

[239] *Id.* (Kagan, J., dissenting).

[240] *Id.* at 2170.

[241] *Id.* at 2187 (Kagan, J., dissenting).

[242] *Id.* (Kagan, J., dissenting).

[243] *Id.* (Kagan, J., dissenting) (quoting F.E.R.C. v. Mississippi, 456 U.S. 742, 767, n. 30 (1982) (finding that land use regulation is "perhaps the quintessential state activity").

[244] *Id.* at 2187 (Kagan, J., dissenting).

state property rights.[245] A court must examine pre-existing property rights in order to determine whether they have subsequently been taken.[246] Such local law questions are more familiar to state courts.[247]

3. *Overruling* Williamson County *Contravened the Longstanding Doctrine of Stare Decisis*

The dissent explained that deviating from stare decisis requires special justification, which the majority's opinion did not have.[248] It stated that if Congress can address an issue, the Court should allow a decision to stand regardless of whether it is correct, and allow Congress to make the necessary change.[249] The dissent explained Congress could address the *San Remo* preclusion trap with an amendment to the Full Faith and Credit Statute.[250] For this reason, it believed the majority should have adhered to *Williamson County*.[251] The dissent also explained the majority erred in claiming a lack of reliance on *Williamson County* as a justification for overruling the opinion.[252] Reliance interests are interests in protecting the "expectations of those who live under the law."[253] Subsequent changes in the law might affect those who have expectations of the law and rely upon it.[254] The dissent acknowledged that individuals and governments may not have relied on *Williamson County.*[255] However, the principle of reliance only enhances adherence to stare decisis, while a lack of reliance does not provide a reason for departure from precedent.[256] Thus, not only did the majority lack justification, but stare decisis actually favored the opposite conclusion.[257]

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[245] *Id.* (Kagan, J., dissenting).

[246] *Id.* (Kagan, J., dissenting).

[247] *Id.* (Kagan, J., dissenting).

[248] *Id.* at 2189 (Kagan, J., dissenting).

[249] *Id.* (Kagan, J., dissenting); *see also* Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 424 (1986); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

[250] *Knick,* 139 S. Ct. at 2189 (Kagan, J., dissenting). *See generally* San Remo Hotel, L.P. v. City and Cty. of San Francisco, 545 U.S. 323 (2005); Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

[251] *See Knick,* 139 S. Ct. at 2189 (Kagan, J., dissenting).

[252] *Id.* at 2190 (Kagan, J., dissenting).

[253] *See* Randy J. Kozel, *Stare Decisis as Judicial Doctrine,* 67 WASH. & LEE L. REV. 411, 415 (2010) (quoting Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurrence)).

[254] *Id.*

[255] *Knick,* 139 S. Ct. at 2190.

[256] *Id.* (Kagan, J., dissenting) (quoting Kimble v. Marvel Entm't, LLC, 576 U.S. 446 (2015)).

[257] *See Knick,* 139 S. Ct. at 2189–90.

IV. ANALYSIS AND SOLUTION

The *Knick* Court erred in overruling *Williamson County* because its interpretations of the Takings Clause and takings precedent were incorrect.[258] Its decision will lead to negative consequences: it will become impossible for governments to avoid constitutional violations and federal courts will be flooded with state-court litigation.[259] Furthermore, the doctrine of stare decisis should have swayed the majority from overruling precedent.[260] Though it should have left the problem to be solved by Congress, an amendment to the Full Faith and Credit Statute is still warranted.[261]

A. The Court Erred in Overruling Williamson County

In *Knick,* the U.S. Supreme Court overruled *Williamson County*, which held the Takings Clause included a state-litigation requirement.[262] The Court based its decision to overrule precedent on a mischaracterization of prior case law and a conceptually flawed interpretation of the Fifth Amendment.[263] Under the correct interpretation of the Fifth Amendment, a plaintiff does not have a claim for which relief can be granted until she has adhered to the state-litigation requirement.[264] The Court's decision in *Knick* will cause adverse consequences, including a flood of litigation in federal courts in addition to a greater likelihood that federal, state, and local governments will violate the Constitution.[265] Additionally, the Court's decision to overrule *Williamson County* contravened the doctrine of stare decisis.[266]

1. The Court's Interpretation of Takings Clause Precedent Was Incorrect

The Court erroneously interpreted prior case law to conclude there is a violation of the Fifth Amendment at the moment the government takes property, regardless of whether the government later grants just compensation.[267] The dissent correctly interpreted precedent when it explained the language of the Fifth Amendment requires two elements to prove a violation: first, the government

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[258] *See infra* notes 267–351 and accompanying text.

[259] *See infra* notes 352–71 and accompanying text.

[260] *See infra* notes 372–410 and accompanying text.

[261] *See infra* notes 411–53 and accompanying text.

[262] *Knick,* 139 S. Ct. at 2167.

[263] *See infra* notes 267–341 and accompanying text.

[264] *See infra* notes 342–51 and accompanying text.

[265] *See infra* notes 352–71 and accompanying text.

[266] *See infra* notes 372–410 and accompanying text.

[267] *See infra* notes 268–324 and accompanying text.

must take property, and second, the government must deny just compensation.[268] Because there are two elements, the government cannot violate the Takings Clause until it takes property *and* denies a landowner just compensation.[269] But the majority misinterpreted takings precedent to conclude the Fifth Amendment only requires one element.[270] The majority looked to cases which have explained when the government takes property, the property owner has a right to just compensation upon the taking.[271] In doing so, the Court concluded this right to just compensation necessarily arises because the government violated the Constitution.[272] First, the Court misinterpreted the holding in *Jacobs*.[273] Second, it inaccurately analogized a Fourth Amendment claim of excessive force to that of a Fifth Amendment takings claim.[274] Third, it overstated the position the *First English* Court took when looking at an earlier dissent by Justice Brennan in *San Diego Gas & Electric Co. v. San Diego*.[275] Fourth, the Court inaccurately held *Williamson County*'s reliance on *Monsanto* was misplaced.[276] Finally, the Court's decision improperly overruled decades of case law.[277]

First, the Court misinterpreted the holding in *Jacobs*.[278] This case did not say federal courts cannot require a state proceeding before the plaintiff can make a federal claim.[279] The Court in *Jacobs* simply determined the government needed to pay interest on compensation for a taking.[280] The *Jacobs* court explained, regardless of the timing of the proceeding, the Fifth Amendment gives rise to the takings claim and the right to just compensation at the time government took the private property.[281] Therefore, the *Jacobs* court concluded the government had to compensate the property owner from the date the government took the property, plus interest from that date.[282] While the Court in *Knick* correctly explained the

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[268] *See Knick,* 139 S. Ct. at 2181 (Kagan, J., dissenting).

[269] *Id.* (Kagan, J., dissenting). *See generally* United States v. Jones, 109 U.S. 513, 518 (1883).

[270] *See Knick,* 139 S. Ct. at 2170–73; *see also infra* notes 278–324 and accompanying text.

[271] *See Knick*, 139 S. Ct. at 2170–73.

[272] *See id.*; *see also infra* notes 278–324 and accompanying text.

[273] *See infra* notes 278–84 and accompanying text.

[274] *See infra* notes 285–91 and accompanying text.

[275] *See infra* notes 292–99 and accompanying text; *see also* San Diego Gas & Elec. Co. v. San Diego 450 U.S. 621, 654 (1981) (Brennan, J., dissenting).

[276] *See infra* notes 300–12 and accompanying text.

[277] *See infra* notes 313–19 and accompanying text.

[278] *See Knick,* 139 S. Ct. at 2170–71. *See generally* Jacobs v. United States (*Jacobs II*), 290 U.S. 13 (1933).

[279] *See Jacobs II,* 290 U.S. at 16 ("The only question before us is as to the right to the item of interest.").

[280] *See id.* at 17.

[281] *See id* at 16–17.

[282] *See id* at 17.

right to compensation arises at the moment of the taking, the Court erroneously extended this right when it said the government violates the Constitution at that very moment.[283] Furthermore, it incorrectly held any remedy under state law cannot restrict a federal takings claim.[284]

The Court also erroneously analogized the situation in *Knick* to a Fourth Amendment claim of excessive force.[285] *Jacobs* does not support this analogy.[286] *Jacobs* merely held a property owner has a right to compensation in an amount equivalent to what the government would have paid at the moment of the taking, plus interest.[287] Rather than holding the taking itself was prohibited, *Jacobs* permitted the taking, but held the Fifth Amendment imposed the duty to pay upon the government.[288] The Fourth Amendment prohibits the use of excessive force, meaning there is a violation of the Constitution at the moment excessive force occurs.[289] Conversely, at the moment of a taking, the government has not yet violated the Constitution because the Fifth Amendment does not prohibit governments from taking property—it simply imposes a limiting duty.[290] Therefore, the violation occurs at the moment the governmental entity denies a landowner just compensation.[291]

The Court also overstated the meaning of *First English*.[292] *First English* examined one of Justice Brennan's dissents which supported the theory that a constitutional violation occurs the moment the government takes property.[293] However, the *First English* Court did not actually adopt Justice Brennan's stance.[294] The *First English* Court simply found there is no difference between

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[283] *See Knick,* 139 S. Ct. at 2170.

[284] *See id.* at 2171.

[285] *Id.*

[286] *See Jacobs II,* 290 U.S. at 17; *see also Knick,* 139 S. Ct. at 2181 (Kagan, J., dissenting).

[287] *See Jacobs II,* 290 U.S. at 17.

[288] *Id.* at 16–17.

[289] *See* U.S. CONST. amend IV.

[290] *See* U.S. CONST. amend V; Max Kidalov & Richard H. Seamon, *The Missing Pieces of the Debate Over Federal Property Rights Legislation,* 27 HASTINGS CONST. L.Q. 1, 25 (1999) (explaining the state-litigation requirement is a ripeness consideration and is also an element of the cause of action); *see also* Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18, 21 (1940) ("The Fifth Amendment does not entitle . . . [the owner] to be paid in advance of the taking . . . ." (quoting Hurley v. Kincaid 285 U.S. 95, 104 (1932))); *Knick,* 139 S. Ct. at 2181 (Kagan, J., dissenting).

[291] *See* Kidalov & Seamon, *supra* note 290, at 25; *Knick,* 139 S. Ct. at 2181 (Kagan, J., dissenting).

[292] *Knick,* 139 S. Ct. at 2172.

[293] San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting); *see also* First English Evangelical Lutheran Church v. Cty. of Los Angeles, 482 U.S. 304, 318 (1987).

[294] *First English,* 482 U.S. at 318–19.

temporary and permanent takings.[295] Accordingly, the Court in *First English* only considered whether the Takings Clause requires the government to compensate for temporary takings.[296] It first recognized that any landowner's claim for compensation is grounded in the Constitution.[297] The *First English* Court then held, regardless of the action taken, the government must pay just compensation to the owner for the entire period during which the government engaged in a taking.[298] The *First English* Court did not hold a violation *occurs* at the time of the taking; rather, it held the obligation to pay just compensation *arises* at that time.[299]

The Court erroneously overruled *Williamson County,* which relied on *Monsanto.*[300] The Court explained *Williamson County*'s reliance on *Monsanto* was misplaced.[301] The majority argued it was misplaced because *Monsanto* sought to enjoin a federal statute, while *Williamson County* involved a claim that a regional planning commission's decision had effected a taking of plaintiff's property.[302] Furthermore, the federal statute in *Monsanto* required plaintiffs to exhaust an arbitration proceeding prior to bringing a constitutional claim.[303] The *Knick* Court explained Congress has the power to statutorily require plaintiffs to exhaust administrative procedures prior to bringing a constitutional claim and, because *Williamson County* did not involve such a statute, *Monsanto* was not applicable to *Williamson County*.[304] However, the reliance on *Monsanto* was warranted because it did address when a takings claim may be brought, which is the same question the *Knick* Court addressed.[305]

The *Knick* Court also argued that *Williamson County*'s interpretation of *Monsanto* was incorrect.[306] The *Monsanto* Court explained a takings claim was premature because the plaintiff had not initiated an arbitration proceeding.[307] If

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[295] *Id.* at 318.

[296] *Id.* at 317–18.

[297] *Id.* at 315 (referencing *San Diego,* 450 U.S. at 654–55 (Brennan, J., dissenting)).

[298] *Id.* at 318–19.

[299] *See id.* at 319.

[300] *See* Knick v. Twp. of Scott*,* 139 S. Ct. 2162, 2179 (2019); Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194–95 (1985).

[301] *See Knick,* 139 S. Ct. at 2173–74.

[302] *Id.* at 2173; *see Williamson Cty.,* 473 U.S. at 185; Ruckelshaus v. Monsanto Co.*,* 467 U.S. 986, 990 (1984).

[303] *Monsanto,* 467 U.S. at 994–95.

[304] *See Knick,* 139 S. Ct. at 2173.

[305] *See Monsanto,* 467 U.S. at 1013; *see also Knick,* 139 S. Ct. at 2184–85 (Kagan, J., dissenting).

[306] *See Knick,* 139 S. Ct. at 2173.

[307] *See Monsanto,* 467 U.S. at 1013.

the arbitration proceeding provided just compensation, the plaintiff would have no takings claim.[308] The majority posited that, even if the plaintiff in *Monsanto* had no claim following an arbitration proceeding, it was because the constitutional violation had been remedied, not because it had not occurred.[309] However, the *Monsanto* Court held that the availability of a claim for compensation, through arbitration, precluded a claim for a constitutional violation.[310] A violation does not occur until there has been a denial of just compensation; therefore, if the government provided just compensation, then there is no violation.[311] Because *Monsanto* held there was no Fifth Amendment takings violation until a denial of compensation through the provided mechanism, *Williamson County* correctly interpreted *Monsanto*.[312]

Finally, the Court's decision to overrule *Williamson County* consequently overruled decades of case law.[313] In overruling *Williamson County*, the Court also overruled *Cherokee Nation* and the subsequent cases which relied upon its reasoning.[314] *Cherokee Nation* held the government does not need to pay compensation in advance of a taking, and the government's procedure to provide compensation after a taking is sufficient to satisfy the Fifth Amendment.[315] Following *Cherokee Nation*, the U.S. Supreme Court repeatedly held that as long as there is a procedure for providing just compensation, there has been no violation of the Fifth Amendment.[316] Any means the government provides litigants to obtain just compensation is sufficient for constitutional purposes.[317]

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[308] *Id.* at 1013.

[309] *Knick,* 139 S. Ct. at 2173.

[310] *See Monsanto,* 467 U.S. at 1013.

[311] *See infra* notes 325–51 and accompanying text.

[312] *See Monsanto,* 467 U.S. at 1013; *see also supra* notes 306–11 and accompanying text. The *Knick* court also correctly pointed out *Williamson County*'s mischaracterization of the Tucker Act as a prerequisite to a takings claim rather than as a takings claim itself. *Knick,* 139 S. Ct. at 2174. But *Williamson County* only noted the federal Tucker Act as an analogy to state inverse condemnation claims—the Court's reasoning did not depend on the characterization of the Tucker Act. *See* Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194–95 (1985).

[313] *See Knick,* 139 S. Ct. at 2177; *see also infra* notes 314–18 and accompanying text.

[314] *See Knick*, 139 S. Ct. at 2182; *see also* Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641, 659 (1890).

[315] *Cherokee*, 135 U.S. at 659.

[316] *See Knick,* 139 S. Ct. at 2181–83 (Kagan J., dissenting); Horne v. Dep't of Agriculture, 569 U.S. 513, 525–26 (2013); Albert Hanson Lumber Co. v. United States, 261 U.S. 581, 586–87 (1923) (explaining that just compensation is a condition placed on the government when it takes property). Though title of the property does not pass until compensation has been paid, the government can take possession of the property so long as the landowner has a procedure for obtaining just compensation. *Id.* at 587.

[317] *See generally* Reg'l Rail Reorganization Act Cases, 419 U.S. 102 (1974); Yearsley v. W. A. Ross Constr. Co., 309 U.S. 18 (1940); Hurley v. Kincaide, 285 U.S. 95 (1932); Crozier v. Fried. Krupp Aktiensgesellschaft, 224 U.S. 290 (1912); Williams v. Parker, 188 U.S. 491 (1903).

Through *Knick*, the Court overruled cases asserting that a takings violation does not occur until the government denies just compensation.[318] The decision to overrule precedent requires special justification, and the *Knick* majority did not provide sufficient justification.[319]

A correct interpretation of the Fifth Amendment Takings Clause did not warrant overruling *Williamson County*.[320] A constitutional claim does not arise until there has been a taking *and* a subsequent denial of just compensation.[321] The cases which the *Knick* court relies on only provide there is an obligation to pay just compensation, not that a violation occurs at the moment the government takes property.[322] A takings plaintiff must first avail herself of the available statutory procedure to obtain just compensation.[323] Until a denial of such compensation, a takings claim is premature.[324]

2. The Court's Interpretation Was Conceptually Flawed

The *Knick* Court argued the Fifth Amendment's plain meaning indicates a violation occurs at the moment of the taking.[325] This argument directly contradicts the Court's repeated interpretation that the Fifth Amendment does not require advanced compensation.[326] To interpret the Fifth Amendment to say a violation occurs at the moment the government takes property would essentially require the government to pay for any taking in advance in order to avoid violating the

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[318] *See supra* notes 278–317 and accompanying text.

[319] *See* Arizona v. Rumsey, 467 U.S. 203, 212 (1984) ("Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification."); *see also* Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1875 (2008) ("[T]he Court may overrule its own decisions only when there is a special justification recognized in stare decisis beyond mere wrongness.") (internal quotation marks omitted).

[320] *See infra* notes 321–24 and accompanying text.

[321] *See* U.S. CONST. amend V; Kidalov & Seamon, *supra* note 290, at 25 (explaining the state-litigation requirement is a ripeness consideration and is also an element of the cause of action).

[322] *See, e.g.*, First English Evangelical Lutheran Church v. Cty. of Los Angeles, 428 U.S. 304 (1987); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); Jacob v. United States (*Jacobs II*) 290 U.S. 13 (1933); *see also supra* notes 278–312 and accompanying text.

[323] *See Monsanto*, 467 U.S. at 1013.

[324] *See supra* notes 267–323 and accompanying text.

[325] *See* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2170 (2019).

[326] *See* Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18, 21 (1940) ("The Fifth Amendment does not entitle . . . [the owner] to be paid in advance of the taking." (quoting Hurley v. Kincaid, 285 U.S. 95, 104 (1932))); Sweet v. Rechel, 159 U.S. 380, 403 (1895) (The Fifth Amendment "does not provide or require that compensation actually be paid in advance of the occupancy of the land to be taken."); *see also* Nicole Stelle Garnett, *The Public Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 972 (2003) [hereinafter *The Public Use Question*]; Nicole Stelle Garnett, *Planning as Public Use?,* 34 ECOLOGY L.Q. 443, 460 (2007) [hereinafter *Planning as Public Use?*].

Constitution.[327] The Court further argued the state-litigation requirement would render 42 U.S.C. § 1983 meaningless.[328] However, the state-litigation requirement would do the opposite—it would instead give rise to a claim under § 1983.[329]

First, though the Court explains its interpretation does not require advanced compensation, it effectively does.[330] If a violation occurs at the moment of taking, as the *Knick* Court says it does, the government must pay compensation prior to taking land.[331] If it does not do so, the government will have committed a violation.[332] This contradicts prior case law, which states the owner of land is not entitled to payment prior to a taking.[333] Therefore, the Court's reasoning that advanced compensation is not required is flawed.[334]

The Court also incorrectly concluded the state-litigation requirement renders 42 U.S.C. § 1983 meaningless.[335] The Court explained a litigant does not need to bring a lawsuit in state court prior to a lawsuit in federal court because a state-litigation requirement will undermine the purpose of § 1983.[336] However, a violation of the Fifth Amendment does not occur until the government denies compensation through a state remedy.[337] Landowners must first avail themselves of the proper state procedures before a court can find the government has denied their rights.[338] When the state court denies compensation, a plaintiff has a federal

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[327] *See infra* notes 330–34 and accompanying text.

[328] *See Knick,* 139 S. Ct. at 2172–73.

[329] S*ee* Kidalov & Seamon, *supra* note 290, at 52–53 ("Section 1983 requires proof of a 'deprivation' of a federal right. The Just Compensation Clause does not give property owners a right to be free from governmental takings of their property for public use. Thus, such a taking does not, standing alone, cause a 'deprivation' of a federal right under section 1983.").

[330] *See infra* notes 331–34 and accompanying text.

[331] *See Knick*, 139 S. Ct. at 2170 ("[A] property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it.").

[332] *Id.*

[333] *See* Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18, 21 (1940); Hurley v. Kincaid, 285 U.S. 95, 104 (1932) ("The Fifth Amendment does not entitle . . . [the owner] to be paid in advance of the taking."); *see also Planning as Public Use?*, *supra* note 326, at 460.

[334] *See supra* notes 330–33 and accompanying text.

[335] *See Knick,* 139 S. Ct. at 2172–73.

[336] *Id.*

[337] *See* Kidalov & Seamon, *supra* note 290, at 36 (explaining the state-litigation requirement is a ripeness consideration and is also an element of the cause of action); Sweet v. Rechel, 159 U.S. 380, 403 (1895) (The Fifth Amendment "does not provide or require that compensation actually be paid in advance of the occupancy of the land to be taken."); *see also Yearsley*, 309 U.S. at 21; *Hurley*, 285 U.S. at 104; *supra* notes 267–324, *infra* notes 342–51 and accompanying text.

[338] *See* Kidalov & Seamon, *supra* note 290, at 52–53 ("Section 1983 requires proof of a 'deprivation' of a federal right. The Just Compensation Clause does not give property owners a right to be free from governmental takings of their property for public use. Thus, such a taking does not, standing alone, cause a 'deprivation' of a federal right under section 1983.").

claim to bring pursuant to § 1983.[339] Because § 1983 allows a plaintiff to bring a claim for a violation of a constitutional right, a claim under that statute would arise at the time the violation occurs—when compensation is denied.[340] Therefore, the state-litigation requirement would not "defeat" the purpose of § 1983; rather, it would give rise to a claim under that statute.[341]

3. Prior to Satisfying the State-Litigation Requirement, A Plaintiff Has No Claim for Relief

Courts have cast the state-litigation requirement as both a jurisdictional and prudential ripeness rule.[342] However, it is more fundamental because the state-litigation requirement is also an element of a takings claim.[343] The Court in *Williamson County* treated the ripeness consideration as both a justiciability concern and a cause of action concern.[344] The Court implied that it is a

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[339] *Id.*; *see also* 42 U.S.C. § 1983 (2018).

[340] *See* 42 U.S.C. § 1983 (2018); *see also supra* note 337 and accompanying text.

[341] *See supra* notes 335–40 and accompanying text.

[342] *See* Kidalov & Seamon, *supra* note 290, at 25–26 ("By calling exhaustion a 'ripeness' requirement, the Court has linked exhaustion to justiciability, of which ripeness is a component. The justiciability doctrine reflects both Article III [(jurisdictional)] limits and 'prudential' rules of judicial 'self-governance.' The Article III limits of the justiciability doctrine restrict[s] the power of the federal courts . . . to decide[e] 'cases' and 'controversies.' Article III would therefore bar . . . federal courts [from hearing] takings claims by plaintiffs who had not met Williamson's exhaustion requirement, if that requirement were a necessary ingredient of an Article III 'case or controversy.' Article III would impose no such bar, however, if the exhaustion requirement were instead 'prudential.'"). While there are many arguments about the nuances of the ripeness consideration of the state-litigation requirement, this paper does not discuss those. The U.S. Supreme Court indicated a shift in the state-litigation rule from a jurisdictional requirement to a prudential rule. *See* Breemer, *supra* note 74, at 338–39; Kidalov & Seamon, *supra* note 290, at 25–26. However, when viewed as a ripeness rule, the U.S. Supreme Court should hold the state-litigation requirement is a jurisdictional rule to prevent defendants from removing takings claims from state court only to have them dismissed under the state-litigation requirement. *See* Breemer, *supra* note 74 at 332–37 (explaining that many takings claims are removed to federal court only to be later dismissed based upon *Williamson County*); Scott A. Keller, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the Williamson County State Litigation Requirement for Regulatory Takings Claims,* 85 TEX. L. REV. 199, 219–21 (2006) (explaining that Supreme Court precedent has allowed for removal of takings claims). If the court lacked jurisdiction, there would be no basis for removal. *Id.* (explaining that if the state-litigation rule was a jurisdictional requirement, the Supreme Court was incorrect to allow removal because it lacked jurisdiction); *see also* 28 U.S.C. § 1441(a) (2018).

[343] *See* Gene R. Nichol, *Ripeness and the Constitution,* 54 U. CHI. L. REV. 153, 176 (1987) (explaining that courts can use the doctrine of ripeness to determine if a litigant has an actionable claim); *see also* Katherine Mimms Crocker, *Justifying a Prudential Solution to the Williamson County Ripeness Puzzle*, 40 GA. L. REV. 163, 177 (2014) ("Williamson County's compensation prong can be understood as . . . an elemental ingredient of what it takes to inflict injury under the text of the Takings Clause . . . .").

[344] *See* Kidalov & Seamon, *supra* note 290, at 36 (explaining that the state-litigation requirement is a ripeness consideration and also an element of the cause of action); Crocker, *supra* note 343, at 176 (explaining Williamson's ripeness requirement can be viewed as either "Article III

justiciability concern because until a plaintiff exhausted state remedies, the claim was not ripe.[345] The ripeness requirement refers to the notion that until a claim is "ripe," a court will not hear it.[346] The Court also implied that the state-litigation requirement is an element of a Fifth Amendment takings claim; therefore, until it is satisfied, the plaintiff does not have a cause of action.[347]

The notion that the state-litigation requirement is an element of a Fifth Amendment claim has its basis in the correct interpretation of the Fifth Amendment.[348] A takings plaintiff must state a claim for which relief can be granted, and the claim for which relief can be granted is in the language of the Fifth Amendment—the government must not take property without providing compensation.[349] The *Williamson County* Court further explained that until a plaintiff has availed herself of the state procedures and been denied compensation, the plaintiff has "no claim" for a taking against the government.[350] Therefore, until the state-litigation element is met, a plaintiff does not have a cause of action.[351]

4. The Court's Decision Will Make Constitutional Violations Inevitable and Will Flood Federal Courts with State Issues

Aside from the majority's erroneous reasoning, it also failed to recognize the gravity of the adverse consequences of its decision.[352] However, the dissent correctly acknowledged two consequences which will result from overruling *Williamson County*: (1) well-meaning governments will inevitably become constitutional violators and (2) federal courts will have to address a large influx of state-law issues.[353]

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based" ripeness or as an element of a takings claim); Nichol, *supra* note 343, at 162 (explaining one application of ripeness does not relate to jurisdictional power, but only to the actionability of a claim). Justiciability means "[t]he quality, state, or condition of being appropriate or suitable for adjudication by a court." *Justiciability,* BLACK'S LAW DICTIONARY (11th ed. 2019). "The central concepts . . . of justiciability . . . [include] advisory opinions, feigned and collusive cases, standing, *ripeness,* mootness, political questions, and administrative questions." *Id.* (emphasis added).

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

[346] *See Ripeness,* BLACK'S LAW DICTIONARY (11th ed. 2019) ("The requirement that this state must exist before a court will decide a controversy.").

[347] *See Williamson Cty.,* 473 U.S. at 194–95 (1985); Kidalov & Seamon, *supra* note 290, at 36; Crocker, *supra* note 343, at 176.

[348] *See supra* notes 267–341 and accompanying text.

[349] FED. R. CIV. P. 8(a)(2); U.S. CONST. amend V; *see also* Kidalov & Seamon, *supra* note 290, at 36–37; *supra* note 337 and accompanying text.

[350] *See Williamson Cty.,* 473 U.S. at 194–95; Kidalov & Seamon, *supra* note 290, at 36–37; Crocker, *supra* note 343, at 176–77; Nichol, *supra* note 343, at 169.

[351] *See supra* notes 348–50 and accompanying text.

[352] *See infra* notes 353–71 and accompanying text.

[353] *See* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2187 (2019) (Kagan, J., dissenting); *see also supra* notes 233–47; *infra* notes 354–71.

First, it will be nearly impossible for governments to implement land use regulation without violating the Constitution.[354] The holding in *Knick* implies the government will have to pay advanced compensation to avoid such a constitutional violation.[355] Though a limited number of bright-line rules exist regarding what constitutes a taking, "most takings claims turn on situation-specific factual inquiries."[356] The ways in which regulations can interfere with property interests are limitless.[357] Furthermore, there is no definite standard for determining if a regulation reaches the level of a taking.[358] Accordingly, at the time an administrative body enacts a regulation, it is impossible to discern with certainty whether the regulation will result in a taking.[359] If a plaintiff brings a takings claim and the court determines a regulation does effect a taking, the court could find the government has violated the Constitution.[360] Furthermore, to satisfy the "just compensation" requirement, the government must ensure it pays the landowner the correct amount.[361] It then follows, to avoid a constitutional violation, the government must determine two things prior to enacting any regulation: whether the regulation will constitute a taking and the amount the government will have to pay to fully compensate the landowner.[362]

Second, removing the state-litigation requirement will flood the federal courts with state-law issues.[363] Takings law begins in property law, which is primarily a state-law concern; therefore, state courts are a more proper forum to determine whether there has been a taking, as well as the amount of compensation

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[354] *See infra* notes 355–62 and accompanying text.

[355] *See* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2181–82 (2019) (Kagan, J., dissenting); *see also infra* notes 356–62 and accompanying text.

[356] Ark. Game and Fish Comm'n v. United States, 568 U.S. 23, 32 (2012).

[357] *Id.* at 31.

[358] *Id.*

[359] *See id.*; *see also* Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 644–45 (2014) (explaining the determination of whether a taking will occur requires an ad hoc inquiry into numerous factors and the Court has provided little guidance on how to apply them). An "ad hoc inquiry" refers to those cases in which the Court must look to the specific facts and circumstances of that case to make a determination of whether there was a taking. *See* Pa. Cent. Transp. Co. v. New York City, 438 U.S. 104, 123–24 (1978).

[360] *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

[361] *See, e.g.*, Gary Knapp, Annotation, *Supreme Court's View as to What Constitutes "Just Compensation" Required, Under Federal Constitution's Fifth Amendment, for Taking of Personal Property for Public Use*, 155 L. ED. 2D. 1185, 2 (2012) (explaining the Supreme Court has declined to provide a standard formula for determining just compensation).

[362] *See Knick,* 139 S. Ct. at 2181 (Kagan, J., dissenting); *see also supra* notes 354–61 and accompanying text.

[363] *See infra* notes 364–71 and accompanying text.

the government must pay.[364] The U.S. Supreme Court has explained the Constitution does not create property rights, but rather that state property laws create property rights.[365] To determine a violation of the Takings Clause, courts must first discern the extent of a property interest under the applicable state law.[366] Every regulation does not rise to the level of a compensable taking; therefore, aside from a limited number of per se takings, each regulation is subject to an ad hoc inquiry to determine whether it constitutes a taking.[367] The court must determine whether the plaintiff had a property right prior to the regulation, and whether the regulation subsequently affected that right.[368] Removing the state-litigation requirement opens the doors of the federal courts to hear many more takings cases.[369] Plaintiffs who were previously required to first seek compensation in state court will now have the option to begin in federal court, thus greatly increasing state-law issues being addressed in the federal docket.[370] Such issues

[364] *See The Demise of Federal Takings Litigation, supra* note 90, at 289–90 ("Consider an example of differences in state law property: the rights of waterfront landowners. Oregon recognizes customary rights in the public to cross the dry sand area between ordinary high tide and the vegetation line. New Hampshire, by contrast, rejects customary rights altogether. Against that background, suppose a municipality in Oregon were to prohibit construction of any structures within one hundred feet of the mean high-water mark. If the Supreme Court were to reject a takings challenge to that ordinance, the Court's opinion would provide little guidance with respect to the constitutionality of an identical ordinance enacted by a New Hampshire municipality, because the background property law principles are so different."); *see also Knick*, 139 S. Ct. at 2187–88 (Kagan, J., dissenting) (explaining it is difficult for federal courts to address state-specific property issues and that those issues should remain in the state courts); Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029–30 (1992); F.E.R.C. v. Mississippi, 456 U.S. 742, 767 n. 30 (1982) ("[R]egulation of land use is perhaps the quintessential state activity.").

[365] *Phillips*, 524 U.S. at 164 ("Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" (quoting Bd. of Regents v. Roth 408 U.S. 564, 577 (1972)).

[366] *See Lucas,* 505 U.S. at 1029 (explaining that if a regulation prohibits something state law also prohibits, it will not be a taking); *Phillips*, 524 U.S. at 164.

[367] *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005) ("[G]overnment regulation of private property may, *in some instances*, be so onerous that its effect is tantamount to a direct appropriation or ouster—and . . . such 'regulatory takings' may be compensable under the Fifth Amendment.") (emphasis added); Pa. Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). "[A]ny law that is unconstitutional per se violates the constitution inherently and may not be applied to any situation in a constitutionally acceptable manner." *Per se*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY, COMPACT EDITION 796 (Stephen Michael Sheppard, ed., 2011).

[368] *See Lucas,* 505 U.S. at 1029–32 (remanding to the state court to determine if the background principles of state property law already prohibited the uses the government sought to regulate).

[369] *See* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2188–89 (2019) (Kagan, J., dissenting) (the majority's decision "sends a flood of complex state-law issues to federal courts").

[370] *Id.* at 2187–89 (Kagan, J., dissenting) (the majority's decision "channels to federal courts a (potentially massive) set of cases that more properly belongs, at least in the first instance, in state courts—where *Williamson County* put them. . . . [I]t makes federal courts a principal player in local and state land-use disputes").

are better suited for state rather than federal courts because state courts are more familiar with and apt to address such state-specific laws.[371]

5. The Court's Decision was Incorrect Based on Stare Decisis

The majority looked to various factors to determine if it should contradict the doctrine of stare decisis.[372] These factors include: "the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision."[373]

The majority first explained the quality of the *Williamson County* Court's reasoning was "wrong" and "ill founded."[374] It also stated it "conflicted with much of our takings jurisprudence."[375] The majority conflated the factors of the quality of reasoning and the consistency with other decisions.[376] It explained that the *Williamson County* Court wrongly interpreted *Monsanto* and ignored *Jacobs* and its progeny, which held that the Fifth Amendment gives a landowner the right to compensation at the moment of taking.[377] However, these assertions are incorrect because they are based on the majority's mischaracterizations of *Jacobs*, *First English*, and *Monsanto*.[378] The decisions the *Williamson County* Court relied on merely held that the obligation to pay just compensation arises at the time of the taking, not that a violation of the Fifth Amendment occurs at the moment of the taking.[379] *Williamson County* followed this jurisprudence when it held that a takings plaintiff has not suffered a constitutional violation until the plaintiff has exhausted her remedies through state-provided procedures.[380] Therefore, *Williamson County*'s reasoning was not flawed and did not conflict with prior takings jurisprudence.[381]

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[371] *See Lucas,* 505 U.S. at 1029–32 (remanding to the state court to determine if the background principles of state property law already prohibited the uses the government sought to regulate); *see also supra* notes 364–368 and accompanying text.

[372] *Knick,* 139 S. Ct. at 2177–78; *see also supra* notes 178–201 and accompanying text.

[373] *Knick,* 139 S. Ct. at 2178.

[374] *Id.*

[375] *Id.*

[376] *Id.*

[377] *Id.*

[378] *See* Jacobs v. United States (*Jacobs II*), 290 U.S. 13 (1933); First English Evangelical Lutheran Church v. Cty. of Los Angeles, 428 U.S. 304 (1987); Ruckelshaus v. Monsanto, 467 U.S. 986 (1984); *see also supra* notes 278–312 and accompanying text.

[379] *See supra* notes 278–312 and accompanying text.

[380] *See generally* Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194–95 (1985).

[381] *See supra* notes 374–80 and accompanying text.

Next, the majority improperly decided *Williamson County* was an unworkable decision.[382] The majority argued that because *Williamson County* and the Full Faith and Credit Statute barred takings plaintiffs from federal court, it was unworkable.[383] However, the fact that it barred takings plaintiffs from federal court is not sufficient to conclude the state-litigation requirement was unworkable.[384] The doctrine of unworkability looks to the ease with which litigants, courts, and others are able to interpret and apply a rule.[385] A decision that is overly vague or confusingly complex requires a court to find that precedent is unworkable.[386] Conversely, a rule that is uncomplicated and clear requires a court to find that precedent workable regardless of any undesirable effects.[387] The state-litigation requirement provided a clear rule to which litigants had adhered for many years.[388]

Even if the state-litigation requirement was unworkable, a problem rooted within a statutory rule should compel courts to apply stare decisis with more force.[389] Because Congress can address such problems, the courts need not address those problems and should adhere to stare decisis.[390] In this case, the problem is

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[382] *See infra* notes 383–88 and accompanying text.

[383] *See* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2178–79 (2019).

[384] *See infra* notes 385–88 and accompanying text.

[385] *See* Randy J. Kozel, *Stare Decisis in the Second-Best World*, 103 CAL. L. REV. 1139, 1162–63 (2015) ("Unworkability refers to the 'mischievous consequences to litigant and courts alike' that can result from a vague or byzantine rule. . . . [It] deal[s] with whether courts, litigants, and other stakeholders have been able to understand and apply the rule without undue difficulty." (quoting Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965))). "The proper reasons for paying attention to a decision's workability are procedural in nature. . . . A rule of decision that is hopelessly convoluted or exceedingly vague renders a precedent unworkable regardless of its substantive effect. Likewise, a rule of decision that is unmistakably clear must be acknowledged as workable even if its substantive effects have been disastrous." *Id.*; *see also* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 152 (Alfred A, Knopf, ed.) (2010) (stating that unworkable legal rules "may have . . . created legal conflict or otherwise caused serious harm").

[386] *See supra* note 385 and accompanying text.

[387] *See supra* note 385 and accompanying text.

[388] *See* Williamson Cty. Reg'l Planning Comm'n. v. Hamilton Bank, 473 U.S. 172, 194 (1985). The state-litigation requirement was again upheld twenty-eight years later. *See* Horne v. Dep't of Agriculture, 569 U.S. 513, 525 (2013).

[389] *See* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2189 (2019) (Kagan, J., dissenting); *see also* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2101 (2018) ("The [stare decisis] bar is even higher in fields in which Congress 'exercises primary authority' and can, if it wishes, override this Court's decision with contrary legislation.") (Roberts, J., dissenting) (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 799 (2014)); Square D. Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 424 (1986) ("*Stare decisis* is usually the wise policy because in most matters, it is more important that the applicable rule of law be settled than it be settled right. . . . This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation." (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting))).

[390] *See Knick,* 139 S. Ct. at 2189 (Kagan, J., dissenting); *South Dakota,* 138 S. Ct. at 2101; *Square D. Co.,* 476 U.S. at 424; *Burnet,* 285 U.S. at 406.

rooted within the Full Faith and Credit Statute.[391] Because Congress can amend this statute and fix the problem the *Knick* Court attempted to correct, the Court should have left it to Congress.[392]

The majority was also wrong to conclude that because there have been no reliance interests on *Williamson County*, it was justified in straying from stare decisis.[393] While the absence of reliance interests may reduce the role of stare decisis because no one has used the precedent to serve as a "guide for lawful behavior," this was not enough justification for the Court to overrule *Williamson County.*[394] Although it may be true there are no reliance interests on *Williamson County*, the lack of reliance alone is insufficient to justify overruling a case.[395] The Court has used reliance interests as a justification for adhering to precedent, but the court should not use their absence to stray from stare decisis.[396] Therefore, because the other factors did not justify the Court in overruling precedent, the lack of reliance interests was not sufficient to justify contradicting the doctrine of stare decisis.[397]

Additionally, the majority incorrectly justified its decision to stray from stare decisis because of the evolution of the state-litigation requirement.[398] This justification is incorrect for two reasons: first, the justification for the state-litigation requirement has not evolved, and second, evolution is not a justification

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[391] *See supra* notes 79–97; *infra* notes 418–20 and accompanying text.

[392] *See Knick,* 139 S. Ct. at 2189 (Kagan, J., dissenting); *see also infra* notes 418–30 and accompanying text.

[393] *See infra* notes 394–97 and accompanying text. Reliance interests refer to whether anyone has reasonably relied on a court's prior decision. *See generally* Kozel*, supra* note 253, at 418.

[394] United States v. Gaudin*,* 515 U.S. 506, 521 (1995); *see* Payne v. Tennessee, 501 U.S. 808, 828 (1991) ("Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved . . . ."). The U.S. Supreme Court has also explained that the role of stare decisis is reduced "when the rule is not only procedural but rests upon an interpretation of the Constitution." *Gaudin*, 515 U.S. at 521. The majority argued this was the case in *Knick*. *See Knick,* 139 S. Ct. at 2177. However, this does not provide justification to overrule *Williamson County*, because it simply reduces the role of stare decisis. *See Gaudin,* 505 U.S. at 521. Because all other factors support adhering to stare decisis, this alone would not be sufficient. *See id.*; *see also supra* notes 374–92 and accompanying text; *infra* notes 398–410 and accompanying text.

[395] *See Gaudin*, 515 U.S. at 521; Emery G. Lee III, *Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases,* 33 U. TOL. L. REV. 581, 605 (2002).

[396] *See* Alexander Lazaro Mills, *Reliance by Whom? The False Promise of Societal Reliance in Stare Decisis Analysis*, 92 N.Y.U. L. REV. 2094, 2121 (2017) (quoting Lee, *supra* note 395, at 605); BREYER, *supra* note 385, at 152 ("[T]he public's reliance on a decision argues strongly . . . against overruling an earlier case.").

[397] *See* Lee*, supra* note 395 at 605 and accompanying text; *see also supra* notes 393–96 and accompanying text.

[398] Knick v. Twp. of Scott, 139 S. Ct. 2162, 2178 (2019); *see also supra* notes 74–78, 194 and accompanying text.

for the Court to abandon stare decisis.[399] First, the Court had not changed the justification for the state-litigation requirement until *Knick*.[400] The majority merely looked to the U.S. Supreme Court's recasting of the state-litigation requirement from a jurisdictional rule to a prudential rule as its basis for determining the justification had evolved.[401] Though the state-litigation requirement may have developed from a jurisdictional rule to a prudential rule, until *Knick*, the justification for the rule remained the same—there was no constitutional violation until the government denied just compensation.[402] Therefore, the state-litigation requirement was justified by the rule that there was no claim to be made in federal court for a violation of the Fifth Amendment until the government denied just compensation.[403] This rule was reiterated twenty-eight years after *Williamson County* in *Horne v. Department of Agriculture* when the U.S. Supreme Court cited the state-litigation requirement.[404] Further, even if some argue that the state-litigation requirement has evolved, evolution has little foundation in U.S. Supreme Court jurisprudence as a justification for straying from stare decisis.[405] More importantly, if the evolution of the law is a justification for overruling the law, then laws would never have legs to stand on.[406] To say a court should overrule a decision based solely on the evolution of the law justifies the court in overruling every case.[407] The law is ever-changing, hence the need for the doctrine of stare decisis.[408] A reliable judicial system and predictable outcomes are the basis of a fair system.[409] All of these theories support adhering to the principle of stare decisis.[410]

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[399] *See infra* notes 400–10 and accompanying text.

[400] *See Knick,* 139 S. Ct. at 2170; *see also id.* at 2190 (Kagan, J., dissenting)

[401] *Id.* at 2178.

[402] *Id.* at 2170 (overruling *Williamson County* and holding, contrary to *Williamson County*, a violation of the Takings Clause occurs at the moment the government takes private property without providing compensation).

[403] *Id.*; *see also* Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194–95 (1985).

[404] *See* Horne v. Dep't of Agriculture, 569 U.S. 513, 525 (2013).

[405] *Knick,* 139 S. Ct. at 2190 (Kagan, J., dissenting) ("[T]he majority's only citation is to last Term's decision overruling a 40-year-old precedent.").

[406] *See* Nina Varsava, *How to Realize the Value of Stare Decisis: Options for Following Precedent*, 30 YALE J.L. & HUMAN. 62, 70 (2018) ("By providing stability of law that has been decided, stare decisis is the foundation of a nation governed by law." (quoting Lighting Ballast Control LLC v. Philips Elecs. N. Am. Corp., 744 F. 3d 1272, 2181 (Fed. Cir. 2014))); Daniel A. Farber, *The Rule of Law and the Law of Precedents,* 90 MINN. L. REV. 1173, 1202 (2006) ("If precedent carried no weight, whatever the Court may say about constitutional meaning today would be up for grabs tomorrow.").

[407] *See* Farber, *supra* note 406, at 1202–03.

[408] *See id.*

[409] *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991) (The doctrine "promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.").

[410] *See supra* notes 372–409 and accompanying text.

B. Congress Should Amend the Full Faith and Credit Statute to Allow Property Owners to Bring Takings Claims in Federal Court Following State Court Proceedings

Takings claimants' inability to access federal courts required a remedy.[411] While the U.S. Supreme Court thought it found one when deciding *Knick*, its solution was unsatisfactory.[412] The Court's interpretation of the Fifth Amendment had been consistent for over forty years prior to *Knick*.[413] Rather than upholding the state-litigation requirement and requiring Knick to seek an inverse condemnation action in state court, the Court overturned several decades of precedent.[414] Instead, the Court should have decided the case consistently with precedent and stare decisis, while simultaneously encouraging Congress to make changes.[415] Although the Court did not encourage Congress in *Knick*, it is still imperative for Congress to address the catch-22 scenario *Knick* exposed.[416] This situation would be best remedied by a legislative amendment to the Full Faith and Credit Statute as proposed below.[417]

1. Proposed Amendment

This Note proposes an amendment to the Full Faith and Credit Statute. It would appear as the fourth and final paragraph, and is reflected below in the context of the entire statute:

> The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

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[411] *See supra* notes 125–43 and accompanying text.

[412] *See supra* notes 267–410 and accompanying text.

[413] *See* Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194–95 (1985). The state-litigation requirement was again upheld twenty-eight years later. *See* Horne v. Dep't of Agriculture, 569 U.S. 513, 525 (2013).

[414] *See supra* notes 313–18 and accompanying text.

[415] *See infra* notes 425–30 and accompanying text.

[416] *See infra* notes 431–53 and accompanying text.

[417] *See infra* notes 418–24, 431–53 and accompanying text.

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, 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, Territory or Possession from which they are taken.
>
> Claims brought under the Fifth Amendment Takings Clause through the Fourteenth Amendment in State Court may be brought anew in Federal Court, with the Federal Court affording deference to the State Court's factual findings and legal conclusions regarding state-law based property interests.

2. *Although Congress Should Have Amended the Full Faith and Credit Statute Prior to* Knick*, Doing So Now Would Alleviate Future Concerns and Problems Caused by* Knick

The Full Faith and Credit Statute requires all courts to give a state court decision the same effect it would have in the state court.[418] In other words, this statute requires federal courts to apply the preclusion rules prescribed by the state in which the decision was made.[419] Consequently, if the state court would have held that there is a preclusive effect on the decision within that state, there is a preclusive effect upon the decision in federal court, and the claim is barred in federal court.[420] Though the catch-22 should have been left to Congress, *Knick*'s decision will allow many takings claimants to avoid the problem of preclusion in federal courts by initially bringing their claims in that forum.[421] However, a statutory amendment is still warranted to alleviate federalism and uniformity concerns, as well as future problems following the *Knick* decision.[422] Even after *Knick*, some takings claimants may still be barred from federal court because of

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[418] *See The Demise of Federal Takings Litigation*, *supra* note 90, at 271.

[419] *See Breemer*, *supra* note 74, at 328; Robert H. Smith, *Full Faith and Credit and Section 1983: A Reappraisal,* 63 N.C. L. REV. 59, 60–61 (1984). Preclusion includes the doctrines of both issue preclusion and claim preclusion. *Preclusion,* BLACK'S LAW DICTIONARY (11th ed. 2019). Issue preclusion is "[t]he binding effect of a judgment as to matters actually litigated and determined in one action on later controversies between the parties involving a different claim from that on which the original was based." *Collateral Estoppel,* BLACK'S LAW DICTIONARY (11th ed. 2019). Claim preclusion is "[a]n affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been—but was not—raised in the first suit." *Res Judicata,* BLACK'S LAW DICTIONARY (11th ed. 2019).

[420] *See supra* note 419 and accompanying text.

[421] *See* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2179 (2019).

[422] *See infra* notes 431–53 and accompanying text.

preclusion.[423] To avoid these situations, Congress should limit the Full Faith and Credit Statute's preclusive effect through an amendment.[424]

Different text in the Full Faith and Credit Statute would have eliminated the problems associated with the *Knick* Court's decision to overrule *Williamson County*.[425] An amendment prior to *Knick* would have prevented the need to overrule several decades of legal decisions and make an unfounded departure from stare decisis, while also preventing far-reaching adverse consequences for governments as well as federal courts.[426] The majority in *Knick* contended that such an amendment would not address the issue of the state-litigation requirement.[427] While this may be true, due to the prior jurisprudence and the correct conceptual interpretation of the Fifth Amendment, there was no support for the notion that a constitutional claim was available before litigants exhausted state-provided remedies.[428] Because of this, the state-litigation requirement was necessary.[429] Therefore, amending the Full Faith and Credit Statute would have resolved the inability of plaintiffs to access federal courts following their exhaustion of state procedures.[430]

The proposed amendment to the Full Faith and Credit Statute would alleviate negative concerns and consequences following *Knick*.[431] One reason is that it would provide a balance between the respective involvement of the state and federal judiciaries in takings litigation, which would mitigate federalism concerns.[432] Fifth Amendment challenges have roots in both federal and state property law.[433] This is because Fifth Amendment challenges are distinct constitutional claims in which state law provides the background principles for defining the property interest at issue, while federal law provides the standards

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[423] *See infra* notes 448–53 and accompanying text.

[424] *See infra* notes 448–53 and accompanying text.

[425] *See infra* notes 426–30 and accompanying text.

[426] *See supra* notes 267–324, 352–410 and accompanying text.

[427] *See* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2179 (2019).

[428] *See supra* notes 267–351 and accompanying text.

[429] *See supra* notes 267–351 and accompanying text.

[430] *See supra* notes 418–29 and accompanying text.

[431] *See infra* notes 432–53 and accompanying text.

[432] *See Federalism*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The legal relationship and distribution of power between the national and regional governments within a federal system of government, and in the United States particularly, between the federal government and the state governments."); Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464, 490 (2000) (explaining federalism allocates power between the state and federal governments); *The Demise of Federal Takings Legislation*, *supra* note 90, at 288 (explaining that delegating takings cases to state courts is supported by federalism concerns); *see also infra* notes 433–41 and accompanying text.

[433] *See generally* U.S. CONST. amend. V; *see also infra* notes 434–38 and accompanying text.

under which to determine if a taking of that property interest has occurred.[434] In contrast, federal standards provide the background and principles under which to analyze other constitutional challenges, such as Equal Protection claims.[435] This distinction is rooted in the text of the Fifth Amendment which states that "*private property* must not be *taken*."[436] Because the text refers specifically to private property interests and because the nature of these interests derive from state law, a determination of the interests should rest with state courts.[437] Likewise, as the Fifth Amendment is federal constitutional law, the determination of what constitutes a taking properly rests with the federal courts.[438] An amendment to the Full Faith and Credit Statute would allow state courts and federal courts to make these respective determinations.[439] While state courts would be left to address complex issues of state property law, federal courts would also have an important role to play: applying and evolving national standards for analyzing whether there has been a constitutional violation.[440] The proposed amendment would enable federal courts to be available when needed, as anticipated by the *Williamson County* Court, by allowing takings claimants to proceed to federal court if the government denies them just compensation through state-provided remedies.[441]

Another reason Congress should amend the Full Faith and Credit Statute is to increase federal uniformity.[442] Though it is the duty of the U.S. Supreme Court to ensure federal constitutional rights are protected uniformly, the Takings Clause entails unique protection because private property interests have roots in state law.[443] Though a federal takings standard can be prescribed uniformly,

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[434] *See The Demise of Federal Takings Legislation*, *supra* note 90, at 289–90.

[435] *Id* at 288–89.

[436] *See* U.S. CONST. amend. V (emphasis added).

[437] *See* Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L. J. 203, 222 (2004) (explaining property rights are created by state law); *see* Lucas v. S. C. Coastal Council, 505 U.S. 1003, 1029 (1992) (recognizing if a regulation prohibits something state law also prohibits, it will not be a taking). *See generally* Murdock v. City of Memphis, 87 U.S. 590, 626 (1874) ("The state courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law . . . .").

[438] *See The Demise of Federal Takings Litigation*, *supra* note 90, at 256 ("[A] municipality's alleged taking of private property raises a federal question, which confers jurisdiction on the federal courts.").

[439] *See infra* notes 440–41 and accompanying text.

[440] *See* Sterk, *supra* note 437, at 207 ("The primary role state law must play in policing takings does not, however, make the Supreme Court irrelevant. First, the Supreme Court might articulate categorical rules that address difficulties cutting across state law.").

[441] *See* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2178–79 (2019) ("*Williamson County* envisioned that takings plaintiffs would ripen their federal claims in state court and then, if necessary, bring a federal suit under §1983.").

[442] *See infra* notes 443–47 and accompanying text.

[443] *See The Demise of Federal Takings Litigation, supra* note 90, at 294–95; U.S. CONST. amend. V.

because of the vast differences in property rights across states, state courts' application of the comprehensive national takings standard would vary greatly.[444] Due to the large variations in state property law, a takings decision in one state could have a different outcome in another.[445] It would increase federal uniformity and benefit both the state and federal courts if plaintiffs had the option to first litigate in state court and then proceed to federal court if needed.[446] It would allow state courts to make determinations about the underlying private property interests, leaving federal courts to apply the developed federal takings standard.[447]

Finally, the proposed amendment is still needed to prevent future takings claimants from being subject to Knick's catch-22.[448] Even after *Knick*, federal courts may be justified in invoking *Pullman* abstention to allow state courts to address underlying state law questions.[449] Federal courts may be tempted to apply this doctrine with more frequency to accommodate the influx in takings cases.[450] In these cases, plaintiffs may then be denied access to federal court because the federal question may be moot or preclusion doctrines may prevent plaintiffs from

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[444] *See* Sterk, *supra* note 437, at 206 ("Because the constitutional standard against which any regulation is measured must itself incorporate background state law, the Supreme Court cannot develop a comprehensive national takings standard."); *see also supra* note 364 and accompanying text.

[445] *See* Sterk, *supra* note 437, at 206 ("A regulation that constitutes an unconstitutional taking in Houston could pass constitutional muster if passed in New York. Because the constitutional standard against which any regulation is measured must itself incorporate background state law, the Supreme Court cannot develop a comprehensive national takings standard.").

[446] *See supra* notes 443–45; *infra* note 447 and accompanying text.

[447] *See The Demise of Federal Takings Litigation, supra* note 90, at 292; *see also* Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts,* 48 VAND. L. REV. 1, 16 (1995) ("The need for concrete facts is acute in land use law, where so much litigation arises out of local ordinances about which there may be little reported case law. With a wide variety of different municipalities enacting land use laws and with few of these laws ever reaching the courts, those courts that are called upon to construe these statutes and ordinances need as complete a factual record as possible, so as to avoid making overly broad pronouncements.").

[448] *See infra* notes 449–53 and accompanying text.

[449] *See* Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 690–91 (1987) (explaining that *Pullman* abstention can be invoked when there are questions of state law and federal constitutionality, the state law is unclear, and when a determination of the state law may obviate the need for the federal court to rule on the federal question); *see also* R.S. Radford & Jennifer Fry Thompson, *The Accidental Abstention Doctrine: After Thirty Years, the Case for Diverting Federal Takings Claims to State Court Under Williamson County Has Yet to Be Made,* 67 BAYLOR L. REV. 567, 597–603 (2015) (explaining that the Ninth Circuit invoked the *Pullman* Abstention doctrine broadly to abstain from hearing takings cases). *See generally* Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d. 401 (9th Cir. 1996) (explaining that a determination that there was a taking under the state constitution may render it unnecessary to determine whether there was a federal violation); Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941).

[450] *See supra* note 449 and accompanying text; *see also* Radford & Thompson, *supra* note 449, at 597 (explaining that, prior to *Williamson County*, the Ninth Circuit invoked this doctrine frequently to avoid deciding takings cases).

returning to federal court.[451] Similar to the predicament exposed in *Knick*, these plaintiffs would have to litigate in state court and then subsequently be barred from returning to federal court.[452] Therefore, the proposed amendment would still allow these plaintiffs to access the federal courts by overcoming the issue of preclusion.[453]

V. CONCLUSION

In *Knick*, the U.S. Supreme Court erroneously overruled *Williamson County*, and with it, years of prior jurisprudence.[454] It held a takings plaintiff may bring suit in federal court without first seeking just compensation through the procedures provided by the state.[455] In doing so, the Court mischaracterized prior decisions and incorrectly asserted that a constitutional violation occurs at the time of taking.[456] Furthermore, the Court's interpretation of the Fifth Amendment Takings Clause was conceptually flawed and ignored harmful consequences.[457] Contrary to the majority's interpretation, a takings violation does not occur until the government denies just compensation.[458] Therefore, a federal takings claim does not exist until that moment.[459] Additionally, the doctrine of stare decisis favors adherence to precedent, which clearly provides that a violation of the Constitution does not occur until the government has denied a plaintiff just compensation.[460] For these reasons, the Court should have adhered to *Williamson County* and upheld the state-litigation requirement.[461]

While the *Knick* Court's decision was erroneous, Congress could have interceded to address the problem by amending the Full Faith and Credit Statute.[462] Had Congress done so earlier, takings plaintiffs would not have been

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[451] *See generally* San Remo Hotel, L.P., 545 U.S. 323, 330 (2005); *see also* 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, 23 (1999) ("Even if a takings plaintiff is allowed to proceed in federal court following an England reservation and unsuccessful state court adjudication, issue preclusion may bar litigation of the federal takings claim.").

[452] *See supra* notes 449–51 and accompanying text; *see also* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2167 (2019).

[453] *See supra* notes 418–24, 448–52 and accompanying text.

[454] *See Knick,* 139 S. Ct. at 2179; *supra* notes 267–324 and accompanying text.

[455] *See Knick,* 139 S. Ct. at 2179.

[456] *See supra* notes 278–324 and accompanying text.

[457] *See supra* notes 325–41, 352–71 and accompanying text.

[458] *See supra* notes 342–51 and accompanying text.

[459] *See supra* notes 342–51 and accompanying text.

[460] *See supra* notes 372–410 and accompanying text.

[461] *See supra* notes 267–410 and accompanying text.

[462] *See supra* notes 411–15, 425–30 and accompanying text.

placed in a catch-22.[463] Despite Congress' lack of action thus far, the proposed amendment is still warranted to address concerns raised by the *Knick* Court's decision as well as to ensure future takings plaintiffs have access to federal court.[464] If Congress enacted such an amendment, a takings suit brought in state court would not have a preclusive effect on a subsequent federal takings claim.[465] The amendment will also facilitate federalism by balancing the involvement of state and federal courts.[466] Furthermore, it will aid the courts in uniformly preserving the rights protected under the Fifth Amendment by allowing state courts to determine state property law while the federal courts can provide the federal standard.[467] The amendment will allow the state and federal courts to engage in their respective roles, playing to each court's strengths and facilitating harmony throughout the judicial system.[468] Finally, it will prevent any other takings litigants from being subject to Rose Mary Knick's catch-22 if federal courts are tempted to invoke *Pullman* abstention to avoid deciding takings cases.[469] While it is impossible to solve the soldier's catch-22, it is not too late to solve this one, despite the *Knick* Court's unfavorable decision.[470]

[463] *See* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2167 (2019); *supra* notes 425–30 and accompanying text.

[464] *See supra* notes 431–53 and accompanying text.

[465] *See supra* notes 418–24 and accompanying text.

[466] *See supra* notes 432–41 and accompanying text.

[467] *See supra* notes 442–47 and accompanying text.

[468] *See supra* notes 432–47 and accompanying text.

[469] *See supra* notes 448–53 and accompanying text.

[470] *See supra* notes 431–53 and accompanying text.