

**DYING ON THE VINE: HOW A RETHINKING OF “WITHOUT
JUST COMPENSATION” AND TAKINGS REMEDIES
UNDERCUTS *WILLIAMSON COUNTY*’S RIPENESS DOCTRINE**

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INTRODUCTION

In the 1985 decision of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, the Supreme Court articulated one of the most unique and controversial takings principles of the modern era: the idea that one must unsuccessfully sue for monetary compensation under state law and in state court before seeking federal court review of a takings claim arising under the Fifth Amendment to the Constitution.¹ This “state litigation” ripeness doctrine has attracted tremendous criticism since its inception,² including criticism from four Supreme Court justices in the 2005 decision of *San Remo Hotel v. City and County of San Francisco*,³ and another two justices in a 2016 dissent to denial of certiorari in *Arrigoni Enterprises v. Town of Durham*.⁴

Despite the criticism, the Court has not overturned *Williamson County*. Yet, the precedent is not doing well.⁵ As noted elsewhere, there is a growing consensus—driven by the Supreme Court’s decisions—that the state litigation ripeness doctrine is a prudential principle that courts can ignore in

1. *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 194–97 (1985).

2. 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. L. 671, 673 (2004); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U. J.L. & POL’Y 99, 102 (2000); J. David Breemer, *You Can Check Out But You Can Never Leave: The Story of San Remo Hotel—The Supreme Court Relegates Federal Takings Claims to State Courts Under a Rule Intended to Ripen the Claims for Federal Review*, 33 B.C. ENVTL. AFF. L. REV. 247, 290–98 (2006) [hereinafter *The Story of the San Remo Hotel*]; J. David Breemer, *Overcoming Williamson County’s Troubling State Procedures Rule: How the England Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. LAND USE ENVTL. L. 209, 210–11 (2003); Peter A. Buchsbaum, *Should Land Use Be Different? Reflection on Williamson County Regional Planning Board v. Hamilton Bank*, in TAKING SIDES ON TAKINGS ISSUES, 471, 479 (Roberts ed. 2002); Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation* (pt. 2), 20 ZONING & PLAN. L. REP. 25, 27 (1997); Scott A. Keller, Note, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the Williamson County State Litigation Requirement for Regulatory Takings Claims*, 85 TEX. L. REV. 199, 240 (2006).

3. *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 352 (Rehnquist, C.J., concurring); see also *Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 17 (1st Cir. 2007) (noting “substantial criticism” of *Williamson County*).

4. *Arrigoni Enters. v. Town of Durham*, 136 S. Ct. 1409, 1409, 1411–12 (2016) (Thomas, J., dissenting).

5. *Emmert v. Clackamas County*, No. 3:13-cv-01317-ST, 2015 WL 9999211, at *3 (D. Or. Dec. 29, 2015) (“[T]he state litigation ripeness doctrine articulated in *Williamson* has been weakened considerably since former Chief Justice Rehnquist and three other justices urged its reconsideration in *San Remo* . . .”).

some cases.⁶ This understanding has encouraged courts to review takings claims that they would have summarily dismissed two decades ago.⁷ The prudential trend is uneven, but it has gained enough traction to sap *Williamson County* of a substantial portion of its former strength.⁸

A second, more subtle, development in the area of takings remedies is also undermining the rationale and force of *Williamson County*. Recent decisions like *Horne v. Department of Agriculture*⁹ and *Koontz v. St. Johns River Water Management District*¹⁰ contradict the idea that the phrase “without just compensation” merely implies the necessity of some post-takings monetary remedy—a core premise for *Williamson County*’s state litigation rule.¹¹ These decisions apply the Just Compensation Clause as a condition or limit on the takings power, one the government defendant must satisfy at the time of the taking.¹² Justices Thomas and Kennedy explicitly endorsed this perspective in their dissent of the denial of certiorari in *Arrigoni Enterprises*.¹³ The redirection has important ramifications for *Williamson County*. If just compensation is a limit on power, instead of—or as well as—a post-takings remedy, then a takings violation may accrue the moment a property invasion occurs without accompanying compensation, rather than at a later time when an independent damages remedy fails.¹⁴ This understanding is already implicit in certain takings contexts, where

6. 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, 339–41 (2014); see also David L. Callies, *Through a Glass Clearly: Predicting the Future in Land Use Takings Law*, 54 *WASHBURN L.J.* 43, 98 (2014) (citing prudential cases).

7. See *Emmert*, 2015 WL 9999211, at *3 (“Lower courts, including the Ninth Circuit, have undercut the state litigation requirement by holding that *Williamson* is a ‘prudential’ ripeness rule which may not be applied when doing so would cause unfairness or an inefficient expenditure of court and party resources.”); see also Breemer, *supra* note 6, at 338–39, 341–42, 346 (cataloguing prudential takings cases).

8. Callies, *supra* note 6, at 97–98, 100 (noting the Second, Fourth, Fifth, Sixth, and Ninth Circuit’s adoption of the notion of “prudential ripeness” and the Third, Seventh, and Tenth Circuit’s acknowledgement of this shift while also discussing the First, Eighth, and Eleventh Circuit’s unwillingness to move away from a “strictly jurisdictional” conception of ripeness).

9. *Horne v. Dep’t of Agric.*, 133 S. Ct. 2053, 2056 (2013).

10. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2596 (2013).

11. *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 194–95 (1985).

12. See *Horne*, 133 S. Ct. at 2062 & n.6 (explaining that the government’s ability to take private property is limited by the requirement, at the time of taking, of “just compensation” or the taking will be invalid).

13. *Arrigoni Enters. v. Town of Durham*, 136 S. Ct. 1409, 1409–10 (2016) (Thomas, J., dissenting).

14. *Id.*

property owners may seek to invalidate a law or order that fails to include compensation, and it is primed to grow elsewhere.¹⁵

This article reviews the question of whether and how “without just compensation” can be viewed as a limit on power; recent decisions bearing on that issue; and the effect on *Williamson County*’s state litigation rule. Part II reviews *Williamson County*, with particular emphasis on the relationship between the Court’s remedial understanding of “without just compensation” and the state litigation rule. Part III reviews recent Supreme Court precedent that treats the concept of “without just compensation” as a condition that must be satisfied at the time of a taking. Part IV discusses the effect of such precedent on *Williamson County*’s state litigation rule. Part V concludes that current trends in takings law are likely to decrease *Williamson County*’s importance, regardless of Supreme Court action in this area.

I. TAKINGS DAMAGES AND THE STATE LITIGATION RIPENESS DOCTRINE

A. *The Williamson County Case*

1. Facts and Procedure

Williamson County arose from a dispute over the completion of an approved residential cluster subdivision outside Nashville, Tennessee.¹⁶ After the developer constructed a portion of the subdivision, the county altered the zoning rules, lowering the allowable building densities.¹⁷ This prevented the developer from completing the final phases. When the developer resubmitted its plat for review under the new rules, the planning commission (Commission) rejected it as inconsistent with its new, reduced density standards.¹⁸ Hamilton Bank foreclosed on the developer and acquired interests in the partially completed subdivision.¹⁹

When Hamilton resubmitted a plat for the final phase of the subdivision, the Commission rejected it again.²⁰ Hamilton then sued the Commission in federal court, alleging that its denial unconstitutionally took the Bank’s real property interests.²¹ Although a jury awarded Hamilton damages for a

15. See *infra* sec. II.B.1–3 (stating that the Supreme Court decisions of *Koontz*, *Nollan*, and *Dolan* implicitly affirm the power-conditioning view in a facial takings context).

16. *Hamilton Bank v. Williamson Cty. Reg’l Planning Comm’n*, 729 F.2d 403, 403, 406 (6th Cir. 1984), *rev’d*, 473 U.S. 172 (1985).

17. *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 178 (1985).

18. *Id.* at 179–80.

19. *Id.* at 181.

20. *Id.*

21. *Id.* at 182.

temporary taking of its property,²² the trial judge granted judgment for the County notwithstanding the jury verdict.²³ The Sixth Circuit subsequently reversed the district court, and upheld the jury verdict,²⁴ prompting the Commission to petition the Supreme Court for certiorari.²⁵

2. The Creation of the State Litigation Rule

The United States Supreme Court granted certiorari in *Williamson County* to decide whether the government “must pay money damages to a landowner whose property allegedly has been ‘taken’ temporarily by the application of government regulations.”²⁶ But the Court never reached this issue, because it turned the case into a ripeness dispute.²⁷ In particular, the Court concluded that Hamilton’s regulatory takings claim was unripe because the Commission had not arrived at a “final decision” applying its land-use restrictions to Hamilton’s property.²⁸ In the Court’s view, the problem was that certain “variances” were available from some of the Commission’s restrictions, but Hamilton had never sought them, leaving the process short of final agency action.²⁹

The Court’s “no final decision” conclusion effectively ended the *Williamson County* case. However, the Court went on to articulate and discuss a second, more novel basis for holding the case unripe.³⁰ Specifically, it held that Hamilton was required to seek monetary compensation through available state procedures, such as a state law inverse-condemnation action, before filing its federal takings claim in federal court. The Court stated: “if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.”³¹ The claim was unripe because the bank had not sought just compensation through Tennessee’s inverse-condemnation court procedure before seeking damages for a taking in federal court under 42 U.S.C. § 1983.³² This has been termed the “state litigation” requirement.³³

22. *Id.* at 182–83.

23. *Id.* at 183.

24. *Hamilton Bank v. Williamson Cty. Reg’l Planning Comm’n*, 729 F.2d 403, 409 (6th Cir. 1984), *rev’d*, 473 U.S. 172 (1985).

25. Petition for Writ of Certiorari at 1, *Williamson Cty.*, 473 U.S. 172 (No. 84-4).

26. *Williamson Cty.*, 473 U.S. at 185.

27. *Id.* at 185–86, 190, 192, 194.

28. *Id.* at 186–90.

29. *Id.*

30. *Id.* at 194.

31. *Id.* at 195.

32. *Id.* at 182, 194–97.

3. The Post-takings Damages Remedy Behind the State Litigation Doctrine

At the heart of *Williamson County*'s state litigation ripeness ruling is the premise that the Just Compensation Clause principally functions as, and guarantees, a post-takings damages remedy. *Williamson County* makes this clear when it notes the "Fifth Amendment [does not] require that just compensation be paid in advance of, or contemporaneously with, the taking," but only that a property owner have an available avenue for monetary relief after the taking.³⁴ In other words, the Court holds, all that is constitutionally required by the phrase "without just compensation" is a money damages procedure that the property owner can invoke after a taking.³⁵ From there, the Court jumped to the conclusion³⁶ that an aggrieved property owner must try to get monetary relief through an available state court damages procedure before it has an actionable federal takings claim.³⁷

At this stage, it is important to recognize that *Williamson County* dealt with only one kind of takings claim: an as-applied takings claim seeking damages for property injuries under 42 U.S.C. § 1983. It is possible that the Court's treatment of "without just compensation" as a promise of a post-takings damages remedy derives from the particular claim in *Williamson County*.³⁸ Since the takings claimant itself invoked the Just Compensation Clause as a source of damages, it is not surprising the *Williamson County* Court tracks that view in explaining the claimant must seek damages at the state level.³⁹ *Williamson County* did not consider a takings claim seeking equitable relief, and the Court did not discuss how the Just Compensation Clause would function in that context.⁴⁰

Nevertheless, the *Williamson County* Court used fairly broad language in casting the Just Compensation Clause as a promise for post-takings

33. *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 349 (2005) (Rehnquist, C.J., concurring).

34. *Williamson Cty.*, 473 U.S. at 194.

35. *Id.* at 194–95.

36. Notably, the *Williamson County* Court does not explain its leap from the premise that a taking against a local entity is non-actionable if there is an available post-takings damages remedy to the conclusion that the owner must resort to *state courts* for that remedy. *See Berger & Kanner, supra* note 3, at 694–96 ("There is nothing in . . . the language of the Fifth Amendment that requires municipal nonpayment [of compensation] to be certified by a state court before it is complete.").

37. *Williamson Cty.*, 473 U.S. at 194–96.

38. Interestingly, the *Williamson County* Court viewed Hamilton Bank's complaint "as stating a claim under the Just Compensation Clause," rather than under the Takings Clause, as in most takings cases. *Id.* at 186. This likely arose because Hamilton sought damages for a temporary taking. *Id.* at 185.

39. *Id.* at 182, 186, 196–97.

40. *See id.* at 185–86, 195 (addressing only the issue of money damages under the Just Compensation Clause).

damages.⁴¹ If that language reflects the correct view, it is relatively easy (at least on a superficial level)⁴² to understand how the Court came to the conclusion that a takings claim will not accrue until a property owner uses an available damages procedure.⁴³ Under this view, the issues revolve around the nature and timing of the required damages procedure, and resolving the dispute becomes a matter of judicial prudence and preference informed by comity and efficiency concerns.⁴⁴ If one can get around the normal rule against exhaustion of state remedies⁴⁵ (and the *Williamson County* Court did so),⁴⁶ why not rely on takings remedies in the state system as the sufficient after-the-fact damages procedure? This is exactly the logic adopted by *Williamson County*.⁴⁷

Of course, the entire syllogism falls apart if any step fails, and it is most obviously wrong if the initial “damages” view of “just compensation” is incorrect.⁴⁸ And in fact, that premise has little basis in the Supreme Court’s takings jurisprudence.⁴⁹ *Williamson County* is an outlier in treating the “without just compensation” language as a mere guarantee that a property owner can demand money after the government has exercised the takings power with no accompanying guarantee of compensation.⁵⁰ The case’s oddity has grown clearer in recent years.

41. *See id.* at 195 (“[T]he Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking . . .”).

42. Again, even if one accepts the post-takings damages view of “just compensation,” it is hard to understand why courts should look to the state *courts* to determine whether an adequate damages procedure exists for a taking caused by an administrative agency or legislature. It is more logical to look to the procedures of the agency causing the taking to see if there is an available damages remedy. *See Berger & Kanner, supra* note 3, at 695–96 (emphasizing *Williamson County*’s failure to distinguish between the actions of a municipal agency and the state court).

43. *Williamson Cty.*, 473 U.S. at 197.

44. *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 345 (2005).

45. *See Steffel v. Thompson*, 415 U.S. 452, 472–73 (1974) (“[W]e have not required exhaustion of state judicial or administrative remedies [in 42 U.S.C. § 1983 cases], recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights.”).

46. *Williamson Cty.*, 473 U.S. at 192–93.

47. *Id.* at 194–96 (explaining there is no constitutional takings injury until a state fails to provide adequate compensation).

48. *See id.* at 195 (finding that the Constitution is satisfied by a “provision for obtaining [monetary] compensation after the taking”).

49. *See Arrigoni Enters. v. Town of Durham*, 136 S. Ct. 1409, 1410 (2016) (Thomas, J., dissenting) (arguing the text and history of the Takings Clause cast doubt on the damages view); Joshua D. Hawley, *The Beginning of the End? Home v. Department of Agriculture and the Future of Williamson County*, 2012 CATO SUP. CT. REV. 245, 246 (criticizing *Williams County*’s suggestion that “the availability of [a] post-deprivation process” has to do with ripeness).

50. *See Hawley, supra* note 49, at 247 (“*Williamson County* decisively broke with this [historic] understanding of the Takings Clause and converted the ‘adequate compensation’ inquiry—formerly about whether the government had acted lawfully or not—into a jurisdictional test.”); John F. Preis, *Alternative*

B. Cases Before and After Williamson County Undercut the Post-takings Damages View of “Without Just Compensation” by Offering an Alternative, Power-conditioning View

As commentators have previously noted, the text, history, and purpose of the Takings Clause are inconsistent with the idea that the Just Compensation Clause only guarantees a post-takings damages remedy.⁵¹ The Clause’s “without just compensation” language is more naturally read as a limit on, or condition precedent to, the exercise of governmental takings power.⁵² This is consistent with the entire purpose of the Bill of Rights: to constrain and condition governmental power over individuals.⁵³ And indeed, for much of American history, the Supreme Court and other courts read “just compensation” as a necessary condition to a takings action.⁵⁴ Courts understood that an act causing a taking must include a provision paying or guaranteeing compensation.⁵⁵ Without this, the taking was unlawful and could immediately be challenged and enjoined.⁵⁶

Williamson County clearly retreats from this view in treating the “without just compensation” requirement merely as a promise of

State Remedies in Constitutional Torts, 40 CONN. L. REV. 723, 726 (2008) (arguing *Williamson County* represents “a marked change from past practice”).

51. See, e.g., J. David Breemer, *Overcoming Williamson County’s Troubling State Procedures Rule: How the England Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. LAND USE & ENVTL. L. 209, 219 (2003) (explaining how there is reason to doubt “the assumption that the Just Compensation Clause merely acts as . . . a right to post-taking damages”).

52. *Id.*; *Arrigoni Enters.*, 136 S. Ct. at 1410 (Thomas, J., dissenting) (“A purported exercise of the eminent-domain power is invalid, the Fifth Amendment suggests, unless the Government pays just compensation before or at the time of its taking.”).

53. See, e.g., U.S. CONST. amend. XIV, § 1 (stating that deprivation of property or liberty is conditioned on due process).

54. *Arrigoni Enters.*, 136 S. Ct. at 1410 (Thomas, J., dissenting) (“This understanding of the just-compensation requirement as a constraint on Government power appears to comport with historical understandings of the Takings Clause”); *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890); see also Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 113 (1999) (explaining the historical conception of “just compensation” as a limit on legislative power).

55. *Cherokee Nation*, 135 U.S. at 659.

56. Brauneis, *supra* note 54, at 113. For a prominent state court example, see *Agins v. City of Tiburon*, 598 P.2d 25, 28 (Cal. 1979) (“[I]f regulative legislation is so unreasonable or arbitrary as virtually to deprive a person of the complete use and enjoyment of his property, it comes within the purview of the law of eminent domain. Such legislation is . . . invalid as an exercise of the power of eminent domain since no provision is made for compensation.” (italics omitted) (quoting JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN, § 1.42[1] (Matthew Bender, 3d rev. ed. 1975))), *aff’d*, 447 U.S. 255 (1980), *abrogated by* *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

post-takings damages remedy.⁵⁷ But the Court failed to dismantle or explain away the prior “power-conditioning” view, and thus its step away from this position is largely hollow.⁵⁸ Further, most of the takings cases cited by the *Williamson County* Court in support of the state-litigation rule, such as the 1984 opinion in *Ruckelshaus v. Monsanto Co.*,⁵⁹ actually follow the power-conditioning/limiting view of “without just compensation,” rather than a post-takings damages view.⁶⁰

Equally of note, the Supreme Court failed to reinforce *Williamson County*’s post-takings damages view of “without just compensation” in subsequent cases. Only two years after *Williamson County*, the Court returned to the power-conditioning understanding in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.⁶¹ There, the Court stated that the Just Compensation Clause “does not prohibit the taking of private property, but instead *places a condition on the exercise of that power*.”⁶² In subsequent cases, individual justices continued to advance this view.⁶³

The contradictory meanings of “without just compensation” within the Court’s takings jurisprudence continued unaddressed for several decades after *First English*.⁶⁴ While courts repeated the damages view in *Williamson County* more often in this era (mainly because courts were simply applying the state litigation requirement),⁶⁵ the alternative, power-conditioning view

57. *Compare Cherokee Nation*, 135 U.S. at 659 (stating that a property owner is entitled to a “provision for obtaining compensation before his occupancy is disturbed”), *with Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 195 (1985) (stating that the Constitution is “satisfied by a reasonable and adequate provision for obtaining compensation after the taking”).

58. *Williamson Cty.*, 473 U.S. at 194–95 (separating the act of taking from the compensation requirement without addressing precedent that sees takings as a condition on government power).

59. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

60. In *Monsanto*, the Court allowed a takings claimant against the United States to immediately file suit for a taking in the U.S. Court of Claims when the disputed statutory scheme itself did not include any provision for compensation. *Id.* at 1018–19. This result is consistent with the understanding that “just compensation” is a condition of any act causing a taking.

61. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987).

62. *Id.* (emphasis added).

63. *See Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 724 (2010) (noting that an act of the Florida Legislature would comply with the Takings Clause if the *Legislature* “either provide[s] compensation or acquiesce in the invalidity of the offending features of the Act”); *id.* at 736 (Kennedy, J., concurring) (“[T]he Takings Clause implicitly recognizes a governmental power while placing limits upon that power.”); *Wilkie v. Robbins*, 551 U.S. 537, 583 (2007) (Ginsburg, J., dissenting) (stating the Takings Clause “confers on [the property owner] the right to insist upon compensation as a condition of the taking of his property”).

64. *See, e.g., Pascoag Reservoir & Dam, L.L.C. v. Rhode Island*, 337 F.3d 87, 91–92 (1st Cir. 2003) (dismissing a takings claim under the state litigation requirement, with no discussion of the power-conditioning view).

65. *Id.*

of “just compensation” seen in pre-*Williamson* cases remained dormant and primed for revival.

II. HORNE, KOONTZ, AND SAN REMO REVIVE THE JUST COMPENSATION CLAUSE AS A CONDITION ON THE EXERCISE OF THE TAKINGS POWER

Since the Court’s 2005 decision in *San Remo Hotel*, the “without just compensation” issues underlying *Williamson County* have reemerged within the Court’s takings jurisprudence.⁶⁶ While the Court has yet to directly reconsider *Williamson County*’s view of “without just compensation,” or the state litigation ripeness requirement arising from it, recent decisions touch on these issues and suggest that the Court does not view “just compensation” simply as a post-takings damages remedy.⁶⁷ Indeed, recent takings decisions resuscitate the power-conditioning view of “without just compensation,” both in general and in certain classes of takings cases where equitable relief is allowed.⁶⁸ These developments have important, negative consequences for *Williamson County*.

A. Horne Sanctions the Power-conditioning View of “Without Just Compensation”

The Court’s 2013 opinion in *Horne v. Department of Agriculture* is potentially the most consequential recent decision dealing with the meaning of “just compensation.”⁶⁹ The *Horne* dispute arose from New Deal-era regulations designed to prop up the price of raisins by preventing farmers from marketing all their crops, thus limiting the supply.⁷⁰ The regulations required the Hornes to forfeit up to 47% of their raisin crop without compensation, or pay a fine.⁷¹ When the Hornes failed to turn over their raisins, the federal government imposed about \$700,000 in fines against them.⁷²

The Hornes then sued in a United States District Court, claiming the scheme unconstitutionally took their property.⁷³ They could not seek damages, but sought to invalidate the taking of their raisins and the penalty

66. See *infra* sec. II.A (addressing the power-conditioning view underlying *Williamson County*).

67. *Id.*

68. See *infra* sec. II.B (discussing *First English*’s return to the power-conditioning view).

69. *Horne v. Dep’t of Agric.*, 133 S. Ct. 2053, 2056 (2013).

70. *Id.* at 2057.

71. *Id.* at 2057–58, 2057 n.2.

72. *Id.* at 2059.

73. *Horne v. Dep’t of Agric.*, 673 F.3d 1071, 1071–72 (9th Cir. 2011), *rev’d*, 133 S. Ct. 2053 (2013).

arising under the Agricultural Marketing Agreement Act of 1937.⁷⁴ The government argued in part that the claim was unripe in federal district court,⁷⁵ asserting that the Hornes had to sue for damages in the U.S. Court of Claims before seeking to stop the taking in a federal district court.⁷⁶ In other words, the government claimed that until the Hornes unsuccessfully asked for damages, they could not claim a violation of the Takings Clause in federal court.⁷⁷ The Ninth Circuit bought this argument, but the Supreme Court reversed in its 2013 opinion.⁷⁸

In considering whether the Takings Clause only allows—indeed, demands—a post-takings damages suit, the *Horne* Court noted that *Williamson County*'s claims to this effect are “not, strictly speaking, jurisdictional” in nature.⁷⁹ In an important footnote, the Court elaborated: “A ‘Case’ or ‘Controversy’ exists once the government has taken private property without paying for it. Accordingly, whether an alternative remedy exists does not affect the jurisdiction of the federal court.”⁸⁰

This statement is irreconcilable with the idea that a takings violation—an invasion of property rights “without just compensation”—cannot exist if there is a viable, unused post-takings state damages remedy.⁸¹ It instead shows that a taking cause of action can exist when the governmental body causing the taking fails to provide compensation *with the taking*.⁸² Implicit in this view is the understanding that the requirement of just compensation is a condition which the government defendant must satisfy at the time of the taking, either by paying money at that time or by providing a certain mechanism for such payment. If the government defendant fails this condition, a takings “controversy” exists.⁸³ In this view, a takings claim accrues at the time of the act causing

74. *Id.* at 1079–80; *Horne*, 133 S. Ct. at 2059–61.

75. *Horne*, 133 S. Ct. at 2061.

76. *Id.* at 2061–62.

77. *Id.* at 2062.

78. *Id.* at 2056.

79. *Id.* at 2062.

80. *Id.* at 2062 n.6 (emphasis added).

81. Michael W. McConnell, *Horne and the Normalization of Takings Litigation: A Response to Professor Echeverria*, 43 ENVTL. L. REP. 10749, 10750–51 (2013) (noting that given *Horne*'s statement on when a takings “case and controversy” exists, “*Williamson County* [the state litigation doctrine] cannot be correct, at least on its own terms”); see also Hawley, *supra* note 49, at 246 (elaborating that *Williamson County* “has nothing to do with ripeness; it has to do with remedies”) (italics omitted).

82. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702, 723–24 (2010) (noting that an act of the Florida Legislature would comply with the Takings Clause if the Legislature “either provide[s] compensation or acquiesce in the invalidity of the offending features of the Act”).

83. *Horne*, 133 S. Ct. at 2062 & n.6.

the alleged taking, and the court has power to hear the claim then, not after a different court denies damages.⁸⁴ This is contrary to *Williamson County*.⁸⁵

B. Koontz Allows Equitable Relief in Unconstitutional Exactions Cases and Thus Shows that “Just Compensation” Can Function As a Limit on Power, Not Just As Money

The Supreme Court’s 2014 decision in *Koontz v. St. Johns River Water Management District* also supports the idea that the Just Compensation Clause operates as a condition precedent to a taking, not just as a post-takings damages remedy.⁸⁶

1. The *Koontz* Decision

The *Koontz* case involved a federal constitutional challenge to a Florida land-use agency’s denial of a development permit to a property owner because he refused to improve state land located miles away from his property at a cost of \$90,000–100,000.⁸⁷ The landowner, Coy Koontz Sr., challenged the exaction in Florida courts as a violation of his constitutional property rights under *Nollan v. California Coastal Commission*⁸⁸ and *Dolan v. City of Tigard*.⁸⁹ To understand the Supreme Court’s ruling in the *Koontz* case, it is necessary to briefly review the *Nollan* and *Dolan* decisions.

The 1987 *Nollan* case arose after the California Coastal Commission approved a permit for the Nollans to remodel a beachfront home subject to the condition that they dedicate an easement for public access across their shoreline property.⁹⁰ The Nollans sued to strike down this condition as an unconstitutional taking.⁹¹ When the case reached the Supreme Court, it held that the principles of the Takings Clause forbid the government from imposing—without compensation—land use conditions that bear no

84. *Blanchette v. Conn. Gen. Ins. Corp. (Regional Rail Reorganization Act Cases)*, 419 U.S. 102, 150, 156 (1974) (claim for compensation available if compensation provisions in statute reorganizing railways failed to secure full compensation).

85. *Compare Horne*, 133 S. Ct. at 2062 & n.6 (noting that jurisdiction over a just compensation claim exists “once the government has taken private property without paying for it”), with *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 194–95 (1985) (emphasizing that just compensation claims are not ripe until post-takings compensation procedures have been utilized).

86. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2603 (2013) (Kagan, J., dissenting).

87. *Id.* at 2593 (majority opinion); Joint Appendix at 151, *Koontz*, 133 S. Ct. 2586. (No. 11-1447).

88. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

89. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

90. *Nollan*, 483 U.S. at 828–29.

91. *Id.* at 829.

“essential nexus,” i.e., no direct relationship, to the impact of the project.⁹² *Nollan* recognized that the government can constitutionally impose conditions that directly mitigate public harms caused by a development project. But the Court held that when there is no connection between a project and a proposed condition, the condition is simply (in the Court’s words) “an out-and-out plan of extortion,” and a taking of property.⁹³ Since the Nollans’ project had no adverse impact on public-beach access, the Commission’s easement demand was unconstitutional.⁹⁴

In *Dolan*, the Court considered permit conditions that required a hardware-store owner to dedicate portions of her land to the city for use as a public bike path and to improve a storm drainage system.⁹⁵ The Court viewed the case as an opportunity to explain the reach of *Nollan*, and particularly, to decide how close a connection there must be between a land-use permit condition and the impacts of a project to satisfy takings principles.⁹⁶ *Dolan* ultimately held that land-use agencies bear a constitutional burden to show that a permit condition bears “rough proportionality” in both “nature and extent to the impact of the proposed development.”⁹⁷

That brings us to *Koontz*. When the St. Johns River Water Management District informed Coy Koontz that to get a building permit he must pay to improve culverts on state-owned property, in addition to accepting a conservation easement on most of his undeveloped land, Koontz balked.⁹⁸ The agency then denied his permit, and Mr. Koontz sued.⁹⁹ In so doing, he claimed that the off-site improvement condition violated *Nollan* and *Dolan*.¹⁰⁰ Koontz won in the lower courts, but the Florida Supreme Court reversed.¹⁰¹ That court specifically held that no exaction claim under *Nollan* and *Dolan* can arise from a permit *denial* (as opposed to exactions included in an *approved* permit) and, even if it could, *Nollan* and *Dolan* do not apply to exactions that demand money.¹⁰²

92. *Id.* at 834–38.

93. *Id.* at 837–38 (internal citation omitted).

94. *Id.* at 838–39, 841–42.

95. *Dolan v. City of Tigard*, 512 U.S. 374, 379–82 (1994).

96. *Id.* at 388.

97. *Id.* at 391.

98. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2593 (2013).

99. *Id.* at 2593 (explaining that the District would allow construction if Koontz agreed to one of two concessions; however, Koontz chose to refuse both and sued).

100. *Id.*

101. *Id.* at 2593.

102. *Id.* at 2594.

The Supreme Court took the case to address these two rulings.¹⁰³ In a decision authored by Justice Alito, the Court held that an exaction that forms the basis for a permit denial must comply with the “essential nexus” and “rough proportionality” standards of *Nollan* and *Dolan*, in the same way that a condition attached to an approved permit must comply with those standards.¹⁰⁴ The Court further held that *Nollan* and *Dolan* are not limited to dedications of real property; they apply to conditions that require permit applicants to spend money for some public purpose as well.¹⁰⁵ Although four justices dissented, their objections focused on the money-exactions issue.¹⁰⁶ Indeed, the dissenters agreed that *Nollan* and *Dolan* do not hinge on whether a permit was denied or approved; those decisions apply in both instances, provided the exaction was an integral part of the decision.¹⁰⁷ It is this particular ruling (that a property owner can challenge conditions in a permit denial under *Nollan* and *Dolan*) that bears on the Just Compensation Clause issue and, by extension, on *Williamson County*.

2. The Just Compensation Clause Allows Equitable Relief in Permit Denial *Nollan/Dolan* Cases, Implicitly Affirming the Power-conditioning View

In validating a *Nollan/Dolan* claim against exactions arising from a permit denial, the *Koontz* Court had to address this problem: how can one objecting to an exaction invoke the guarantee against takings without just compensation when the exaction is never actually imposed because the permit is denied?¹⁰⁸ The answer lay in a broad view of Just Compensation Clause remedies.

According to *Koontz*, a property owner invoking *Nollan* and *Dolan* against an exaction that precipitates a permit denial does so pursuant to the “unconstitutional conditions doctrine.”¹⁰⁹ The claimant is not seeking to challenge a consummated taking, but instead is seeking to halt a threatened, uncompensated (and thus, unconstitutional) taking that inhibits his or her right to use property.¹¹⁰ While the Just Compensation Clause will not

103. *Id.* at 2591.

104. *Id.* at 2591, 2595.

105. *Id.* at 2599.

106. *Id.* at 2603 (Kagan, J., dissenting).

107. *Id.* at 2603–04.

108. *Id.* at 2596 (majority opinion).

109. *Id.*

110. *Id.* at 2597.

provide damages in this context, it does allow the plaintiff to invalidate the exaction.¹¹¹

The dissenting justices agreed, stating that “when the government denies a permit because an owner has refused to accede to that same demand, nothing has actually been taken. *The owner is entitled to have the improper condition removed . . . but he cannot be entitled to constitutional compensation for a taking of property.*”¹¹²

In short, the Court understood that a *Nollan/Dolan* claim arising from a permit denial does not implicate a damages remedy under the Just Compensation Clause.¹¹³ Yet, at the same time, all of the justices recognized that the Just Compensation Clause gives rise to a ripe, equitable relief claim when the government denies a permit because it is unable to coerce an uncompensated exaction from a property owner.¹¹⁴

This result is possible only if the Just Compensation Clause is more than just a damages remedy. If it had only that status, it would be impossible to provide relief from exactions in the permit-denial context under the vehicle of the Just Compensation Clause, because damages do not result from inchoate exactions. Yet, *Koontz* allows such relief.¹¹⁵ In so doing, the *Koontz* Court necessarily applied the Just Compensation Clause as a limit on the exercise of government power, specifically the power to deny permits based on exactions violating *Nollan* and *Dolan*.¹¹⁶ The *Koontz* Court stated, for instance, that “[e]xtortionate demands for property in the land-use permitting context run afoul of the Takings Clause . . . because they impermissibly

111. *See id.* at 2597 (“Where the permit is denied and the condition is never imposed, nothing has been taken. While the unconstitutional conditions doctrine recognizes that this *burdens* a constitutional right, the Fifth Amendment mandates a particular *remedy*—just compensation—only for takings. In cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action—whether state or federal—on which the landowner relies.”).

112. *Id.* at 2603 (Kagan, J., dissenting) (emphasis added). The dissenters stated: “[The fact that the government condition took nothing] does not prevent *Koontz* from suing to invalidate the purported demand as an unconstitutional condition. But it does mean, as the majority agrees, that *Koontz* is not entitled to just compensation under the Takings Clause.” *Id.* at 2611 (citation omitted). Like the majority, the dissent added that, in addition to a constitutionally authorized equitable remedy, one who challenges an exaction in a permit denial “may be entitled to a monetary remedy created by state law for imposing such a condition . . .” *Id.* at 2603.

113. *Id.*

114. Importantly, the “right” that is threatened and actionable in the *Nollan* and *Dolan* Unconstitutional Conditions context is the right to be free from excessive exactions that are *uncompensated*. The *Nollan/Dolan* claimant can seek equitable relief in this context. *Id.* at 2597 (majority opinion); *id.* at 2603 (Kagan, J., dissenting) (“The owner is entitled to have the improper condition removed.”).

115. *Id.* at 2596 (majority opinion).

116. *Id.* at 2603.

burden the right not to have property taken without just compensation.”¹¹⁷ In recognizing equitable relief as the proper remedy, the *Koontz* Court necessarily equated the “right” of “just compensation” as a contemporaneous condition on land-use exactions.¹¹⁸ It is impossible to reconcile this view with *Williamson County*’s treatment of the Just Compensation Clause as solely a promise of damages after the taking.¹¹⁹

3. The Just Compensation Clause Also Functions As a Condition and Allows Equitable Relief in Approved Permit Exaction Cases

Koontz’s discussion of the function of the Just Compensation Clause in the permit-denial context begs the question of how it functions in the more common situation, seen in *Nollan* and *Dolan* themselves, where a permit is *approved* subject to a condition or exaction. The *Koontz* decision implies that these traditional *Nollan/Dolan* cases give rise to a just-compensation-based damages claim, but it does not discuss whether claimants could also seek to invalidate a condition, as in the permit denial context.¹²⁰

There is good reason to think that invalidation is also a proper remedy when property owners challenge exactions attached to approved permits.¹²¹ As *Koontz* makes clear, the *Nollan/Dolan* framework is no longer a Takings Clause doctrine even in the approved permit context. It is a particular strand of the Unconstitutional Conditions Doctrine,¹²² where one may seek equitable relief when invoking that doctrine to challenge a condition on personal activity that violates a constitutional right.¹²³ The whole point of the doctrine is to allow citizens to strike down a condition that unconstitutionally burdens a right.¹²⁴

117. *Id.* at 2596.

118. *Id.*

119. *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 195–96 (1985) (stating that the Fifth Amendment does not require contemporaneous compensation, only a “provision for obtaining compensation after the taking”).

120. *Koontz*, 133 S. Ct. at 2597.

121. See generally Scott Woodward, *The Remedy for a “Nollan/Dolan Unconstitutional Conditions Violation,”* 38 VT. L. REV. 701, 714–15 (2014) (relying on federal and state courts applying *Nollan* and *Dolan* where “[i]n general, the remedy for an unconstitutional conditions violation is invalidation of the condition” rather than compensation).

122. *Koontz*, 133 S. Ct. at 2594.

123. See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 595–96 (1972) (equitable relief sought against employment condition violating the First Amendment); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 251, 253 (1974) (equitable relief sought against a healthcare benefits condition that burdened the right to travel).

124. See *Perry*, 408 U.S. at 595–96 (discussing equitable relief sought for unconstitutional conditions).

It is no different in standard, approved permit *Nollan/Dolan* cases. The property owner challenging an approved land-use permit containing a suspect exaction is trying to void the condition, not get damages,¹²⁵ because even a permit approval does not result in a transfer of a property interest from the owner to the government through an exaction.¹²⁶ The exaction will typically demand a dedication of property from the owner, but that dedication does not occur upon permit approval.¹²⁷ The owner can walk away from the approval, and the exaction will never be consummated.¹²⁸ Property will not change hands and damages likely will not occur.¹²⁹ Nevertheless, the permit applicant may challenge the exaction when the permit is approved, before any property dedication requiring an exaction is finished.¹³⁰ In this context, where the plaintiff is permitted to stop a property-related injury before damages occur, injunctive relief is the obvious and proper remedy.¹³¹

In *Nollan* itself, the property owner sought to invalidate the public-access exaction in an approved permit, and the courts went along.¹³² The *Nollan* Court did not consider whether the property owner's exaction claim was improper because the owner sought to invalidate the exaction, rather than claim damages after the fact.¹³³ In fact, the Court struck down the easement condition in *Nollan* because the State of California imposed an exaction without supplying compensation.¹³⁴

The fact that *Nollan*, other permit-approval cases, and permit-denial cases all make invalidation of an exaction possible clearly implies that the Just Compensation Clause has a power-limiting function, as well as a damages purpose. Indeed, invalidation is only possible as a remedy for uncompensated exactions if the phrase "without just compensation" serves

125. In both *Nollan* and *Dolan*, the property owner/plaintiffs challenged the legality of exactions through state law procedures authorizing invalidation of illegal land-use decisions. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 828 (1987) (stating that the Nollans petitioned for a writ of administrative mandamus); *see also Dolan v. City of Tigard*, 512 U.S. 374, 379–82 (1994) (stating that Dolan challenged the exaction at the Land Use Board of Appeals).

126. *Dolan*, 512 U.S. at 408 (Stevens, J., dissenting).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Nollan*, 483 U.S. at 828–29; *Dolan*, 512 U.S. at 385 (majority opinion).

131. Woodward, *supra* note 121, at 740.

132. *Nollan*, 483 U.S. at 828 (“[T]he Nollans filed a petition for writ of administrative mandamus asking the Ventura County Superior Court to invalidate the access condition.”).

133. *See id.* at 828, 830–34 (proceeding to the merits after noting that the Nollans were seeking to invalidate the exaction).

134. *Id.* at 841–42.

as a limit on the government's power to impose exactions that are takings, i.e., not reasonably related to the proposed development.¹³⁵

C. San Remo and Other Decisions Demonstrate that the Just Compensation Clause Is a Condition, Not a Damages Remedy, in the Facial Takings Context

The power-conditioning function of the Just Compensation Clause is also evident in the context of facial takings claims. "In a facial takings claim, the landowner maintains that the mere enactment of the regulation constitutes a taking of all affected property without adequate procedures to provide prompt, just compensation."¹³⁶ There is substantial confusion among the federal courts on the nature of, and remedy for, facial takings claims in the post-*Williamson* framework. Some courts have concluded that facial claims seek equitable relief from an uncompensated taking, not damages; therefore, facial takings claimants need not seek monetary damages in state court for ripeness under *Williamson County*.¹³⁷ Other courts have arrived at a contrary conclusion. These hold that damages remain the sole remedy for facial takings claims, and thus facial claims must comply with *Williamson County*'s state litigation ripeness doctrine.¹³⁸

The 2005 *San Remo* decision sheds some light on these issues. In *San Remo*, the Court held that federal res judicata rules bar a property owner from filing a federal takings claim in federal court after the owner "ripens" the claim by a failed state court suit.¹³⁹ A property owner who fails to secure state law damages in state court for a property invasion does not get a

135. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2596 (2013).

136. *Taylor v. Vill. of N. Palm Beach*, 659 So. 2d 1167, 1170 (Fla. Dist. Ct. App. 1995); *see also* *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494–95 (1987) (discussing whether the mere enactment of an act constitutes a taking).

137. *Holliday Amusement Co. of Charleston v. South Carolina*, 493 F.3d 404, 407 (4th Cir. 2007) ("We recognize, of course, that the state procedures requirement does not apply to facial challenges to the validity of a state regulation."); *Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach*, 727 F.3d 1349, 1359 n.6 (11th Cir. 2013) ("*Williamson County*'s finality principles do not apply to facial claims that a given regulation is constitutionally infirm."); *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 287 (5th Cir. 2012) ("The Supreme Court has held *Williamson County* to be inapplicable to facial challenges."); *Asociación de Suscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Juarbe-Jiménez*, 659 F.3d 42, 49–50 (1st Cir. 2011) ("[The Supreme Court] has also explained that facial challenges are not subject to the second portion of *Williamson County*'s ripeness analysis . . ."); *Hillcrest Prop., L.L.P. v. Pasco County*, 731 F. Supp. 2d 1288, 1295 (M.D. Fla. 2010) ("[A] facial challenge to an ordinance becomes ripe upon the ordinance's enactment.").

138. *See, e.g.,* *Alto Eldorado P'ship v. County of Santa Fe*, 634 F.3d 1170, 1177 (10th Cir. 2011) (holding plaintiffs must first seek compensation and meet the *Williamson County* ripeness requirement).

139. *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 337–38 (2005).

“second bite at the apple” in federal court through a federal takings claim, notwithstanding *Williamson County*’s contrary guidance.¹⁴⁰

Much has been written about *San Remo*’s effect in creating a trap for takings plaintiffs by closing the federal court to takings claims the moment they ripened in state court under *Williamson County*.¹⁴¹ *Williamson County* baits the trap by instructing takings plaintiffs to sue in state court for ripeness and *San Remo* snaps it shut by concluding that losing state court plaintiffs can never go to federal court.¹⁴² This scheme appears to relegate many federal takings plaintiffs to state courts.¹⁴³

Yet, the *San Remo* Court appeared to recognize a facial takings exception from this jurisdictional Catch-22.¹⁴⁴ The Court noted that, while the plaintiffs’ facial takings claim was barred in federal court under res judicata principles due to a prior state court suit, they “could have raised most of their facial takings challenges, which by their nature requested relief distinct from the provision of ‘just compensation,’ directly in federal court.”¹⁴⁵ In making this point, the Court cited to a 1992 Supreme Court case adjudicating a facial takings claim seeking equitable relief.¹⁴⁶

The Court’s statement—that facial takings claims do not seek “provision” of “just compensation”—indicates that a facial takings violation is not remedied by after-the-fact damages, but by equitable relief.¹⁴⁷ As discussed above, such relief is possible only if and when the Just Compensation Clause functions as a condition on the government’s power, not just as a damages remedy.¹⁴⁸ A law that takes property on its face can be immediately challenged, and potentially enjoined, because “just compensation” functions as a condition on laws that take property in every application. If such laws do not contain or create a provision for compensation, then they fail to comply with the “just compensation” condition and are subject to invalidation.¹⁴⁹

140. *Id.* at 346.

141. *See, e.g.,* Michael M. Berger, *supra* note 2, at 102 (observing that “the very act of ripening a case also ends it”); Berger & Kanner, *supra* note 2, at 687 (describing the process of “ripening” as the “death knell” for property owners’ cases).

142. *Rockstead v. City of Crystal Lake*, 486 F.3d 963, 968 (7th Cir. 2007).

143. *See San Remo*, 545 U.S. at 342 (clarifying that plaintiffs, when properly in state court, do not have a “right” to have federal claims heard in federal court).

144. *Id.* at 346.

145. *Id.* at 345–46.

146. *Id.* (citing *Yee v. Escondido*, 503 U.S. 519, 534 (1992)).

147. *Id.*

148. *See supra* sec. II.B.3 (showing how permit denial cases imply that the Just Compensation Clause has a power-conditioning function).

149. *See Taylor v. Vill. of N. Palm Beach*, 659 So. 2d 1167, 1170 (Fla. Dist. Ct. App. 1995) (noting that regulations require “adequate procedures to provide [homeowners] prompt, just compensation”); *Joint Ventures, Inc. v. Dep’t of Transp.*, 563 So. 2d 622, 625, 627 (Fla. 1990) (holding a

A few courts have concluded that the *San Remo* Court's recognition of an immediate equitable remedy for a facial taking rests on the particular type of facial claim at issue in that case.¹⁵⁰ The facial claim in *San Remo* arose largely from the now-defunct theory that a regulation causes a taking if it fails to "substantially advance legitimate government interests . . ."¹⁵¹ This begs the question of whether *San Remo*'s discussion of the remedial and ripeness rules for facial claims pertains only to the "substantially advances" formula, which is no longer viable after the Court's decision in *Lingle v. Chevron*.¹⁵²

This view is impossible to square with *San Remo* or the Court's takings jurisprudence as a whole. First, *San Remo* did not limit its discussion of facial claims to "substantially advances" claims,¹⁵³ though it easily could have done so. Second, the *San Remo* plaintiff did not bring solely a "substantially advances" facial claim.¹⁵⁴ The plaintiff also alleged a facial takings claim based on "lack of a nexus between the required fees and the ultimate objectives sought to be achieved via the ordinance, and . . . [the law's] imposition of an undue economic burden on individual property owners."¹⁵⁵ So, while the *San Remo* Court undoubtedly intended its facial takings discussion to include the plaintiff's "substantially advances" claims, it is difficult to conclude the Court was referring only to such claims.¹⁵⁶

Perhaps even more compelling, the Court has never limited equitable-relief, facial takings claims to the "substantially advances" context. It has instead recognized and adjudicated numerous different types of these facial takings claims.¹⁵⁷ In the 1981 case of *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*,¹⁵⁸ the Court addressed the merits of an injunctive-relief facial takings claim based on lost economic use of

statute that took property on its face was unconstitutional due to its failure to include an adequate compensation guarantee).

150. See, e.g., *Alto Eldorado P'ship v. County of Santa Fe*, 634 F.3d 1170, 1175 (10th Cir. 2011) (explaining that *San Remo* focused on the facial nature of the challenge).

151. See *San Remo*, 545 U.S. at 334 n.12 ("Count 1 alleged that the [city ordinance] was facially unconstitutional and unconstitutional as applied to petitioners because . . . it failed to substantially advance legitimate government interests . . ." (internal quotations omitted)).

152. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540, 542–45 (2005) (holding that the "substantially advances" formula comes from due process, not takings, and therefore is invalid).

153. *San Remo*, 545 U.S. at 346 n.25.

154. *Id.* at 341 (Rehnquist, C.J., concurring).

155. *Id.* at 341 (citing *San Remo Hotel, L.P. v. City & County of San Francisco*, 41 P.3d 87, 106–09 (Cal. 2002)).

156. *Id.*; see also *Goodwin v. Walton County*, No. 3:16-cv-364/MCR/CJK, 2017 WL 1217188, at *4 (N.D. Fla. Mar. 30, 2017) ("[T]he Court in *Lingle* did not abandon all facial takings claims, only the substantially advances claim . . .").

157. See *infra* notes 159–66 and accompanying text (explaining how the Court has addressed takings claims involving the loss of economic use).

158. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).

land.¹⁵⁹ Six years later in *Keystone Bituminous Coal Association v. DeBenedictis*,¹⁶⁰ property owners raised a facial takings claim against a statute that restricted their ability to mine coal.¹⁶¹ The claim was not based on the law's failure to substantially advance legitimate state interests, but on the negative effects on property value.¹⁶² The property owners sought an injunction through this claim, and the courts adjudicated it.¹⁶³ A decade later, in *Suitum v. Tahoe Regional Planning Agency*,¹⁶⁴ the Court referred to a facial claim that legislation had "deprived [the owner] of economically viable use of [his] property" when the Court stated that "'facial' challenges to regulation are generally ripe the moment the challenged regulation or ordinance is passed"¹⁶⁵

This history reinforces the conclusion that the *San Remo* Court was speaking generally, not just about facial "substantially advances" claims, when it stated that "facial" takings claims do not seek or hinge on damages, and accordingly do not require pursuit of damages in state court for ripeness purposes.¹⁶⁶ Facial claims instead arise instantly from any law that takes property without a concurrent mechanism for compensation, because the compensation mandate operates as a limit on the legislative power, rather than the promise of an independent, post-takings monetary remedy.¹⁶⁷ This is quite different from *Williamson County*'s view that the Just Compensation Clause limits accrual of an as-applied takings violation until the owner exhausts outside damages remedies.¹⁶⁸

159. *Id.* at 273–74, 295–96.

160. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 479 (1987).

161. *Id.* at 476–79.

162. *Id.* at 480.

163. *Id.* at 478–79.

164. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997).

165. *Id.* at 736 n.10 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981)).

166. *See supra* notes 154–64 and accompanying text (describing the validity of takings claims where a statute restricted land use).

167. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984) ("Because of the availability of the Tucker Act, Monsanto's ability to obtain just compensation does not depend solely on the validity of the statutory compensation scheme."); McConnell, *supra* note 81, at 10750 ("As the *Horne* decision demonstrates, a claimant may obtain equitable relief in district court without undertaking a futile trip to the Court of Federal Claims (or state equivalent) where the statutory scheme provides no compensation even in the event of a taking.").

168. *Compare Horne v. Dep't of Agric.*, 133 S. Ct. 2053, 2062 (2013) (finding the statute in question did not allow for a concurrent compensation mechanism, thus the takings claim could be reviewed immediately), *with Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194–95 (1985) (emphasizing that claimants must use alternative post-takings remedies if available).

III. HOW THE EMERGING POWER-CONDITIONING VIEW OF “WITHOUT JUST COMPENSATION” DIMINISHES *WILLIAMSON COUNTY*’S STATE LITIGATION REQUIREMENT

Decisions that explicitly or implicitly view the Just Compensation Clause as a condition on the power to take property, rather than a post-takings remedy, set the stage for a serious reduction in the scope and application of *Williamson County*’s state litigation doctrine. *Horne* has the potential to create momentum at the Supreme Court to overrule or alter *Williamson County*. Other relevant Supreme Court decisions pave the way for a decrease in the lower courts’ application of the state litigation concept, whether or not the Court reconsiders *Williamson County*.

A. *Williamson County Loses Force Where the Just Compensation Clause Functions As a Condition on the Power to Take Property*

Horne has the most potential to change the state litigation doctrine because its statement that a takings controversy exists when the government takes property without paying compensation, regardless of the existence of alternative damages remedies,¹⁶⁹ flatly contradicts *Williamson County*.¹⁷⁰ In *Williamson County*, the prohibition on a taking “without just compensation” means a takings violation exists (i.e., is ripe) if money cannot be obtained through a post-takings damages remedy.¹⁷¹ In *Horne*, it means a violation exists when the defendant fails to compensate when taking property.¹⁷² *Horne*’s statement is broad enough to include all types of takings claims.¹⁷³

If *Horne*’s view is correct, then *Williamson County* is wrong in requiring state court damages litigation to create an actionable, ripe claim for a violation of the Just Compensation Clause.¹⁷⁴ *Horne* thus provides fodder for a complete reversal of *Williamson County*’s state litigation doctrine. Under *Horne*’s power-conditioning view of the Just Compensation Clause, takings claims should and would be ripe the moment a takings defendant invades property without compensation.¹⁷⁵ This regime would not require

169. *Horne*, 133 S. Ct. at 2062 n.6.

170. McConnell, *supra* note 81, at 10751.

171. *Williamson Cty.*, 473 U.S. at 194–95.

172. *Horne*, 133 S. Ct. at 2062 n.6.

173. *See id.* (suggesting that there is no limit to the types of takings included in this reasoning, as the Court does not differentiate or specify between the various types of takings claims).

174. *Id.*

175. *Id.*; *see also* Arrigoni Enters. v. Town of Durham, 136 S. Ct. 1409, 1410 (2016) (Thomas, J., dissenting) (explaining that the “exercise of the eminent-domain power” is conditioned upon “just compensation before or at the time of [the] taking”).

the government defendant to actually pay the owner in advance of, or contemporaneously with, the taking to avoid a claim (though it could). The government would need some law or mechanism guaranteeing compensation at the time of the taking.¹⁷⁶ Such a shift refocuses the “without just compensation” issue from state courts to the executive and legislative bodies that almost always cause takings, consistent with pre-*Williamson County* doctrine, and in so doing, creates a framework for ripening claims without state court remedies.¹⁷⁷

While *Horne* provides the Supreme Court with precedential footing for a future retreat from its ill-considered and harmful state litigation ripeness doctrine, *Koontz* paves the way for lower courts to decline to apply *Williamson County* in *Nollan/Dolan* exaction cases. As we have seen, *Koontz* makes clear that under the Unconstitutional Conditions Doctrine the Just Compensation Clause is a condition on the exaction power, not just a damages remedy.¹⁷⁸ Because of this, property owners may immediately seek invalidation of uncompensated exactions in the permit denial or approval context.¹⁷⁹

Williamson County itself made clear that property rights claims that properly seek invalidation of a regulation, rather than after-the-fact damages under the Just Compensation Clause, are not subject to the state litigation ripeness requirement.¹⁸⁰ Thus, after *Koontz*, property owners filing otherwise ripe *Nollan* and *Dolan* claims seeking to invalidate permit conditions should not have to sue for compensation in state courts to ripen their claims. Such claims should be permissible in federal court.¹⁸¹

The same goes for facial claims. Courts get it right when they hold facial takings claims exempt from the state litigation doctrine on the ground that such claims do not seek, or hinge on the availability of, post-takings damages under the Just Compensation Clause.¹⁸² There is a sound reason why “just

176. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 n.21 (1984) (“To the extent that the operation of the statute provides compensation, no taking has occurred . . .”).

177. See *supra* sec. I.B (discussing the Supreme Court’s criticism of the “without just compensation” issue).

178. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2597 (2013).

179. Woodward, *supra* note 121, at 705.

180. *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 197 (1985) (reviewing a substantive due process claim that sought “invalidation of the regulation” without applying the state litigation requirement).

181. See, e.g., *Levin v. City & County of San Francisco*, 71 F. Supp. 3d 1072, 1079 (N.D. Cal. 2014) (holding taking claims “ripe without a prior damages suit”); *White Oak Realty v. U.S. Army Corp. of Eng’rs.*, No. 13–4761, 2016 WL 355485, at *3, *5–6 (E.D. La. Jan. 28, 2016) (holding that a district court could provide remedies for takings claims in equity).

182. See *Goodwin v. Walton County*, No. 3:16–cv–364/MCR/CJK, 2017 WL 1217188, at *4 (N.D. Fla. Mar. 31, 2017) (stating that facial challenges are “immediately ripe” because of the very nature of the relief they request).

compensation” is a contemporaneous condition on legislation challenged as a facial taking, rather than solely an implied right to post-takings damages. In a facial takings context, the very text of the legislation invades a constitutionally protected property interest, in every possible application, at the moment of enactment. Since the taking is obvious and unavoidable at the time of enactment, the duty to provide compensation as a condition of the takings power is also obvious and unavoidable at the time.¹⁸³ In other words, the obligation to provide compensation is foreseeable at the time of passage, and the condition must be met then.¹⁸⁴ Thus, it makes sense to look to the law itself to see whether the government complied with the compensation condition. If not, the law is “without just compensation” and the law can be invalidated until it is modified or enacted with compensation. Accordingly, courts have correctly allowed equitable relief as a means of enforcing the Just Compensation Clause in the facial context, and on this basis, also rightly exempted these claims from *Williamson County*’s “seek damages in state court” ripeness requirement.¹⁸⁵

B. The Increasing Prominence of the Power-conditioning View of the Just Compensation Clause Will Speed Williamson County’s General Decline

The Supreme Court’s criticism of *Williamson County*, and its transformation of the state litigation doctrine from a jurisdictional to a prudential regime, has clearly weakened the doctrine.¹⁸⁶ There is no doubt now that courts *have the power* to hear takings claims without ever requiring the claimant to seek damages in state court.¹⁸⁷ The only question is whether

183. *See* *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984) (concluding that even if data consideration and data disclosure are a governmental taking, there is an adequate remedy under the Tucker Act).

184. In contrast, an as-applied taking of property is not apparent at the time of enactment of a land-use regulation. Rather, it only potentially becomes apparent if and when the otherwise constitutional regulation is applied to certain particular situations, which often cannot be foreseen beforehand. *See As-Applied Challenge*, BLACK’S LAW DICTIONARY (10th ed. 2014) (explaining that an as-applied challenge concerns a facially constitutional law that may be unconstitutional when applied to certain parties or facts).

185. *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 736 n.10 (1997); *Asociación de Suscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Juarbe-Jiménez*, 659 F.3d 42, 48 (1st Cir. 2011).

186. *See, e.g.,* *Arrigoni Enters. v. Town of Durham*, 136 S. Ct. 1409, 1409–10 (Thomas, J. dissenting) (indicating that “suspect reasoning” in *Williamson County* led to the state litigation doctrine and that there are reasons to doubt the damages view); *Del-Prairie Stock Farm, Inc. v. County of Walworth*, 572 F. Supp. 2d 1031, 1033 (E.D. Wis. 2008) (“[A] concrete takings injury can occur without state litigation.”).

187. *See, e.g.,* *Sansotta v. Town of Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013) (“[B]ecause *Williamson County* is a prudential rather than a jurisdictional rule, we may determine that in some instances, the rule should not apply and we still have the power to decide the case.”).

they should.¹⁸⁸ Federal courts are increasingly answering that question in the affirmative.¹⁸⁹

Discomfort with the logic of *Williamson County*'s state litigation rule is rising in other contexts. Facial takings claims are exempt from the state exhaustion ripeness doctrine in many circuit courts.¹⁹⁰ The same rule typically does not apply to takings claims challenging a taking of money.¹⁹¹ Courts now recognize that government defendants waive *Williamson County* when they do not properly raise it.¹⁹²

Underlying much of this change is the recognition that the Just Compensation Clause can function (at least in some circumstances) as a condition on the exercise of government power, rather than as a post-takings damages remedy.¹⁹³ If and when this view becomes more overt, it will become more normal to see federal takings adjudication without exhaustion of state court damages remedies. After all, if “just compensation” is an immediate limit on a government’s power to take property, as in contexts where equitable relief is allowed, post-takings state remedies are irrelevant.¹⁹⁴ All that matters is whether the taking comes with compensation. If not, the taking is “without just compensation” and

188. *Id.*

189. *See, e.g., id.* at 545 (providing where the rule “is a prudential rather than a jurisdictional rule,” courts may use their discretion); *Town of Nags Head v. Toloczko*, 728 F.3d 391, 399 (4th Cir. 2013) (stating that courts should have the power to use their discretion).

190. *Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404, 407 (4th Cir. 2007) (“[T]he state procedures requirement does not apply to facial challenges to the validity of a state regulation.”); *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 287 (5th Cir. 2012) (“The Supreme Court has held *Williamson County* to be inapplicable to facial challenges.”); *Temple B’Nai Zion, Inc. v. City of Sunny Isles Beach*, 727 F.3d 1349, 1359 n.6 (11th Cir. 2013) (“*Williamson County*’s finality principles do not apply to facial claims that a given regulation is constitutionally infirm.”).

191. *See E. Enters. v. Apfel*, 524 U.S. 498, 521 (1998) (no suit for compensation necessary to challenge a demand by government for “a direct transfer of funds”); *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 227 (2003) (finding the case ripe without prior damages suit). The most common reason given by courts for exempting money takings from *Williamson County* is that it would “entail an utterly pointless set of activities” to require a plaintiff to submit to a taking of money and then seek one-for-one dollar reimbursement in state court to ripen a claim against the taking. *Apfel*, 524 U.S. at 521 (quoting *Student Loan Mktg. Ass’n v. Riley*, 104 F.3d 397, 401 (D.C. Cir. 1997)). A suit for damages is not “available” or, as a practical matter, prudent in this context and is therefore not required. *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 849–50 (9th Cir. 2001); *García-Rubiera v. Calderón*, 570 F.3d 443, 453 (1st Cir. 2009); *Asociación de Suscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 19–20 (1st Cir. 2007); *In re Chateaugay Corp.*, 53 F.3d 478, 491–92 (2d Cir. 1995); *Transohio Sav. Bank v. Office of Thrift Supervision*, 967 F.2d 598, 613–14 (D.C. Cir. 1992).

192. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 729 (2010).

193. *See supra* sec. I.B (discussing *First English*’s framework for ripening takings claims without state court remedies).

194. *See Horne v. Dep’t of Agric.*, 133 S. Ct. 2053, 2602 n.6 (2013) (explaining that it is irrelevant whether an alternate, post-takings remedy exists).

justiciable in state or federal court.¹⁹⁵ This view is most likely to bear fruit in the near future in *Nollan/Dolan* exaction claims. There is no reason to require a property owner to seek damages to ripen a *Nollan* and *Dolan* claim when that claim seeks to invalidate a condition that demands property, but which has not resulted in any transfer of property to the government.

Given present trends, it is not hard to envision a day when *Williamson County*'s state litigation requirement is treated as the exception to federal takings review, rather than the rule. It is true that *Williamson County* is still strong enough to burden and sometimes defeat important, as-applied regulatory and physical takings claims.¹⁹⁶ This alone justifies Supreme Court reconsideration of the issue. However, even if the Court stays away from the issue, many takings claims can and should be heard in federal courts. It is also possible to foresee a day when the Supreme Court itself will return to the common sense, pre-*Williamson* understanding that a takings violation exists when the government entity causing a taking fails to supply compensation at the time of the taking. When the Court does, it will bury *Williamson County* with other wrongly decided decisions.

IV. CONCLUSION

During the period between *Williamson County* and *San Remo*, the state litigation rule was probably the most difficult hurdle faced by takings claimants and the most common reason for their claims to fail. The doctrine drained such claimants of their time, money, and motivation by kicking them back and forth between state and federal courts under a disingenuous "ripeness" doctrine, without any hearing on the merits or any clear direction on how or where the claims could actually ripen.¹⁹⁷

Although *San Remo* did not overrule *Williamson County*, it initiated an on-going reassessment that has steadily eroded the power and reach of the state litigation ripeness doctrine. Part of this re-assessment involves a broader understanding of the phrase "without just compensation" and the takings remedies that arise from it. The Just Compensation Clause is increasingly viewed (most often implicitly) as a limit or condition on

195. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 & n.21 (1984). *But see* John Echeverria, *Horne v. Department of Agriculture: An Invitation to Reexamine "Ripeness" Doctrine in Takings Litigation*, 43 ENVTL. L. REP. 10735, 10736 (2013) (arguing that federalism concerns may justify limiting takings claims to state court).

196. *See, e.g.*, *Pascoag Reservoir & Dam, L.L.C. v. Rhode Island*, 337 F.3d 87, 96 (1st Cir. 2003) (concluding no relief was available because plaintiffs failed to pursue state court remedies).

197. *See id.* (dismissing under the state litigation doctrine).

governmental power to take property, not just as a damages remedy.¹⁹⁸ The vitality of this view is seen most clearly in a variety of cases, such as facial and *Nollan/Dolan* disputes, where takings claimants may seek equitable relief from a taking instead of monetary compensation.¹⁹⁹ Such developments are inconsistent with, and undercut, *Williamson County*'s state litigation doctrine because the core of that doctrine—that takings violations do not exist until plaintiffs pursue damages after a taking—fundamentally rests on the assumption that “without just compensation” only offers a post-takings damages remedy.

Hopefully, renewed thinking on takings remedies will speed *Williamson County*'s decline. It is now clear that the state litigation doctrine was never sound in theory or practice. The Court took a fairly simple phrase—one telling the government it cannot constitutionally take property without providing compensation—and turned it into a counterintuitive declaration that the government cannot constitutionally take property without some available post-takings damages remedy in state court. The Due Process Clause, which contains the phrase “without due process,” is not strained out this way. Instead, it is interpreted to mean that due process must be afforded at the time of a property deprivation, and if not, the deprivation is “without due process” and actionable in state or federal court. There is no reason to construe “without just compensation” in the Takings Clause differently.²⁰⁰

It is time to go back to the simpler view. No one loses anything if the Takings Clause once again simply tells government agencies, “don't take property unless you provide a prompt means to pay property owners at the time.” If the government does not abide by this, the government can be sued: sometimes for equitable relief restraining the taking until compensation is guaranteed, and sometimes for damages for any past injury. If the government provides a mechanism to compensate for the taking, there is no constitutional violation. If not, a claim for a violation exists, and federal courts can immediately hear a takings claim.

Since takings tests are difficult for property owners, it will quickly become obvious if a claim lacks merit. Fairness, justice, and resources will be preserved if takings claims stand or fall in the courts on the merits, rather than being whittled away in a flawed *Williamson County* ripeness grinder.

198. *See supra* sec. I.B (reading just compensation as “a limit on, or condition precedent to, the exercise of governmental takings power”).

199. *See supra* secs. II.B1, II.C (explaining how *Koontz* and *San Remo* involve a broad understanding of “without just compensation”).

200. *Arrigoni Enters. v. Town of Durham*, 136 S. Ct. 1409, 1409–10 (2016) (Thomas, J., dissenting) (stating that *Williamson County*'s interpretation “seems at odds with the plain text and original meaning of the Takings Clause”).