
*Fifth Amendment — Takings Clause —
State Litigation Requirement — Knick v. Township of Scott*

The state-litigation requirement for takings claims has been subject to vitriol ever since its establishment in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*¹ almost thirty-five years ago.² Notwithstanding federal courts' jurisdiction over claimed violations of the Fifth Amendment's Takings Clause,³ the Supreme Court mandated that property owners alleging such claims against local government regulations exhaust all adequate state court remedies before pursuing relief in federal court.⁴ The Court later amplified the force of this requirement by clarifying in its 2005 decision in *San Remo Hotel, L.P. v. City of San Francisco*⁵ that legal and factual issues resolved by state courts may not be relitigated in a subsequent federal court challenge.⁶ The practical effect of the state-litigation requirement has thus been to restrict access to federal forums.⁷

Seizing a long-awaited opportunity,⁸ last Term, in *Knick v. Township of Scott*,⁹ the Supreme Court overruled *Williamson County*'s state-litigation requirement.¹⁰ The Court held that the taking of property without just compensation creates an actionable takings claim, and thus a property owner may proceed directly to federal court with a 42 U.S.C. § 1983 action.¹¹ In reaching its conclusion, the Court relied on dicta from previous cases that cast the state-litigation requirement, originally

¹ 473 U.S. 172 (1985), overruled by *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019).

² See Ian Fein, Note, *Why Judicial Takings Are Unripe*, 38 *ECOLOGY L.Q.* 749, 773 (2011) (noting commentators' descriptions of the requirement as "deceptive, inherently nonsensical, draconian, and a Kafkaesque maze, among other unflattering things" (internal quotation marks omitted)).

³ U.S. CONST. amend. V (prohibiting the taking of private property "for public use, without just compensation"); see 28 U.S.C. § 1343(a)(3) (2012) (establishing original jurisdiction in federal district courts over constitutional claims); 42 U.S.C. § 1983 (2012) (creating a federal cause of action for local-government violations of constitutional rights).

⁴ *Williamson Cty.*, 473 U.S. at 195. While at the time of the decision many states did not have a compensation remedy, almost all states do now following the Court's ruling in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), that the self-executing nature of the Fifth Amendment requires a compensation remedy. *Id.* at 315–16; see Thomas W. Merrill, Essay, *Anticipatory Remedies for Takings*, 128 *HARV. L. REV.* 1630, 1641 n.54 (2015).

⁵ 545 U.S. 323 (2005).

⁶ *Id.* at 338.

⁷ See J. David Breemer, *The Rebirth of Federal Takings Review? The Courts' "Prudential" Answer to Williamson County's Flawed State Litigation Ripeness Requirement*, 30 *TOURO L. REV.* 319, 319 (2014); see also, e.g., *Marek v. Rhode Island*, 702 F.3d 650, 653–54 (1st Cir. 2012) (dismissing takings claim where landowner failed to first bring inverse condemnation claim in state court).

⁸ See, e.g., *San Remo*, 545 U.S. at 348–52 (Rehnquist, C.J., joined by O'Connor, Kennedy, and Thomas, JJ., concurring in the judgment) (suggesting a willingness to reconsider the requirement).

⁹ 139 S. Ct. 2162 (2019).

¹⁰ *Id.* at 2179.

¹¹ *Id.* at 2167–68.

conceived as a jurisdictional requirement, as a prudential limit.¹² *Knick* signals the Court's continued willingness to incrementally sidestep the constraints of stare decisis, and its doctrinal shift saddles municipalities and federal courts with practical challenges.

The death of the state-litigation requirement can be traced to a graveyard. Rose Mary Knick, a resident of Scott Township, Pennsylvania, owns property that includes a small family graveyard closed to the public.¹³ In 2012, Scott Township passed an ordinance mandating that cemeteries, whether on public or private property, “be kept open and accessible to the general public during daylight hours” and authorizing the township’s code enforcement officer “to ‘enter . . . property’ to determine the existence and location of a cemetery.”¹⁴ The township’s code enforcement officer inspected Knick’s property and issued a notice of violation.¹⁵

Knick sought declaratory and injunctive relief in state court against enforcement of the ordinance, but she did not institute an inverse condemnation proceeding — a state court mechanism to determine whether a taking has occurred and, if so, the amount of compensation due.¹⁶ The municipality stayed the proceedings against Knick after she filed her suit.¹⁷ The state court found that, because the enforcement action had ceased, Knick “could not demonstrate the irreparable harm necessary for equitable relief.”¹⁸

Knick then filed a § 1983 suit in federal court, seeking damages for the taking of her property for public use without just compensation in violation of the Fifth Amendment.¹⁹ Judge Caputo dismissed most of Knick’s claims with prejudice.²⁰ However, he dismissed her takings claim without prejudice, instructing Knick to first pursue an inverse condemnation action pursuant to *Williamson County* and as specified by the Pennsylvania Eminent Domain Code.²¹

The Third Circuit affirmed.²² Despite noting that the ordinance was “extraordinary and constitutionally suspect,”²³ Chief Judge Smith²⁴ held that the court was bound by *Williamson County* to dismiss the suit.²⁵

¹² *Id.* at 2178.

¹³ *Id.* at 2168.

¹⁴ *Id.* (quoting Scott Township, Pa., Ordinance 12-12-20-001 §§ 5–6 (Dec. 20, 2012)).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Knick v. Scott Township*, No. 3:14-CV-2223, 2015 WL 6560647, at *3 (M.D. Pa. Oct. 29, 2015). She also alleged violations of her First, Fourth, and Fourteenth Amendment rights. *Id.*

²⁰ *Id.* at *8–12.

²¹ *Knick v. Scott Township*, No. 3:14-CV-02223, 2016 WL 4701549, at *4–6 (M.D. Pa. Sept. 8, 2016).

²² *Knick v. Township of Scott*, 862 F.3d 310, 314 (3d Cir. 2017).

²³ *Id.*

²⁴ Chief Judge Smith was joined by Judges McKee and Rendell.

²⁵ *Knick*, 862 F.3d at 326.

The Supreme Court reversed.²⁶ Writing for the majority, Chief Justice Roberts²⁷ held that “[a] property owner has an actionable Fifth Amendment takings claim *when* the government takes his property without paying for it”;²⁸ thus, he “may bring his claim in federal court under § 1983 at that time.”²⁹ In so doing, the Court overruled *Williamson County*’s state-litigation requirement.

The majority declared the requirement misguided and suggested that it had always been the case that a takings claim ripens at the time of a taking. First, Chief Justice Roberts emphasized that the text of the Takings Clause conditions government takings on “just compensation,” not “an available procedure that will result in compensation.”³⁰ Referencing cases in which the Court had held similarly,³¹ he concluded that *Williamson County* “was not just wrong . . . [but] was exceptionally ill founded and conflicted with much of [the Court’s] takings jurisprudence.”³²

Moreover, the majority reasoned that the requirement unjustifiably relegated the Takings Clause to “‘the status of a poor relation’ among the provisions of the Bill of Rights.”³³ Chief Justice Roberts posited that the *Williamson County* Court had anticipated that property owners denied compensation in state court could pursue relief in federal court, but instead owners fell into the “Catch-22” of the *San Remo* preclusion trap, in which an unfavorable outcome in state court would bar relitigation in federal court.³⁴ The state-litigation requirement, he found, could not be squared with the guarantees of a federal forum for unconstitutional state action and the “settled rule . . . that ‘exhaustion of state remedies “is not a prerequisite to an action under [42 U.S.C.] § 1983.’”³⁵ He asserted that overruling *Williamson County* was necessary to “restor[e] takings claims to the full-fledged constitutional status the Framers envisioned.”³⁶

Having found *Williamson County* in error, Chief Justice Roberts proceeded to justify its overruling on several grounds, including “the quality

²⁶ *Knick*, 139 S. Ct. at 2167.

²⁷ Chief Justice Roberts was joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh.

²⁸ *Knick*, 139 S. Ct. at 2167 (emphasis added).

²⁹ *Id.* at 2168.

³⁰ *Id.* at 2170 (quoting U.S. CONST. amend. V).

³¹ *Id.* at 2178. He referenced *Jacobs v. United States*, 290 U.S. 13 (1933), which held that a property owner bringing suit against the federal government is entitled to compensation as if the compensation had been paid “at the time of the taking,” *id.* at 17, and *First English*, which held the same, 482 U.S. 304, 315 (1987).

³² *Knick*, 139 S. Ct. at 2178.

³³ *Id.* at 2169 (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994)).

³⁴ *Id.* at 2167.

³⁵ *Id.* (alteration in original) (emphasis omitted) (quoting *Heck v. Humphrey*, 512 U.S. 477, 480 (1994)).

³⁶ *Id.* at 2170. He argued the state-litigation requirement clashed with “[t]he ‘general rule’ . . . that plaintiffs may bring constitutional claims under § 1983 ‘without first bringing any sort of state lawsuit.’” *Id.* at 2172–73 (quoting DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 262 (2002)).

of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision.”³⁷ The Chief Justice noted a shift by courts from understanding the requirement as jurisdictional — that is, as “an element of a takings claim” — to “prudential”³⁸ — that is, based on policy considerations³⁹ — and rejected the validity of a rule whose justification “continues to evolve.”⁴⁰ The Chief Justice argued that the preclusion trap and the resulting bar to a federal forum rendered the decision unworkable.⁴¹ Having already noted *Williamson County*’s inconsistency with the case law,⁴² the Court explained that its holding would not bar enforcement of local regulatory programs, many of which compensate individuals after the fact, but would simply allow claims for that compensation into federal court.⁴³

In a brief concurrence, Justice Thomas repudiated the “‘sue me’ approach to the Takings Clause” perpetuated by *Williamson County*, which forces property owners to sue for compensation and finds no constitutional violation if compensation is subsequently paid.⁴⁴ He agreed that the majority’s decision would not necessarily subject many regulatory programs to injunctions.⁴⁵ But, even absent injunctive relief, he wrote that the opinion might still make some programs unworkable or even subject governments to tort liability.⁴⁶

Justice Kagan dissented from the majority’s opinion,⁴⁷ which she described as “smash[ing] a hundred-plus years of legal rulings to smithereens.”⁴⁸ *Williamson County* was the logical successor to *Cherokee Nation v. Southern Kansas Railway Co.*⁴⁹ and its progeny, which established that the Takings Clause does not entitle a property owner to advance or contemporaneous compensation but rather to a “reasonable, certain and adequate provision for obtaining compensation.”⁵⁰ Justice Kagan

³⁷ *Id.* at 2178 (alterations in original) (quoting *Janus v. AFSCME*, 138 S. Ct. 2448, 2478–79 (2018)).

³⁸ *Id.* (first citing *Horne v. Dep’t of Agric.*, 569 U.S. 513, 525–26 (2013); and then citing *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 733–34 (1997)).

³⁹ See generally Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845, 854 (2017).

⁴⁰ *Knick*, 139 S. Ct. at 2178.

⁴¹ *Id.* at 2178–79.

⁴² *Id.* at 2178.

⁴³ *Id.* at 2179 (“As long as just compensation remedies are available — as they have been for nearly 150 years — injunctive relief will be foreclosed.”).

⁴⁴ *Id.* at 2180 (Thomas, J., concurring).

⁴⁵ *Id.*

⁴⁶ *Id.* (“If this requirement makes some regulatory programs ‘unworkable in practice,’ so be it” (internal citation omitted) (quoting Letter Brief of U.S. Department of Justice at 5, *Knick*, 139 S. Ct. 2162 (No. 17-647))).

⁴⁷ Justice Kagan was joined by Justices Ginsburg, Breyer, and Sotomayor.

⁴⁸ *Knick*, 139 S. Ct. at 2183 (Kagan, J., dissenting).

⁴⁹ 135 U.S. 641 (1890).

⁵⁰ *Id.* at 659. Justice Kagan rejected the majority’s attempts to distinguish *Cherokee* and its progeny on the basis that they dealt with claims for injunctive relief as the “equity/law distinction played little or no role in [the Court’s] analyses” in those cases. *Knick*, 139 S. Ct. at 2185 (Kagan, J., dissenting).

rejected the majority's textual analysis, noting that the Fifth Amendment does not elaborate upon "exactly what mechanism or at exactly what time" the government must pay compensation, and thus "no more states the majority's rule than it does *Williamson County's*."⁵¹ She also rejected the notion that takings plaintiffs face superfluous hurdles, attributing the "distinctive aspects of litigating a takings claim" to "the distinctive aspects of the constitutional right," which necessitates that "two things occur: (1) the government takes property, and (2) it fails to pay just compensation."⁵² Moreover, she disagreed with the majority's characterization of the state-litigation requirement's shifting rationale, arguing that the jurisdictional rationale "has held strong for 35 years."⁵³ She suggested that, to the extent that the *San Remo* preclusion trap effected an injustice, it would be better resolved through legislation.⁵⁴

The dissent highlighted two "damaging consequences" of the majority's decision.⁵⁵ First, as government regulators usually cannot know in advance whether the implementation of a regulation will effect a taking, "[i]t will inevitably turn even well-meaning government officials into lawbreakers."⁵⁶ Second, "it will subvert important principles of judicial federalism" by "channell[ing] to federal courts a (potentially massive) set of cases that more properly belongs . . . in state courts."⁵⁷ Justice Kagan highlighted that resolution of the takings claim in the case at bar depended on the determination of a state law issue — whether the ordinance merely codified Pennsylvania common law.⁵⁸ She warned that the ruling may portend other capricious departures from established precedent, reminding the majority that "judges do not get to reverse a decision just because they never liked it in the first instance."⁵⁹

Knick marks the climax of recent jurisprudence undermining the force of the state-litigation requirement. In recent cases, the Court framed the requirement as prudential in nature, a label that never quite fit given the

⁵¹ *Knick*, 139 S. Ct. at 2184 (Kagan, J., dissenting).

⁵² *Id.* Unlike other prohibitions in the Bill of Rights — the Fourth Amendment ban on unreasonable seizures, for example — the Takings Clause does not limit the government's authority to infringe a right, but rather imposes a financial condition upon it. *See id.*

⁵³ *Id.* at 2190.

⁵⁴ *Id.* at 2189 (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

⁵⁵ *Id.* at 2187.

⁵⁶ *Id.*; *see also* Brief for the United States as Amicus Curiae in Support of Vacatur and Remand at 16, *Knick*, 139 S. Ct. 2162 (No. 17-647) (arguing that "it would be impossible to provide compensation in advance for all federal actions that might ultimately be found to be takings").

⁵⁷ *Knick*, 139 S. Ct. at 2187 (Kagan, J., dissenting) (noting that land-use regulations are "perhaps the quintessential state activity" (quoting *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982))).

⁵⁸ *Id.*

⁵⁹ *Id.* at 2190. Highlighting the Court's citation to *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), Justice Kagan warned: "If that is the way the majority means to proceed — relying on one subversion of *stare decisis* to support another — we may as well not have principles about precedents at all." *Knick*, 139 S. Ct. at 2190 (Kagan, J., dissenting).

origination of the requirement as a limitation on the Article III jurisdiction of federal courts. Although the Court may have stopped short of invalidating the rule explicitly on the basis of its prudential characterization, this notion paved the way for *Williamson County*'s overruling by eliciting many of the circumstances that the Court found weighed against stare decisis. The Court's move, while subtle, signals a willingness to cautiously yet decisively maneuver around the constraints of stare decisis, with concerning implications for takings jurisprudence.

The state-litigation requirement transformed considerably under the Court's stewardship from an essential jurisdictional requirement to a discretionary one often waived under prudential considerations. *Williamson County*, which centered on a land developer's challenge to a local zoning ordinance, framed the requirement as a necessary element of a takings claim.⁶⁰ Citing a line of cases dating back to 1890, the Court unambiguously asserted that the Fifth Amendment does not "require that just compensation be paid in advance of, or contemporaneously with, [a] taking."⁶¹ But a conflicting interpretation arose in cases such as *Suitum v. Tahoe Regional Planning Agency*,⁶² in which the Court referenced the state-litigation requirement as a "prudential hurdle[]" without expounding upon its implications.⁶³ The Court reiterated its prudential characterization in later cases in which it chose to suspend the requirement without explicit acknowledgement of doing so.⁶⁴

Notably, in *Horne v. Department of Agriculture*,⁶⁵ Justice Thomas's majority opinion framed the state-litigation requirement as "prudential" and "not, strictly speaking, jurisdictional."⁶⁶ He proceeded to assert the very reasoning that underlies the *Knick* Court's decision: "[a] 'Case' or 'Controversy' exists once the government has taken private property without paying for it."⁶⁷ The presentation of this justification in a footnote in *Horne* and in dicta in related cases does not disturb Justice Kagan's assertion that the Court had not abandoned in any holding its understanding of the requirement as a vital claim element.⁶⁸ Nevertheless, the Court's repeated framing of the rule as prudential worked a

⁶⁰ *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985), overruled by *Knick*, 139 S. Ct. 2162.

⁶¹ *Id.* at 194 (citing *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890)).

⁶² 520 U.S. 725 (1997).

⁶³ *Id.* at 734; see also, e.g., *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323, 349 (2005) (Rehnquist, C.J., concurring in the judgment).

⁶⁴ See Merrill, *supra* note 4, at 1635–36 (first citing *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702 (2010); then citing *Horne v. Dep't of Agric.*, 569 U.S. 513 (2013); and then citing *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013)).

⁶⁵ 569 U.S. 513.

⁶⁶ *Id.* at 526 (first quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1013 (1992); and then citing *Stop the Beach Renourishment*, 560 U.S. at 729 & n.10).

⁶⁷ *Id.* at 526 n.6.

⁶⁸ *Knick*, 139 S. Ct. at 2190 (Kagan, J., dissenting).

death by a thousand cuts, laying the foundation for *Williamson County*'s overruling through an escalating, though implicit, repudiation of *Williamson County*'s logic.⁶⁹

The Court's treatment of the state-litigation requirement as prudential contributed to it easily satisfying the stare decisis factors. First, the prudential framing reduced the requirement's ability to function as a clear guide. Although the state-litigation requirement was once a "nearly insurmountable barrier,"⁷⁰ the Supreme Court's discretionary application of the requirement⁷¹ paved the way for lower courts to discretionarily waive it,⁷² reducing the credible reliance parties could have on the requirement's application. Second, the framing of the state-litigation requirement as a prudential limit on federal courts' jurisdiction exacerbated the Court's issues with its prior reasoning. With the state-litigation requirement already castigated as "an exhaustion requirement for § 1983 takings claims,"⁷³ the prudential framing worsened the doctrinal deficiency by implicating the Court's unease with unelected federal judges deciding on policy grounds to not hear cases that fall under their jurisdiction.⁷⁴ Whereas a jurisdictional view partly alleviates this tension by taking discretion from judges, the prudential view reinforces an understanding of the requirement as subordinating the takings rights.

Most notably, the prudential framing allowed the Court to substitute its own priorities regarding workability in place of those underlying the *Williamson County* decision. *Williamson County* justified the requirement by arguing that a taking did not occur until the government failed to provide just compensation through some "meaningful postdeprivation process."⁷⁵ In this way, the Court prioritized having a "complete" state

⁶⁹ See Michael W. McConnell, *Horne and the Normalization of Takings Litigation: A Response to Professor Echeverria*, 43 ENVTL. L. REP. 10,749, 10,751 (2013). Such "subtle dicta" that influence how the Court will decide future cases have been termed "[t]ime bombs." Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 781 (2012).

⁷⁰ Breemer, *supra* note 7, at 320.

⁷¹ See Merrill, *supra* note 4, at 1635–36 (collecting cases).

⁷² See Breemer, *supra* note 7, at 342–43. Such is a feature of time bombs: the right dicta in the right case allow circuits to "interpret cases in ways that are equivalent to overruling . . . to reach results in line with what the judges predict to be current Supreme Court majority preference." Hasen, *supra* note 69, at 797.

⁷³ *Knick*, 139 S. Ct. at 2173.

⁷⁴ See, e.g., *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (noting that declining to adjudicate claims properly within the jurisdiction of federal courts "is in some tension with . . . the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging'" (internal quotation marks omitted) (quoting *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013))); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) (rejecting the Sixth Circuit's consideration of prudential, rather than constitutional, grounds when analyzing justiciability).

⁷⁵ *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985), *overruled by Knick*, 139 S. Ct. 2162.

action.⁷⁶ The prudential framing provided the *Knick* Court an opportunity to evaluate the doctrine anew, and to prioritize property owners' lack of access to federal forums over completeness.⁷⁷ *Knick* provides one of several examples of the Court's use of the unworkability factor to reevaluate and overcome competing priorities.⁷⁸

That *Knick*'s workability analysis is anything but inevitable highlights the ease with which the Court may employ workability to undermine unfavorable precedent. First, the majority overstated the prudential hurdle presented by the requirement, even as the prudential label afforded much opportunity to remedy the doctrine's chief defects. Concerns regarding gamesmanship — for example, that of defendants removing takings claims initially filed in state court to federal court and then moving to dismiss them on the ground that the issue was not first litigated in state court⁷⁹ — have routinely been resolved by courts.⁸⁰ And although sparse in its application, *Williamson County* preserved the Supreme Court's authority to review takings claims initially heard by state courts.⁸¹ *Knick* suggests these processes have been inadequate,⁸² without providing evidence of state courts' refusal to follow established rules, the processes' unavailability in egregious cases, or other insufficiencies that would lead to localities imposing regulations that amount to takings without compensation.

Second, the majority's conception of workability overlooks troubling uncertainties created by *Knick* in allowing some takings claims to ripen with the mere enactment of a law. This uncertainty is particularly likely

⁷⁶ *Id.* (quoting *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984)).

⁷⁷ See *Knick*, 139 S. Ct. at 2179. But see *Allen v. McCurry*, 449 U.S. 90, 105 (1980) (rejecting the idea that plaintiffs have a universal right to litigate a federal claim in a federal court). However, it is not clear that federal forums deliver significant additional likelihood of success on takings claims. Cf. Joseph William Singer, Kormendy Lecture, *Justifying Regulatory Takings*, 41 OHIO N.U. L. REV. 601, 635–41 (2015) (cataloging the many regulations that the Supreme Court has upheld against takings claims).

⁷⁸ See Mary Ziegler, *Taming Unworkability Doctrine: Rethinking Stare Decisis*, 50 ARIZ. ST. L.J. 1215, 1217 (2018) (noting concerns about unworkability have “played a central role” in recent Court decisions overruling established precedent). Just one year prior, *Janus v. AFSCME* similarly reevaluated *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), concluding *Abood* had erred in failing to properly weigh the burden on employees' free speech rights, *Janus v. AFSCME*, 138 S. Ct. 2448, 2477 (2018), despite considerable precedent suggesting the government can “impose[] speech restrictions relating to workplace operations,” *id.* at 2492 (Kagan, J., dissenting). The Court concluded that stare decisis did not favor upholding the decision, in part because “*Abood*'s line between chargeable and nonchargeable union expenditures” had proven unworkable. *Id.* at 2481 (majority opinion).

⁷⁹ See *Arrigoni Enters., LLC v. Town of Durham*, 136 S. Ct. 1409, 1411 (2016) (Thomas, J., dissenting from the denial of certiorari).

⁸⁰ Federal courts, for example, have found that a defendant has waived the state-litigation requirement through its removal to federal court or neglect of the argument. See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702, 729 & n.10 (2010); *Key Outdoor Inc. v. City of Galesburg*, 327 F.3d 549, 550 (7th Cir. 2003).

⁸¹ See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1009–10 (1992) (considering a takings claim originally brought in South Carolina state court).

⁸² See *Knick*, 139 S. Ct. at 2167.

in cases like *Knick* in which a regulation effects a per se limitation on the right to exclude, notwithstanding the fact that such right may not be absolute under state common law.⁸³ The advice to tread cautiously — even to provide immediate compensation — in order to avoid adjudicating civil rights claims is impractical for many municipalities, who may instead refrain from passing laws impacting property owners' rights to avoid lengthy, costly federal court processes.⁸⁴ Requiring that local governments provide just compensation at the time of a taking thus achieves the same practical effect as would have been caused by subjecting them to injunctions. The case at bar illustrates the consequences for individuals on the opposite side of the fence: if the public has a cognizable property right under state law to visit loved ones in a local cemetery, then the removal of an ordinance implementing that right may impede property rights overall.⁸⁵

Third, the overruling of *Williamson County* poses the risk of reduced consistency among courts. What Chief Justice Roberts depicted as an unfortunate catch-22 was defensible on the grounds of efficient federalism: it maintained state court evaluation of state law questions crucial to the determination of whether there has been a federal constitutional violation.⁸⁶ *Knick* may result in the crowding of federal courts, through which myriad takings claims stemming from local regulations of zoning and land use may now pass unencumbered.⁸⁷ But it may not provide plaintiffs the hoped-for escape from state review of takings claims: given state courts' recognized primacy in such areas⁸⁸ and federal courts' reluctance to sit as "super zoning boards,"⁸⁹ it is likely that federal courts

⁸³ See, e.g., *Yee v. City of Escondido*, 503 U.S. 519, 528 (1992).

⁸⁴ Some states structure adjudication to provide a clear opportunity where the public entity may rescind or amend regulation and "pay only for any temporary taking." Brief of the State of California et al. as Amici Curiae in Support of Respondents at 11, *Knick*, 139 S. Ct. 2162 (No. 17-647) [hereinafter States Brief].

⁸⁵ See Brief of Cemetery Law Scholars as Amici Curiae in Support of Respondents at 15, *Knick*, 139 S. Ct. 2162 (No. 17-647).

⁸⁶ See John Echeverria, *Horne v. Department of Agriculture: An Invitation to Reexamine "Ripeness" Doctrine in Takings Litigation*, 43 ENVTL. L. REP. 10,735, 10,744-45, 10,744 n.82 (2013). But see 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, 615-17 (2015).

⁸⁷ See Gary Dreyzin, Note, *The Next Wave of Climate Change Litigation: Comparing Constitutional Inverse Condemnation Claims in the United States, South Africa, and Japan*, 31 GEO. ENVTL. L. REV. 183, 185 (2018) (arguing that government action to prevent climate change or to respond to climate disasters is likely to lead to increased takings claims).

⁸⁸ *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323, 347 (2005).

⁸⁹ *Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir. 1998) (alteration omitted) (quoting *Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir. 1985)); see also Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91, 92 (1994) (arguing that federal courts seem to classify takings cases as "simply too burdensome").

will continue to depend on certification procedures⁹⁰ or abstain altogether from certain issues.⁹¹ Where federal courts do adjudicate property law issues, their rulings do not necessarily bind state courts,⁹² opening the door to inconsistent rulings among plaintiffs of the same state. Differing approaches to defining property rights increase the likelihood of inconsistent takings jurisprudence: federal courts may be wary of judicially extending state law without precedent directly on point and thus are less empowered to define property rights when compared to states.⁹³ “[A] single, clear path” for the resolution of their claims may still elude plaintiffs.⁹⁴

The Supreme Court’s approach in overruling *Knick* is curious, considering the jurisprudential roads not taken that did not run directly through so much precedent.⁹⁵ The Court ultimately fulfilled the invitation of a series of cases that had eroded *Knick* to its logical breaking point through its utilization of the prudential label as a scarlet letter.⁹⁶ In so doing, the *Knick* ruling saddles takings jurisprudence with concerning ambiguities that restrict local government regulatory authority, potentially at the expense of property rights overall. It also raises uncertainty in other contexts in which the Court has affixed prudential labels, such as *Pullman* abstention and standing doctrine.⁹⁷ *Williamson County* may ultimately prove one of several eroded and then overruled precedents⁹⁸ that reveal a more discretionary implementation of stare decisis by the post-Kennedy Court.

⁹⁰ See Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251, 293–94, 294 n.203 (2006).

⁹¹ Brief of Amici National Governors Ass’n, et al. in Support of Respondents at 32–33, *Knick*, 139 S. Ct. 2162 (No. 17-647) [hereinafter *Governors Brief*] (noting that district courts have routinely “abstained when confronting takings claims that are not subject to *Williamson County*,” *id.* at 32).

⁹² States Brief, *supra* note 84, at 25 (“While the appellate determination of an open state law issue in state court is typically definitive, determination of the same issue in federal court might be only a ‘dubious and tentative forecast’ of how the state courts would resolve the issue.” (quoting *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29 (1959))).

⁹³ Cf. Elizabeth Ruth Carter, Comment, *Ghosts of the Past and Hopes for the Future: Article 466 and Societal Expectations*, 81 TUL. L. REV. 1665, 1683 (2007).

⁹⁴ *Governors Brief*, *supra* note 91, at 32.

⁹⁵ Such paths, including proceeding through 28 U.S.C. § 1331 (2012), were considered at oral argument before the appointment of Justice Kavanaugh. See Transcript of Oral Argument at 22–23, *Knick*, 139 S. Ct. 2162 (No. 17-647).

⁹⁶ Similar actions by the Court have elicited claims of strategic narrowing in areas such as abortion, campaign finance, and standing. Richard M. Re, Essay, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1863–64 (2014); see also William D. Araiza, Essay, *Playing Well with Others — But Still Winning: Chief Justice Roberts, Precedent, and the Possibilities of a Multi-Member Court*, 46 GA. L. REV. 1059, 1060, 1075 (2012) (highlighting cases in which the Roberts Court subtly paved the way for explicit discrediting of undesirable precedent in later cases).

⁹⁷ See Smith, *supra* note 39, at 855–69.

⁹⁸ See, e.g., *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1492 (2019) (overruling *Nevada v. Hall*, 440 U.S. 410 (1979)).