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THE RIPENESS GAME: WHY ARE WE STILL FORCED TO PLAY?

Michael M. Berger*

I. INTRODUCTION

This is not my first rodeo; I have written about ripeness in land use takings cases before.¹ After all this time and analysis, I am left with this primal question: WHY? For decades, the reports of the decisions of federal district and circuit courts have been overflowing with opinions that laid waste to countless forests so they could discuss the reasons why they were not going to reach the merits of the

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¹ Michael M. Berger, *Anarchy Reigns Supreme*, 29 WASH. U. J. URB. & CONTEMP. L. 39 (1985); Michael M. Berger, "Ripeness" Test for Land Use Cases Needs Reform: Reconciling Leading Ninth Circuit Decisions is an Exercise in Futility, 11 ZONING & PLAN. L. REP. 57 (1988); Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735, 786-95 (1988); Michael M. Berger, *The Civil Rights Act: An Alternative for Property Owners Which Avoids Some of the Procedural Traps and Pitfalls in Traditional 'Takings' Litigation*, 12 ZONING & PLAN. L. REP. 121 (May 1989); Michael M. Berger & Daniel R. Mandelker, *A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings*, 42 LAND USE L. & ZONING DIG. 3 (Jan. 1990); Michael M. Berger, *The "Ripeness" Mess in Federal Land Use Cases or How the Supreme Court Converted Federal Judges into Fruit Peddlers*, INST. ON PLAN., ZONING, & EMINENT DOMAIN (1991); Michael M. Berger, *Regulatory Takings Under the Fifth Amendment: A Constitutional Primer*, WASH. LEGAL FOUND. 13-19 (1994); Michael M. Berger & Gideon Kanner, *The Need for Takings Law Reform: A View From the Trenches—A Response to Taking Stock of the Takings Debate*, 38 SANTA CLARA L. REV. 837 (1998); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U. J.L. & POL'Y 99 (2000); Michael M. Berger, *Property Rights and Takings Law: Y2K and Beyond*, INST. ON PLAN., ZONING, & EMINENT DOMAIN (2002) [hereinafter *Property Rights & Takings*]; Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 URB. LAW. 671 (2004); Michael M. Berger, *What Has San Remo Done to the Ripeness Doctrine?*, INST. ON PLAN., ZONING, & EMINENT DOMAIN (2006).

particular property rights case then at issue. After prodding and poking, like so many highly educated fruit peddlers, the courts decided that the cases were simply not “ripe” enough for them to deal with. How much ink and paper could have been saved—and perhaps some justice done in the process—if the courts had simply decided the issues in the cases before them?

As practiced in land use cases, the ripeness rule was nonsense when first articulated² and it remains nonsense today. One might have been willing to cut the Supreme Court some slack in the early days of regulatory taking litigation (i.e., the late 1970s and early 1980s, when land use taking issues began to appear in court with some regularity), as the Court was candid about its inability to determine any bright line rules in a legal field that it had essentially abandoned for half a century (i.e., since the decision in *Pennsylvania Coal Co. v. Mahon*).³ In the Court’s 1978 words:

While this Court has recognized that the “Fifth Amendment’s guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,” this Court, quite simply, has been unable to develop any “set formula” for determining when “justice and fairness” require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely “upon the particular circumstances [in that] case.”⁴

² Actually, it was not “first articulated” at the outset of the series of Supreme Court opinions we now categorize as dealing with “ripeness.” Rather, after ducking the substantive issue (of what it takes to cause a regulatory taking) each time it came before the Court for nearly a decade, it finally dawned on people that what had developed (by the repeated dismissal of cases accepted for review as not having been ready for prime time) was an ad hoc rule for determining whether a regulatory taking case was ripe enough for litigation. See *infra* text accompanying notes 17-27.

³ See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). There were no Supreme Court inverse condemnation cases between then and 1978.

⁴ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123-24 (1978) (alteration in

The Court was still floundering when, in 1985, it articulated what has become the backbone of the ripeness rule in federal takings litigation: A case is not ripe for federal court takings litigation until the property owner has “obtained a final decision” of what use will be permitted of the owner’s land and has exhausted (unsuccessfully) any avenue of compensatory relief afforded under state law.⁵ Thus, the *Williamson County* rule was born.⁶ It would not be until 1987, when the Court decided the famous “trilogy” of *Keystone Bituminous Coal Ass’n v. DeBenedictis*, *Nollan v. California Coastal Commission*, and *First English v. County of Los Angeles*⁷ that the Court began to get a handle on substantive regulatory takings law.⁸

But much has happened since 1978, and even since 1987. The slate is no longer clean, and the Court is no longer a stranger to takings cases. Indeed, the Court’s most recent Term showed that the Justices now seem able to deal with some of the basic substantive issues of takings law, sometimes unanimously.⁹ Moreover, in 2005, four Justices of the Supreme Court went on record as saying that the *Williamson County* rule was in serious need of re-evaluation and, perhaps, should be discarded.¹⁰ The author of that concurring opinion (Chief Justice Rehnquist) confessed that he might have been mistaken in joining the *Williamson County* majority.¹¹ Three others (Justices O’Connor, Kennedy, and Thomas) signed the Chief’s concurring opinion.¹² Both lower courts and scholarly commentators

original) (citations omitted).

⁵ *Williamson Cnty. Reg’l. Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 186 (1985).

⁶ *Id.*

⁷ *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 505 (1987); *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 841-42 (1987); *First English Evangelical Lutheran Church v. Cnty. of Los Angeles*, 482 U.S. 304, 322 (1987).

⁸ A contemporaneous discussion of the holdings in those seminal cases is in Berger, *Happy Birthday, Constitution*, *supra* note 1, at 743-55. The author briefed and argued *First English* and filed an amicus curiae brief in *Nollan*.

⁹ *Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511, 522 (2012); *Horne v. United States Dep’t of Agric.*, 133 S. Ct. 2053, 2056 (2013); *Koontz v. St. John’s River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591 (2013); *Lozman v. City of Riviera Beach*, 133 S. Ct. 735 (2013).

¹⁰ *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323, 348-52 (2005) (Rehnquist, C.J., concurring).

¹¹ *Id.* at 348-49.

¹² *Id.* at 348. The continuing validity of *Williamson County* had not been raised by the owner’s counsel. Indeed, at oral argument Justice O’Connor directly asked whether he had challenged *Williamson County*. When he replied in the negative, she responded, “Maybe

have seemed to engage in a contest to invent expletives to use in describing *Williamson County*.¹³ Unfortunately, although the Court has had the issue of *Williamson County*'s continued legitimacy presented in a number of petitions for certiorari since 2005, the Court has granted none.¹⁴ Nor, of course, has it indicated why—following a concurring opinion that seemed like an open invitation to the bar to present the issue for determination¹⁵—it has chosen to remain aloof from the fray.

I've said it before. Indeed, in boldly setting out a takings agenda for the Court during the Y2K frenzy of prognostications and hysterical warnings of impending doom, I strongly urged the Court to “develop a clear, understandable, workable ‘ripeness’ rule. Better yet, allow property owners to sue directly in federal court to redress violations of federal constitutional rights.”¹⁶ It is time. For those property owners who have lost substantial interests in property because of the ripeness game that has left them either playing the role of shuttlecock in some jurisprudential badminton game batting them between state and federal courts,¹⁷ or simply because they became

you should have.” Various of the supporting amicus briefs did so (including one written by the author of this article), but the Court acted as though the legitimacy of *Williamson County* was not involved, as it had not been raised by a party. Later in oral argument, in a colloquy with the city's lawyer, Justice O'Connor noted that “frankly, it isn't clear to me that the Court ever contemplated just cutting off any determination in Federal court of takings claims in the way that it seems to work out by application of *Williamson County*.”

¹³ Berger & Kanner, *Shell Game*, *supra* note 1, at 702-03. The opprobrious descriptions of the *Williamson County* rule ran a gamut from “unpleasant,” “unfortunate,” and “unclear,” through “nonsense,” “draconian,” and “Kafkaesque.” *Id.* at 702-04.

¹⁴ See, e.g., *Rockstead v. City of Crystal Lake*, 486 F.3d 963 (7th Cir. 2007), *cert. denied*, 552 U.S. 947 (2007); *McNamara v. City of Rittman*, 473 F.3d 633 (6th Cir. 2007), *cert. denied*, 552 U.S. 813 (2007); *Torromeo v. Town of Fremont*, 438 F.3d 113 (1st Cir. 2006), *cert. denied*, 549 U.S. 886 (2006); *Hoagland v. Town of Clear Lake*, 415 F.3d 693 (7th Cir. 2005), *cert. denied*, 547 U.S. 1004 (2006); *SFW Arecibo, Ltd. v. Rodriguez*, 415 F.3d 135 (1st Cir. 2005), *cert. denied*, 546 U.S. 1075 (2005).

¹⁵ The bar certainly views opinions like this—whether concurring in an opinion on the merits, as here, or concurring in or dissenting from the denial of certiorari—as at least broad hints from the Court (or some segment of it) about issues that ought to be presented for decision. See, e.g., Tom Goldstein, *What You Can Learn from Opinions Regarding the Denial of Certiorari*, SCOTUS BLOG (Nov. 18, 2013, 2:10 PM), <http://www.scotusblog.com/2013/11/what-you-can-learn-from-opinions-regarding-the-denial-of-certiorari/>;

Christopher M. Mason, *SCOTUS Cert Skirt Left Door Open for Cy Pres Tune-Up*, LAW 360: A LEXISNEXIS COMPANY (Nov. 8, 2013, 6:28 PM), <http://www.law360.com/articles/487709/scotus-cert-skirt-left-door-open-for-cy-pres-tune-up>.

¹⁶ Berger, *Property Rights & Takings*, *supra* note 1, at 3.

¹⁷ See, e.g., *Agri-Dade, Ltd. v. Metro. Dade Co.*, 605 So. 2d 1272 (Fla. Dist. Ct. App. 1992); *Agripost, Inc. v. Miami-Dade Cnty.*, 195 F.3d 1225 (11th Cir. 1999); *Agripost, LLC*

exhausted and gave up, it is long past time.

This much should be clear: No other constitutional claimant is made to run a litigational gauntlet like the one established for property owners. Not one.¹⁸ Federal constitutional issues can, and should, be litigated in federal court. While there may be reasons why individual cases are set aside, there is no rule that operates across the board as it does in property takings cases. Nor is there a principled reason for treating citizens who own property differently from other citizens when all claims are that a government agency violated constitutional rights.

In recent years, there have been some hopeful signs (in addition to the inexplicably ignored concurring opinion in *San Remo Hotel, L.P. v. City of San Francisco*),¹⁹ primarily the recognition by some courts that the ripeness doctrine is prudential, not jurisdictional, so that federal courts may hear these cases if they so choose. But, (1) that is not a mandatory rule, and in consequence, (2) it is not universally followed.

In short, it is time for the Supreme Court to act decisively to eliminate this carbuncle on the body of the law.

II. A QUICK SUMMARY OF THE *WILLIAMSON COUNTY* RULES

To make sure we are all playing on the same page, here is a quick summary of the ripeness rules after *Williamson County*. The rules have two prongs, finality and compensation. Each prong has several branches.

A. The Supreme Court's Development of "Finality"

The test was not officially recognized as requiring "finality" until after a number of its branches had sprung forth. In hindsight, however, this appears to be what the Supreme Court was up to, and we have—to date—recognized five different branches of the "finality" prong of the "ripeness" doctrine:

v. Miami-Dade Cnty., 525 F.3d 1049 (11th Cir. 2008), *cert. denied*, 556 U.S. 1151 (2009).

¹⁸ Berger & Kanner, *Shell Game*, *supra* note 1, at 676.

¹⁹ 545 U.S. 323 (2005).

*Branch 1: The property owner must apply for a specific use.*²⁰

No application for use was made in *Agins v. City of Tiburon*,²¹ one of the first modern-era takings cases to reach the Supreme Court.²² The parties stipulated that, if an application had been made, it would have been denied.²³ Not enough for the Court. Some commentators have speculated that this was because *Agins* was an early case (after a half century layoff from property cases), but later cases demonstrate that it has taken a long time for the Court to begin to grasp the realities of the land planning process.

*Branch 2: The property owner apparently must make more than one application (or, at least, not apply only for the maximum use permitted under the zoning ordinance); in other words, a “meaningful application” for use is required.*²⁴

Only one application was made in each of the cases cited in the margin.²⁵ There is troublesome language in *MacDonald, Sommer & Frates v. Yolo County*²⁶ about the property owner’s plans being “exceedingly grandiose,” thus necessitating an application for some use, presumably, less “grandiose.”²⁷ The problem for property owners in trying to understand and work within the system is that the application in that case was precisely what the general plan and zoning called for.²⁸ The result is typical in California and in some other jurisdictions as well. But, does it comport with either common sense or rational law? Even after spending prodigious sums and enormous effort to draft general (California’s word for comprehensive) plans and zoning ordinances, planning agencies rarely approve development

²⁰ *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

²¹ 447 U.S. 255 (1980).

²² *Id.* at 260.

²³ *Id.*

²⁴ *Penn Cent.*, 438 U.S. at 104-05; *MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 352 n.8 (1986).

²⁵ *Penn Cent.*, 438 U.S. at 117-19; *MacDonald*, 477 U.S. at 347.

²⁶ 477 U.S. 340 (1986).

²⁷ *MacDonald*, 477 U.S. at 353 n.9.

²⁸ *Id.* at 347.

proposals that seek to develop land *precisely* in accordance with the applicable planning and zoning. They always demand something less. Application of this branch of the finality ripeness rule reinforces that predilection. The *Del Monte Dunes*²⁹ litigation, that took years to conclude and had to go all the way to the United States Supreme Court for finality, is a paradigm.³⁰ There, the 37.6-acre rectangular, undeveloped parcel bordering the Pacific Ocean in Monterey had, for many years, been planned and zoned for multi-family housing at a density of twenty-nine units per acre.³¹ I'll do the math for you: That comes to more than 1000 homes for the property. That level of development was in keeping with the commercial and multi-family development bordering the parcel.³² The developer would certainly have been within his rights to propose a 1000-unit condo development. But he didn't. He sought only 344 single family detached homes.³³ And the planners turned him down because—at one-third the density of the official plan—it was deemed too dense.³⁴ They told him to submit a revised plan for 264 units.³⁵ They turned that one down and suggested 224.³⁶ Then 190.³⁷ Nothing passed muster. That's when the courts got involved.

Here's the planning essence: What's the point of comprehensive plans and zoning ordinances if landowners and developers cannot rely on them as at least rough guides of what they will be allowed to do? Planning and zoning is not cheap, it is not easy, and (at least in California) it is not done overnight. Enabling legislation requires intensive analysis involving housing, traffic, geology, the environment, and more, along with multiple public hearings for public input—often by planning commissions as well as governing bodies. After all that, shouldn't citizens be able to rely on the product?

²⁹ 526 U.S. 687 (1999).

³⁰ *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 693, 695 (1999).

³¹ *Id.* at 694, 695.

³² *Id.* at 695.

³³ *Id.*

³⁴ *Id.* at 695-96.

³⁵ *Del Monte Dunes*, 526 U.S. at 695-96.

³⁶ *Id.* at 696.

³⁷ *Id.*

*Branch 3: The property owner must apply for a variance.*³⁸

Although the idea of seeking a variance seems hard to dispute in the abstract, it can cause problems in particular cases. In *Williamson County* itself, for example, the Court was suggesting the use of the variance procedure (essentially a device to resolve minor size and configuration problems) to deal with a 736 home, 676-acre subdivision in bulk.³⁹ Some lower courts have taken the Supreme Court literally, and held that a “variance” must be sought even if one is not legally available according to local law.⁴⁰ Perhaps this was just an early indication of the Court’s lack of understanding of the process, and it used the word “variance” in the vernacular sense of simply asking that the rules be changed to fit the planned project.⁴¹

*Branch 4: The property owner must obtain a “final” determination of what the government will permit.*⁴²

This idea obviously caused a little bit of confusion within the Court, because the opinion contains a somewhat lengthy discussion to the effect that the “finality” requirement is not an exhaustion of administrative remedies requirement, even though the concepts sound awfully similar.⁴³ What is supposedly needed is a “final” determination of what the regulator will allow the property owner to do on his land.⁴⁴ As any planner knows, however, that is not the job of either a

³⁸ *Williamson Cnty.*, 473 U.S. at 200.

³⁹ *Id.* at 177, 188.

⁴⁰ *See, e.g.*, *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375, 377 (9th Cir. 1988); *Lake Nacimiento Ranch Co. v. Cnty. of San Luis Obispo*, 841 F.2d 872, 877 (9th Cir. 1988).

⁴¹ *See S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 503 (9th Cir. 1990) (“The term ‘variance’ is not definitive or talismanic; if other types of permits or actions are available and could provide similar relief, they must be sought.”).

⁴² *Id.* at 502.

⁴³ *Id.* at 503 n.4.

⁴⁴ Of course, if comprehensive plans and zoning ordinances could actually be taken at face value as showing what could be developed on specific property, then this idea of getting a “final” decision from planners about what could be developed might make some modicum of sense. But that is not our system. *Berger & Kanner, Shell Game, supra* note 1, at 676; *Agins*, 447 U.S. at 260.

municipal planning or zoning ordinance or of a professional planner. The planner's job is to draw an abstract plan for all or part of a municipality and then (after it is adopted by the governing body) determine whether a specific proposal meets all the requirements. Anyone who thinks that he can get a planning agency to tell him what he CAN do on his land has probably been abusing some controlled substance—or doesn't understand the planning process.

*Branch 5: The property owner must actually be injured by application of the regulation.*⁴⁵

The idea of suffering actual injury as a predicate to an action seeking compensation is hardly new to the law.⁴⁶ In Supreme Court parlance, there would be no case or controversy.⁴⁷ However, as is often the case, the devil is in the details. What, for example, constitutes an “actual injury?” If a property owner is prevented from using land, that non-use is certainly felt as injury by the owner. Courts, however, have sometimes dismissed such concerns as simply the normal impact of the planning process. Or consider property owners who are prevented from changing the use of property that has become economically unproductive. The Supreme Court's earliest pronouncement showed little understanding:

[T]he New York City law does not interfere in any way with the *present uses* of the Terminal. Its designation as a landmark not only permits but contemplates that appellants *may continue to use the property precisely as it has been used for the past 65 years . . .*⁴⁸

B. The “Compensation” Prong

Branch 1: If compensation is available in state court it must be sought before resort can be had to

⁴⁵ See, e.g., *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-97 (1981); *Keystone*, 480 U.S. at 493; *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988).

⁴⁶ See, e.g., *Bond v. United States*, 131 S. Ct. 2355, 2366 (2011) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

⁴⁷ *Id.*

⁴⁸ *Penn Cent.*, 438 U.S. at 136 (emphasis added).

*federal court.*⁴⁹

*Branch 2: The property owner must seek compensation before seeking to invalidate the regulation.*⁵⁰

III. THE UPSHOT IN THE LOWER COURTS

Lower courts have been understandably confused. I had one Ninth Circuit Judge ask me during oral argument whether I did not think it obvious that the Supreme Court did not want any regulatory taking cases in federal court?⁵¹ I had an Eighth Circuit Judge ask why we were bothering with his court at all, rather than simply appealing directly to the Supreme Court, which is the only court that could resolve the mess.⁵²

Part of the problem has been the refusal of some lower courts to simply read the language of *Williamson County*, rather than trying to read the minds of the Justices. The Court's analytical section begins with the announced "conclu[sion] that respondent's claim is premature."⁵³ Please note that the word chosen was "premature," not "moribund."⁵⁴ Prematurity necessarily means that something is yet to be done to make the matter mature, or jurisdictionally "ripe."⁵⁵ The *Williamson County* opinion then goes on to say that, because of the lack of both a final administrative decision and the absence of an attempt to seek compensation in state court, "respondent's claim is not ripe."⁵⁶ Please note again that the phrase chosen was "not ripe," rather than "dead." Absence of ripeness necessarily means that things need to—and can—be done to make the matter ripe.⁵⁷

⁴⁹ *Williamson Cnty.*, 473 U.S. at 194.

⁵⁰ *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 17 (1990); *contra* *Roscco Holdings, Inc. v. State*, 260 Cal. Rptr. 736, 743-44 (Ct. App. 1989) (finding that in California, invalidation must be sought before compensation).

⁵¹ *See* *Hayward Exch., Inc. v. City of Oakland*, 69 F.3d 544 (9th Cir. 1995).

⁵² *See* *Kottschade v. City of Rochester*, 319 F.3d 1038, 1042 (8th Cir. 2003).

⁵³ *Williamson Cnty.*, 473 U.S. at 185.

⁵⁴ *Id.*

⁵⁵ *Id.* at 186.

⁵⁶ *Id.*

⁵⁷ *See* *Berger, Supreme Bait & Switch*, *supra* note 1, at 102, 104-05 (discussing with greater detail what more can be done in order to ripen the matter).

IV. THE SUPREME COURT HAS ENGENDERED BOTH HOPE AND CONFUSION

There is good news and bad news from the Supreme Court. We'll start with the bad news.

A. Procedurally, the Supreme Court has Multiplied the Confusion

Procedural problems exist because, as noted earlier, the Supreme Court's ripeness doctrine was not developed by the Court as a unitary doctrine *vel non*. Rather, it simply grew on its own as the Court lurched through the late 1970s and early 1980s, granting certiorari in regulatory takings cases and then concluding that it could not (for one reason or another) reach the merits.⁵⁸ Some of us believe that it was merely a case of the Court always having four votes to grant certiorari, but never being able to get a group of five to coalesce around a result. Hence, the series of decisions that ducked making decisions. What we were left with was the inadvertently developed ripeness rule.

What scholars and practitioners alike believed we had as of 1985 (when *Williamson County* was decided) was a rule that required property owners to seek relief under state law (presumably in state court), if relief were theoretically available there, and then lose in that attempt before darkening the doorway of a federal courthouse.⁵⁹ Property owners and their advocates believed this to be an unfair rule, but at least it was a clearly stated unfair rule.⁶⁰

That regime lasted until 1997, with decision of the *City of Chicago v. International College of Surgeons* case.⁶¹ That was a removal case. As a reminder of first year Civil Procedure class, when a case is brought in state court that could have been brought in federal court, the defendant has the right to remove the matter to federal

⁵⁸ *Penn Cent.*, 438 U.S. at 131; *Williamson Cnty.*, 473 U.S. at 199; *Hodel*, 452 U.S. at 304.

⁵⁹ Some cases in this era were able to be filed immediately in federal court because there was not even theoretical relief available in state court. *See, e.g., Del Monte Dunes*, 526 U.S. at 699 (stating that compensation is not available in California).

⁶⁰ Berger, *Supreme Bait & Switch*, *supra* note 1, at 134.

⁶¹ 522 U.S. 156 (1997).

court.⁶² Long story short, the City of Chicago placed historic preservation restrictions on property owned by the Surgeons.⁶³ The Surgeons sued in state court.⁶⁴ Preferring the confines of the local federal court, the City removed the case.⁶⁵ The case reached the Supreme Court on the question of whether removal was appropriate.⁶⁶ The Court held that it was, on the stunning ground that “ ‘[A] facial challenge to an allegedly unconstitutional . . . zoning ordinance’ is a claim ‘which we would assuredly not require to be brought in state courts.’ ”⁶⁷

The Court evidently overlooked *Williamson County*, under which any such claim brought in federal court would swiftly have been dismissed.⁶⁸ Strangely, no party who filed a brief in the *College of Surgeons* case cited either *Williamson County* or its ripeness rule.⁶⁹ Thus, the confluence of *Williamson County* and *College of Surgeons* led to a rule that a property owner *could not* file suit in federal court over a takings claim, but the defendant municipality *could* remove it there.⁷⁰ A one way option. Anarchy rather than law.

But all has not been bleak. There has been some more helpful procedural commentary from the Supreme Court. In addition to the *San Remo* concurrence’s suggestion that *Williamson County* may have been “mistaken,” the Court has expressed the view that *Williamson County* ripeness is a “prudential” rule rather than a “jurisdictional” one.⁷¹ This is a critical happening. It reinforces the plain words of *Williamson County* about federal litigation being premature (rather than barred), and it allows flexibility to lower courts to consider the merits of serious cases brought before them, rather than

⁶² 28 U.S.C. § 1441(a) (1988).

⁶³ *Int’l Coll. of Surgeons*, 522 U.S. at 159-60.

⁶⁴ *Id.* at 160.

⁶⁵ *Id.* at 161.

⁶⁶ *Id.* at 163.

⁶⁷ *Id.* at 168 (alteration in original) (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 372 (1989)).

⁶⁸ *Williamson Cnty.*, 473 U.S. at 194-95.

⁶⁹ See Brief for Petitioner, *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156 (1997) (No. 96-910); Brief for Respondent on the Merits, *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156 (1997) (No. 96-910).

⁷⁰ *Int’l Coll. of Surgeons*, 522 U.S. at 163; *Williamson Cnty.*, 473 U.S. at 194.

⁷¹ *San Remo*, 545 U.S. at 348 (Rehnquist, C.J., concurring); *Horne*, 133 S. Ct. at 2062; *Stop the Beach Renourishment, Inc. v. Florida Dep’t of Env’tl. Prot.*, 560 U.S. 702, 729 (2010).

spending their time on procedural web spinning of little moment. Moreover, in response to those lower courts' concluding that federal claims could not be brought in state court, the lead opinion in *San Remo* rejected the idea, saying that *Williamson County* "does not preclude state courts from hearing simultaneously a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution."⁷²

Some lower courts are joining this trend. The Fourth Circuit recently decided two cases in somewhat different procedural postures, but ended up allowing federal litigation to proceed. In *Sansotta v. Town of Nags Head*,⁷³ suit was filed in state court and then removed by the defendant to federal court.⁷⁴ When the town then sought dismissal from the federal court for lack of ripeness, the Fourth Circuit concluded quite sensibly that removal constituted a waiver of any such ripeness defense the town may once have had.⁷⁵ At the same time, in *Town of Nags Head v. Toloczko*,⁷⁶ it was the property owner who removed the case to federal court.⁷⁷ Nonetheless, the Fourth Circuit held that *Williamson County*'s rule was prudential, giving courts the discretion to litigate or not.⁷⁸ In this case, the court held that federal litigation was appropriate and ordered the district court to consider it.⁷⁹ In a recent en banc decision, the Ninth Circuit concluded that the rule was prudential and decided the merits.⁸⁰ Thus, although the property owner lost, it was on the merits, not because of the game of jurisdiction guessing.⁸¹

B. Substantively, the Court Seems to be Gaining Understanding of Land Use

One of the problems in the Supreme Court's development of

⁷² *San Remo*, 545 U.S. at 346.

⁷³ 724 F.3d 533 (4th Cir. 2013).

⁷⁴ *Id.* at 538.

⁷⁵ *Id.* at 545-46.

⁷⁶ 728 F.3d 391 (4th Cir. 2013).

⁷⁷ *Id.* at 394.

⁷⁸ *Id.* at 399.

⁷⁹ *Id.*

⁸⁰ *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1118 (9th Cir. 2010) (en banc).

⁸¹ *Id.*

rules for litigating regulatory taking cases has seemed to be the Court's general lack of understanding of how the land use process actually works. No disrespect is intended; it is simply that the Justices have had little or no exposure to this field of the law and their research attorneys likewise. How else can you explain *Williamson County*'s bland suggestion that the "variance" concept—a specific tool designed to deal with minor size and space adjustments—be used to reconfigure an entire (and quite large) subdivision?⁸² Or *MacDonald*'s suggestion that a property owner's application to develop his land in precisely the way that the city's general plan and zoning ordinance said that he could was somehow "exceedingly grandiose?"⁸³

The arc of the Court's education and understanding of the process has proceeded from 1978 until now in a generally positive way. The current state of that understanding may be seen in the three decisions dealing with property rights decided from late 2012 through mid-2013.⁸⁴

The first case was actually a physical invasion case, but the Court took the opportunity to (1) eliminate a foolish rule that had developed regarding compensation for temporary takings and (2) expressly distance itself from a "Chicken Little" argument that government agencies routinely make in all taking cases, particularly regulatory taking cases.⁸⁵ The case was *Arkansas Game & Fish Commission v. United States*.⁸⁶ The issue was whether the old federal flooding rule, that flooding cannot be a taking unless it is absolutely, positively, and irrevocably permanent, is still valid.⁸⁷ The Federal Circuit held it was valid and reversed a judgment for compensation, holding that the situation "at most created tort liability."⁸⁸

The property taken was bottomland timber. The taking was done by six consecutive years of flooding (protested by the owner) during the growing season. The classic federal rule was that flooding is not a taking if it is not permanent, no matter how many times it

⁸² *Williamson Cnty.*, 473 U.S. at 188.

⁸³ *MacDonald*, 477 U.S. at 353 n.9.

⁸⁴ *Koontz*, 133 S. Ct. 2586; *Horne*, 133 S. Ct. 2053; *Ark. Game and Fish Comm'n*, 133 S. Ct. 511; see also *Lozman*, 133 S. Ct. 735 (dealing with admiralty jurisdiction that I view as a taking case, however, because it involves seizure and destruction of a floating home).

⁸⁵ *Ark. Game & Fish Comm'n*, 133 S. Ct. at 519.

⁸⁶ 133 S. Ct. 511 (2012).

⁸⁷ *Id.* at 515.

⁸⁸ *Ark. Game & Fish Comm'n v. United States*, 637 F.3d 1366, 1378-79 (Fed. Cir. 2011).

happens temporarily. It was akin to the tort concept that every dog is entitled to one “free bite” before its owner can be held liable for damages. Not sure if that makes sense with dogs; it never made sense to me for flood control projects.

Moreover, the law has changed. After *First English*, where the Court held that the Fifth Amendment protects against temporary, as well as permanent, takings,⁸⁹ this issue should have been closed. Since then, the Federal Circuit dealt with the concept of “permanence” (albeit in a non-flooding context) and concluded, if the action happens for as long as the government wants it to, it is permanent — even though the government may stop at any time.⁹⁰ Furthermore, that same court held the destruction of timber (which apparently happened six times in this case) required compensation.⁹¹

Below, the Claims Court determined that the flooding was both substantial and predictable, and awarded \$5.7 million in damages for lost trees and reclamation costs. The Federal Circuit reversed.⁹² Acknowledging the temporary taking rule of *First English*, the Circuit decided to ignore it because “cases involving flooding and flow-age easements are different.”⁹³

The Supreme Court held these cases are not different and therefore reversed.⁹⁴ That resolved one problem: the idea that some kinds of takings could be immunized if they did not happen frequently enough, a positive development.⁹⁵

But perhaps the highlight of the opinion was the Court’s response to the Fed’s argument that imposing liability “would unduly impede the government’s ability to act in the public interest.”⁹⁶ That canard has been raised in numerous taking cases — particularly regulatory cases — with numerous governmental amici (from agencies at levels ranging from the United States Solicitor General to local mosquito abatement districts). The answer: “[t]ime and again in Takings

⁸⁹ *First English*, 482 U.S. at 318-19.

⁹⁰ *Hendler v. United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991).

⁹¹ *Cooper v. United States*, 827 F.2d 762, 763-64 (Fed. Cir. 1987).

⁹² *Ark. Game & Fish Comm’n*, 637 F.3d at 1379.

⁹³ *Id.* at 1374 (relying on pre-*First English* decisions).

⁹⁴ *Ark. Game & Fish Comm’n*, 133 S. Ct. at 519, 523.

⁹⁵ *Ark. Game & Fish Comm’n v. United States*, 736 F.3d 1364, 1367 (Fed. Cir. 2013) (demonstrating that on remand, the Federal Circuit got the message and ruled in favor of the property owner).

⁹⁶ *Ark. Game & Fish Comm’n*, 133 S. Ct. at 521.

Clause cases” the government has raised this issue; “[t]he sky did not fall” after the argument was rejected before.⁹⁷

This decision was unanimous.

Next, the Court dealt with administrative overreaching by the Department of Agriculture.⁹⁸ Everyone knows those dancing California raisins. What you may not know is (1) almost all American raisins come from California, and (2) the Feds have a Depression-era scheme to prop up raisin prices by requiring all raisin handlers to donate a substantial portion of their product to the Feds for use in school lunch programs, etc.⁹⁹ There is supposed to be some payment for those raisins, but not enough to satisfy all the raisin folks. Mr. and Mrs. Horne got tired of it and refused to comply.¹⁰⁰ They tired of the game in 2002-2003 and 2003-2004, when the Feds required them to “donate” 47% and 30% of their crop to the “reserve” pool, for which they would not be paid.¹⁰¹ They voiced their position to the Secretary of Agriculture:

[W]e are growers that will pack and market our raisins. We reserve our rights under the Constitution of the United States . . . [T]he Marketing Order Regulating Raisins has become a tool for grower bankruptcy, poverty, and involuntary servitude.^[102] The Marketing Order Regulating Raisins is a complete failure for growers, handlers, and the USDA . . . [W]e will not relinquish ownership of our crop. We put forth the money and effort to grow it, not the Raisin Administrative Committee. This is America, not a communist state.¹⁰³

The Government then brought an enforcement action against them — for the value of their own raisins that they did not turn over (\$483,843.53) — plus a hefty fine (\$202,600), plus interest.¹⁰⁴ The

⁹⁷ *Id.*

⁹⁸ *Horne*, 133 S. Ct. at 2056.

⁹⁹ *Id.* at 2056-58 (explaining the difference between “growers” and “handlers” is so arcane that counsel could not always keep it straight).

¹⁰⁰ *Id.* at 2059.

¹⁰¹ *Id.* at 2057 n.2, 2059.

¹⁰² Apparently, this Thirteenth Amendment issue did not make it into the complaint.

¹⁰³ *Horne*, 133 S. Ct. at 2058 n.3 (alteration in original).

¹⁰⁴ *Id.* at 2059.

Hornes' defense was that the Feds had taken their private property for public use without compensation.¹⁰⁵ It seems that in all the years since this statute was enacted, no one had thought to do that. The Hornes had initially argued that the Fifth Amendment violation consisted of the Government's confiscating their raisins.¹⁰⁶ However, when the Government's enforcement action was filed, that changed to a claim that they could not be compelled to pay fines for refusing to accede to an unconstitutional taking of their raisins.¹⁰⁷

The definitive question turned out to be whether the Hornes could raise the Fifth Amendment as a defense to the Federal Government's action or, instead, whether they had to pay the money and then sue in the Court of Federal Claims to get it back.¹⁰⁸ The Government's overreaching position was the latter.¹⁰⁹

The District Court ruled in favor of the Government.¹¹⁰ The Ninth Circuit initially affirmed, holding that the farmers could have avoided the confiscatory program by simply not entering the raisin market.¹¹¹ Because they voluntarily chose to sell their raisins, they accepted the consequences. (The District Court concluded that "[t]he Government does not force plaintiffs to grow raisins or to market the raisins" and mildly called donating nearly half the crop "an admissions fee or toll — admittedly a steep one — for marketing raisins.")¹¹² After the Hornes petitioned for rehearing, the Government, for the first time, urged that the takings defense was not ripe because it should have been brought in the Court of Federal Claims.¹¹³ In an amended opinion, the Ninth Circuit agreed, holding that the exclusive forum for takings claims is the Claims Court.¹¹⁴ Certiorari was granted to determine whether the Takings Clause could be raised as a defense to enjoin a direct transfer of funds mandated by the government

¹⁰⁵ *Id.*

¹⁰⁶ *Horne v. United States Dep't of Agric.*, No. CV-F-08-1549, 2009 WL 4895362, *5 (E.D. Cal. Dec. 11, 2009).

¹⁰⁷ *Id.* at *6.

¹⁰⁸ *Horne*, 133 S. Ct. at 2063.

¹⁰⁹ *Id.* at 2061.

¹¹⁰ *Id.* at 2059.

¹¹¹ *Id.* at 2060.

¹¹² *Id.*

¹¹³ *Horne v. United States Dep't of Agric.*, 673 F.3d 1071, 1079 (9th Cir. 2012).

¹¹⁴ *Id.* at 1080.

and whether the federal district court would have jurisdiction.¹¹⁵

In its decision, the Court distinguished *Williamson County* in ways that may prove useful in other takings cases.¹¹⁶ (1) The Hornes plainly satisfied the requirement of obtaining a “final decision” from the agency: the agency imposed concrete fines.¹¹⁷ The ease with which the Court reached this conclusion was interesting, as four Justices had concluded in *Eastern Enterprises v. Apfel*¹¹⁸ that a mere monetary demand (there, the funding of health benefits for the families of former coal miners) should not activate the Takings Clause.¹¹⁹ (2) The possibility of using alternative judicial procedures (state courts in *Williamson County* and the CFC here) was not a barrier, as the raisin marketing statute preempted the CFC.¹²⁰

What may elevate this opinion above the realm of raisin marketing orders is the Court’s general conclusion that the regulated entity did not have to *first* pay the fine before being allowed to challenge it in court.¹²¹ The ability to demand payment — here, some \$700,000 — as a condition to entry into a federal courthouse gives the Government a giant leg up. How many people are able to pay that price of admission? As the Court put it, however:

In the case of an administrative enforcement proceeding, when a party raises a constitutional defense to an assessed fine, it would make little sense to require the party to pay the fine in one proceeding and then turn around and sue for recovery of that same money in another proceeding.¹²²

More than just raisin growers face this kind of hurdle.

This decision was also unanimous.

Just before it recessed for the summer, the Court decided what may have been the most important of the decisions, *Koontz*.¹²³ We all know *Nollan* and *Dolan*, and their rules about confiscatory conditions

¹¹⁵ *Horne*, 133 S. Ct. at 2060-61.

¹¹⁶ *Id.* at 2061-62.

¹¹⁷ *Id.*

¹¹⁸ 524 U.S. 498 (1998).

¹¹⁹ *Id.* at 503-04, 521.

¹²⁰ *Horne*, 133 S. Ct. at 2062-63.

¹²¹ *Id.* at 2063.

¹²² *Id.*

¹²³ *Koontz*, 133 S. Ct. 2586.

placed on the *issuance* of land use permits.¹²⁴ But what if the regulator proposes conditions and the owner rejects them and the permit is then *denied*? Do the *Nollan/Dolan* rules apply? Does it matter that the proposed conditions would have required work or money to be spent on irrelevant and distant land?

The trial court found a taking.¹²⁵ The District then changed its mind and issued the permits.¹²⁶ Compensation of some \$376,000 was awarded for a temporary taking.¹²⁷ The Florida District Court affirmed,¹²⁸ but the Florida Supreme Court reversed.¹²⁹ It held that the *Nollan/Dolan* rules do not apply (1) to money or (2) to the denial of a permit.¹³⁰

The United States Supreme Court reversed on both issues.¹³¹ The vote was 5-4 but, as to the latter point, the Court was unanimous.¹³² All of the Justices recognized the word game that the government was playing and would have none of it.¹³³ Indeed, probably the most refreshing thing about the majority opinion was several clear statements indicating that the Court (and, remember, this part of the opinion was unanimous) seemed to finally understand what actually occurs during municipal land use permit hearings: Four times — count ‘em, four (five, if you count the one quote from *Nollan*) — the Court used the word “extortionate” to describe the imposition of conditions.¹³⁴ Elsewhere, the Court also seemed to grasp the unfair attempts that municipalities make to leverage their power:

[L]and use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far

¹²⁴ See generally *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan*, 483 U.S. 825 (1987).

¹²⁵ *Koontz*, 133 S. Ct. at 2593.

¹²⁶ *St. John’s River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8, 17 (Fla. Dist. Ct. App. 2009) (Griffin, J., dissenting).

¹²⁷ *Id.*

¹²⁸ *Koontz*, 133 S. Ct. at 2593.

¹²⁹ *Id.*

¹³⁰ *Id.* at 2593-94.

¹³¹ *Id.* at 2603.

¹³² *Id.* (Kagan, J., dissenting).

¹³³ *Koontz*, 133 S. Ct. at 2603.

¹³⁴ *Id.* at 2595-97, 2603 (majority opinion).

more than [the] property it would like to take. . . . So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable.¹³⁵

If there were nothing more, this would have been significant progress. But there is, of course, more.

The facts were not unusual. Koontz owned a bit less than fifteen acres of land and wanted to develop 3.7 acres.¹³⁶ As it was largely wetlands (it was in Florida, after all), he offered to place a conservation easement over the remainder of the property.¹³⁷ The agency wanted more.¹³⁸ It offered Koontz two options: (1) he could reduce his project to one acre and put the easement over all the remaining property; or (2) he could pay for work done on agency property located several miles away and having nothing to do with his proposed project.¹³⁹ Koontz declined, and the agency denied the permit.¹⁴⁰

When the dust settled in Florida, the state Supreme Court had issued an opinion that would have hamstrung takings litigation in general and exaction litigation in particular.

The United States Supreme Court split down traditional ideological lines, with Justice Alito writing for the majority and Justice Kagan for the dissenters.¹⁴¹ The majority made quick work of Florida's "maneuver [that] effectively interred" *Nollan* and *Dolan*.¹⁴² As noted, even the dissenters agreed on this point: whether the conditions are attached before the permit is issued, or held over the developer's head until afterward, makes no difference.¹⁴³ Conditions, whether precedent or subsequent, are treated the same for this purpose.

The upshot of these recent decisions is that the Supreme Court

¹³⁵ *Id.* at 2594-95.

¹³⁶ *Id.* at 2591-92.

¹³⁷ *Id.* at 2592-93.

¹³⁸ *Koontz*, 133 S. Ct. at 2593.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 2591, 2603.

¹⁴² *Koontz*, 133 S. Ct. at 2591.

¹⁴³ *Id.* at 2603 (Kagan, J., dissenting).

seems finally to be gaining an understanding of how the land use process works, how regulators have been using their position to leverage their bargaining strength, and how a number of time-honored government arguments can no longer be credited.

That brings us full circle. If, as I strongly suspect, much of the ripeness problem came about because the Supreme Court simply did not understand the land use system and took the government's word for how it operates, then the last several decades of hearing these cases has provided an eye-opening education. Armed with knowledge, the Supreme Court is now in a position to tackle *Williamson County* head on and bring some sanity to this legal field.

V. CONCLUSION: WHERE DO WE GO FROM HERE?

The Supreme Court has some work to do. Although it is nice to see that some circuit courts now recognize that *Williamson County* established merely a prudential rule, other circuits insist that such prudence be exercised in favor of yielding jurisdiction to state courts and keeping their federal hands off these cases.¹⁴⁴ That leads to a mishmash of law, applying what should be a uniform standard of conduct under the federal constitution. Until the Supreme Court steps in, there will be no uniformity.

The rest of us, of course, will never know why the Supreme Court denied certiorari in the growing number of petitions that have raised the *Williamson County* issue. It is unfortunate that two of the four Justices openly skeptical of *Williamson County* in the *San Remo* litigation are no longer on the Court. It may be that the remaining two Justices have not been able to garner sufficient support among the newer members of the Court to take another case. That would be a shame.

In the end, the procedural mess that exists in regulatory taking cases can wholly be laid at the doorstep of the Supreme Court. If you go back and read the Circuit Court opinion in *Williamson County*, you will find a perfectly rational determination of a regulatory taking case that was tried on its merits and fully adjudicated. For some reason, the Supreme Court decided to place some restrictions on bringing such cases in federal court. As the concurring *San Remo* Justices observed, however, there had developed a catalogue of shortcomings

¹⁴⁴ *Sansotta*, 724 F.3d at 545; *Guggenheim*, 638 F.3d at 1117.

noted by lower courts and legal commentators, challenging the core *Williamson County* precept that the Constitution somehow requires state court litigation.¹⁴⁵ That, said the four Justices, is “not clear,” “not obvious,” and “[not] support[ed]” by the cases relied on there.¹⁴⁶

But, there is only one court that can clean up this mess, and that is the Supreme Court. I have always been an optimist (one cannot represent property owners in this field without being an optimist), but I have not been able to get the Court’s attention either with the articles noted in the early footnote, or with petitions for certiorari asking for rational resolution of this package of issues.

I will continue to be an optimist. The fact that the Court could actually deal with the merits of multiple takings cases in its most recent Term gives me hope that it can finally cut through the mare’s nest that ripeness has become. Stay tuned. This ain’t over yet.

¹⁴⁵ *San Remo*, 545 U.S. at 349-51 (Rehnquist, C.J., concurring).

¹⁴⁶ *Id.* at 349 n.1 (Rehnquist, C.J., concurring).