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CHAPTER 1

Regulatory Taking, Ripeness, and Categorical Takings after *Lucas*

A. Takings: An Overview

Property rights, and in particular rights in land, have always been fundamental to and part of the preservation of liberty and personal freedom in the United States.[6] They are particularly so today.[7]

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6. For a summary of the 13th- and 14th-century roots of our present constitutional principles and the treatment of property rights through the late 1980s, *see* Norman Karlin, *Back to the Future: From* Nollan *to* Lochner, 17 SW. U. L. REV. 627 (1988). "To the Framers [of the Constitution] identifying property with freedom meant that if you could own property, you were free. Ownership of property was protected." *Id*. at 638. For a series of essays on property rights in America between the 17th and 20th centuries, *see* LAND LAW AND REAL PROPERTY IN AMERICAN HISTORY (Kermit L. Hall, ed., 1987). For an excellent analysis of the relationship between property rights and other fundamental rights, *see* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 136 (2d ed. 1998).
7. *See* William W. Van Alstyne, *The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court*,

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Professor Richard Epstein, in his seminal work on property and takings, describes "[t]he notion of exclusive possession" as "implicit in the basic conception of private property."[8] It is so recognized in the first edition of the American Law Institute's Restatement of the Law of Property in 1936:

> § 7 Possessory Interests in Land.
>
> A possessory interest in land exists in a person who has (a) a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so as to exercise *such control as to exclude* other members of society in general from any present occupation of the land.[9]

The U.S. Supreme Court has cited this section with approval in several cases discussing property rights.[10]

While regulations of land were analyzed differently from physical takings for much of the early history of the United States, this changed radically in 1922 with the near-unanimous decision of the U.S. Supreme Court in *Pennsylvania Coal Co. v. Mahon*.[11] There, the Court held that a regulation that goes "too far" is a taking of property, presumably as much as the physical taking or invasion of property is a taking of property.[12] Of course, in both instances—regulatory

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43 Law & Contemp. Probs. 66 (1980); Carol M. Rose, *Property as the Keystone Right?*, 71 Notre Dame L. Rev. 329 (1966). For an excellent argument concerning the fundamental nature of property rights under the substantive due process clause, *see* Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 Geo. L.J. 555 (1997).

8. Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 63 (1985).

9. Restatement of Property § 7 (1936) (emphasis added).

10. *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331–32 (2002); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435–36 (1982).

11. 260 U.S. 393 (1922).

12. *Id.* at 415. For general comment on *Pennsylvania Coal*, *see generally* Fred P. Bosselman, David L. Callies & John Banta, The Takings Issue (1973); Steven J. Eagle, Regulatory Takings (1996); Epstein, *supra* note 8; William

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takings and physical takings/invasions—property rights are preserved and the Constitution's Fifth Amendment protection may be viewed as irrelevant, so long as the property owner receives just compensation for the property interest taken. While state and lower federal courts have hewed strictly to the requirement of compensation for physical taking, state courts chose largely to ignore the new doctrine of regulatory takings from the 1930s through the 1970s, particularly as governmental regulation for a host of environmental, "welfare"-like public purposes proliferated.[13] Thus, various state appellate and supreme courts as well as some federal courts upheld regulations that substantially devalued or destroyed the economically beneficial use of the relevant property interest to preserve open space and various natural resources.[14]

This trend toward upholding such "regulatory takings" accelerated, due in part to a glacial silence from the U.S. Supreme Court following *Pennsylvania Coal* in 1922[15] and *Village of Euclid v. Ambler Realty Co*. in 1926.[16] Aside from a brief 1928 foray into zoning as

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A. Fischel, Regulatory Takings: Law, Economics, and Politics (1995); Jan Laitos, The Law of Property Rights Protection (1998); Meltz et al., *infra* note 31. For an often argued, though somewhat revisionist view of what *Pennsylvania Coal* may mean, *see* Robert Brauneis, *"The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal Co. v. Mahon, 106 Yale L.J. 613 (1996).

13. *See* Bosselman, Callies & Banta, *supra* note 12, at 141–235.

14. *See, e.g.*, Steel Hill Dev., Inc. v. Town of Sanbornton, 49 F.2d 956, 962–63 (1st Cir. 1972) (forest conservation districts); Candlestick Properties Inc. v. San Francisco Bay Conservation & Dev. Comm'n, 89 Cal. Rptr. 897, 906 (Cal. Ct. App. 1970) (shorelines); Maher v. City of New Orleans, 235 So. 2d 402, 405–06 (La. 1970) (historic preservation); *In re* Spring Valley Dev., 300 A.2d 736, 754 (Me. 1973) (pond shore); Potomac Sand & Gravel Co. v. Governor of Md., 293 A.2d 241, 252 (Md. 1972) (tidal waters); McNeely v. Board of Appeal, 261 N.E.2d 336, 345 (Mass. 1970) (local business district); Golden v. Planning Bd., 285 N.E.2d 291, 304–05 (N.Y. 1972) (growth management); Just v. Marinette County, 201 N.W.2d 761, 772 (Wis. 1972) (wetlands).

15. 260 U.S. 393 (1922).

16. 272 U.S. 365 (1926).

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applied,[17] and the destruction of one form of private property (red cedar trees) to preserve another (apple trees),[18] the Court abandoned the field to state and lower federal courts for nearly half a century.[19] When it did break this silence on April Fool's Day in 1974, it did so to ignominiously uphold a local ordinance prohibiting three or more persons unrelated by blood or marriage from living in the same single-family house in order to preserve "[a] quiet place where yards are wide, people few, and motor vehicles restricted . . . where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[20] Once having dipped its collective toe in this dank swamp, however, the Court soon found itself enmeshed in the arcane law of regulatory takings and property rights, for which it very nearly threw in the towel, showing itself to be a very different Court from the *Pennsylvania Coal* Court in 1922.[21]

The law of takings is divided into two principal parts: physical and regulatory. In the first category is that which we call eminent domain or compulsory purchase. With one exception (inverse condemnation), physical taking occurs when government intends to take land or an interest in land. Regulatory taking occurs when government, through the exercise of the police or regulatory power, so burdens land, or an interest in land, with land use regulations that courts treat the action as if government had intended physically to exercise eminent domain or take or condemn the land. U.S. Supreme Court cases govern most aspects of takings on the theory that either the Fifth Amendment to the U.S. Constitution (nor shall private property be taken for public use without the payment of just compensation) or the 14th Amendment (nor shall private property be taken without due process of law) applies to both physical and

17. *See* Nectow v. City of Cambridge, 277 U.S. 183 (1928).
18. *See* Miller v. Schoene, 276 U.S. 272, 277, 280 (1928).
19. *See* Dennis J. Coyle, Property Rights and the Constitution: Shaping Society through Land Use Regulation 40–49 (1993).
20. Village of Belle Terre v. Boraas, 416 U.S. 1, 2, 9 (1974).
21. *See* Ely, *supra* note 6.

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regulatory takings. What follows is a general description and analysis of the types of regulatory takings together with recent trends in each.

1. Regulatory Takings

If a land use regulation (zoning, subdivision, and so forth) goes "too far" in reducing the use of a parcel of land, then it is a taking requiring compensation as if government physically took or condemned an interest in (or all of) the land. This basic principle was established in 1922 in the U.S. Supreme Court case of *Pennsylvania Coal Co. v. Mahon*.[22] The question, of course, is, what's "too far"? The Court in *Pennsylvania Coal* made it abundantly clear that the decision was not an attack on all land use controls.[23] Indeed, just four years later, the same Court upheld local zoning against a 14th Amendment attack (taking of property without due process of law).[24] The Court has reiterated that state and local government may regulate the use of land under the police power, for the health, safety, and welfare of the people, without violating constitutional proscriptions against the taking of property without compensation many times in the past dozen years.[25] However, the Court has also laid down guidelines for when a regulation takes property. These fall into two categories: total or per se takings and partial takings.

a. Total Takings

A land use regulation totally "takes" property when it leaves the owner without any "economically beneficial use" of the land.[26] The land may still have value. It may even retain some limited uses. It makes no difference what the landowner knew or should have known about the regulatory climate when the landowner acquired the land.

22. 260 U.S. 393 (1922).
23. *Id*. at 413.
24. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
25. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994), *and* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).
26. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992).

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If it has no beneficial economic use, then government must pay for the land or rescind the regulation (and possibly pay compensation for the time during which the illegal regulation affected the relevant land), unless the regulation falls within two exceptions: nuisance or background principles of a state's law of property.[27] These rules come from the U.S. Supreme Court's 1992 decision in *Lucas v. South Carolina Coastal Council*,[28] confirmed and explained in *Palazzolo v. Rhode Island*,[29] together with some gloss added by recent decisions of the U.S. Federal Circuit.[30] It is worth examining the elements of total takings in a bit more detail to fully understand the reach of what the Court calls this categorical or per se rule.

i. Taking of All Economically Beneficial Use

In *Lucas*, the Court was presented with an ideal vehicle in which to set out criteria for deciding both total and partial takings cases. It did so in the first category—total takings—in the opinion itself. It did so in the latter category in footnotes, as described in Part b below. With only two exceptions (also discussed below), a regulation "takes" property when the landowner is left with no economically beneficial use of the land.[31]

Ultimately, that is what happened to David Lucas.[32] After developing a waterfront residential project, Lucas purchased the remaining two lots on his own account, intending to build upscale

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27. *Id*. at 1029.
28. *Id*.
29. 533 U.S. 606 (2001).
30. *See, e.g.*, Love Terminal Partners, L.P. v. U.S., 889 F.3d 1331 (Fed. Cir. 2018); Lost Tree Hill Corp. v. U.S., 787 F.3d 1111 (Fed. Cir. 2015).
31. *See Lucas*, 505 U.S. at 1019. For collective comment on *Dolan* and *Lucas*, *see* Takings: Land Development Conditions and Regulatory Takings after *Dolan* and *Lucas* (David L. Callies, ed., 1996) *and* Robert L. Meltz et al., The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation (1999).
32. *See generally* David Lucas, Lucas vs. the Green Machine (1995) (providing the historical narrative of this landmark case).

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single-family residences on them.[33] However, before he could commence construction, the South Carolina Coastal Council moved the beachline (seaward of which construction was prohibited) so that the Lucas lots were now in a construction-free zone.[34] The original line, the new line, and the coastal protection statue by which authority the council acted all were designed to further some health, safety, but primarily welfare, purposes largely unique to coastal areas.[35] Figuring prominently in the list of public purposes was the protection of habitat; plant, animal, and marine species; dunes; natural environment; and the tourist industry.[36] Lucas claimed the moving of the line, together with the development restrictions imposed by the statute and its regulations, took his property without compensation by denying him a permit to construct anything but walkways and permitting no uses but camping and walking on the two lots.[37] The South Carolina Supreme Court upheld the statute largely on the grounds of the paramount governmental purposes set out in the Beachfront Management Act, and Lucas appealed.[38]

The U.S. Supreme Court reversed.[39] The rule the Court announced is a narrow one: a regulation that removes all productive or economically beneficial use from a parcel of land is a taking requiring compensation under the Fifth Amendment.[40] Note that the Court writes of *use* and not *value*. Clearly two beachfront lots have value even if a regulation prevents all economic *use*. "Salvage" uses such as camping and picnicking do not count as "economically beneficial" uses such as building a house. It is a taking regardless of how or when the

33. *Lucas*, 505 U.S. at 1006–08.
34. *Id*. at 1008–09.
35. *See id*. at 1007–08
36. 16 U.S.C. §§ 1451 et seq. (1972).
37. *See Lucas*, 505 U.S. at 1007–09.
38. *Id*. at 1009–10.
39. *Id*. at 1032.
40. *See id*., 505 U.S. at 1016–19. Note this is not the same as rendering the lots or parcels *valueless*, as some commentators would have it. *See, e.g.*, Meltz et al., *supra* note 31, at 140, 218.

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property was acquired, regardless of the "expectations" of, or notice to, the landowner, and (of course) regardless of the public purpose or state interest that generated the regulation. For too long, according to the Court, police power regulations have primarily conferred "public benefits."[41] For this the *public* must clearly pay, rather than the landowner upon whom the burden of such regulation falls:[42]

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.

ii. The Exceptions to the per se or Categorical Rule

Herein lie the *Lucas* exceptions to the per se rule of total takings: the Court requires compensation for taking of all economically beneficial use unless there can be identified "background principles of nuisance and property law that prohibit the uses [the landowner] now intends in the circumstances in which the property is presently found."[43] These background principles have been held to include

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41. *See Lucas*, 505 U.S. at 1024.

42. *Id*. at 1027. For a historical argument that much private use of wetlands is not part of such title, see Fred P. Bosselman, *Limitations Inherent in the Title to Wetlands at Common Law*, 15 Stan. Envtl. L.J. 247 (1996). For a typical recent federal court decision applying this standard, *see* Wise v. City of Lauderhill, 2016 WL 3747605 (2016).

43. *Lucas*, 505 U.S. at 1031. Arguing that *only nuisance* is a background principle exception, *see* Meltz et al, *supra* note 31, at 377. For extended commentary on the *Lucas* exceptions, *see* Louise A. Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28 Ind. L. Rev. 329 (1995); Todd D. Brody, Comment, *Examining the Nuisance Exception to the Takings Clause: Is There Life for Environmental Regulations after Lucas?*, 4 Fordham Envtl. L. Rep. 287 (1993); J. Bradley Horn, Case Notes, 43 Drake L. Rev. 227 (1994); Brian D. Lee, Note, 23 Seton Hall L. Rev. 1840 (1993).

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custom and the public trust doctrine[44] and possibly statutes and state constitutions under certain conditions, as discussed in Chapters 2–4.

In sum:

(a) If the common law of the state would allow neighbors or the state to prohibit the two houses that Lucas wants to construct because they are either public or private nuisances, then the state can prohibit them under the coastal-zone law without providing compensation. This result occurs because such nuisance uses are always unlawful and are never part of a landowner's title, so prohibiting them by statute would not take away any property rights. The Court gives as an example a law that might prohibit a landowner from filling his land, which floods his neighbor's land.[45]

(b) If the background principles of the state's property law would permit such prohibition of use as the two houses Lucas proposed to construct, then again no compensation is required, again because land use restrictions based on such principles were never part of a landowners' title to begin with. However, the Court did not fully explain these principles, nor did it discuss them except in a nuisance context.

In determining whether the proposed use is a public or private nuisance and therefore forbidden without payment of compensation, the following three factors are critical, but *only* within the nuisance context:

1. the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities,
2. the social value of the claimant's activities and their suitability to the locality in question, and

44. Bridge Aina Le'a LCC v. Land Use Comm's, 2016 WL 79567 (2016).
45. *Lucas*, 505 U.S. at 1029.

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3. the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners).[46]

iii. Notice

The *Lucas* Court made it clear that when a property owner learned of a land use regulation's effect on the subject, property was irrelevant to a total regulatory takings challenge, just as it would be irrelevant in an eminent domain proceeding.[47] While the Rhode Island Supreme Court attempted to engraft such a notice requirement on total takings jurisprudence, the U.S. Supreme Court in *Palazzolo*, discussed below in subsection 2, firmly rejected that attempt.[48]

b. Partial Takings

A partial taking occurs whenever a land use regulation deprives a landowner of sufficient use and value that goes beyond necessary exercise of the police power for the health, safety, and welfare of the people but stops short of depriving the landowner of all economically beneficial use.[49] Indeed, the Court in *Palazzolo* ultimately decided that Palazzolo suffered only a *partial taking*.[50] Partial takings by regulation are more common than total takings, and the standard is not so easy to apply.

The standards originated in the first regulatory taking case decided by the U.S. Supreme Court following its half-century of silence following *Pennsylvania Coal*, *Euclid*, and *Nectow: Penn Central Transportation Co. v. New York*.[51] Penn Central Transportation Company sought relief from New York City historic preservation ordinances prohibiting it from developing Grand Central Station

46. *Id.* at 1030–31 (citations omitted).
47. *See id*. at 1027–28.
48. Palazzolo v. Rhode Island, 533 U.S. 606 (2001).
49. *See* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).
50. *Palazzolo*, 533 U.S. at 631–32.
51. *Penn Central Transp. Co.*, 438 U.S. 104 (1978).

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into a 55-story office building.[52] In the course of deciding that such regulations were valid exercises of the police power and denying compensation for an alleged Fifth Amendment regulatory taking, the Court first admitted difficulty in coming up with regulatory taking standards[53] but then offered as "relevant" the following two tests:

1. the economic effect on the landowner, and in particular, the extent to which the regulation interfered with the distinct (later reasonable) investment back expectations of the landowner, and
2. the character of the regulation, or whether it resulted in a physical or a regulatory taking.[54]

Because this book deals almost entirely with total or categorical regulatory takings after *Lucas*, this brief summary of partial regulatory takings after *Knick* ends here, with the caveat that much of what follows about *Knick* and ripeness in section B, *infra*, is applicable to both categorical regulatory taking claims under *Lucas* and partial regulatory taking claims under *Penn Central*.

2. *Lucas* Takings and the Court, Waiting for the "Extraordinary Case"

Nearly two decades later, the Court accepted a takings claim that utilized its total regulatory taking test defined in *Lucas*. In *Palazzolo v. Rhode Island*, the Court examined a coastal regulation that left only the upland portion of an 18-acre parcel, primarily a salt marsh susceptible to tidal flooding, developable.[55] Persuaded by the trial court's finding that the parcel retained a "few crumbs" of development use, the Court found the *Lucas* claim failed and remanded the case for decision under partial takings analysis.[56] Despite dutifully

52. *Id*. at 116–17.
53. *Id*. at 123–24.
54. *Id*. at 124.
55. 33 U.S. 606, 614–15 (2001).
56. *Id.* at 631–32.

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reciting the claim in "*Lucas* terms,"[57] the Court conflated "use" and "value" by finding residual monetary value dispositive of whether there remained economically beneficial use.[58] Value, however, is not the measure the Court articulated in *Lucas*. When the Court found a total taking, as the trial court had in *Lucas*, the Court notably did not repeat the trial court's use of "value" and instead defined its total regulatory taking test as deprivation of all economically beneficial use.[59]

Soon after, the Court accepted certiorari in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.[60] The issue was the degree of a temporary taking that would satisfy the Court's earlier decision in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, California* 15 years prior.[61] In *First English*, the Court said a lot about regulatory takings, finding the county ordinance deprived the landowner of all use of its property for a "considerable period of years" and required compensation for the period of the taking in addition to invalidation of the ordinance for constitutionally sufficient remedy.[62] Nonetheless, *First English* noted that property owners must accept normal delays in land use permitting processes without compensation.[63]

In *Tahoe-Sierra*, the Court clarified the temporary taking ambiguity, noting that a moratorium of unreasonable length could effect a taking but only in applied challenges.[64] The Court again mixed up value with use by observing that "a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."[65] The Court found no taking because a total taking

57. *Id.* at 649 (Ginsburg, J., dissenting).
58. *Id.* at 631.
59. *Lucas*, 505 U.S. at 1019.
60. 535 U.S. 302 (2002).
61. 482 U.S. 304 (1987).
62. *Id.* at 322.
63. *Id.* at 321.
64. *See Tahoe-Sierra Pres. Council Inc.*, 535 U.S. at 320.
65. *Id.* at 332.

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is reserved for "the 'extraordinary case' in which a regulation permanently deprives property of all value."[66] Therefore, the regulation prohibiting any economic use of land for a 32-month period did not, under the *Tahoe-Sierra* Court's analysis, constitute a categorical taking under *Lucas*.[67]

This departure from the "*all* economically beneficial use" language of *Lucas* was to a large extent rectified in the Court's 2005 review of takings jurisprudence in *Lingle v. Chevron U.S.A. Inc*.[68] Justice O'Connor, writing for a unanimous court, not only overruled the "substantially advances" test for a Fifth Amendment taking (reversing *Agins v. City of Tiburon*),[69] but also reiterated that the original tests for both total and partial regulatory takings had not changed.[70] The Court confirmed that a *Lucas* taking occurs "where regulations completely deprive an owner of 'all economically beneficial use[e]' of her property."[71]

Again, in *Arkansas Game and Fish Commission v. United States*, the Court directly addressed the total takings standard in a case arising out of the impact of government-induced temporary flooding that impaired the landowner's use of its property for timber growing.[72] The Court reiterated that the temporary nature of a taking does not exempt the claim from the Takings Clause.[73] In briefly reviewing its takings jurisprudence, the Court repeated that a total taking occurs when a regulation permanently requires landowners to sacrifice all economically beneficial use of their land.[74]

Most recently, in *Murr v. Wisconsin*, the Court avoided finding a total taking by defining the relevant parcel to include plaintiffs'

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66. *Id.*
67. *Id.* at 331–32.
68. 544 U.S. 528 (2005).
69. 447 U.S. 255 (1980), *rev'd* 544 U.S. 528 (2005).
70. *Lingle*, 544 U.S. 528.
71. *Id*. at 538.
72. 568 U.S. 23 (2012).
73. *Id.* at 34.
74. *Id.* at 32.

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adjacent parcel.[75] Thus, plaintiffs' *Lucas* claim that state and local regulations preventing use or sale of Lot E because it had less than one acre of land suitable for development failed because the Court deemed the remaining use on Lots E and F in the aggregate sufficiently economically beneficial.[76]

3. The Circuits

Since *Lucas*, the First, Second, Third, and Sixth Circuits have yet to decide a total takings claim.[77] Other circuits tend to apply the *Lucas* standard of all economically beneficial use, although some decisions appear to mix or conflate use with value, contrary to *Lucas* and its U.S. Supreme Court progeny.[78] Most federal appellate courts largely follow the Supreme Court's direction to look at residual use, not value, in reviewing categorical takings claims. Thus, for exam-

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75. 137 S. Ct. 1933 (2017).
76. *Id.* at 1950.
77. *E.g.*, Deniz v. Municipality of Guaynabo, 285 F.3d 142 (1st Cir. 2002) (concluding plaintiff's failure to seek compensation through Puerto Rico's inverse condemnation remedy renders both the takings and substantive due process claims unripe for federal adjudication); *and* Sunrise Detox V, LLC v. City of White Plains, 769 F.3d 118 (2nd Cir. 2014) (declining adjudication of plaintiff's regulatory taking theory for lack of ripeness under *Williamson County*); 287 Associates v. Township of Bridgewater, 101 F.3d 320 (3rd Cir. 1996) (holding *Lucas* did not "create" plaintiffs' total taking cause of action because the *Lucas* Court emphasized there was nothing new to its economically beneficial use rule, and such argument failed to revive a claim where statute of limitations had tolled); Anderson v. Charter Township of Ypsilanti, 266 F.3d 487 (6th Cir. 2001) (holding that landowner effectively waived right to pursue federal takings claims in federal court after township removed case and federal court remanded state court issues); *and* Alto Eldorado Partnership v. County of Santa Fe, 634 F.3d 1170 (10th Cir. 2011).
78. *E.g.*, Quinn v. Bd. of Cty. Commm'rs for Queen Anne's Cty., Md, 862 F.3d 433, 442 (4th Cir. 2017) (rejecting a *Lucas* claim because the lots retained some "value for assemblage under the challenged grandfather/merger provision"); Lost Tree Hill Corp. v. U.S., 787 F.3d. 1111, 1113 (Fed. Cir. 2015) (affirming "that a *Lucas* taking occurred because the government's permit denial eliminated all value stemming from [the parcel]'s possible economic uses.").

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ple, the Fifth Circuit found an ordinance that prohibited all mining deprived the landowner of all use of its property interest—quarrying rights—and that the ordinance, therefore, was a categorical taking.[79] The Tenth Circuit similarly found restrictions prohibiting the use of 40 acres of land from its customary use—growing and feeding dairy cattle—constituted a deprivation of all economically beneficial use.[80] The Eleventh Circuit similarly focused on the taken use and available remaining uses in reviewing the challenged rezoning of a beachfront property from RU-2, residential duplex use, to PA, private airport use, shortly after plaintiff purchased the property.[81] The trial court found that under the new zoning ordinance, the property could still be used in "several economically viable ways: as a private airport, and also for the construction of boat slips, a beach club, or dry storage space for boats."[82]

B. Ripeness: *Knick* and Before

The question of when a regulatory takings claim is "ripe" for review arises because of tests the Supreme Court has articulated in deciding regulatory takings claims. If a court cannot determine the extent of economic loss (whether partial or total), it cannot decide whether a regulatory taking has occurred. When a claimant sues under the Fifth Amendment, the issue of damages is critical because the Amendment does not categorically prohibit takings but only takings without just compensation.[83] This consideration underlies the so-called ripeness doctrine, which is set out in the Court's *Williamson County* decision.[84] Ever since, this "prudential" inquiry has become a virtually insuperable barrier to bringing regulatory takings claims, in part because some courts have con-

79. Vulcan Materials Co. v. City of Tehuacana, 369 F.3d 882, 891–92 (2004).
80. U.S. v. Hardage, 996 F.2d 312 (10th Cir. 1993).
81. New Port Largo, Inc. v. Monroe County, 95 F.3d 1084 (11th Cir. 1996).
82. *Id.* at 1089.
83. U.S. Const. amend. V.
84. Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) [hereinafter *Williamson County*].

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verted the two-part ripeness test into a jurisdictional, rather than a prudential, rule. The application of the test has become a further hurdle for plaintiff landowners when federal courts "preclude" plaintiffs from raising takings issues litigated first in state court in order to satisfy the state action ripeness prong.

Fortunately, the Court eliminated the state action/litigation requirement in *Knick v. Township of Scott, Pennsylvania*.[85] Moreover, a wave of other recent decisions recognize ripeness as primarily prudential. As a prudential inquiry, courts may refuse to raise the ripeness barrier in particularly egregious circumstances, such as when a plaintiff landowner has spent years in court attempting to reach the merits of a regulatory takings claim.

The state action requirement began with *Williamson County*, in which the Court barred Hamilton Bank, the owner of a parcel that was denied development approval by Williamson County, from bringing a regulatory taking claim in federal court because the claim was not "ripe." Ripeness, according to the Court, required the landowner to (1) obtain a "final decision" from the relevant state or county agencies on its application for development (in that case, subdivision approval)[86] and (2) seek and fail to obtain compensation for the regulatory taking in state court.[87] Noting that the property owner had sought neither a variance (or similar land use exception) for its project nor state compensation for the alleged taking, the Court held that Hamilton Bank failed both prongs of the ripeness test and could therefore not bring a substantive takings challenge in federal court.[88] Since *Williamson County*, both the final decision rule and the compensation requirement have raised considerable barriers to the bringing of regulatory takings challenges to land use controls.[89]

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85. 139 S. Ct. 2162 (2019).
86. *Id.* at 186–94.
87. *Id.* at 194–97.
88. *Id.*
89. For critical comment on the insuperable barrier which *Williamson County* imposes, *see* Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37 (1995)

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The subsequent Supreme Court decision in *San Remo Hotel, L.P. v. City and County of San Francisco* indirectly demonstrates the difficulty of applying the ripeness doctrine to regulatory takings disputes.[90] *San Remo* does not deal directly with either *Williamson* prong, instead addressing the preclusion problem created for litigants whom federal courts direct to first seek relief in state court under either or both prongs of *Williamson County*.[91] Such litigants dutifully bring their claims in state court, are usually denied relief, and return to federal court, only to find that they are then precluded from "relitigating" the takings claims in the original federal court.[92]

The *San Remo* decision is just as important for what the Court does not address as for what it does. Carefully noting which parts of the petition for certiorari it chose to address, the five-justice majority opinion, written by Justice Stevens, set out the narrow question before the Court: "This case presents the question whether the federal courts may craft an exception to the full faith and credit statute, 28 U.S.C. § 1738, for claims brought under the Takings Clause of the Fifth Amendment."[93] Notably, the correctness or continued validity of the *Williamson County* ripeness test was not specifically addressed.[94] The Court dealt only with the limited issue of remedy

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and Michael M. Berger, *The "Ripeness" Mess in Federal Land Use Cases, or How the Supreme Court Converted Federal Judges into Fruit Peddlers*, *in* Institute on Planning, Zoning and Eminent Domain (1991).

90. 545 U.S. 323 (2005).

91. *Id.*

92. *Id*. at 336–38; Thomas E. Roberts, *Fifth Amendment Taking Claims in Federal Court: The State Compensation Requirement & Principles of Res Judicata*, 24 Urb. L. 479 (1992); *see also* City of Chi. v. Int'l Coll. of Surgeons, 522 U.S. 156 (1997) (blessing the removal imbalance caused by *Williamson County* ripeness hurdles by permitting the regulator's removal game because property owners are "assuredly" not required to bring facial challenges to an allegedly unconstitutional zoning ordinance in state court, despite notable silence to its *Williamson County* decision).

93. *San Remo Hotel*, 545 U.S. at 326.

94. Neither was it addressed by the federal courts below nor raised before the Court by the parties, as correctly noted by Chief Justice Rehnquist in his concurring opinion. *See id.* at 352 (Rehnquist, C.J., concurring).

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for preclusion under the full faith and credit statute and narrowly ruled that federal courts may not carve out an exception to the statute—in this case for regulatory takings—unless Congress so allows, either explicitly or implicitly. Presumably, a petitioner in *San Remo Hotel*'s posture was precluded from raising regulatory takings issues litigated in federal court that it previously litigated in state court, despite being forced into state court in order to "ripen" the case under the first prong of *Williamson County*. Language elsewhere in the opinion suggests it was likely the majority would permit preclusion under other circumstances as well, although a five-justice opinion is perhaps a slender reed upon which to rely for much beyond the holding itself.[95] Regardless, the Court made it clear there is no right to hear a regulatory taking claim in federal court, whether a landowner is forced into state court under preclusion principles or not. From this decision, it was also clear that the *Williamson County* ripeness barrier against bringing regulatory takings claims remained intact. Chief Justice Rehnquist, writing for concurring members of the Court, clearly signaled his intent to revisit at least the second prong requiring state action.[96]

A number of federal appellate courts have since agreed with the suggestion of the late Chief Justice that the interpretation of the state action prong as a jurisdictional test lacks authority. In recent decisions prior to *Knick*, the Court used language emphasizing that *Williamson County* was, in fact, "a discretionary, prudential ripeness doctrine."[97] For example, in the 2010 decision of *Stop the Beach Renourishment Inc. v. Florida Department of Environmental Protection*,[98] the Supreme Court considered a case in which beachfront landowners alleged an inverse condemnation after the state

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95. *Id.* at 343 (quoting Allen v. McCurry, 449 U.S. 90, 103–04 (1980)).
96. *Id.* at 348 (Rehnquist, C.J., concurring).
97. 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 (2014).
98. 560 U.S. 702 (2010).

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undertook a "beach renourishment" project that deprived them of their littoral rights and rights to accretion.[99] The Court made short work of the respondents' attempt to argue the taking claim was not ripe because the petitioners had not sought just compensation in state court, holding the ripeness objection—which was not raised in the writ for certiorari—did not present a jurisdictional issue and was therefore waived.[100] In the 2013 decision of *Horne v. U.S. Department of Agriculture*, the Court again clarified that "prudential ripeness" is "not, strictly speaking, jurisdictional."[101] In a footnote to the opinion, the Court further explained that a "[c]ase or [c]ontroversy 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."[102] Commentators correctly speculated that the Supreme Court, by emphasizing the prudential nature of the doctrine, paved the way for lower federal courts to relax ripeness requirements[103] and to address challenged regulations directly.

Given the direction of a number of federal decisions following *San Remo*, *Stop the Beach*, and *Horne*, it is clear that the *Williamson County* ripeness rule had already been substantially diluted with respect to the state action requirement. First, many courts cast the ripeness doctrine as mostly prudential rather than jurisdictional. Second, courts have been increasingly loath to apply the state action prong, at least in part to avoid lengthy delays in reaching the merits of a regulatory taking claim.[104]

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99. *Id*. at 730.
100. *Id.* at 729.
101. 569 U.S. 513, 526 (2013).
102. *Id*. at n.6 (internal quotations omitted).
103. Breemer, *supra* note 97, at 339.
104. David L. Callies, *Through a Glass Clearly: Predicting the Future in Land Use Takings Law*, 54 Washburn L.J. 43, 102 (2012).

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C. *Knick v. Township of Scott, Pennsylvania*

In *Knick*, the Court first clarified that the government violates the Takings Clause once it takes property without just compensation, which gives rise to the property owner's Fifth Amendment claim under § 1983.[105] By concentrating upon the proper understanding of the Fifth Amendment right to just compensation, *Knick*'s holding follows logically: the state action prong of *Williamson County* ripeness is overruled because of its poorly reasoned and unworkable effects in practice.[106] The first prong, finality, was not at issue in *Knick* and is thus left undisturbed.[107]

The regulation underlying *Knick* involved a local ordinance that violated the fundamental right to exclude.[108] Knick owned 90 acres of pastureland in Scott Township, a small community outside of Scranton, Pennsylvania.[109] Her land was primarily used as a grazing area for horses and other farm animals, except for Knick's single-family home and a small grave area where a neighbor's ancestors were allegedly buried.[110] Pennsylvania has a long history of permitting backyard burials, and in 2012, the township passed an ordinance requiring all cemeteries to maintain open public access during daylight hours.[111] The ordinance also authorized township officers to enter property in order to determine the existence and location of a cemetery on privately owned property.[112] After an officer discovered several grave markers on Knick's property, Knick was notified that she was in violation of the ordinance for failure to open her property for public access.[113]

105. *Knick*, 139 S. Ct. at 2177.
106. *Id.* at 2178–79.
107. *Id.* at 2169.
108. *Id.*
109. *Id*.
110. *Id.* at 2168.
111. *Id.*
112. *Id*.
113. *Id.*

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Knick petitioned the state court for declaratory and injunctive relief on the ground that the ordinance effected a taking of her property.[114] Upon the township's stay of enforcement of the ordinance during state court proceedings, Knick was procedurally precluded from a state remedy.[115] The state court declined to rule on Knick's request for declaratory and injunctive relief because she could not demonstrate the irreparable harm necessary for equitable relief without an ongoing enforcement action.[116] Knick then filed in federal district court alleging the ordinance constituted a Fifth Amendment taking.[117] However, the claim was dismissed because Knick did not first pursue an inverse condemnation action in state court.[118] Despite the Third Circuit noting the ordinance was "extraordinarily and constitutionally suspect," the court affirmed the dismissal of Knick's claim under *Williamson County*.[119] The Supreme Court agreed that the contested ordinance clearly caused an uncompensated regulatory taking and so accepted *Knick* on certiorari, ultimately eliminating the state action prong from the *Williamson County* two-prong test.[120]

The *Knick* opinion opens by characterizing *Williamson County* as holding "a property owner whose property has been taken by a local government has not suffered a violation of his Fifth Amendment rights—and thus cannot bring a federal takings claim in federal court—until a state court has denied his claim for just compensation under state law."[121] The Court first corrects this misconception of when the right for compensation arises. According to *Knick*, the plaintiff's inability to pursue his federal claim due to *Williamson*

114. *Id*.
115. *Id.*
116. *Id.*
117. *Id*.
118. *Id.* at 2169.
119. *Id.*
120. *Id.* at 2169–70.
121. *Id.* at 2167.

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County ripeness and the Court's subsequent decision in *San Remo* "rests on a mistaken view of the Fifth Amendment."[122]

Knick holds that the availability of any particular compensation remedy under state law cannot infringe upon or restrict the property owner's federal constitutional claim.[123] The existence of state procedure that may result in compensation does not affect or deprive a property owner of his or her right to just compensation.[124] The Court explained that the *Williamson County* court created the state procedure prong under a different understanding of the Fifth Amendment. *Williamson County* explicitly held that the property owner "cannot claim" a violation of the Takings Clause until he or she has used the available state law procedure for compensation and been denied.[125] Under this view of the Takings Clause, the existence of a state remedy qualifies the right, preventing the right to compensation from vesting until exhaustion of state remedies proves unsuccessful.[126]

After citing a large body of cases that illustrate ambiguity when the taking arises, *Knick* holds that plaintiffs may bring constitutional claims under the Takings Clause without first bringing any sort of state lawsuit, even when state court procedures to address the underlying contention are available.[127] The Court describes the state action prong as practically effectuating a state exhaustion requirement.[128] Thus, the state action prong of *Williamson County* ripeness was based on a flawed interpretation of the Takings Clause.[129] *Knick* concludes that government violates the Takings Clause when it takes property without compensation and that a property owner may bring a Fifth Amendment claim at that time. Because the violation is

122. *Id.*
123. *Id*. at 2171.
124. *Id*.
125. *Id.* (quoting *Williamson County*, 473 U.S. at 195).
126. *Id.*
127. *Id.* at 2172–73 (quoting D. Dana & T. Merrill, Property: Takings 262 (2002)).
128. *Id.* at 2173.
129. *Id.*

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complete at the time of the taking, the plaintiff's pursuit of remedy in federal court need not wait on prior state action.[130]

The *Knick* dissent defends the *Williamson County* rationale that a Fifth Amendment violation does not arise until the government denies the property owner compensation in a subsequent proceeding.[131] Nevertheless, after *Knick*, it is clear where the law stands: an unconstitutional Fifth Amendment taking arises as soon as the property owner suffers an uncompensated taking. From this conclusion, it necessarily follows that the state action prong rested on a misunderstanding of the now-clarified law.

D. The Circuits: Where We Were

Prior to *Knick*, the need to apply both prongs of the *Williamson County* ripeness test was mitigated by many courts. Several circuits were trending toward treating ripeness as a prudential requirement.[132] Five circuits made up the prudential group, all of which explicitly described the prudential nature of ripeness and reserved discretion in applying the state action prong accordingly. Three other circuits strictly adhered to *Williamson County*, requiring claims to satisfy the state action prong under all circumstances. Finally, two circuits recognized the second prong as prudential but had yet to use such discretion to waive the state action prong.

However, the prudential circuits did not eliminate the second prong. They generally viewed ripeness as a prudential measure that vested final discretion in its judges. The Ninth Circuit was first to shift to an unequivocal prudential view.[133] The Fifth Circuit overturned

130. *Id.* at 2177.
131. *Id*. at 2180–81 (Kagan, J., dissenting).
132. Callies, *supra* note 104, at 97, 101.
133. *See* Guggenheim v. City of Goleta, 638 F.3d 1111, 1118 (9th Cir. 2010); *see also* MHC Fin. Ltd. P'ship v. City of San Rafael, 714 F.3d 1118, 1130 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 900 (2014) (exercising its discretion not to impose the "prudential requirement of exhaustion in state court").

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precedent construing ripeness as strictly jurisdictional, holding the two-prong requirements of ripeness were merely prudential.[134]

The Fourth Circuit set out thorough rationale for prudential ripeness in its 2013 decision of *Town of Nags Head v. Toloczko*.[135] In deciding the applicability of a local ordinance that prohibited reconstruction of private residences on land designated "public trust area" by the town situated within the coastal zone, the court narrowly approached ripeness in response to the defense raised by the town.[136] The court first held that ripeness is a prudential rule, not a jurisdictional one.[137] Therefore, a federal court could exercise discretion in requiring ripeness.[138] The court then exercised its discretion and declined to apply the second prong of the ripeness rule "in the interests of fairness and judicial economy."[139]

In *Town of Nags Head v. Sansotta*, the Fourth Circuit took a further step toward ending the use of the state action prong as means to avoid judgment on the merits.[140] Observing that the interaction of removal and preclusion under *Williamson County* ripeness as interpreted in state courts could be used to bar challenged land use controls from federal court review (upon a plaintiff filing a takings claim in state court, as required by *Williamson County*, a defendant could simply remove to federal court and immediately unripen the removed claim in the new federal forum), the Fourth Circuit held in *Sansotta* that the town automatically waived ripeness when it removed to federal court.[141]

The Second Circuit also held *Williamson County* ripeness was prudential rather than jurisdictional and reserved the right to exercise discretion in applying the doctrine in order to retain federal

134. Rosedale Missionary Baptist Church v. New Orleans City, 641 F.3d 86 (5th Cir. 2011).
135. 728 F.3d 391 (4th Cir. 2013).
136. *Id*.
137. *Id.*
138. *Id.*
139. *Id.*
140. 724 F.3d 533 (4th Cir. 2013).
141. *Id.* at 544.

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jurisdiction to decide a case.[142] The Sixth Circuit similarly joined the prudential group of circuits, noting that "dismissing a case on ripeness grounds does a disservice to the federalism principles embodied in [the] doctrine" upon holding a state litigation requirement "clearly has no merit."[143]

Prior to *Knick*, the Third, Seventh, and Tenth Circuits appeared to be on the verge of treating the second prong as prudential. These circuits all recognized ripeness is prudential but hesitated to use discretion to apply the doctrine.[144] For example, the Seventh Circuit noted that the prudential nature of the *Williamson County* requirements "do[es] not, however, give the lower federal courts license to disregard them."[145] The First, Eighth, and Eleventh Circuits continued to strictly apply ripeness as a jurisdictional rule that bars claims from federal review that fail the *Williamson County* ripeness requirements.[146]

The effect of the first—the finality—prong of the ripeness doctrine was also mitigated by lower courts. To satisfy the finality prong, the government entity issuing the offending regulation must first

142. Sherman v. Town of Chester, 752 F.3d 554, 561 (2d Cir. 2014) (citing *Sansotta*, 724 F.3d at 545 and *Horne v. Dep't of Agric.*, 133 S. Ct. 2053, 2062 (2013)).

143. Wilkins v. Daniels, 744 F.3d 409, 418 (6th Cir. 2014).

144. *See, e.g.*, Alto Eldorado P'ship v. County of Santa Fe, 634 F.3d 1170 (10th Cir. 2011); Peters v. Village of Clifton, 498 F.3d 727 (7th Cir. 2007); Cty. Concrete Corp. v. Township of Roxbury, 442 F.3d 159 (3d Cir. 2006).

145. *Peters*, 498 F.3d at 734.

146. *See, e.g.*, Marek v. Rhode Island, 702 F.3d 650, 653–54 (1st Cir. 2012) ("It follows inexorably that the plaintiff would have had to pursue this procedure fully in a state court before a federal court could exercise jurisdiction over his takings claim. His failure to do so was fatal to his federal takings claim."); 126th Ave. Landfill, Inc. v. Pinellas County, 459 F. App'x 896, 900 (11th Cir. 2012) ("In a takings case . . . a plaintiff must first exhaust administrative remedies, then seek inverse condemnation in state court; only if both of those are unsuccessful may a plaintiff attempt to bring suit in federal court under the Fifth Amendment's Takings Clause"); Snaza v. City of Saint Paul, 548 F.3d 1178, 1181–83 (8th Cir. 2008) ("*Williamson County* is jurisdictional.").

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reach a final decision on the application of the subject regulation.[147] Because the finality requirement allegedly serves a legitimate purpose, it has largely been spared the criticism leveled at the state action requirement.[148] Federal courts had, however, imposed limitations on the finality requirement to avoid gamesmanship and repetitive, unfair, or futile efforts to pursue further administrative relief.[149]

The Supreme Court addressed the finality requirement in *Palazzolo v. Rhode Island*, creating a protection against government abuse through a prohibition on "burden[ing] property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision."[150] *Palazzolo* also held that a takings claim likely ripens once there is a reasonable degree of certainty that the government agency lacks further discretion to permit or deny development or use of land.[151] The reasonable measure test in *Palazzolo* reflects the observation by lower courts that some form of a "futility exception" exists to the ripeness finality requirement.[152]

In sum, *Knick* reduced ripeness to the finality prong, the strength of which has yet to be directly addressed by the Supreme Court. Ridding ripeness of the state action requirement is not the only work *Knick* accomplished. What's left of the ripeness doctrine is now clearly "prudential." *Knick* was unambiguous in clarifying the discretionary nature of the ripeness test for entry to federal courts. Landowners facing ripeness can seek the court's discretion because ripeness can no longer serve as a jurisdictional barrier to federal court. Moreover, the preclusion issues raised in *San Remo* can now

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147. *Williamson County*, 473 U.S. at 193.
148. *E.g.*, Kurtz v. Verizon N.Y., Inc., 758 F.3d 506, 512 (2d. Cir. 2014).
149. Callies, *supra* note 104, at 102; *e.g.*, Southview Assocs., Ltd. v. Bongartz, 980 F.2d 84, 98 (2d Cir. 1992); Gilbert v. City of Cambridge, 932 F. 2d 51, 60–61 (1st Cir. 1991); S. Pac. Transp. Co. v. City of Los Angeles, 922 F. 2d 498, 504 (9th Cir. 1990); Eide v. Sarasota Cty., 908 F. 2d. 716, 726 (11th Cir. 1990).
150. 533 U.S. 606, 620–21 (2001).
151. *Id.* at 620.
152. Callies, *supra* note 104, at 102 (*citing S. Pac. Transp. Co.*, 922 F.2d at 504).

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be avoided by landowners who previously waited to satisfy the finality requirement before challenging land use controls on the merits.[153]

E. Why It Matters: Hawai'i and the Need for Bringing Regulatory Takings Challenges in Federal Court

The importance of access to the federal court system for regulatory taking challenges is superbly illustrated by the 2017 decision of the Hawai'i Supreme Court in *Leone v. County of Maui*.[154] There, the Court upheld a jury verdict finding no regulatory taking even though the landowners were prevented by local land use regulation from building a single-family house—or indeed anything else—on their lot.[155] The facts are strikingly similar to *Lucas v. South Carolina Coastal Council*, the 1992 U.S. Supreme Court opinion finding a total regulatory taking of a beachfront lot due to state coastal zone regulations forbidding the construction of a single-family home.[156] In *Lucas*, the Court held that, with exceptions relating to nuisance and background principles of a state's law of property (neither of which were at issue in *Leone*), government may not deprive a landowner of all economically beneficial use of its property without paying compensation, as if the property were acquired by eminent domain.[157] Maui County caused such a deprivation but refused either to pay for the Leone parcel or to permit the construction of a single-family home on it, thereby bringing the case squarely within the rule and facts of *Lucas*.[158]

An excellent example of how federal courts contrastingly treat categorical, total regulatory takings is *Resource Investments, Inc. v. United States*.[159] Plaintiffs, whose core business was use and

153. *See* Brian Connolly, *Takings Precedent Overruled*, 85 J. Planning 13 (2019).
154. 404 P.3d 1257 (2017).
155. *Id.*
156. 505 U.S. 1003 (1992).
157. *Id.* at 1019.
158. *Leone*, 404 P.3d at 1278.
159. 85 Fed. Cl. 447 (2009).

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development of sanitary landfills, claimed a total, per se regulation taking when the U.S. Corps of Engineers denied a dredge and fill permit for a proposed landfill.[160] In holding that plaintiffs clearly established facts necessary for a total regulatory taking under *Lucas* even though the United States had presented evidence of potential use for growing hay, later subdivision, or timber harvesting, the Court of Federal Claims analyzed (and applied) the federal law on regulatory takings.[161] Turning in particular to *Lucas* (and citing other federal cases in support), the court first observed that *Pennsylvania Coal* foreshadowed *Lucas* and that the partial taking decision in *Penn Central* "did not resolve whether its balancing text applied to all regulatory impingements—regardless of the amount by which the regulation reduced the value of the affected property interest"[162]—and concluded that *Lucas* "answered in the negative."[163] The court emphasized and reiterated that the per se, total, categorical regulating taking test is whether the regulation denies all economic beneficial use of land;[164] it then noted that the nuisance and background principles of a state's law of property must not apply to a landowner's property in order for there to be a total regulatory taking.[165] The court then quickly dispensed with the notion that retaining *value* somehow excuses government from liability for compensation under *Lucas*:

> Both in its holding and its reasoning, *Lucas* thus focuses on whether a regulation permits *economically viable use* of the property, not whether the property retains same value on paper.[166]

160. *Id*. at 457–63.
161. *Id*. at 490–93.
162. *Id*. at 474
163. *Id*.
164. *Id*. at 475, 477 (holding, in this case, that the exceptions did not apply).
165. *Id*. at 475–76.
166. *Id*. at 486 (emphasis in original).

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After noting that a number of previous federal court decisions similarly so hold,[167] the court then squarely addressed the "value":

> To be sure, the complete elimination of the property's value may be *sufficient* to establish a categorical taking under many circumstances, given the obvious correlation between uses and their market values; a parcel of real property without value would usually have no lawful economically viable use. Yet the lack of value is not *necessary* to effect a taking, as a parcel will typically [sic] retain some quantum of value even without economically viable use. . . . Even the property at issue in *Lucas* retain some accounting or appraised value.[168]

The court then continued, virtually foreseeing the facts of *Leone*:

> Indeed, it is not difficult to identify other circumstances such as purchasing a parcel to preserve development-free open space or natural land, in which a parcel may have some value despite its lack of economically viable uses. Therefore, categorical treatment remains appropriate even if a parcel retains some nominal value, so long as the claimant is without economically viable use of his property.

The *Leone* facts are instructive. In 1996, the Maui County Council adopted a resolution authorizing the mayor to acquire what would later become the Leone lot, along with eight others, for the creation of a public park.[169] Accordingly, the applicable county plans, which have the force of law in Hawai'i, designated the Leone lot as "park" land.[170] The county only purchased two of the lots intended for park

167. *Id*. at 487, including cases in which the government tried conscientiously to use "investor value" as economically beneficial use. *Id*. (*citing* Florida Rock Indus., Inc. v. U.S., 791 F.2d 893, 902 (Fed. Cir. 1986)).
168. *Id*. at 487–88 (emphasis in original).
169. *Leone*, 404 P.3d at 1260.
170. *Id.*

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use, and the remaining lots were sold to private landowners.[171] When the Leones sought a special management area permit in order to construct a single-family house on their single-family lot, purchased for that purpose, the county denied the permit solely on the ground that the property was designated "park" on the applicable county plan, thereby rendering the proposed single-family dwelling inconsistent with that plan.[172]

Acknowledging that the U.S. Supreme Court in *Lucas* held a regulatory taking "occurs when the 'regulation denies all economically beneficial or productive use of land . . . typically, as here, by requiring land to be left substantially in its natural state,'" the Hawai'i Supreme Court nevertheless upheld a jury verdict against the Leones on the grounds of "conflicting testimony" about the value, not the use, of the Leone parcel.[173] The Leones' experts testified "unequivocally . . . that the County's regulations deprived the Leones of all economically beneficial use of their property."[174] The county's expert testified, in contrast, that "the property had great 'investment use'" and that "the property had 'tremendous opportunities for increases in value' because it was 'a very scarce commodity' and 'an oceanfront lot on one of the best beaches in south Maui.'"[175] After noting that the lot was placed in a family investment trust and that the Leones had placed it on the market for more money than they paid for it (before this 2017 decision denying the Leones a permit to construct a house on it), the court blithely determined "that investment use is a relevant consideration in a takings analysis" which, if true, is a factor only in partial, not total, regulatory takings cases.[176] The court held, "[a]s such, there is evidence to support the jury's finding that the property retained some economically beneficial use."[177]

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171. *Id*.
172. *Id.* at 1260–61.
173. *Id*. at 1270, 1277 (quoting *Lucas*, 505 U.S. at 1015, 1018).
174. *Id.* at 1277.
175. *Id.*
176. *Id.*
177. *Id.*

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The decision is badly flawed on the law. Land always has *some* value. Land being what it is—as Will Rogers once observed, "they ain't making any more of it"—that value tends to rise over time.[178] If that increase in value is the equivalent of economically beneficial use—and the virtually identical fact pattern in *Lucas* makes it clear it is not—then there is nothing left of *Lucas* and total, categorical regulatory takings. As long as state courts choose to ignore clear federal precedent in regulatory takings cases, as the Hawai'i Supreme Court has done in *Leone*, there must be an available remedy in federal court. The *Knick* decision opens federal courts to regulatory takings litigation that restores such remedy.[179]

In sum, the U.S. Supreme Court has reopened the door of federal courts to regulatory taking claims. The need for landowners to pursue a state action remedy—usually compensation—in order to ripen a claim before a federal court as required by *Williamson County* has been eliminated by the *Knick* decision. The Court added that a regulatory taking occurs as soon as the relevant regulation affects the economically beneficial use of the relevant parcel. When state supreme courts ignore federal case law on regulatory takings—as the Hawai'i Supreme Court did in *Leone*—this is a necessary and overdue correction to federal case law on both partial and total regulatory takings. However, the taking of all economic use does not necessarily constitute a Fifth Amendment total or categorical taking. There are—as the Court specifically set out in *Lucas*—exceptions: background principles of a state's law of property and nuisance.

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178. Peter M. Wolf, Land in America 6 (1981).

179. David L. Callies & Ellen R. Ashford, Knick *in Perspective: Restoring Regulatory Takings Remedy in Hawai'i*, 42 U. Haw. L. Rev. 136, 143–45 (2020). However, not all federal courts favor finding a regulatory taking. For arguments and analysis demonstrating that federal courts can be as impervious as state courts in finding regulatory takings and awarding compensation, *see* Greg Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vanderbilt L. Rev. 1 (1995), and Bethany Berger, Knick v. Township of Scott, Pennsylvania: Not the Revolution Some Hope for and Others Fear, 34 Probate & Property 38 (May/June 2020).

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Recall that in the 1992 case of *Lucas v. South Carolina Coastal Council*,[180] the U.S. Supreme Court created its now-famous "categorical rule" for regulatory takings. Pursuant to the Fifth Amendment to the U.S. Constitution, the rule requires the government to provide just compensation whenever it denies a property owner all "economically beneficial use" of land.[181] Neither the purposes behind the denial nor the circumstances under which the land is acquired can diminish the government's liability.[182]

The *Lucas* Court did, however, establish two exceptions to the otherwise inflexible "categorical rule," declaring that the rule does not apply if, first, the challenged regulation prevents a nuisance or, second, the regulation is grounded in a state's background principles of property law.[183] Nuisance is covered in Chapter 5. Leaving nothing to chance, the *Lucas* Court explained that the nuisance exception would allow the government to prohibit the construction of a power plant on an earthquake fault line or the filling of a lake bed that was likely to result in flood damage to a neighbor without incurring takings liability.[184] By contrast, the Court was silent with respect to the meaning of the second exception of "background principles of state property law."[185]

A major and often unexplored question in takings law is the extent of the background principles exception. The subject is important for two distinct reasons. First, it is not always easy to discern what comprises such background principles. Second, once defined, the principles can, when subject to expansive interpretation, seriously erode the basic *Lucas* doctrine meant to provide compensation for regulatory takings that deprive an owner of all economically beneficial use of land. A related issue is the extent to which background

180. 505 U.S. 1003 (1992).
181. *Id.* at 1019.
182. *See, e.g.*, Palm Beach Isles Assocs. v. United States, 231 F.3d 1354 (Fed. Cir. 2000).
183. *Lucas*, 505 U.S. at 1020–32.
184. *Id.* at 1029.
185. *Id.* at 1029–30.

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principles analysis overlaps with the continuing discussion of the role of investment-backed expectations in *Lucas* situations (there should be none) and the so-called notice rule arguably raised by pre-existing state statutes in either total (*Lucas*) or partial (*Penn Central Transportation*) taking analyses.

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