

A PRUDENTIAL TAKE ON A PRUDENTIAL TAKINGS DOCTRINE

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The Supreme Court is set to decide a case requesting reconsideration of a doctrine that has long bedeviled constitutional litigants and commentators. The case is Knick v. Township of Scott, and the doctrine is the “ripeness” rule from Williamson County Regional Planning Commission v. Hamilton Bank that plaintiffs seeking to raise takings claims under the Fifth Amendment must pursue state-created remedies first—the so-called “compensation prong” (as distinguished from a separate “takings prong”). This Essay argues that to put the compensation prong in the best light possible, the Court should view the requirement as a “prudential” rule rather than (as it has previously done) a constitutional one. It then argues that the Court should reject this doctrine not because it is a prudential rule, which would follow a larger trend in recent case discussions, but because it is a bad prudential rule. This path is the prudential one because casting doubt on prudential rules more generally could cause a significant set of additional doctrines to suffer unintended and unwelcome consequences.

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INTRODUCTION

The Supreme Court is set to decide a case requesting reconsideration of a doctrine that stands as a “major barrier[] to federal court adjudication” of plaintiffs’ constitutional rights.¹ The case is *Knick v. Township of Scott*,² and the doctrine is the rule from *Williamson County Regional Planning Commission v. Hamilton Bank*³ that plaintiffs seeking to raise takings claims under the Fifth Amendment must pursue state-created remedies first. I call this rule the “compensation prong” (because *Williamson County* also articulated a “takings prong,” which I describe below).

This Essay advances two arguments. The first is that the Court should view the compensation prong as a “prudential” rule rather than a constitutional one. *Williamson County* described the compensation prong as a “ripeness” requirement, meaning that it prevents courts from deciding disputes that are not ready for review. Courts sometimes think of ripeness as a constitutional command grounded in Article III’s case-or-controversy limitation. With respect to the compensation prong, however, courts sometimes think of ripeness as a different kind of constitutional command, one grounded in the Fifth Amendment. Alternatively, courts sometimes think of ripeness not as a constitutional command at all, but as a principle grounded in prudential, or policy, considerations.

What I call the *Williamson County* “ripeness puzzle” asks to which of these categories courts should view the compensation prong as belonging.⁴ For mainly consequentialist reasons, I argue that a prudential solution puts the rule in the best light possible. The Supreme Court should thus view the compensation prong as “a self-imposed, common law limit on federal jurisdiction designed to foster core values” of federalism ostensibly inherent in providing state courts the first pass at property disputes.⁵

The second argument that this Essay advances is that the Supreme Court should abandon the compensation prong—but that it should also proceed with caution. For although the requirement may sound like a narrow issue of narrow concern, doing away with it could threaten to disrupt or in some instances destroy rules including the political-question doctrine, the general prohibition against third-party standing, and many more.⁶

1. Thomas W. Merrill, Essay, *Anticipatory Remedies for Takings*, 128 HARV. L. REV. 1630, 1633 (2015).

2. 862 F.3d 310, 314 (3d Cir. 2017), cert. granted in part, 138 S. Ct. 1262 (2018) (mem.).

3. 473 U.S. 172 (1985).

4. For a more detailed discussion of this “ripeness puzzle,” see Katherine Mims Crocker, *Justifying a Prudential Solution to the Williamson County Ripeness Puzzle*, 49 GA. L. REV. 163 (2014).

5. Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845, 853 (2017).

6. The Court may have granted cert in *Knick* for the very purpose of abolishing the compensation prong. The Court limited its consideration of the case to the reconsideration question, denying cert on a separate ground for review. See Petition for Writ of Certiorari at i, *Knick v. Twp. of Scott*, No. 17-647 (U.S. Oct. 31, 2017) (presenting a second question

There are two key ways that the compensation prong, understood as prudential in character, could come to an end in *Knick*. First, the Court could reject the doctrine simply because it rests on prudential concerns, a relatively broad ruling. Doing so would follow a trend in recent case discussions denigrating prudential rules in the jurisdictional context. Second, the Court could reject the balance of policy priorities underlying the doctrine, a relatively narrow ruling. In other words, the Court could scrap the compensation prong not because it is a prudential principle, but because it is a bad prudential principle.

I argue, again for consequentialist reasons, that the second option provides the more prudential path forward, for the first option could cause a sweeping assortment of doctrines to suffer unintended and unwelcome consequences. In *Knick*, therefore, the Court should regard the compensation prong as prudential in character but renounce it on other grounds. And beyond *Knick*, the Court should reconsider other purportedly prudential limitations on federal jurisdiction in cases that more squarely present them.

These arguments unfold as follows. Part I describes the decisional background leading up to *Knick*. Part II outlines the case for a prudential characterization of the compensation prong. Part III discusses the recent trend toward repudiating prudential principles. Part IV outlines a prudential path forward. I conclude that the Court should forsake the compensation prong in *Knick* not because it is a prudential rule, but because it is a bad prudential rule. I further conclude that the Court should adopt a particularized approach to rethinking prudential principles beyond the present matter.

I. FROM WILLIAMSON COUNTY TO KNICK

The Supreme Court has decided two major compensation-prong cases: *Williamson County* in 1985 and *San Remo Hotel, L.P. v. City and County of San Francisco*⁷ in 2005.

In *Williamson County*, a bank seeking to develop land asserted that county zoning requirements violated the Takings Clause of the Fifth Amendment,⁸ which says that “private property” shall not be “taken for public use, without just compensation.”⁹ The bank sued and won in federal court, but the Supreme Court held the bank’s claim improper.¹⁰

regarding a purported circuit split over the treatment of facial takings claims). And the grant came on the heels of a dissent from the denial of cert in *Arrigoni Enterprises v. Town of Durham*, in which two Justices pressed their colleagues to rethink the compensation prong. See 136 S. Ct. 1409 (2016) (Thomas, J., joined by Kennedy, J., dissenting from denial of certiorari).

7. 545 U.S. 323 (2005).

8. *Williamson Cty.*, 473 U.S. at 175.

9. U.S. CONST. amend. V.

10. *Williamson Cty.*, 473 U.S. at 175, 200 (explaining that “[a]lthough the jury’s verdict [in favor of respondent] was rejected by the District Court, which granted a judgment

Williamson County articulated two rules. First, the Court said, a federal takings claim “is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue,” meaning that prospective plaintiffs must obtain such decisions before suing.¹¹ I call this the “takings prong” because the textual hook to the Fifth Amendment, to the extent that one existed, was that it is impossible for property to be “*taken*” before a final decision occurs.¹²

Second (and more significantly for present purposes), the Court said, “[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.”¹³ And “all that is required” to permit the possibility of just compensation, the Court continued, “is that a ‘reasonable, certain and adequate provision for obtaining compensation’ exist at the time of the taking.”¹⁴ The Court held that prospective plaintiffs must pursue such mechanisms to ripen their claims, which could include suing under an “inverse-condemnation” cause of action in state court.¹⁵ I call this the “compensation prong” because the textual hook to the Fifth Amendment was that “no constitutional violation occurs until *just compensation* has been denied.”¹⁶

The Supreme Court returned to the compensation prong in *San Remo Hotel*, holding that issues decided in state courts by virtue of *Williamson County* have preclusive effect in later federal suits.¹⁷ The facts and procedural history of *San Remo Hotel* are complex, but the plaintiffs unsuccessfully pursued unripe federal takings claims in federal court, unsuccessfully litigated state takings claims in state court, and then unsuccessfully attempted to reassert their federal takings claims in federal court.¹⁸ The Supreme Court affirmed the application of issue preclusion under the Full Faith and Credit Statute to turn aside the second federal suit.¹⁹

The reasoning in *San Remo Hotel* was twofold. First, the Court explained that courts may not “simply create exceptions” to the statute

notwithstanding the verdict to petitioners, the verdict was reinstated on appeal” and concluding that the claim was premature).

11. *Id.* at 186.

12. See *id.* at 190–91.

13. *Id.* at 194.

14. *Id.* (quoting Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 124–125 (1974)).

15. *Id.* at 194–96; see *Inverse Condemnation*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining inverse condemnation as “[a]n action brought by a property owner for compensation from a governmental entity that has taken the owner's property without bringing formal condemnation proceedings”).

16. *Williamson Cty.*, 473 U.S. at 194 n.13 (emphasis added).

17. *San Remo Hotel*, L.P. v. City & Cty. of San Francisco, 545 U.S. 323, 347–48 (2005).

18. *Id.* at 330–35.

19. *Id.* at 347–48.

wherever they “deem them appropriate.”²⁰ Second, the Court reasoned that the law does not require a federal forum for all federal claims. Instead, the Court said that “[s]tate courts are fully competent to adjudicate constitutional challenges to local land-use decisions” and that “state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions” underlying some property disputes.²¹

Chief Justice Rehnquist, joined by three others, concurred in the judgment. Rehnquist urged his colleagues to revisit the compensation prong, observing that the upshot of *San Remo Hotel* was that “litigants who go to state court to seek compensation will likely be unable later to assert their federal takings claims in federal court.”²²

Fast-forward to *Knick*, the pending case. Rose Mary Knick owns land in the Township of Scott, Pennsylvania.²³ The township enacted an ordinance requiring that all cemeteries be “open and accessible to the general public during daylight hours.”²⁴ Government officials entered Knick’s land and declared her in violation of the ordinance because certain stones on her property were believed to be grave markers.²⁵ Knick sued the township in federal court, asserting Fifth Amendment takings claims.²⁶ The district court held the claims unripe under the compensation prong because Knick had not sought compensation in an inverse-condemnation action in state court.²⁷ The Third Circuit affirmed,²⁸ and the Supreme Court agreed to hear the case.²⁹ Oral argument occurred on October 3, 2018,³⁰ and a decision should come down by June 2019.

20. *Id.* at 344.

21. *Id.* at 347.

22. *Id.* at 351 (Rehnquist, C.J., joined by O’Connor, Kennedy, and Thomas, JJ., concurring in the judgment). Of note, the Court decided *Kelo v. City of New London*, 545 U.S. 469 (2005), and *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), the same year as *San Remo Hotel*. “Taken together, these three decisions represent a substantial change—entirely in the direction of relegating takings issues to the political and legal judgments of the states.” William A. Fletcher, Keynote Address, *Kelo, Lingle, and San Remo Hotel: Takings Law Now Belongs to the States*, 46 SANTA CLARA L. REV. 767, 776 (2006).

23. *Knick v. Twp. of Scott*, 862 F.3d 310, 315 (3d Cir. 2017), *cert. granted in part*, 138 S. Ct. 1262 (2018) (mem.).

24. *Id.*

25. *Id.* Knick has previously disputed that there is a cemetery on her land. *Id.*

26. *Id.* at 315–16.

27. *Knick v. Twp. of Scott*, No. 3:14-CV-02223, 2016 WL 4701549, at *6 (M.D. Pa. Sept. 8, 2016).

28. *Knick*, 862 F.3d at 328.

29. *Knick v. Twp. of Scott*, 138 S. Ct. 1262 (2018) (mem.) (granting certiorari).

30. *Supreme Court of the United States: October Term 2018*, SUP. CT. (July 9, 2018), https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalendarOctober2018.pdf [https://perma.cc/SR8G-VZ6U].

II. THE CASE FOR A PRUDENTIAL CHARACTERIZATION

As I have discussed in prior work, the *Williamson County* ripeness puzzle asks whether courts should regard the compensation prong as arising from constitutional commands or prudential preferences.³¹

The constitutional solution to the *Williamson County* ripeness puzzle includes two options. First, courts sometimes think of ripeness as a constitutional command grounded in Article III's case-or-controversy limitation. As the D.C. Circuit has explained: "Article III . . . limits federal court jurisdiction to cases and controversies. Consistent with this limitation and 'our theoretical role as the governmental branch of last resort,' the ripeness doctrine precludes premature adjudication of 'abstract disagreements' and instead reserves judicial power for resolution of concrete and 'fully crystallized' disputes."³² The compensation prong could thus represent a jurisdictional component of what renders a federal takings claim cognizable under Article III.³³

Second, in the context of the compensation prong, courts sometimes think of ripeness as a constitutional command grounded in the Fifth Amendment. As *Williamson County* itself stated, "because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied."³⁴ The compensation prong could thus represent a substantive element of what renders a federal takings claim actionable.³⁵

The prudential solution to the *Williamson County* ripeness puzzle turns on a different understanding of the doctrine, where courts sometimes think of ripeness not as a constitutional command at all, but as a principle grounded in policy considerations. As the Second Circuit has explained: "[W]hen a court declares that a case is not prudentially ripe, it means that the case will be *better* decided later . . . It does not mean that the case is not a real or concrete dispute affecting current concerns of the parties

31. The majority of this Part summarizes the overarching argument from my previous publication on the compensation prong. See Crocker, *supra* note 4.

32. *VanderKam v. VanderKam*, 776 F.3d 883, 888 (D.C. Cir. 2015) (citation omitted) (quoting Nat'l Treasury Emp.'s Union v. United States, 101 F.3d 1423, 1431 (D.C. Cir. 1996)).

33. See *Flying J Inc. v. City of New Haven*, 549 F.3d 538, 544 (7th Cir. 2008) ("The point of *Williamson County* is that there is no case or controversy within the meaning of Article III until the plaintiff has pursued all available remedies in state court . . .").

34. 473 U.S. 172, 194 n.13 (1985).

35. See Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 164–70, 176 (1987). In *Knick*, the Solicitor General filed an amicus brief that seems to embrace this interpretation of the Fifth Amendment but that treats the compensation prong as arising from 42 U.S.C. § 1983. See Brief for the United States as Amicus Curiae in Support of Vacatur and Remand at 19–21, *Knick v. Twp. of Scott*, No. 17-647 (U.S. June 5, 2018). Respondents then adopted this apparently novel position as well. See Brief for Respondents at 36, *Knick*, No. 17-647 (U.S. July 30, 2018). This understanding of the compensation prong is problematic for several reasons, as *Knick*'s reply brief discusses. See Petitioner's Reply Brief at 4–9, *Knick*, No. 17-647 (U.S. Aug. 24, 2018).

within the meaning of Article III.”³⁶ The compensation prong could thus rest on the subconstitutional federalism concerns that *San Remo Hotel* invoked—specifically, that state courts can adequately handle federal constitutional challenges and expertly address property disputes.³⁷

In *Knick*, the Supreme Court should regard the compensation prong as prudential in character. For the descriptive reasons that follow, this would be most consistent with the direction of the Court’s evolving statements on the topic. And for the normative reasons that follow, this would put the requirement in the best light possible, which is important in case the doctrine survives and to rest any potential rejection on the firmest logical footing.

On a descriptive level, the Supreme Court has taken several steps toward ascribing a prudential makeup to the compensation prong. Rehnquist noted this shift in his separate opinion in *San Remo Hotel*. In *Williamson County*, Rehnquist recalled, the Court had “purported to interpret the Fifth Amendment in divining [the compensation prong].”³⁸ But “[m]ore recently,” he observed, “we have referred to [the compensation prong] as merely a prudential requirement.”³⁹

Rehnquist cited *Suitum v. Tahoe Regional Planning Agency*,⁴⁰ which had called the *Williamson County* requirements “prudential hurdles.”⁴¹ Before *San Remo Hotel*, the Court in *Lucas v. South Carolina Coastal Council*⁴² had also stated that a *Williamson County* issue went “only to the prudential ‘ripeness’ of [the plaintiff’s] challenge.”⁴³ And after *San Remo Hotel*, the Court in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*⁴⁴ declared the compensation prong non-jurisdictional.⁴⁵ The Court made a similar remark in *Horne v. Department of Agriculture*,⁴⁶ stating that “[a]lthough we often refer to [the compensation prong] as prudential ‘ripeness,’ we have recognized that it is not, strictly speaking, jurisdictional.”⁴⁷

Accordingly, the trend in Supreme Court opinions points toward a reimaging of the compensation prong as prudential in character. This also appears to have become the dominant position in the pages of academic

36. Simmonds v. INS, 326 F.3d 351, 357 (2d Cir. 2003).

37. See Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251, 285 (2006).

38. *San Remo Hotel, L.P. v. City & Cty. of San Francisco*, 545 U.S. 323, 349 (2005) (Rehnquist, C.J., concurring in the judgment).

39. *Id.*

40. 520 U.S. 725 (1997).

41. *Suitum*, 520 U.S. at 733–34.

42. 505 U.S. 1003 (1992).

43. *Lucas*, 505 U.S. at 1012–13.

44. 560 U.S. 702 (2010).

45. *Stop the Beach*, 560 U.S. at 729 & n.10.

46. 569 U.S. 513 (2013).

47. *Horne*, 569 U.S. at 526.

journals.⁴⁸ But in each case outlined above, the Court's comments were dicta or failed to exclude an understanding of the compensation prong based in the Fifth Amendment.⁴⁹ And divergent views continue to crop up in law reviews.⁵⁰ This means that more than a decade after Rehnquist criticized the majority in *San Remo Hotel* for "conspicuously leav[ing] open" the question whether the compensation prong "is merely a prudential rule, and not a constitutional mandate,"⁵¹ the question remains open today.⁵²

On a normative level, two points bear considering. First, textual and historical arguments cast doubt on the initial framing of the compensation prong as part and parcel of the Fifth Amendment.⁵³ With respect to text, there is a good argument that the "most natural[]" reading of the amendment is that "'compensation must accompany the taking,' and not that 'the claimant shall have the opportunity to ask for the compensation remedy in a post-taking court action.'"⁵⁴ And with respect to history, among other things, commentators and judges have argued that "[d]uring the century following the ratification of the Bill of Rights and parallel state provisions, courts held that compensation must be provided at the time of the act . . . alleged to be a taking."⁵⁵

48. See, e.g., J. David Bremer, *The Rebirth of Federal Takings Review? The Courts' "Prudential" Answer to Williamson County's Flawed State Litigation Ripeness Requirement*, 30 TOURO L. REV. 319 (2014); see also Merrill, *supra* note 1, at 1648–49, 1651–52 (suggesting that a prudential solution to the *Williamson County* ripeness puzzle is preferable to either constitutional possibility).

49. In *Suitum* and *Lucas*, only the *Williamson County* takings prong was at issue. See *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 (1997); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1012–13 (1992). And by declaring the requirement non-jurisdictional in *Stop the Beach and Horne*, the Court excluded at most an understanding based in Article III, for an understanding based in the Fifth Amendment "does not relate to jurisdictional power at all." *Nichol, supra* note 35, at 162. *Horne's* statement also appears to have been dictum, for one reason because the Court concluded that petitioners had no alternative remedy and that their claim was thus not premature. See 569 U.S. at 527–28.

50. See, e.g., Andrew W. Schwartz, *No Competing Theory of Constitutional Interpretation Justifies Regulatory Takings Ideology*, 34 STAN. ENVT'L LJ. 247, 296 & n.222 (2015) (arguing that *Stop the Beach* and *Suitum* "incorrectly characterized *Williamson County's* state compensation requirement as prudential").

51. 545 U.S. 323, 351 n.2 (2005) (Rehnquist, C.J., concurring in the judgment).

52. Indeed, in dissenting from the cert denial in *Arrigoni*, Justice Thomas noted that "several Courts of Appeals continue to treat the *Williamson County* rule as a jurisdictional rule limiting the courts' power to consider federal takings claims until the plaintiffs exhaust state-law remedies." 136 S. Ct. 1409, 1412 (2016) (Thomas, J., dissenting from denial of certiorari).

53. See Merrill, *supra* note 1, at 1647–49 (advancing a similar argument).

54. *Arrigoni*, 136 S. Ct. at 1410 (Thomas, J., dissenting from denial of certiorari) (quoting J. David Bremer, *Overcoming Williamson County's Troubling State Procedures Rule: How the England Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. LAND USE & ENV. L. 209, 219 (2003)).

55. *Id.* (quoting J. David Bremer, *Overcoming Williamson County's Troubling State Procedures Rule: How the England Reservation, Issue Preclusion Exceptions, and the Inadequacy*

Second, viewing the compensation prong as prudential in character would appear to inflict the least damage on litigants and courts. Prudential rules, after all, are susceptible to exceptions based on policy considerations, but constitutional rules defining the case-or-controversy requirement or the substantive merits of a claim generally are not.⁵⁶

Commentators have found numerous reasons to criticize the compensation prong. As one author notes, scholars have called it “deceptive, inherently nonsensical, draconian, and a Kafkaesque maze, among other unflattering things.”⁵⁷ For purposes of illustrating rather than exhausting the doctrine’s possible adverse effects, therefore, consider two circumstances that commentators have contended could cause the compensation prong to produce steep and senseless consequences. The first concerns removal, and the second concerns claim preclusion.

First: removal. As Justice Thomas recently explained, “[w]hen a plaintiff files a suit in state court to exhaust his remedies as *Williamson County* instructs, state-government entities and officials may remove that suit to federal court under 28 U.S.C. § 1441.”⁵⁸ But “[o]nce in federal court, some state defendants have moved to dismiss on the ground that ‘the plaintiff did not litigate first in the state court.’”⁵⁹ And, Thomas said, some have succeeded, with federal courts dismissing claims instead of remanding them.⁶⁰ Such “gamesmanship,” Thomas argued, “leaves plaintiffs with *no* court in which to pursue their claims.”⁶¹ A prudential understanding of the compensation prong would allow courts to avoid this outcome. They could hold, for example, that removing a federal takings claim from state court to federal court causes the defendant to forfeit any compensation-prong argument.⁶²

Second: claim preclusion. *San Remo Hotel* focused on issue preclusion. But commentators have contended that its reasoning could also lead to claim preclusion in a meaningful number of cases, thus keeping additional federal takings claims out of federal court.⁶³ Foreclosing a federal forum for the

Exception Open the Federal Courthouse Door to Ripe Takings Claims, 18 J. LAND USE & ENV. L. 209, 220 (2003)).

56. Apparently for this reason with respect to Article III, in *Arrigoni*, Thomas framed the Court’s gestures at a prudential characterization of the compensation prong as an effort to “ameliorate [its] effects.” *Id.* at 1411.

57. Ian Fein, Note, *Why Judicial Takings Are Unripe*, 38 ECOLOGY L.Q. 749, 774 (2011) (internal quotation marks omitted); see also, e.g., Maureen E. Brady, *The Damagings Clauses*, 104 VA. L. REV. 341, 408 (2018) (calling the compensation prong “one of the most maligned rules in condemnation law”).

58. *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of certiorari).

59. *Id.* (quoting Michael M. Berger & Gideon Kanner, *Shell Game! You Can’t Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 URB. LAW. 671, 673 (2004)).

60. *Id.*

61. *Id.*

62. See Breemer, *supra* note 48, at 342–45.

63. See, e.g., Sterk, *supra* note 37, at 276–83.

vindication of a federal constitutional right is problematic in itself. Even worse is the added possibility that a constitutional understanding of the compensation prong could lead courts to forbid plaintiffs from bringing federal takings claims in state courts too.

To understand this possibility, return to the two potential constitutional solutions to the *Williamson County* ripeness puzzle. For interpretations of Article III, federal rules are generally viewed as inapplicable in state courts.⁶⁴ But states can choose to adopt their own rules imposing equal or stricter requirements.⁶⁵ For interpretations of the Fifth Amendment, the same rules apply in federal and state courts. Under either scenario, “[t]he federal takings claim simply does not exist before the state inverse condemnation claim is resolved, and may not, therefore, be considered alongside the state claim in state court.”⁶⁶

A plaintiff could try to avoid this possibility by bifurcating her claims—in particular, by litigating a predicate state claim before bringing a federal takings claim in state court. But it is possible that a state court would hold that state claim-preclusion rules do not allow such bifurcation. If federal claim-preclusion rules would bar a federal takings claim in federal court, then state claim-preclusion rules would presumably bar the same claim in state court. Intersystem preclusion in federal court, after all, reflects the intrasystem preclusion rules of the judgment-rendering state.⁶⁷

Combining a constitutional solution to the *Williamson County* ripeness puzzle with the possibility of state-court claim preclusion thus presents a situation where a federal takings claim could conceivably “go from green to rotten without ever being ripe.”⁶⁸ A prudential solution, however, would allow courts to bypass this prospect by permitting plaintiffs to prosecute

64. See Matthew I. Hall, *Asymmetrical Jurisdiction*, 58 UCLA L. REV. 1257, 1272 (2011). For an argument that state courts should be required to abide by Article III’s case-or-controversy requirement “when they adjudicate questions of federal law,” see William A. Fletcher, *The ‘Case or Controversy’ Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 282–84 (1990).

65. See Christopher S. Elmendorf, Note, *State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs*, 110 YALE L.J. 1003, 1006–08 (2001). Of course, states can also select rules that are more lenient. See *id.*

66. 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, 18 (1999).

67. See *Allen v. McCurry*, 449 U.S. 90, 96 (1980) (stating that under the Full Faith and Credit Statute, “Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so”).

68. John Martinez & Karen L. Martinez, *A Prudential Theory for Providing a Forum for Federal Takings Claims*, 36 REAL PROP., PROB. & TR. J. 445, 451 (2001); see also Michael M. Berger & Gideon Kanner, *Shell Game! You Can’t Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 URB. LAW. 671, 709–10 (2004). There are potential workarounds for this quagmire, which is why I treat this situation as a possibility rather than a certainty.

predicate state claims and federal takings claims side-by-side in state courts. Rehnquist made a similar point in *San Remo Hotel*. The majority assumed in dictum that *Williamson County* did not apply in state courts.⁶⁹ This assumption could be correct, Rehnquist said, only if the compensation prong represented “a prudential rule” rather than “a constitutional mandate.”⁷⁰

In short, the compensation prong is best viewed as a prudential rule, and the Supreme Court should analyze it as such in *Knick*.

III. THE TREND TOWARD REPUDIATING PRUDENTIAL PRINCIPLES

The Supreme Court has disparaged prudential limitations on federal jurisdiction in two recent cases: *Lexmark International, Inc. v. Static Control Components, Inc.*⁷¹ and *Susan B. Anthony List v. Driehaus*.⁷²

In *Lexmark*, the Court (unanimously) said that the concept of prudential standing “is in some tension with... the principle that ‘a federal court’s obligation to hear and decide’ cases within its jurisdiction ‘is virtually unflagging.’”⁷³ The Court stated that “[j]ust as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because ‘prudence’ dictates.”⁷⁴ The Court concluded that the “zone-of-interests” inquiry, which asks whether a cause of action “encompasses a particular plaintiff’s claim,” was a doctrine of statutory interpretation rather than of prudential standing.⁷⁵

In *Susan B. Anthony List*, the Court (again unanimously) criticized prudential ripeness by quoting *Lexmark*. In particular, the Court said, “[t]o the extent respondents would have us deem petitioners’ claims nonjusticiable ‘on grounds that are prudential, rather than constitutional,’ ‘that request is in some tension with our recent reaffirmation of the principle that a federal court’s obligation to hear and decide’ cases within its jurisdiction ‘is virtually unflagging.’”⁷⁶ But the Court concluded that it did not need to resolve the “continuing vitality” of the doctrine in question because the test was “easily satisfied” in favor of “prompt judicial review” in the case at bar.⁷⁷

69. See *San Remo Hotel, L.P. v. City & Cty. of San Francisco*, 545 U.S. 323, 346 (2005).

70. *Id.* at 351 n.2 (Rehnquist, C.J., concurring in the judgment) (referring to an understanding of the compensation prong based in the Fifth Amendment).

71. 572 U.S. 118 (2014).

72. 134 S. Ct. 2334 (2014).

73. *Lexmark*, 572 U.S. at 126 (some internal quotation marks omitted) (quoting *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013)).

74. *Id.* at 128 (citation omitted).

75. *Id.* at 127.

76. *Susan B. Anthony List*, 134 S. Ct. at 2347 (alteration and some internal quotation marks omitted) (quoting *Lexmark*, 527 U.S. at 125–26).

77. *Id.* at 2347.

The sentiments expressed in *Lexmark* and *Susan B. Anthony List* carry an uncertain but potentially significant scope, as commentators have noted.⁷⁸ On the one hand, Chief Justice Marshall stated the classic principle that federal courts have “no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given,” for either “would be treason to the constitution.”⁷⁹ But on the other, the Supreme Court has long recognized “judicially self-imposed limits on the exercise of federal jurisdiction.”⁸⁰ These “entrenched tenet[s]” seem to “self-evidently conflict[]” where courts can decline to adjudicate cases because of prudential considerations.⁸¹

So where can courts decline to adjudicate cases because of prudential considerations? Nobody can answer this question in a universal and universally satisfying way because “the boundaries between constitutional, prudential, and statutory limits are not generally fixed,” but “are often blurred, porous, and contested.”⁸² It should come as little surprise, therefore, that the list of rules that have been identified as possibly prudential is long. Consider the following illustrations, which are drawn from a sampling of recent scholarship examining doctrines that the Supreme Court or some of its members have treated as prudential:

- The general prohibition against third-party standing,
- The zone-of-interests standing test as applied to constitutional claims,
- The standing prohibition on asserting generalized grievances,
- The taxpayer-standing doctrine,
- The standing rule for federal-question cases about domestic relations,
- The ripeness doctrine examining the fitness of the issues for review and the hardship to the parties of delay,
- At least some aspects of mootness,
- The adverseness requirement,
- At least some aspects of the political-question doctrine,
- Abstention doctrines,
- Some aspects of state sovereign immunity, and
- The act-of-state doctrine.⁸³

To clarify, my point is not that these doctrines actually rest on prudential concerns. Indeed, the Court or some Justices have framed several

78. See, e.g., Crocker, *supra* note 4, at 175–76; Ernest A. Young, *Prudential Standing After Lexmark International, Inc. v. Static Control Components, Inc.*, 10 DUKE J. CONST. L. & PUB. POL’Y 149 (2014).

79. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

80. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

81. Smith, *supra* note 5, at 847–48; see Young, *supra* note 78, at 161.

82. Smith, *supra* note 5, at 852.

83. See *id.* at 855–69; Young, *supra* note 78, at 150–63.

of these issues in constitutional or statutory terms.⁸⁴ My point is instead that the dividing lines are disputed and often indistinct—and that far-flung limitations on federal jurisdiction are thus regarded as at least possibly prudential in character. The upshot is that sweeping criticisms of prudential principles could destabilize a large swath of jurisdictional doctrine.⁸⁵

Litigants have already seized on the Court's recent statements to cast doubt on purportedly prudential principles beyond those at issue in *Lexmark* and *Susan B. Anthony List*. A prominent example occurred in *Starr International Co. v. United States*,⁸⁶ in which David Boies and Paul Clement joined forces with others before the Supreme Court to challenge the general rule against third-party standing.⁸⁷ *Lexmark*, they said, concluded that "federal courts should not decline to hear and decide cases within their jurisdiction based on grounds that are 'prudential' rather than constitutional."⁸⁸ The Court denied cert in *Starr*, but the case generated a notable amount of apparent interest, including an unrequested response from the Solicitor General and a rescheduled spot on the Court's conference agenda.⁸⁹

At bottom, as one scholar puts the matter, "[i]f the federal courts' jurisdictional obligations are meant to be truly 'unflagging,' a great deal of established doctrine will have to go."⁹⁰ For the Supreme Court to echo in *Knick* the sentiments expressed in *Lexmark* and *Susan B. Anthony List* would encourage broadside attacks on a wide range of jurisdictional doctrines.

IV. A PRUDENTIAL PATH FORWARD

In light of concerns about the trend toward repudiating prudential principles, how should the Supreme Court approach *Knick* and other cases that concern possibly prudential limitations on federal jurisdiction?

In *Knick*, there is no need to color outside the lines of the compensation prong. Even if one sees the requirement as prudential in character, well-established principles support overruling *Williamson County* without overhauling jurisdictional jurisprudence.

84. See Smith, *supra* note 5, at 855–69; Young, *supra* note 78, at 153–55, 161–62.

85. See Joel S. Nolette, *Last Stand for Prudential Standing? Lexmark and Its Implications*, 16 GEO. J.L. & PUB. POL'Y 227, 237–53 (2018) (discussing possible "domino effects" of expanding *Lexmark* (cleaned up)).

86. 856 F.3d 953, 957 (Fed. Cir. 2017), *cert. denied*, 138 S. Ct. 1324 (2018) (mem.).

87. See Nolette, *supra* note 85, at 236–37 (discussing *Starr* as presenting an opportunity to flesh out the implications of *Lexmark*).

88. Petition for Writ of Certiorari at 17, *Starr Int'l Co. v. United States*, 138 S. Ct. 1324 (2017) (mem.) (No. 17-540).

89. See Docket Search, SUP. CT., <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-540.html> [https://perma.cc/KPT4-DD99].

90. Young, *supra* note 78, at 161. I agree that *Lexmark* "was surely right to ground the zone-of-interests doctrine more squarely in Congress's intent." *Id.* at 163. But I also agree that "the majority's discussion may spur far-reaching changes in how lawyers think and (especially) talk about standing"—and many other doctrines. *Id.* at 149.

"Beyond workability," the Court has explained, "the relevant factors in deciding whether to adhere to the principle of stare decisis include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned."⁹¹

Applying these factors here, the compensation prong has proved unworkable for reasons revealed in *San Remo Hotel* and other settings.⁹² The Court appears to have more often avoided than approved the doctrine.⁹³ Any reliance interests seem attenuated and ambiguous.⁹⁴ And there is much agreement that *Williamson County* "cannot be correct, at least on its own terms."⁹⁵ To quote four Justices from *San Remo Hotel*: "It is not obvious that either constitutional or prudential principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim."⁹⁶ As for constitutional principles (and as discussed above), the initial orientation of the compensation prong around the Fifth Amendment suffers from textual and historical suspicions.⁹⁷ And an understanding based in the Fifth Amendment or Article III could cause perverse consequences.⁹⁸ As for prudential principles, to quote the same four Justices: the Court still "has not explained why we should hand authority over federal takings claims to state courts, based simply on their relative familiarity with local land-use decisions and proceedings, while allowing plaintiffs to proceed directly to federal court in cases involving, for example, challenges to municipal land-use regulations based on the First Amendment or the Equal Protection Clause."⁹⁹ Nor, it seems, could the Court do so.¹⁰⁰

91. *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009). The Supreme Court has outlined other helpful formulations for approaching the principle of stare decisis, but this is an efficient formulation that works well here.

92. For an interesting inventory of some settings where the compensation prong and a related principle applicable in the federal-defendant context create workability concerns, see Merrill, *supra* note 1, at 1655–66.

93. *See id.* at 1634–36.

94. One could surmise that the current scheme encourages government officials to engage in more extensive property restrictions than they would otherwise engage in. But one could also surmise the opposite. *See id.* at 1667–69.

95. Michael W. McConnell, *Horne and the Normalization of Takings Litigation: A Response to Professor Echeverria*, 43 ENVTL. L. REP. 10749, 10751 (2013). After all, one can argue that because of preclusion rules, "there was nothing 'premature' about the takings claims in [*Williamson County*], at least if premature is read to mean, as it naturally should, that the claim can become mature (or ripen) at some point in the future." John Echeverria, *Horne v. Department of Agriculture: An Invitation to Reexamine "Ripeness" Doctrine in Takings Litigation*, 43 ENVTL. L. REP. 10735, 10743 (2013).

96. *San Remo Hotel, L.P. v. City & Cty. of San Francisco*, 545 U.S. 323, 349 (2005) (Rehnquist, C.J., concurring in the judgment).

97. *See supra* text accompanying notes 53–55.

98. *See supra* text accompanying notes 57–70.

99. *San Remo Hotel*, 545 U.S. at 350–51 (Rehnquist, C.J., concurring in the judgment) (citations omitted).

100. *See McConnell, supra* note 95, at 10751.

I generally advocate rejecting or limiting dubious doctrines that prevent parties from enforcing their constitutional rights or prerogatives.¹⁰¹ But the sheer number and import of doctrines potentially put at risk should caution the Court against rejecting the compensation prong based on broad objections to prudential rules at large. Perhaps the Court should ultimately abandon some ostensibly prudential rules. But it should not do so—or encourage lower courts to act along similar lines—through a single case that focuses on one narrow and idiosyncratic issue (like *Knick*).

Moreover, misgivings about applying prudential principles could push courts toward recategorizing jurisdictional doctrines as stemming from constitutional or statutory roots. But doing so has important real-world effects. Deeming doctrines constitutional “lock[s] Congress out of dialogues about how to eliminate or operationalize federal jurisdictional limits,” which may “harm[] congressional efforts to expand access to federal courts” and “raises its own set of democratic concerns.”¹⁰² And deeming doctrines statutory compels defendants to raise them early in the litigation process, requires state courts to abide by them, and subjects state decisions to Supreme Court review.¹⁰³ To be clear, there are good arguments that courts should conceptualize certain jurisdictional doctrines with fuzzy foundations as constitutional or statutory requirements. But courts should not rush into such rulings simply because of a rapid repudiation of prudential principles.

Put differently, it is “highly doubtful” that every principle in the jurisdictional context that someone attempts to characterize as prudential would “go by the wayside” were the Court to continue castigating or even to cast aside prudential limitations in *Knick*.¹⁰⁴ At a minimum, courts would likely sort some rules into constitutional or statutory buckets. The primary problem is that many rules would lie in doubt in the meantime. And a secondary problem is that rebranding possibly prudential areas as constitutional or statutory in character could cause other unintended and unwelcome consequences.

In *Knick*, therefore, the Court should regard the compensation prong as prudential in character but reject it for independent reasons. And beyond *Knick*, the Court should reconsider other purportedly prudential limitations on federal jurisdiction in cases that more squarely present them.¹⁰⁵

101. See Crocker, *supra* note 4; Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. (forthcoming 2019); Katherine Mims Crocker, Note, *Securing Sovereign State Standing*, 97 VA. L. REV. 2051 (2011).

102. Smith, *supra* note 5, at 878.

103. See Young, *supra* note 78, at 159–60.

104. *Id.* at 163.

105. It bears mentioning that my view of how and why the Court should reject the compensation prong in *Knick* vis-à-vis its possible status as a prudential principle contradicts the apparent view of at least one other observer. See Joel Nolette, *Knick v. Township of Scott, Pennsylvania: Renouncing “Treason to the Constitution,”* LEAST DANGEROUS BLOG (Mar. 18, 2018), <https://leastdangerousblog.com/2018/03/18/knick-v-township-of-scott-renouncing-treason-to-the-constitution/> [https://perma.cc/ZSK4-27P2].

CONCLUSION

Knick presents an opportunity to overturn the *Williamson County* compensation prong, which requires would-be federal takings plaintiffs to “ripen” their claims by pursuing state procedures for seeking just compensation. The Supreme Court should seize this opportunity, but it should do so in a specific way. The Court should view the compensation prong as prudential rather than constitutional in character and discard it as poorly imagined and sorely impractical. Were the Court instead to eliminate the requirement because of opposition to prudential limitations on federal jurisdiction in general, a cascade of negative effects for doctrines far and wide could follow.