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Weakening the Ripeness Trap for Federal Takings Claims: Sansotta v. Town of Nags Head and Town of Nags Head v. Toloczko

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WEAKENING THE "RIPENESS TRAP" FOR FEDERAL TAKINGS CLAIMS: *SANSOTTA V. TOWN OF NAGS HEAD* AND *TOWN OF NAGS HEAD V. TOLOCZKO*

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I. INTRODUCTION

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,[1] the U.S. Supreme Court held that a regulatory takings claim against a local government is not ripe until the property owner has sought, and been denied, compensation in state court.[2] This state litigation requirement has created a dilemma for plaintiffs who believe their property has been taken by local regulation. If the aggrieved property owners sue in federal court, their lawsuits are subject to being dismissed as unripe.[3] If the aggrieved property owners sue in state court and lose, their claims are then barred from adjudication in federal court under the doctrine of claim or issue preclusion.[4] Thus, unlike plaintiffs pursuing any other constitutional right, federal takings claimants are effectively denied a federal forum, save in the unique circumstance in which the Supreme Court grants a petition for certiorari.[5]

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1. 473 U.S. 172 (1985).

2. *Id.* at 194–97 (citations omitted).

3. *See, e.g.*, N. Va. Law Sch., Inc. v. City of Alexandria, 680 F. Supp. 222, 224–25 (E.D. Va. 1988) (citations omitted) (dismissing the plaintiff's takings claim as unripe for failure to exhaust state remedies).

4. *See* San Remo Hotel, L.P. v. City of S.F., 545 U.S. 323, 337–38 (2005) (citing 28 U.S.C. § 1738; England v. La. Bd. of Med. Exam'rs, 375 U.S. 411 (1964)) (holding that takings claims litigated in state court have preclusive effect in federal court).

5. *See* John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call For Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 URB. LAW. 195, 196

Making matters worse is the decision in *City of Chicago v. International College of Surgeons*,[6] in which the Supreme Court held that a federal takings claim filed in state court can be removed to federal court under 28 U.S.C. § 1441.[7] Reading *International College of Surgeons* and *Williamson County* together leads to the anomalous result that a defendant can choose a federal forum for regulatory takings cases, while a plaintiff cannot.[8] Stranger still are those cases in which the municipal defendant removes a takings case to federal court, only to ask the court to dismiss the case because the plaintiff failed to ripen the claim in the state court proceeding.[9] The "ripeness trap" created by these rules has led to a large amount of procedural gamesmanship, confusion, and consternation for litigants and commentators alike.

During the summer of 2013, however, the Fourth Circuit decided two cases that weaken the trap considerably and help bring some "normalization" to the area of takings litigation.[10] First, the court held in *Sansotta v. Town of Nags Head*[11] that a defendant waives the state litigation requirement by removing a takings case to federal court.[12] Second, the court indicated in *Town of Nags Head v. Toloczko*[13] that it would refuse to apply the rule, even under circumstances in which the plaintiff chose the federal forum, when doing so would promote the interests of fairness and judicial economy.[14]

This Essay discusses these recent Fourth Circuit opinions, as well as the larger legal backdrop of which they are a part, in the following manner. Part II provides an overview of the relevant Supreme Court decisions that created the ripeness trap and how lower courts have employed those decisions. Part III then focuses on the Fourth Circuit's recent weakening of the trap, describing its holdings and rationales in *Sansotta* and *Toloczko*. Part IV analyzes these decisions, emphasizing two broader implications suggested by them. First, the

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(1999) (noting that ripeness rules "have uniquely denied property owners, unlike the bearers of other constitutional rights, access to the federal courts on their federal claims"); Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 22 (1995) ("The state compensation portion of this decision finds no parallel in the ripeness cases from other areas of the law.").

6. 522 U.S. 156 (1977).

7. *Id.* at 163–66 (citations omitted).

8. *See id.* (citations omitted); *Williamson Cnty.*, 473 U.S. at 194–97 (citations omitted).

9. *See, e.g.*, Snaza v. City of St. Paul, 548 F.3d 1178, 1182 (8th Cir. 2008) (citing Koscielski v. City of Minneapolis, 435 F.3d 898, 903 (8th Cir. 2006)) (affirming dismissal of a takings claim as unripe even though defendant removed case to federal court).

10. *See* Town of Nags Head v. Toloczko, 728 F.3d 391 (4th Cir. 2013); Sansotta v. Town of Nags Head, 724 F.3d 533 (4th Cir. 2013). The word *normalization* is borrowed from Professor Michael McConnell's discussion of a recent Supreme Court decision on a related issue. *See* Michael W. McConnell, Horne *and the Normalization of Takings Litigation: A Response to Professor Echeverria*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10749, 10749 (2013).

11. 724 F.3d 533.

12. *Id.* at 549.

13. 728 F.3d 391.

14. *Id.* at 399 (citing *Sansotta*, 724 F.3d at 545; San Remo Hotel, L.P. v. City of S.F., 545 U.S. 323, 346 (2005)).

Fourth Circuit's approach facilitates an understanding of the real basis for the state litigation requirement, which has more to do with abstention than ripeness principles. Second, these decisions implicitly question the rationale for treating takings claims differently than alleged violations of other constitutional rights. A brief conclusion follows in Part V.

II. THE LEGAL BACKDROP

The ripeness trap finds its genesis in *Williamson County*.[15] The plaintiff in *Williamson County* filed suit in federal district court, alleging that the application of local land use regulations resulted in a taking of its property without just compensation in violation of the Fifth Amendment.[16] The district court entered judgment in favor of the local government, a decision which the Sixth Circuit later overturned.[17] The county petitioned the Supreme Court for a writ of certiorari, asserting that a government regulation could never result in a taking under the Fifth Amendment, although it could potentially violate the Due Process Clause.[18] The Court declined to address that question, however, because it found that the plaintiff's claim was premature under either constitutional provision.[19]

For purposes of the Takings Clause, the Court held that the claim was unripe for two independent reasons.[20] First, the Court explained that a takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."[21] Because the plaintiff had not sought a variance from the regulations in question, this prong of the ripeness requirement was unsatisfied.[22] Second, and more significant for purposes of this Essay, the Court concluded that the plaintiff's claim was not ripe because it had not sought "compensation through the procedures the State ha[d] provided for doing so."[23]

The requirement that compensation first be pursued from the state, the Court explained, is derived from the fact that the Fifth Amendment prohibits only an *uncompensated* taking, and not the taking itself.[24] The Court suggested that if the government provides an adequate mechanism for obtaining compensation and such compensation is ultimately paid, then no constitutional violation has

15. 473 U.S. 172 (1985).
16. *Id.* at 182.
17. *Id.* at 183 (citing Hamilton Bank of Johnson City v. Williamson Cnty. Reg'l Planning Comm'n, 729 F.2d 402, 409 (6th Cir. 1984), *rev'd*, 473 U.S. 172 (1985)).
18. *Id.* at 185.
19. *Id.*
20. *See id.* at 186–94 (citations omitted).
21. *Id.* at 186.
22. *Id.* at 188.
23. *Id.* at 194.
24. *Id.* (citing Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 297 n.40 (1981)).

occurred.[25] Because the plaintiff was able to pursue compensation for the alleged taking through an inverse condemnation action in state court, its taking claim was "premature" until it utilized the state procedure and compensation was denied.[26]

Williamson County requires that a federal takings plaintiff seek compensation in state court and lose before the claim under the Takings Clause ripens.[27] Notably, the language employed by the Court in *Williamson County* suggests that, once the state litigation concludes, the unsuccessful property owner would then be allowed to pursue the now-mature claim in a federal forum.[28] In practice, however, that prospect has proved illusory. Within only a few years after *Williamson County*, several lower courts held that a subsequent relitigation of the takings claim in federal court was barred by res judicata, collateral estoppel, and the federal full faith and credit statute[29]—a proposition with which the Supreme Court has since agreed.[30]

Williamson County and its progeny thus set a trap that relegates a federal takings claim to state court.[31] If a plaintiff files a claim in federal court, it will be dismissed as unripe.[32] If the plaintiff ripens the claim by filing suit in state court and loses, the state litigation will be given preclusive effect.[33] In this area of the law, as explained by some commentators, "the very act of 'ripening' a case also ends it."[34]

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25. *See id.* at 194–95 (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1013, 1018 n.21, 1016–20 (1984)).

26. *Id.* at 196–97.

27. *See id.* at 194–97 (citations omitted).

28. *See id.*; *see also* Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-parody Stage*, 36 URB. LAW. 671, 684–85 (2004) ("The Court's language demonstrates that the Court plainly was *delaying* a property owner's entry into the federal courthouse, not barring it."); Thomas E. Roberts, *Fifth Amendment Takings Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 URB. LAW. 479, 480, 486–87 (1992) ("Reliance on the ripeness rationale . . . suggests to property owners that their complaints will be ripe and heard in the federal courts after their state suits are over.") (internal citations omitted).

29. *See, e.g.*, Palomar Mobilehome Park Ass'n v. City of San Marcos, 989 F.2d 362, 364–65 (9th Cir. 1993) (citations omitted) (upholding the district court's dismissal of action based on the doctrine of res judicata); Fields v. Sarasota Manatee Airport Auth., 953 F.2d 1299, 1308 (11th Cir. 1992) (affirming the district court's dismissal of the takings claim); Peduto v. City of N. Wildwood, 878 F.2d 725, 727–29 (3d Cir. 1989) (citations omitted) (affirming the district court's dismissal of the takings claim).

30. *See* San Remo Hotel, L.P. v. City of S.F., 545 U.S. 323, 347–48 (2005).

31. *See* Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under* Williamson County, 26 ECOLOGY L. Q. 1, 2 (1999) (acknowledging that *Williamson County* "effectively bars plaintiffs from raising federal takings claims in federal court").

32. *See* Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194–97 (1985) (citations omitted).

33. *See San Remo*, 545 U.S. at 347–48.

34. Robert H. Freilich & Jason M. Divelbiss, *The Public Interest is Vindicated:* City of Monterey v. Del Monte Dunes, 31 URB. LAW. 371, 387 (1999).

The trap set by *Williamson County* has been subject to much criticism and described—even by some of its supporters—in unflattering terms.[35] Compounding the problem even further, however, is the Supreme Court's subsequent decision in *International College of Surgeons*.[36] In *International College of Surgeons*, the plaintiff filed two lawsuits in state court seeking review of a municipal decision to designate its property as a historical landmark.[37] Asserting federal question jurisdiction because the complaints raised several constitutional challenges—including violations of the Due Process, Equal Protection, and Takings Clauses—the defendant removed the case to federal district court.[38] Although the district court disposed of the claims, the Seventh Circuit reversed and remanded to the state court on the basis that a proceeding to review a state administrative decision was not a "civil action" for purposes of the removal statute.[39]

The Supreme Court disagreed, stating that the "propriety of removal" depends ultimately on the original jurisdiction of the federal court.[40] If the case could have been initiated in federal court, then removal is proper; otherwise, it is not. The Court then suggested that the plaintiff's claims could have been filed directly in federal court because its "state court complaints raised a number of issues of federal law in the form of various federal constitutional challenges."[41] The plaintiff's claims thus arose under the U.S. Constitution and the district court had original jurisdiction over them, notwithstanding the procedural vehicle in which they were packaged.

The Court's decision in *International College of Surgeons* not only complicates matters for a federal takings plaintiff, but it also defies reason if

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35. *See, e.g.*, Steven J. Eagle, *Judicial Takings and State Takings*, 21 WIDENER L.J. 811, 836 (citing *San Remo*, 545 U.S. at 337–38) (stating that the state litigation requirement has "Alice-in-Wonderland quality"); Freilich & Divelbiss, *supra* note 34, at 387 (describing the rule as "inherently nonsensical and self-stultifying"); Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1, 51 (1992) (labeling the rule a "Kafkaesque maze"); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. LAND USE & ENVTL. L. 37, 71 (1995) (describing the *Williamson County* requirement as "a fraud or hoax on landowners"); *see also* Berger & Kanner, *supra* note 28, at 702–03 (collecting similar descriptions). The characterizations offered by some lower courts have been equally uncomplimentary. *See, e.g.*, Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 130 (2d Cir. 2003) (describing the rule as "ironic and unfair"); Kottschade v. City of Rochester, 319 F.3d 1038, 1041 (8th Cir. 2003) (describing the rule as "anomalous"); Fields v. Sarasota Manatee Airport Auth., 953 F.2d 1299, 1307 n.8 (11th Cir. 1992) (describing the rule as "odd"); Murphy v. Village of Plainfield, 918 F. Supp. 2d 753, 761 (N.D. Ill. 2013) (describing the rule as "draconian").

36. 522 U.S. 156 (1997).

37. *Id.* at 159–60.

38. *Id.* at 160–61.

39. *Id.* at 161–62 (citing Int'l Coll. of Surgeons v. City of Chicago, 91 F.3d 981, 994 (7th Cir. 1996), *rev'd*, 522 U.S. 156 (1997)).

40. *Id.* at 163 (citing Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987); Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 8 (1983)).

41. *Id.* at 164.

Williamson County was correct about ripeness. Under *International College of Surgeons*, a defendant may remove a claim that it has taken property in violation of the Constitution because, ostensibly, the plaintiff could have initiated that claim directly in federal district court.[42] Under *Williamson County*, however, the plaintiff's claim is unripe, and therefore cannot be pursued in federal court until compensation has first been sought through litigation in state court.[43] As one federal court explained, the two decisions directly contradict one another: "Either [*International College of Surgeons*] erroneously permitted removal, or [*International College of Surgeons*] implicitly held that the regulatory takings claim was ripe—a *sub silentio* elimination of the *Williamson County* State Litigation prong."[44]

Even so, the Supreme Court has not resolved the conflict between these two cases, leading to the bizarre result that takings plaintiffs cannot invoke federal jurisdiction, but takings defendants can. And those defendants have not been shy in utilizing the power given to them. Recognizing the tension between *International College of Surgeons* and *Williamson County*, governmental defendants routinely seek to remove takings claims filed in state court, only to then seek dismissal of those same claims in federal court on the grounds that the plaintiff failed to ripen them.[45] The combined effect of *International College of Surgeons* and *Williamson County* presents a formidable snare to litigants who believe their property has been taken without just compensation. In addition to effectively foreclosing access to a federal forum for takings plaintiffs, these cases also subject the plaintiffs to a "judicial ping-pong game" of costly delays and procedural gamesmanship.[46]

III. *SANSOTTA* AND *TOLOCZKO*

A. Factual and Procedural Background

It is against this backdrop that a panel of the Fourth Circuit recently decided the cases of *Sansotta v. Town of Nags Head*[47] and *Town of Nags Head v.*

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42. *Id.*

43. *See* Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985).

44. Del-Prairie Stock Farm, Inc. v. Cnty. of Walworth, 572 F. Supp. 2d 1031, 1033 (E.D. Wis. 2008) (emphasis added).

45. *See, e.g.*, Snaza v. City of St. Paul, 548 F.3d 1178, 1182 (8th Cir. 2008) (affirming dismissal of a takings claim removed by the defendant); Vigilante v. Village of Wilmette, 88 F. Supp. 2d 888, 890 (N.D. Ill. 2000) (dismissing the removed takings claim for lack of subject matter jurisdiction); Rau v. City of Garden Plain, 76 F. Supp. 2d 1173, 1176–77 (D. Kan. 1999) (dismissing a takings claim for lack of subject matter jurisdiction following the defendant's removal to federal court); Seiler v. Charter Twp. of Northville, 53 F. Supp. 2d 957, 962 (E.D. Mich. 1999) (dismissing the plaintiff's takings claim as unripe subsequent to removal).

46. Berger & Kanner, *supra* note 28, at 678 (internal quotation marks omitted).

47. 724 F.3d 533 (4th Cir. 2013).

Toloczko.[48] Both cases arose from similar facts related to a tropical storm that damaged several beachfront cottages in Nags Head, North Carolina.[49] After the storm, the town notified several property owners that their cottages were being declared as nuisances under a local ordinance that allowed such a declaration for any structure located in a public trust area.[50] Pursuant to the ordinance, the only method of abating the nuisances was to demolish the offending structures, and the town began imposing daily fines against the owners until such demolition occurred.[51]

Several cottage owners challenged the town's nuisance declarations on the grounds that they amounted to regulatory takings under federal law and inverse condemnations under state law.[52] In *Sansotta*, the cottage owners asserted these claims in a state court action that was subsequently removed to federal district court by the town.[53] In *Toloczko*, by contrast, the town itself initiated state court proceedings, and the defendant owners removed the case on the basis of diversity of citizenship.[54] After removal, the owners filed numerous counterclaims against the town, including the takings and inverse condemnation claims referenced above.[55] In both cases, the district court dismissed the owners' federal takings claims as unripe under *Williamson County*.[56] And in both cases, the Fourth Circuit reversed.[57]

B. The Fourth Circuit's Decision in Sansotta

The court's analyses rested on two foundational propositions. First, the court acknowledged that *Williamson County* normally renders a takings claim unripe, unless the person asserting that claim has unsuccessfully sought compensation in a state court proceeding.[58] Because both cases had been removed to federal court before the state proceedings were completed, the owners technically had not yet satisfied the *Williamson County* requirement.[59] The court also acknowledged, however, that ripeness under *Williamson County*

48. 728 F.3d 391 (4th Cir. 2013).

49. *Id.* at 394; *Sansotta*, 724 F.3d at 537.

50. *Toloczko*, 728 F.3d at 394; *Sansotta*, 724 F.3d at 537–38 (citing Town of Nags Head, N.C., Code of Ordinances, § 16-31(6)(c) (2007)).

51. *Toloczko*, 728 F.3d at 394; *Sansotta*, 724 F.3d at 537–38.

52. *Toloczko*, 728 F.3d at 394; *Sansotta*, 724 F.3d at 538.

53. *Sansotta*, 724 F.3d at 538.

54. *Toloczko*, 728 F.3d at 394. In the state court action, the town sought to collect the fines assessed against the cottage owners, as well as to require them to raze the cottage. *Id.*

55. *Id.*

56. *Id.* at 394 n.4; *Sansotta*, 724 F.3d at 539.

57. *Toloczko*, 728 F.3d at 399; *Sansotta*, 724 F.3d at 549.

58. *Toloczko*, 728 F.3d at 399; *Sansotta*, 724 F.3d at 544 (citing Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194–95 (1985)).

59. *Toloczko*, 728 F.3d at 394; *Sansotta*, 724 F.3d at 544.

involves "only prudential considerations."[60] It is not a jurisdictional rule and, for that reason, it does not bar a federal court from hearing a takings case in all circumstances.[61] The question under *Williamson County*, then, was not whether a federal court *can* adjudicate a takings claim, but whether it *should* do so in the context of the case before it.[62]

The Fourth Circuit answered that question affirmatively in *Sansotta*, in which the town's removal of the case had ended the state litigation prematurely.[63] The court explained that *Williamson County*'s state litigation requirement was rooted in the comparatively better experience that state tribunals have in resolving zoning and land use disputes.[64] By removing a takings claim to federal court, however, a defendant tacitly agrees that the federal courts can handle those claims, thereby foregoing any benefit that state court expertise might otherwise offer.[65] In short, when a government defendant removes a takings claim, "the primary reason for the *Williamson County* state-litigation requirement no longer applies."[66]

In addition, general principles of fair play counseled against imposing the state litigation requirement in these types of cases.[67] The Fourth Circuit analogized to a situation in which a removing state defendant seeks dismissal on the basis of Eleventh Amendment immunity.[68] In such cases, the Supreme Court has made clear that voluntary removal to federal court waives the state's immunity from federal suit, regardless of the state's motivation for initiating the removal.[69] One of the chief reasons underlying that rule is to prevent "unfair tactical advantages"[70] that lead to "seriously unfair results."[71] The Fourth Circuit saw no difference between the Eleventh Amendment context and that at issue under *Williamson County*:

> Like Eleventh Amendment immunity, a state or its political subdivision is entitled to assert the state-litigation requirement when a plaintiff files suit in federal court. But permitting a state or its political subdivision to

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60. *Sansotta*, 724 F.3d at 545 (citing Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 734 (1997)).

61. *Id.* ("Because *Williamson County* is a prudential rather than a jurisdictional rule, . . . we still have the power to decide the case.").

62. *See id.* ("[W]e may determine that in some instances, the rule should not apply . . . .").

63. *Id.*

64. *Id.* (citing San Remo Hotel, L.P. v. City of S.F., 545 U.S. 323, 347 (2005)).

65. *Id.*

66. *Id.*

67. *Id.* at 545–46 (citing Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613 (2002)).

68. *Id.*

69. *See, e.g.*, *Lapides*, 535 U.S. at 618–24 (citations omitted) (concluding that "removal is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive" a state's claim to sovereign immunity).

70. *Id.* at 621.

71. *Id.* at 619.

> assert this requirement after the state or its political subdivision has removed the case to federal court would allow the state or its political subdivision to do in the context of the Takings Clause exactly what the Supreme Court has declared to be improper in the context of the Eleventh Amendment: invoke federal jurisdiction and then object to federal jurisdiction.[72]

Because the situations were similar, the Fourth Circuit concluded that the rules employed in each situation should also be similar.[73] Doing so was not only "logically and legally sound,"[74] but had the advantage of protecting innocent plaintiffs; preventing manipulation by government defendants; and furthering the "strong preference for deciding cases on the merits," rather than on the basis of "procedural gamesmanship."[75] For these reasons, the Fourth Circuit held that the town waived *Williamson County*'s state litigation requirement by removing the case to federal court.[76]

C. *The Fourth Circuit's Decision in* Toloczko

As in *Sansotta*, the *Toloczko* case was removed from state court before the cottage owners obtained an adjudication of their inverse condemnation claim.[77] Indeed, that claim was apparently never even raised before the state court, and was only added after the owners removed the case to federal court.[78] Accordingly, the failure to satisfy the state litigation requirement lay squarely with the owners—and not the government—distinguishing the case from *Sansotta*.[79] The Fourth Circuit explained that "[w]here a plaintiff's failure to satisfy *Williamson County* results from their [sic] own litigation strategy, rather than the defendant's 'procedural gamesmanship' or forum manipulation, . . . *Sansotta*'s waiver principle does not apply."[80]

Even so, as in *Sansotta*, the court again noted that the state litigation requirement is prudential rather than jurisdictional.[81] For this reason, it was within the court's discretion to hear the case, notwithstanding that the state litigation requirement had not been met.[82] The court explained that exercising such discretion and suspending the requirement was especially proper "to avoid

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72. *Sansotta*, 724 F.3d at 546.
73. *Id.*
74. *Id.*
75. *Id.* at 546–47 (citing Heyman v. M.L. Mktg. Co., 116 F.3d 91, 94 (4th Cir. 1997)).
76. *Id.* at 544.
77. Town of Nags Head v. Toloczko, 728 F.3d 391, 394 (4th Cir. 2013).
78. *Id.* (stating that owners' counterclaims were filed after removal).
79. *Id.* at 399 (citing *Sansotta*, 724 F.3d at 545–56).
80. *Id.* (citation omitted).
81. *Id.* (citing *Sansotta*, 724 F.3d 545).
82. *Id.*

piecemeal litigation or otherwise unfair procedures."[83] Although the court did not elaborate beyond stating that it would "not impose further rounds of litigation on the" cottage owners, it concluded that "the interests of fairness and judicial economy" warranted suspension of the state litigation requirement in the present case.[84]

IV. ANALYSIS

Read together, the Fourth Circuit's decisions in *Sansotta* and *Toloczko* weaken the ripeness trap established by *Williamson County* and its progeny, and help to reduce some of the procedural arbitrariness—and resulting inequities—associated with federal takings litigation. Under the rule from *Sansotta*, government defendants accused of violating the Takings Clause will no longer be able to leverage the state litigation requirement in cases that they voluntarily remove to federal court.[85] Moreover, the holding in *Toloczko* suggests that, despite the state litigation requirement, there are at least some circumstances in which a takings plaintiff may successfully invoke a federal forum as well.[86]

These holdings, and the reasoning that underlies them, raise at least two broader implications. First, the decisions highlight that the state litigation requirement of *Williamson County* really has nothing whatsoever to do with *ripeness* as that term is generally understood.[87] Second, the decisions force an evaluation of the proffered reasons why challenges based on the Takings Clause deserve to be treated differently from other constitutional claims.[88]

A. The State Litigation Requirement and Ripeness

As an initial matter, *Sansotta* and *Toloczko* demonstrate that the state litigation requirement is not grounded in ripeness, despite *Williamson County*'s statements to the contrary. As the Supreme Court has repeatedly explained, ripeness is typically associated not only with prudential concerns, but also with constitutional limitations on the power of the federal courts.[89] Because ripeness

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83. *Id.* (quoting San Remo Hotel, L.P. v. City of S.F., 545 U.S. 323, 346 (2005)) (internal quotation marks omitted).

84. *Id.* The concerns about judicial economy and piecemeal litigation no doubt arose from the fact that the plaintiffs had raised several other constitutional challenges from which the district court had erroneously abstained and, therefore, would be heard by the district court on remand. *See id* at 395–98 (citations omitted).

85. *See Sansotta*, 724 F.3d at 544.

86. *See Toloczko*, 728 F.3d at 398–99 (citations omitted).

87. *See Sansotta*, 724 F.3d 533; *Toloczko*, 728 F.3d 391.

88. *See Sansotta*, 724 F.3d 533; *Toloczko*, 728 F.3d 391.

89. *See, e.g.*, Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 670 n.2 (2010) ("Ripeness reflects constitutional considerations that implicate Article III limitations on judicial power, as well as prudential reasons for refusing to exercise jurisdiction." (quoting Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 n.18 (1993))) (internal quotation marks omitted); Renne v. Geary,

is frequently considered a part of the Article III "case or controversy" requirement,[90] a ripeness challenge raises questions about the court's jurisdictional power to hear a case in the first instance.[91]

Notwithstanding the views of some other courts,[92] the Fourth Circuit highlighted in *Sansotta* and *Toloczko* that jurisdictional concerns are not the basis for the state litigation requirement.[93] As the Supreme Court recently made clear, under the Takings Clause, a case or controversy "exists once the government has taken private property without paying for it."[94] Importantly, in most cases, the "government" will be the state or local agency doing the alleged taking.[95] The state judicial system, by contrast, provides a forum to remedy the uncompensated taking, just like a federal court does. In the words of one commentator:

> The real issue is whether the local entity is alleged to have taken private property for public use and failed to pay for it. If so, the question whether the city can be *compelled* to pay lies at the heart of litigation in either state or federal court. As both have jurisdiction to decide federal constitutional questions, the plaintiff may logically file in either.[96]

So long as the plaintiff alleges that a governmental action has effected a taking of its property without payment, subject matter jurisdiction exists and a federal court has the constitutional authority to consider the case—regardless of whether the plaintiff has sought relief in state court.[97]

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501 U.S. 312, 316 (1991) ("Concerns of justiciability go to the power of the federal courts to entertain disputes, and to the wisdom of their doing so.").

90. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 750 (1984) (listing ripeness as one of "the doctrines that cluster about Article III" (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–79 (D.D.C. 1983) (Bork, J., concurring))).

91. *See, e.g.*, Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 197 (1985) (concluding that the takings claim could not be heard because it was unripe).

92. *See, e.g.*, Reahard v. Lee Cnty., 30 F.3d 1412, 1415 (11th Cir. 1994) (stating that "the question of ripeness goes to whether the district court had subject matter jurisdiction" (quoting Greenbriar Ltd. v. City of Alabaster, 881 F.2d 1570, 1573 (11th Cir. 1989))) (internal quotation marks omitted).

93. *See Sansotta*, 724 F.3d 533; *Toloczko*, 728 F.3d 391.

94. Horne v. Dep't of Agric., 133 S. Ct. 2053, 2062 n.6 (2013).

95. *See, e.g.*, *Toloczko*, 728 F.3d 391; *cf.* Michael B. Kent, Jr., *More Questions Than Answers: Situating Judicial Takings Within Existing Regulatory Takings Doctrine*, 29 VA. ENVTL. L.J. 143, 150–51 (2011) (noting that most Supreme Court takings cases involve actions by the executive or legislative branches of government). *But see* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 713–16 (2010) (plurality opinion) (citations omitted) (suggesting that the judicial branch can also take property under certain circumstances).

96. Berger & Kanner, *supra* note 28, at 694.

97. *See Horne*, 133 S. Ct. at 2062 n.6. To the extent the *Williamson County* Court suggested that no constitutional violation occurs if compensation can be obtained through a subsequent state inverse condemnation proceeding, it was simply incorrect. Two years after *Williamson County*, the

This conclusion is bolstered by the Supreme Court's holding in *International College of Surgeons*.[98] Indeed, it is the only sensible way to read that decision. As noted above, *International College of Surgeons* allowed a defendant to remove a takings claim on the basis of federal question jurisdiction.[99] Accordingly, the requirement that plaintiffs first seek and be denied redress in state court cannot depend on jurisdictional limitations—"jurisdiction cannot magically appear out of thin air merely because a municipal defendant thinks it would be advantageous in a particular controversy."[100] If a takings claim presents a federal question for purposes of removal, it equally does so for purposes of initiating a civil action.[101] Thus, the Fourth Circuit correctly concluded in *Sansotta* and *Tolozcko* that the *ripeness* at issue in the state litigation requirement is not rooted in any limitations imposed by Article III.[102]

At the same time, these decisions hint at the absence of another characteristic typically associated with ripeness: that an unripe claim might possibly mature.[103] Even when ripeness rests solely on prudential considerations, the prospect remains that the claim might still be heard by the federal court at some point in the future.[104] As the Second Circuit explained, "when a court declares that a case is not prudentially ripe, it means that the case will be *better* decided later."[105] But this is untrue in the context of the state litigation requirement because the case is over once the state court rules on the plaintiff's request for compensation. As explained earlier, the federal courts must give preclusive effect to the state court decision.[106] In that regard, forcing a

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Supreme Court indicated that a taking occurs at the time the government interferes with the property, regardless of whether that interference is remedied or terminated at some subsequent point. *See* First English Evangelical Lutheran Church of Glendale v. L.A. Cnty., 482 U.S. 304, 318–20 (1987) (citations omitted) (discussing "temporary" takings). As another commentator recently explained, "the availability of a post-deprivation process has nothing to do with *ripeness*; it has to do with *remedies*." *See* Joshua D. Hawley, *The Beginning of the End?* Horne v. Department of Agriculture *and the Future of* Williamson County, 2012–2013 CATO SUP. CT. REV. 245, 246–48 (2013) (discussing *Williamson County*'s jurisdictional test as a break from the prior understanding of takings law).

98. *See* City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 164 (1997).

99. *See id.*

100. Berger & Kanner, *supra* note 28, at 682.

101. *See Int'l Coll. of Surgeons*, 522 U.S. at 163 ("The propriety of removal . . . depends on whether the case originally could have been filed in federal court.").

102. *See* Town of Nags Head v. Toloczko, 728 F.3d 391, 399 (4th Cir. 2013) (citations omitted); Sansotta v. Town of Nags Head, 724 F.3d 533, 545 (4th Cir. 2013) (citations omitted).

103. *See, e.g.*, Bronx Household of Faith v. Bd. of Educ. of City of N.Y., 492 F.3d 89, 111 (2d Cir. 2007) (Leval, J. concurring) ("The concept of ripeness assumes that the relationship between the parties might at some point ripen . . . ."); *see also* Blanchette v. Conn. Gen. Ins. Corps., 419 U.S. 102, 139–40 (1974) (stating that "ripeness is peculiarly a question of timing" and concluding that the posture of the case matured).

104. Simmonds v. Immigration & Naturalization Serv., 326 F.3d 351, 357 (2d Cir. 2003) (discussing the prudential ripeness doctrine).

105. *Id.*

106. *See* San Remo Hotel, L.P. v. City of S.F., 545 U.S. 323, 337–38 (2005) (citing England v. La. Bd. of Med. Exam'rs, 375 U.S. 411, 419 (1964)).

plaintiff to first litigate the takings claim in state court is not a determination that the case could thereafter be more "fit" for federal review. On the contrary, the requirement is an effective foreclosure of the federal forum altogether.[107]

The state litigation requirement, therefore, bears none of the usual hallmarks of ripeness. Instead, the requirement looks more like some type of quasi-abstention doctrine,[108] something that was also suggested by the Fourth Circuit's opinions in *Sansotta* and *Toloczko*.[109] Recall that, in *Sansotta*, the court explained that the primary reason for the state litigation requirement is the comparative expertise of state courts in resolving land use controversies.[110] Commentators have likewise defended *Williamson County* "on the ground that state courts have greater relevant local knowledge in land use matters, and federal courts should avoid entanglement in quintessentially local disputes."[111] Thus, once ripeness justifications are jettisoned, *Williamson County* seems to rest on federalism concerns and "the tensions inherent in a system that contemplates parallel judicial processes."[112] Given that these principles are the very same principles that underlie the cases permitting federal courts to abstain in favor of a state forum, abstention provides a better—albeit imperfect—description of what *Williamson County* is about.[113]

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107. *See id.* (holding that the adjudication of a takings claim in state court has preclusive effect).

108. Admittedly, the state litigation requirement does not precisely match the characteristics of abstention either. First, the decision to abstain typically lies within the discretion of the court, whereas the state litigation requirement is structured more as a directive. *Compare* R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941) (rooting abstention in the exercise of "wise discretion" by federal court), *with* Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 200 (1985) (reversing lower courts' decisions on the merits and remanding the case as "premature"). The Fourth Circuit's indication that a federal court can suspend the state litigation requirement, however, diminishes this difference to some extent. *See* Town of Nags Head v. Toloczko, 728 F.3d 391, 399 (4th Cir. 2013) (suspending the state-litigation requirement in the "interests of fairness and judicial economy"). Second, under *Williamson County*, the federal court typically dismisses or remands a federal takings claim, whereas the power to do so under abstention principles is limited to cases in which "the relief being sought is equitable or otherwise discretionary." Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 731 (1996). For cases seeking damages or compensation, the proper method of abstaining is to stay the federal proceeding and await the outcome of the state suit. *See id.* (reversing the district court's remand order as an "unwarranted application of the *Burford* doctrine" in damages action) (emphasis added). Despite these differences, however, abstention principles provide a better explanation of the rule in *Williamson County* than is provided by the ripeness doctrine.

109. *See Toloczko*, 728 F.3d at 395–99 (citations omitted); Sansotta v. Town of Nags Head, 724 F.3d 533, 544–48 (4th Cir. 2013) (citations omitted).

110. *Sansotta*, 724 F.3d at 545 (citing *San Remo Hotel, L.P.*, 545 U.S. at 347)).

111. John D. Echeverria, Horne v. Department of Agriculture*: An Invitation to Reexamine "Ripeness" Doctrine in Takings Litigation*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10735, 10744 (2013).

112. Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 n.9 (1987) (referring to the various types of abstention).

113. *See, e.g.*, *Quackenbush*, 517 U.S. at 723 ("Federal courts abstain out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism.").

B. Treating Takings Claims Differently

Viewing the state litigation requirement in this way, however, raises another question: Why should the localized context in which takings claims arise necessarily relegate them to a state forum? Although it is true that state courts are generally more familiar with land use issues than federal courts,[114] it is not entirely clear why that familiarity should matter. Other constitutional claims frequently involve localized circumstances with which state courts may be more familiar, but their comparatively better knowledge does not bar access to a federal forum.[115] Indeed, this is true even in the land use context itself where the challenge arises under some other provision of the Constitution.[116]

Perhaps the strongest argument for giving state courts primary responsibility over takings claims derives from the distinctive manner in which those claims arise and the issues that must be evaluated in resolving them. For example, whether a taking has occurred depends, at bottom, on the definition of *property* and its characteristics—questions that are within the province of state, rather than federal, authority.[117] Analyzing a takings claim thus "requires a thorough grounding in background state law," which makes these claims different from most other constitutional challenges.[118] Because takings claims present a unique amalgam of state and federal law, the argument goes, federal courts should be wary about proceeding too swiftly in matters that might intrude on state prerogatives.[119]

Although it is not the aim of this Essay to provide a full exposition of this issue, the argument just presented certainly has some merit. Nonetheless, it is important to remember that takings claims are an amalgam of state *and federal* law. Because the rights protected by the Takings Clause are federal constitutional rights, the states' primacy over property law must be considered in light of these rights. Although ensuring against a constitutional violation will, therefore, necessarily mean that state law—and deference to it—must yield on occasion, this is true of other constitutional rights as well, including other areas in which state property law is central.[120]

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114. *See, e.g.*, Echeverria, *supra* note 111, at 10744; *San Remo Hotel, L.P.*, 545 U.S. at 347.

115. *See* McConnell, *supra* note 10, at 10751 (using as examples "First Amendment claims brought by municipal employees when they are disciplined for speaking out in ways that may or may not be relevant to their jobs and claims of 'exigent circumstances' for warrantless searches").

116. *See San Remo Hotel, L.P.*, 545 U.S. at 350–51 (Rehnquist, C.J., concurring) (noting that First Amendment and Equal Protection challenges to land use ordinances may proceed directly in federal court).

117. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 707 (2010) ("Generally speaking, state law defines property interests . . . ." (citing Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998))).

118. Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251, 288–89 (2006).

119. *See id.* at 292.

120. *See id.* at 290; *see also Stop the Beach Renourishment*, 560 U.S. at 726 ("[F]ederal courts must often decide what state property rights exist in nontakings contexts . . . .").

Consider procedural due process challenges, for example. The first step in proving a denial of procedural due process based on a deprivation of property involves demonstrating that the plaintiff had property in the first place.[121] To determine whether a plaintiff successfully can establish a property right naturally requires an evaluation of state property law, and this task frequently entails navigating the legal and factual complexities related to local land use regulations.[122] Additionally, as one might expect, state and federal courts sometimes disagree as to whether *property* exists to support a procedural due process claim.[123] But there is no suggestion that federal courts should abstain from hearing these types of challenges or that cases involving them are somehow suited for resolution exclusively in a state forum.

Williamson County's state litigation requirement—as well as the ripeness trap that it establishes—thus presents an incongruity between takings claims and other areas of constitutional litigation, including other areas dependent on state property law principles. While thoughtful arguments for relegating takings challenges to state courts have been made, it is not clear why those arguments should apply to such challenges only. The recognition that takings claims are treated differently—often for unclear or unconvincing reasons—has led to calls that they be "normalized."[124] In a recent article, Michael McConnell has defined the term *normalization* to mean "treating Takings Clause claims as normal constitutional claims, subject to the same procedural, jurisdictional, and remedial principles that apply to other constitutional rights."[125] Moreover, Professor McConnell sees a pattern in several recent Supreme Court decisions that he believes begin the process of doing just that—"cut[ting] through the morass of arbitrary, clause-specific rules, complications, and obstacles to relief that have accrued over the past few decades."[126]

The Fourth Circuit's decisions in *Sansotta* and *Toloczko* are a part of this trend. By correctly noting that the state litigation requirement is not jurisdictionally required, the Fourth Circuit affirmed that Takings Clause claims *can* be heard in federal court, just like all other constitutional challenges.[127] Moreover, by twice expressing its confidence that federal courts could navigate

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121. *See, e.g.*, Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 571 (1972) (stating that the purported interest must be within the Fourteenth Amendment's protection of property); Sylvia Dev. Corp. v. Calvert Cnty., 48 F.3d 810, 826 (4th Cir. 1995) (stating that the appellant must establish that it had a property interest to prove a denial of due process).

122. *See Sylvia Dev. Corp.*, 48 F.3d at 826–27 (determining whether the plaintiff had a property interest in context of a land use scheme by evaluating local ordinances).

123. *See, e.g.*, Boreen v. Christensen, 884 P.2d 761, 767–69 (Mont. 1994) (citations omitted) (disagreeing with federal courts' prior interpretations that state law did not create property interest triggering procedural due process protections).

124. *See* McConnell, *supra* note 10, at 10749.

125. *Id.*

126. *Id.* (citing Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013); Horne v. Dep't of Agric., 133 S. Ct. 2053 (2013); Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012)).

127. Sansotta v. Town of Nags Head, 724 F.3d 533, 545 (4th Cir. 2013).

the state law principles underlying the plaintiffs' takings claims,[128] the court suggested in *Sansotta* that the principal justification for the state litigation requirement was not overly persuasive.[129] *Sansotta*'s holding that government defendants may not seek dismissal of cases they voluntarily removed[130] also eliminates an anomalous and lop-sided advantage frequently used against property owners in takings litigation. Finally, although its application seems narrow, the Fourth Circuit's decision in *Toloczko* to waive the state litigation requirement in a case removed by the plaintiffs[131] holds open the possibility that future takings plaintiffs, at least in the Fourth Circuit, might be able to invoke a federal forum directly.[132]

V. CONCLUSION

Williamson County's state litigation requirement sets a trap for unwary property owners who believe that a state or local entity has taken their property in violation of the Takings Clause. As applied by most federal courts, this trap effectively denies owners a federal forum in which to litigate their claims and permits the entities accused of the constitutional violation to force upon the owners undue costs and delays. The Fourth Circuit's recent decisions in *Sansotta* and *Toloczko* weaken this trap considerably and, in the process, highlight the real nature of the state litigation requirement, while simultaneously questioning the reasons that underlie it. In this way, these decisions are part of a larger trend toward normalizing takings litigation. While the *Sansotta* and *Toloczko* cases go a long way toward accomplishing this normalization, they also reveal the need for the Supreme Court to revisit and clarify the ripeness rules applicable to regulatory takings claims.

128. *Id.* at 545, 549.
129. *See id.*
130. *Id.* at 549.
131. Town of Nags Head v. Toloczko, 728 F.3d 391, 399 (4th Cir. 2013).
132. *See id.*