

ARTICLES

The Missing Pieces of the Debate Over Federal Property Rights Legislation

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I. Introduction

The 105th Congress came very close to passing property-rights legislation that reflected a “new breed” of federal property-rights proposals.¹ Property-rights bills in earlier Congresses would have changed the substance of the Just Compensation Clause by making it easier to prove that government action had “taken” private property.² In contrast, last year’s proposed legislation ostensibly changed, not the substance of takings law, but the process for asserting takings claims in federal court. Opponents of these process-oriented takings bills asserted, however, that the bills did change the substance of takings law, and for that reason were unconstitutional. The debate over the constitutionality of the bills has continuing importance in the 106th Congress, where new process-oriented takings bills have been introduced.³ The debate has broader importance as well, for it raises fundamental, unsettled questions about the power of the federal courts and Con-

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1. S. REP. NO. 105-242, at 37 (1998); Robert Meltz, Congressional Research Service, “Property Rights” Bills Take a Process Approach: H.R. 992 and H.R. 1534, No. 97-877A, Summary [hereinafter cited as “CRS Report”]; see also *infra* notes 80-96 and accompanying text (discussing proposed legislation).

2. U.S. CONST. amend. V (“Nor shall private property be taken for public use without just compensation.”).

3. S. 1028, 106th Cong. (1999); H.R. 2372, 106th Cong. (1999).

gress to enforce the Just Compensation Clause against state and local governments. Unfortunately, the legislative debate so far has not adequately explored those questions. This article attempts to provide the missing pieces.

The process-oriented takings bills that are the subject of this article respond to a line of U.S. Supreme Court decisions, the best-known of which is *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*.⁴ Those decisions all involved suits in federal courts against local land-use agencies in which a land owner asserted a "regulatory takings" claim—i.e., a claim that the local agency had "taken" the owner's land by severely restricting the owner's use of it. The Court in the *Williamson* line of cases developed two "ripeness" requirements that a land owner must meet before bringing a regulatory taking claim against a local agency in federal court. First, the owner must get a "final decision" from the local agency on what land uses are permissible. Second, the owner must exhaust all available and adequate state procedures, including state-court procedures, in his or her attempt to obtain just compensation. Although there are exceptions to *Williamson's* "final decision" and "exhaustion" requirements for ripeness, the exceptions are narrow. In a case that does not fall within an exception, *Williamson's* ripeness requirements make the litigation of a regulatory takings claim against a local agency in federal court an arduous and usually futile process.

The main process-oriented takings bill considered in the 105th Congress sought to streamline the current process by altering *Williamson's* ripeness requirements. Specifically, House Bill 1534 ("H.R. 1534") would have modified *Williamson's* "final decision" requirement to limit the time and effort that a property owner must spend trying to resolve matters with the local agency.⁵ In addition, H.R. 1534 would have eliminated *Williamson's* "exhaustion" requirement so that a property owner could assert a regulatory taking claim against a local agency in federal court without seeking just compensation in state court. This article focuses primarily on the second feature of H.R. 1534, the provision eliminating *Williamson's* exhaustion requirement, because H.R. 1534's exhaustion provision raises constitutional questions that neither Congress nor the courts have yet answered.

The opponents of H.R. 1534 challenged the constitutionality of the bill's exhaustion provision on two grounds, to which the support-

4. 473 U.S. 172 (1985); see also S. REP. NO. 105-242, at 8 (1998) (describing *Williamson* as "a key decision" on takings-ripeness doctrine); H.R. REP. NO. 105-323, at 4 (1997).

5. H.R. 1534, 105th Cong. (1997).

ers had one main response. First, opponents suggested that the exhaustion provision would violate Article III of the United States Constitution because the exhaustion requirement is mandated by Article III's "case or controversy" requirement.⁶ They also argued that the exhaustion requirement would make a substantive change in the law of takings by eliminating a necessary element of a cause of action for a violation of the Just Compensation Clause. In their view, such a "substantive" change exceeded Congress' power. Supporters of H.R. 1534 countered both arguments by asserting that the exhaustion requirement is a "prudential" requirement, not a constitutional requirement.⁷ In their view, its prudential nature made it dispensable by Congress at will.

This debate over H.R. 1534's exhaustion provision raises three questions about the power of federal courts and Congress to enforce the Just Compensation Clause against local agencies. First, does Article III bar a federal court from adjudicating a takings claim against a local agency until the claimant has satisfied *Williamson's* exhaustion requirement? Second, even assuming that Article III does not bar such a claim, can the claimant establish a cause of action for a violation of the Just Compensation Clause if the claimant has not satisfied the exhaustion requirement? Third, assuming that Article III does not bar the claim of a plaintiff who has not met the exhaustion requirement, but that such a plaintiff cannot state a cause of action under the Just Compensation Clause, does Congress have power to authorize the federal courts to award just compensation to the plaintiff anyway, if the plaintiff can prove that his or her property has been taken?

The supporters and opponents of H.R. 1534 explored only the first two questions, and even as to these, their analysis was incomplete. In terms of their bottom lines, though, each side was half-right. The supporters of H.R. 1534 correctly contended that Article III does not mandate the exhaustion requirement, and Congress can therefore eliminate it without violating Article III. On the other hand, the opponents of H.R. 1534 correctly contended that the exhaustion require-

6. See U.S. CONST. art. III, § 2, cl. 1 (providing that the judicial power of the United States shall extend to certain "Cases" and "Controversies").

7. The term "prudential" is used to describe rules of justiciability that have been developed by the U.S. Supreme Court and that prevent federal courts from hearing cases that, in the Court's view, are more appropriately resolved in another forum. See Erwin Chemerinsky, *Federal Jurisdiction*, §2.1, at 42 (2d ed. 1994). Prudential rules are not dictated by the Constitution. Rather, they reflect discretionary principles of judicial "self-governance." *Flast v. Cohen*, 392 U.S. 83, 95 (1968); See also *infra* note 127.

ment is an element of a cause of action for a violation of the Just Compensation Clause. The elimination of that requirement would change the substance of takings law in the sense that it would create a new right to monetary relief in federal court. Neither the supporters of H.R. 1534 nor its opponents, however, explored the third question posed above: What enumerated power, if any, enabled Congress to make such a substantive change? The supporters asserted that Congress has the power to eliminate the exhaustion requirement because it is merely prudential. The opponents asserted that Congress lacks the power to eliminate the requirement because doing so would change the substance of takings law.

These assertions mask a difficult question. If the exhaustion requirement were only prudential, Congress plainly could eliminate it under current precedent. The U.S. Supreme Court has indicated that Congress has plenary power to eliminate prudential rules of justiciability. The Court appears to consider that authority is encompassed within Congress' power to make rules for the federal courts. Congress' rulemaking power does not enable it to eliminate the exhaustion requirement, however, because the exhaustion requirement is not simply a prudential rule of justiciability. Unlike the prudential justiciability rules, which are associated with Article III and are supported by separation-of-powers concerns, the exhaustion requirement is instead rooted in the substantive right conferred by the Just Compensation Clause and is supported by federalism concerns. Congress' power to eliminate the requirement, as H.R. 1534's exhaustion provision sought to do, must therefore come from some source other than its power to make rules for the federal courts.

Congress potentially has the power to enact H.R. 1534's exhaustion provision under section 5 of the Fourteenth Amendment.⁸ The potential power exists because H.R. 1534's exhaustion provision enforces the Just Compensation Clause as it applies to local agencies under the Fourteenth Amendment. The power is only potential because Congress has not yet met the stringent requirements for invoking section 5 established by the Supreme Court in *City of Boerne v. Flores*⁹ and *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*.¹⁰ Those cases require Congress to: (1) identify the

8. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriation legislation, the provisions of this article.").

9. 521 U.S. 507 (1997).

10. 119 S. Ct. 2199 (1999); *See also* *Kimel v. Florida Bd. of Regents*, 120 S.Ct. 631 (2000).

violations of the Fourteenth Amendment to which its legislation would respond; and (2) tailor that legislation to remedying or preventing the violations. In addition, to meet the first requirement, Congress must have evidence of fairly widespread violations of the Fourteenth Amendment. The Congress that considered H.R. 1534 did not have evidence in the record that states were routinely violating the Just Compensation Clause. Nonetheless, the evidence may exist. If it does, and if Congress can gather it, H.R. 1534's exhaustion provision should be sufficiently tailored to remedy or prevent violations of the Just Compensation Clause so that it would satisfy the second part of the *Florida Prepaid* test.

Part II of this article describes the events leading to the congressional proposal to eliminate *Williamson's* exhaustion requirement and the legislative debate over the constitutionality of that proposal. Part III evaluates the debate, and, in the course of that evaluation, explores the nature of the exhaustion requirement. Part IV addresses the issue that was ignored in the debate: whether Congress has the power to eliminate the exhaustion requirement.

II. Background

The U.S. Supreme Court has developed rules that make it almost impossible for federal courts to remedy violations of the Just Compensation Clause by local land-use agencies. Recently, Congress has considered bills that would change the Court's rules so as to allow federal courts to remedy such violations. Opponents of those bills challenge their constitutionality. This Part describes the Court's rules, the congressional proposal to change the rules, and the debate over the constitutionality of the congressional proposal.

A. The Ripeness "Mess"

1. *The Ripeness Rules for Regulatory Takings Claims*

The Just Compensation Clause prohibits federal, state, and local governments from taking private property for public use without just compensation.¹¹ Most "takings" occur when the government appro-

11. U.S. CONST. amend. V. The Just Compensation Clause of the Fifth Amendment applies only to the federal government. See *Barron v. The Mayor & City Council of Baltimore*, 32 U.S. 243, 247-51 (1833). The Supreme Court has often said, however, that the Due Process Clause of the Fourteenth Amendment incorporates the just compensation guarantee, making it applicable to state and local governments. See *Dolan v. City of Tigard*, 512 U.S. 374, 383-84 & n.5 (1994). The case that the Court usually cites in support of this incorporation principle did not actually rely on an incorporation theory. See *id.* at

priates property outright—by condemning it, for example.¹² More than seventy-five years ago, however, the United States Supreme Court recognized that a “taking” also can occur when a government regulation “goes too far” in restricting the use of property.¹³ Many people know that the Supreme Court has had trouble explaining when such a “regulatory taking” occurs.¹⁴ Less well-known than the uncertainty about the *substance* of regulatory takings law is the uncertainty that has arisen about the *process* by which a property owner can bring a regulatory taking claim against a local agency in federal court.¹⁵

The latter uncertainty stems from a series of Supreme Court cases in the 1980s, the capstone of which is *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*.¹⁶ In each case, the Court held that a regulatory takings claim against a local land-use agency was not “ripe”

383-84 & n.5, 405-07 (Stevens, J., dissenting) (arguing that *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897), is better understood as substantive due process decision); see also RICHARD C. CORTNER, *THE SUPREME COURT AND THE SECOND BILL OF RIGHTS* 24-29, 215 (1981) (noting that *Chicago, Burlington* did not use incorporation rationale); Robert Brauneis, “*The Foundation of Our ‘Regulatory Takings’ Jurisprudence’: The Myth and Meaning of Justice Holmes’ Opinion in Pennsylvania Coal Co. v. Mahon*,” 106 *YALE L.J.* 613, 670 & n.262 (1996). Nonetheless, the incorporation principle seems well-established with respect to the Just Compensation Clause. See *Dolan*, 512 U.S. at 384 n.5.

12. See Lois J. Schiffer, *Taking Stock of the Takings Debate*, 38 *SANTA CLARA L. REV.* 153, 153 (1997); Michael M. Berger & Gideon Kanner, *The Need for Takings Law Reform: A View from the Trenches—A Response to Taking Stock of the Takings Debate*, 38 *SANTA CLARA L. REV.* 837, 838 (1998).

13. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); see also *Kirby Forest Indus. v. United States*, 467 U.S. 1, 14 (1984) (“We have frequently recognized that a radical curtailment of a landowner’s freedom to make use of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth Amendment, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property.”). Some commentators dispute the modern Court’s view that the decision in *Pennsylvania Coal v. Mahon* was based on the Just Compensation clause. See *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 197-98 & n.15 (1985); see also, e.g., Brauneis, *supra* note 13, at 618-19 (summarizing author’s thesis that *Pennsylvania Coal* is mischaracterized as seminal regulatory takings case).

14. See *Williamson*, 473 U.S. at 199; *Eastern Enterprises v. Apfel*, 524 U.S. 498, 540-42 (1998) (Kennedy, J., concurring in the judgment and dissenting in part); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *Hage v. United States*, 35 Fed. Cl. 147, 152-53 (1996); Carol Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 *S. CAL. L. REV.* 561, 562 (1984) (explaining confused nature of regulatory takings jurisprudence).

15. Cf. Thomas E. Roberts, *Ripeness & Forum Selection in Fifth Amendment Takings Litigation*, 11 *J. LAND USE & ENVTL. L.* 37, 38 (1995) (noting that, despite ripeness requirements for regulatory takings claims in federal courts, many reported cases fail to meet those requirements, suggesting either that the Supreme Court’s requirements “have not penetrated the consciousness” of litigants and their lawyers or that those litigants and lawyers have strong affinity for federal court).

16. 473 U.S. 172; see also *supra* note 6 (citing legislative history describing *Williamson* as “key” case on takings-ripeness doctrine).

for adjudication by a federal court.¹⁷ In so holding, the Court articulated two requirements for a claim to be ripe.¹⁸ First, the plaintiff generally has to get a “final decision” from the local agency regarding the permissible uses of the land.¹⁹ The Court explained that a final decision is necessary so a court can tell if an agency’s restriction on land use “goes [so] far” that it causes a regulatory taking.²⁰ Second, the plaintiff generally must exhaust state compensation procedures, including procedures available in state court.²¹ This exhaustion requirement, the Court explained, springs from the text of the Just Compensation Clause, which prohibits only *uncompensated* takings of private property for public use.²²

17. See *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 735-38 (1997) (tracing Court’s takings-ripeness precedent); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348-53 (1986); *Williamson*, 473 U.S. at 186-200; see also *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 297 (1981) (holding that plaintiffs’ as-applied takings challenge to federal statute was not ripe because of their failure to seek administrative relief by seeking variance from statutory restrictions); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (holding that takings claimants did not present “concrete controversy regarding the application of the specific zoning provisions” because they had not submitted a development plan); cf. *Yee v. City of Escondido*, 503 U.S. 519, 528 (1992) (holding that petitioners could not premise physical takings claim on practical difficulty of using procedure that they had not yet tried); *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 630-33 (1981) (holding that state court’s decision on takings claim was not “final” under the federal statute, 28 U.S.C. § 1257(a), that authorizes U.S. Supreme Court review of certain “final judgments” of state courts); *Washington ex. rel. Grays Harbor Logging Co. v. Coats-Fordney Logging Co.*, 243 U.S. 251, 255-57 (1917); but cf. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1010-14 (1992) (holding that a regulatory takings claim was ripe where the state supreme court ruled on merits of the takings claim, despite defendants’ assertion that post-lawsuit legislative amendment might have mitigated taking).

18. Similar ripeness rules apply to takings claims against the federal government. See *infra* notes 186-187 and accompanying text. This paper addresses only the ripeness rules for takings claims against local land-use agencies.

19. See, e.g., *Williamson*, 473 U.S. at 186 (“As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest 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.”).

20. See *MacDonald*, 477 U.S. at 348; see also *Williamson*, 473 U.S. at 190 (“Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause . . . [T]his Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.”) (citations omitted).

21. See *Williamson*, 473 U.S. at 194.

22. See, e.g., *Suitum*, 520 U.S. at 734 (explaining that exhaustion requirement “stems from the Fifth Amendment’s proviso that only takings without ‘just compensation’ infringe that Amendment”).

To avoid confusion, we pause to define some terminology (the abundance of which contributes to the confusion in this area of the law). The Supreme Court cases from the 1980s developed what is often called the “takings-ripeness” doctrine or, alternatively, the *Williamson* ripeness doctrine.²³ These names reflect the doctrine’s distinctness from the general doctrine of ripeness.²⁴ The takings-ripeness (or “*Williamson* ripeness”) doctrine comprises two “ripeness” requirements or “prongs.”²⁵ We refer to these requirements separately as the “final decision” requirement and the “exhaustion” requirement. The most common variants of these terms (which we hereafter avoid) are the “finality-ripeness”²⁶ and the “compensation-ripeness”²⁷ requirements.

As construed by the lower federal courts, *Williamson*’s two ripeness requirements make it difficult for a plaintiff to bring a regulatory taking claim against a local agency in federal court.²⁸ Many lower courts have held that, to get a final decision, plaintiff must first make a “meaningful application” to the local agency to use his or her land in a specific way.²⁹ This step actually may require a series of applications, especially if the local agency denies initial applications for ostensibly

23. See, e.g., Duane J. Desiderio, *Growing Too Smart—Takings Implications of Smart Growth Policies*, 13 J. NAT. RESOURCES & ENVT. L. 330, 333 (1998) (using term “takings ripeness” doctrine); Martin A. Schwartz & George C. Pratt, *Section 1983 Litigation*, 14 *TOURO L. REV.* 299, 322 (1998) (using term “*Williamson* ripeness test”).

24. See *Suitum*, 520 U.S. at 742-44 (discussing general and takings-ripeness doctrines in separate sections); Timothy V. Kassouni, *The Ripeness Doctrine & the Judicial Relegation of Constitutionally Protected Property Rights*, 29 *CAL. W. L. REV.* 1, 2 (1992) (finding that the Court has developed “a special ripeness doctrine” for property-rights claims).

25. E.g., Kassouni, *supra* note 26, at 3 (referring to *Williamson*’s “two-prong ripeness test”).

26. See *Roosevelt Campobello Int’l Park Comm’n v. United States EPA*, 684 F.2d 1034, 1040 (1st Cir. 1982); S. REP. NO. 105-242, at 33 (1998); R. Jeffrey Lyman, *Finality Ripeness in Federal Land Use Cases from Hamilton Bank to Lucas*, 9 J. LAND USE & ENVT. L. 101, 102 (1993).

27. See *Southern Pacific Transp. Co. v. Los Angeles*, 922 F.2d 498, 505 (9th Cir. 1990) (using the term “compensation ripeness”); S. REP. NO. 105-242, at 33 (1998); Desiderio, *supra* note 25, at 331.

28. See generally Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVT. L. 91 (1994).

29. Cf. *MacDonald*, 477 U.S. at 352-53 & nn.8-9 (construing lower court decision to require plaintiff to have made “a meaningful application,” and apparently approving that requirement by noting that local agency’s “[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews”); *Gilbert v. City of Cambridge*, 932 F.2d 51, 60-62 (1st Cir. 1991); see also, e.g., Michael K. Whitman, *The Ripeness Doctrine in the Land-Use Context: The Municipality’s Ally and the Landowner’s Nemesis*, 29 *URBAN LAW.* 13, 36 (1997) (discussing “meaningful application” requirement).

legitimate reasons.³⁰ Once the agency denies a meaningful application, the federal courts have held, the owner must then seek a variance or waiver of the regulatory restrictions that led to denial.³¹ Only after the agency denies the waiver/variance request will the federal courts say that a “final decision” has occurred. Next, the plaintiff must exhaust all available and adequate state procedures for getting just compensation. Usually this entails at least a suit in state court for just compensation under the inverse condemnation doctrine.³² Finally, the plaintiff must lose his or her state-court suit for compensation.³³ After all, if the state court awards just compensation, the owner cannot go to federal court, because the owner will have gotten everything to which he or she is entitled under the Just Compensation Clause.³⁴

If, on the other hand, the state courts deny just compensation, the owner has two options. The owner can petition the U.S. Supreme Court for a writ of certiorari.³⁵ That is a long shot, of course, even if the owner has a meritorious takings claim.³⁶ Alternatively, the owner can file a new lawsuit in a federal district court. In that lawsuit, the owner can assert a cause of action under section 1983 of Title 42 of the United States Code,³⁷ of which district courts have subject-matter ju-

30. See Brian W. Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness & Abstention Doctrines in Section 1983 Land Use Cases*, 2 HOFSTRA PROP. L.J. 73, 76, 81-82 (1988); see also *infra* note 105 and accompanying text (discussing and citing commentary on H.R. 1534's impact on reapplication requirement).

31. See *Williamson*, 473 U.S. at 187-88; *Virginia Surface Mining*, 452 U.S. at 297.

32. “Inverse condemnation is ‘a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.’” *Agin*, 447 U.S., at 258 n.2 (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980)); see also *infra* notes 62-65 and accompanying text (discussing constitutional nature of inverse-condemnation claim).

33. See *Williamson*, 473 U.S. at 195.

34. As discussed *infra* notes 74, 423, 427 and accompanying text, the supporters of the federal legislation that has been proposed to relax *Williamson*'s ripeness requirements emphasize the difficulty that regulatory takings claimants have getting relief in *federal* court because of the current ripeness requirements. Almost no attention has been paid to the success rate that victims of such takings have enjoyed in getting just compensation in *state* court. See *infra* notes 437-438 and accompanying text. The authors have found no data on that issue, and yet that data would seem to be crucial to assessing the need to relax the barriers to getting just compensation in federal court.

35. See 28 U.S.C. § 1257(a) (1994); see also, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1009-10, 1031-32 (1992) (involving a plaintiff who successfully sought review of state supreme court decision rejecting regulatory taking claim).

36. In the October 1998 Term, for example, the Court granted review in about 1.7% of the cases that were on its docket and acted upon in the course of the Term. See *Statistical Recap of Supreme Court's Workload During Last Three Terms*, 68 U.S.L.W. 3069 (1999); see also *Yee*, 503 U.S. at 536.

37. Section 1983 provides:

risdiction under sections 1331³⁸ and 1343³⁹ of Title 28 of the United States Code. The district-court route may prove fruitless, however,

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1983 (1994).

Section 1983 has been the basis for several of the regulatory takings claims addressed by the Supreme Court. *See City of Monterey v. Del Monte Dunes*, 119 S. Ct. 1624, 1631 (1999), *Suitum*, 520 U.S. at 731; *Williamson*, 473 U.S. at 182. Nonetheless, some commentators disagree about the extent to which plaintiffs use section 1983 as a vehicle for asserting regulatory takings claims. *Compare Vindication of Property Rights: Improving Citizens' Access to Justice: Hearings on H.R. 1534 Before the Sen. Comm. on the Judiciary*, 105th Cong. 87 n.23 (1997) (reproducing Congressional Research Service Report according to which "[t]he majority of takings actions against nonfederal defendants are brought under section 1983") [hereinafter cited as "*Senate Hearing*"] and Mark S. Dennison, *Zoning: Proof of Wrongful Land Use Regulation Pursuant to Section 1983*, in 30 AM. JUR.3d, *Proof of Facts*, § 2, at 508-09 (1995) (stating that section 1983 "has been used extensively . . . in inverse condemnation cases"), with 9 DAVID A. THOMAS, THOMPSON ON REAL PROPERTY, § 81.05(d), at 271 (2d ed. 1994) (describing section 1983 as "little used . . . alternative" to action in inverse condemnation). The dispute shows that it is unclear whether regulatory takings claimants even need to rely on section 1983 to assert their claim in federal court. The Court held in 1987 that the Just Compensation Clause, standing alone, generates a cause of action in inverse condemnation against a local agency that has caused a regulatory taking. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314-20 (1987). Once a claimant has sought and been denied just compensation by the state court in an action in inverse condemnation, that cause of action ripens into a cause of action for a violation of the Just Compensation Clause. Since this constitutionally generated cause of action carries with it a right to an award of just compensation, the statutory cause of action supplied in section 1983 could be effectively superfluous. *See infra* notes 277-285 and accompanying text (discussing this point at greater length); *but cf.* Daniel R. Mandelker, et. al., *Federal Land Use Law: Limitations, Procedures Remedies*, §4.03[4][f], at 4-23 (1986) (suggesting that, by relying on §1983, takings claimant might recover damages in addition to just compensation, such as punitive and consequential damages).

38. 28 U.S.C. § 1331 (1994) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.")

39. Section 1343 provides in pertinent part:

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for the equal rights of citizens or all person within the jurisdiction of the United States[.] * * *

28 U.S.C. § 1343 (a)(3) (1994); *See THOMPSON ON REAL PROPERTY*, *supra* note 39, § 81.05(a)(2) (noting that section 1343 gives district courts jurisdiction of inverse-condemnation actions).

because litigation of the taking claim there ordinarily will be barred by the doctrines of issue or claim preclusion unless, as some federal courts permit, the claimant reserves his or her taking claim while litigating in state court.⁴⁰ The bottom line is that, in cases to which the ripeness rules apply, federal courts almost never award just compensation for a regulatory taking by a local government.⁴¹

2. *Exceptions to the ripeness rules for regulatory takings claims*

There are four situations in which one or both of *Williamson's* ripeness requirements do not apply. The exceptions are narrow. They are nonetheless important to understanding the nature of the ripeness requirements, which is, in turn, important to understanding Congress' power to alter them.

First, it appears that a taking claimant need not satisfy either the final decision requirement or the exhaustion requirement before challenging a local land-use restriction on its face in federal court.⁴² The problem is that facial takings challenges are hard to prove.⁴³ As a

40. See *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998) (stating in dicta that taking claimant would be able to litigate taking claim in federal court by reserving the claim when seeking compensation in state court); *Fields v. Sarasota Manatee Airport*, 953 F.2d 1299, 1303-09 (11th Cir. 1992); cf. *Dodd v. Hood River County*, 59 F.3d 852, 861-63 (9th Cir. 1995) (holding that claim preclusion did not bar litigation of taking claim in federal court); but cf. *Dodd v. Hood River County*, 136 F.3d 1219, 1228 (9th Cir. 1998) (holding that takings claim was precluded in part). See generally *Wilkinson v. Pitkin County Bd. Of County Comm'rs.*, 142 F.3d 1319, 1323-34 (10th Cir. 1998); Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Courts' Misguided Attempts to Avoid Preclusion Under Williamson County*, 26 *Ecology L.Q.* 1 (1999); Thomas E. Roberts, *Fifth Amendment Taking Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 *URBAN LAW.* 479, 482 (1992).

41. See *Overstreet*, *supra* note 30, at 93; *Blaesser*, *supra* note 32, at 91 (estimating that more than 94% of land use cases decided by federal courts in reported decisions from 1983-1988 were found unripe).

42. See *Suitum*, 520 U.S. at 736 n.10 ("Such 'facial' challenges to regulation are generally ripe the moment the challenged regulation or ordinance is passed." (dicta); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 478, 481-502 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295-97 (1981); cf. *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 237, 239-54 (1984) (addressing facial challenge to state law in which plaintiffs asserted that state law violated Just Compensation Clause by taking private property for private, rather than public, use); but see *Roberts*, *supra* note 17, at 57-58 (arguing that plaintiff asserting facial takings challenge does not have to satisfy final decision requirement but does have to satisfy exhaustion requirement).

43. See *Suitum*, 520 U.S. at 736 n.10 (quoting *Keystone*, 480 U.S. at 495); see also *Virginia Surface Mining*, 452 U.S. at 295-96 ("A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land.'") (quoting *Agins*, 447 U.S. at 260).

practical matter, therefore, the exception for facial challenges does not open the federal courthouse doors to many viable takings claims.

Second, a taking claimant need not pursue an administrative route that would normally be required to get a final decision if it would be futile to do so.⁴⁴ This “futility” exception to the final decision requirement is illustrated in *Lucas v. South Carolina Coastal Council*.⁴⁵ Mr. Lucas challenged the application of a construction ban to his property without bringing a state administrative proceeding that, the defendants asserted, might have provided relief.⁴⁶ The Court held that Lucas’s challenge was nevertheless ripe, because it would have been “pointless” for Lucas to bring the administrative proceeding.⁴⁷ It was “pointless” in his case because the defendant agency had stipulated in the litigation that it would have denied him relief in that proceeding.⁴⁸ As *Lucas* illustrates, the futility “exception” is really a pragmatic gloss on, rather than an “exception” to, the final decision requirement.⁴⁹ As *Lucas* also suggests, the applicability of the exception (or gloss) depends partly on the agency’s willingness to throw in the towel.

Similarly, a takings claimant need not exhaust state compensation procedures if it would be futile to do so because compensation would not be available to that claimant. This futility exception to the exhaustion requirement is illustrated in *City of Monterey v. Del Monte Dunes*.⁵⁰ The plaintiff in that case brought an as-applied regulatory takings challenge in federal court without first seeking compensation for the alleged taking in state court.⁵¹ At the time the plaintiff filed its federal-court suit, the state courts did not provide compensatory remedies for the type of regulatory taking alleged by the plaintiff.⁵² The

44. See, e.g., *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, amended, 830 F.2d 968 (9th Cir. 1987), (discussing futility exception to final decision requirement); Roberts, *supra* note 17, at 53-56 (describing this as “prong one futility”).

45. 505 U.S. 1003 (1992); see also DANIEL R. MANDELKER ET. AL., *FEDERAL LAND USE LAW: LIMITATIONS, PROCEDURES, REMEDIES*, §4A.02[5][c], at 4A-15 (1986) (stating that futility exception is “not explicitly recognized by the Supreme Court,” while citing *Lucas*, with “But see” cite, in footnote accompanying this statement).

46. See *id.* at 1006-09, 1043.

47. *Id.* at 1012-13 n.3.

48. See *id.*

49. See *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993) (“The unavailability of state remedies is the functional equivalent of the denial of just compensation.”).

50. 119 S. Ct. 1624 (1999).

51. See *id.* at 1633-34.

52. See *id.* at 1638-39; see also *First English*, 482 U.S. at 308-314 (discussing California case law on temporary regulatory takings).

Court observed that, under those circumstances, the plaintiff “was entitled to proceed in federal court” without exhausting state-court remedies.⁵³ It would have been “pointless” for that plaintiff to seek compensation at the state level.⁵⁴

Finally, a plaintiff does not need to exhaust state compensation remedies that are unfair or otherwise inadequate.⁵⁵ This inadequacy exception to the exhaustion requirement differs from the futility exception to the exhaustion requirement discussed in the last paragraph. To understand the difference, suppose that a state’s courts used a coin-toss to decide regulatory takings claims against its local agencies. It would not necessarily be futile for a claimant to seek compensation in state court; the claimant would have a 50% chance of getting compensation. Nonetheless, the claimant would not have to go to state court, because the court’s use of a coin-toss would be constitutionally inadequate.⁵⁶ The Court has often said that “the Fifth Amendment does not require that just compensation be paid in advance of or even contemporaneously with the taking;”⁵⁷ it does, however, require that “there . . . be at the time of the taking ‘reasonable, certain and adequate provision for obtaining compensation.’”⁵⁸ Thus, a local agency’s taking of private property for public use violates the Constitution not only when the state denies compensation for the taking after it occurs but also when the state does not, at the time of the taking, provide “an adequate process for obtaining compensation.”⁵⁹ In re-

53. *Id.* at 1638-39.

54. *Lucas*, 505 U.S. at 1012-13 n.3.

55. *See MacDonald*, 477 U.S. at 350 n.7; *see also Williamson*, 473 U.S. at 195 (stating that, to claim a violation of Just Compensation Clause, taking claimant must exhaust adequate state compensation procedures).

56. *Cf. Ohio Adult Parole Auth. v. Woodard*, 118 S. Ct. 1244, 1254 (1998) (O’Connor, J., concurring in part and concurring in the judgment) (noting that clemency procedure would violate due process if coin toss were used for decision making).

57. *Preseault v. ICC*, 494 U.S. 1, 11 (1990); *see Williamson*, 473 U.S. at 194; *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940) (quoting *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932)).

58. *Dames & Moore v. Regan*, 453 U.S. 654, 689 (1981) (quoting *Reg’l Rail Reorg. Act Cases*, 419 U.S. 102, 124-25 (1974), and *Cherokee Nation v. Southern Kansas R.R. Co.*, 135 U.S. 641, 659 (1890)); *see Williamson*, 473 U.S. at 194.

59. *Williamson*, 473 U.S. at 194. The substantive and procedural features of just compensation doctrine, to which the text refers, have counterparts in due process doctrine, a correspondence that is not merely coincidental. The Court in *Williamson* based the exhaustion requirement on the principle that “a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedure provided by the State for obtaining just compensation.” *Id.* at 195. The Court analogized that principle to one enunciated in a due process case, *Parratt v. Taylor*, 451 U.S. 527 (1981), overruled in part by *Daniels v. Williams*, 474 U.S. 327 (1986). *See Williamson*, 473 U.S. at 195. In *Parratt*, the Court held that a state

gard to the Just Compensation Clause, therefore, the state has both a substantive obligation (to award compensation) and a procedural obligation (to provide a process for obtaining compensation). If the state fails to meet that procedural obligation, the exhaustion requirement is excused.

The last two exceptions discussed—which excuse exhaustion when compensation is not available or when the procedures for obtaining it are inadequate—are both narrow. In *First English Evangelical Church v. County of Los Angeles*, the Court held that a cause of action in inverse condemnation arises directly from the Just Compensation Clause upon the occurrence of a regulatory taking.⁶⁰ Since the inverse-condemnation cause of action stems from the Constitution, state courts can hear inverse-condemnation claims regardless of whether state law recognizes the cause of action.⁶¹ All a state court needs is appropriate jurisdiction.⁶² It appears that most, if not all, states have courts with jurisdiction to hear constitutional inverse-con-

official's random and unauthorized destruction of the plaintiff's property did not violate the Due Process Clause because the plaintiff could bring a state tort claim for the damage. *See id.* at 536-44. The *Williamson* Court explained that, with respect to such random and unauthorized state acts, the Due Process Clause "is satisfied by the provision of meaningful postdeprivation process." *Williamson*, 473 U.S. at 195. "Thus," the *Williamson* Court concluded, "the State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.'" *Williamson*, 473 U.S. at 195 (quoting *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984)). As the *Williamson* Court understood *Parralt*, due process thus requires both "a meaningful postdeprivation process" and "an adequate postdeprivation remedy." *See id.* In this sense, due process doctrine parallels the just compensation precedent requiring both "an adequate [post-taking] process for obtaining compensation" as well as an award of just compensation at the culmination of this process. *See id.* at 194-95. The parallel may reflect that due process doctrine encompasses principles of both substantive and procedural due process, and that the substantive obligation to pay just compensation also is conjoined with principles of procedural due process. In any event, *Williamson's* interpretation of the Just Compensation Clause as requiring the state to provide both an adequate process and an adequate remedy is consistent with decisions involving takings by the federal government in which the Court has traced to the Fifth Amendment both the federal government's substantive obligation to provide just compensation as well as its procedural obligation to provide an adequate process for providing that compensation. *See Preseault*, 494 U.S. at 11; *Hurley*, 285 U.S. at 104; *Yearsley*, 309 U.S. at 21.

60. 482 U.S. 304, 315-17 (1987); *see also, e.g.*, 9 DAVID A. THOMAS, THOMPSON ON REAL PROPERTY § 81.05(a)(1), at 256-58 (1994) (tracing to *First English* the principle that action in inverse condemnation for regulatory taking arises directly under Just Compensation Clause); Bruce Burton, *Regulatory Takings, Private Property Protection Acts, and the "Moragne Principle": A Proposal for Judicial-Legislative Comity*, 49 S.C. L. REV. 83, 101 & n.73 (1997) (same).

61. *See First English*, 482 U.S. at 315.

62. *See* 9 THOMPSON ON REAL PROPERTY, *supra* note 39, § 81.05(a), at 256-59.

demnation claims.⁶³ As long as the state courts handle those claims consistently with the flexible demands of the Due Process Clause,⁶⁴ a regulatory taking claimant will not be able to show that the state lacks adequate compensation procedures. Furthermore, the claimant will have trouble proving that compensation would not be available through an inverse condemnation action in state court unless the state courts have already rejected claims identical to the claimant's.⁶⁵ Thus, it remains the general rule that, before coming to federal court, a taking claimant must "avail itself of an available and facially adequate state procedure by which it might obtain just compensation."⁶⁶

3. *Summary of takings-ripeness rules and their exceptions; transition*

The Court has developed a specialized "ripeness" doctrine that limits the litigation of regulatory takings claims against local agencies in federal court. The doctrine generally requires someone asserting such a claim (1) to get from the local agency a final decision that delineates the permissible uses of the claimant's property; and (2) to exhaust available and adequate state compensation remedies, typically by bringing an inverse condemnation action in state court. The claimant can avoid both ripeness requirements by asserting a facial challenge, though such a challenge faces an uphill battle. Alternatively, the claimant can avoid or mitigate one or both of the requirements by showing that (a) it would be futile to pursue some administrative step that would ordinarily need to be pursued in order to get a final decision from a local agency; (b) it would be futile to exhaust state compensation procedures because compensation would not be available to that claimant; or (c) the state compensation procedures are inadequate or otherwise unfair. As a practical matter, the claimant seldom will be able to make any of those showings. If the claimant cannot do

63. *See id.* § 81.05(b), at 259; *see also, e.g.,* Carlos Manuel Vázquez, *What is Eleventh Amendment Immunity?*, 106 *YALE L.J.* 1683, 1788 (1997) (asserting that "all states permit inverse condemnation actions").

64. The requirements of the Due Process Clause, however, are flexible. *See* *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (requirements of due process are "flexible").

65. *Cf. Austin v. Honolulu*, 840 F.2d 678, 680 (9th Cir. 1988) (regulatory taking claimant bears burden of proving state compensation procedures are inadequate); *Roberts, supra* note 17, at 67. ("The property owner bears a difficult burden to establish inadequacy of the state's compensation remedy.")

66. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986); *but cf. Kruse v. Village of Chagrin Falls, Ohio* 74 F.3d 694, 697-700 (6th Cir. 1996) (holding that availability of state-court remedies was too uncertain to require exhaustion); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1574-75 (10th Cir. 1995) (holding that exhaustion was not required because compensation was not available in state court).

so, the claimant will usually find his or her taking claim barred in federal court by issue or claim preclusion.

Courts, commentators, litigants, and legislators disagree whether it should be as hard as it is now to litigate regulatory takings claims against local agencies in federal court.⁶⁷ Critics condemn the takings-ripeness doctrine as too complicated and unclear - a "mess."⁶⁸ They also believe that the doctrine unjustifiably prevents federal courts from enforcing federal constitutional rights.⁶⁹ In contrast, supporters of current ripeness law consider it relatively clear and straightforward.⁷⁰ They also believe that the ripeness doctrine preserves federal-court resources and local control over land use disputes.⁷¹

Criticism of current law led to the introduction in the last Congress of bills that would "clean up" the ripeness "mess" by "streamlining" the process by which plaintiffs with regulatory takings claims against local agencies could get their claims heard in federal court.⁷² This article does not address whether the proposed legislation embod-

67. See Roberts, *supra* note 17, at 70-71.

68. *Amendment to the Webb-Kenyon Act; and the Private Property Implementation Act of 1997: Hearings on H.R. 1063 and H.R. 1534 Before the Subcomm. on Courts and Intellectual Property of the House Judiciary Committee*, 105th Cong. 69 (1997) [hereinafter cited as "House Hearing"] (statement of Professor Daniel Mandelker); 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 URBAN LAW. 195 (1999); Berger & Kanner, *supra* note 14, at 864; see also 143 CONG. REC. H8941, 8942 (daily ed. Oct. 22, 1997) (statements of Rep. Coble to interpret when a final decision has occurred have reached conflicting and confusing decisions of Rep. Canady); S. REP. NO. 105-242, at 8 (1998); H.R. REP. NO. 105-323, at 5 (1997); Kassouni, *supra* note 26, at 22 (describing holdings of two of Court's takings ripeness decisions as "amorphous").

69. See 144 CONG. REC. S8022 (daily ed. Jul. 13, 1998) (statements of Sen. Hatch); Delaney & Desiderio, *supra* note 70, at 200-01; Overstreet, *supra* note 30, at 92.

70. See 143 CONG. REC. H8944 (daily ed. Oct. 22, 1997) (statements of Rep. Dingell); S. REP. NO. 105-242, at 29; Lyman, *supra* note 28, at 101.

71. See 144 CONG. REC. S8038 (daily ed. July 13, 1998) (statement of Sen. Murray); 143 CONG. REC. H8952 (daily ed. Oct. 22, 1997) (statement of Rep. Nadler); S. REP. NO. 105-242, at 33 (1998); *House Hearing*, *supra* note 70, at 35 (testimony of John C. Dwyer, Acting Assoc. Attorney General, U.S. Dep't of Justice); Glenn P. Sugameli, "Takings Bills Threaten People, Property, Zoning, and the Environment", 31 URBAN LAW. 177, 182-83 (1999); Sharon Buccino, *Turmoil Over 'Takings': How H.R. 1534 Turns Local Land Use Disputes Into Federal Cases*, 28 ENV'T. L. REP. 100083 (1998); Whitman, *supra* note 31, at 45 (concluding that ripeness doctrine "promotes judicial efficiency and prevents judicial waste").

72. 144 CONG. REC. S8036, S8044 (daily ed. July 13, 1998) (Letter from John H. Dressendorfer, Vice President, American Forest and Paper Ass'n, to Sen. Hatch and remarks of Sen. Craig); 143 CONG. REC. E2089 (daily ed. Oct. 22, 1997) (statement of Rep. Harman); 143 CONG. REC. H8942 (daily ed. Oct. 22, 1997) (statements of Rep. Canady of Rep. Young); Berger & Kanner, *supra* note 14, at 864.

ies good policy.⁷³ The policy pros and cons are discussed in the legislative material and other commentary.⁷⁴ Instead, this article focuses on the constitutionality of a provision in the proposed legislation that was challenged on constitutional grounds: the proposal to eliminate *Williamson's* exhaustion requirement.

B. The Proposed Legislation for "Cleaning Up" the Ripeness "Mess"

Property-rights legislation has been proposed in every Congress, including the current one, since 1990.⁷⁵ Many early proposals required the government to compensate property owners for regulatory actions that diminished the value of their property by more than a prescribed percentage.⁷⁶ These proposals would have, in effect, changed takings law in a substantive way by defining when government regulation "goes [so] far" that it requires government compensation.⁷⁷ Perhaps because of the consistent failure of these substantive

73. Indeed, this article's authors disagree with each other on whether congressional proposals to alter *Williamson's* ripeness requirements are good policy.

74. Compare, e.g., S. REP. NO. 105-242, at 6, 8-12, 20-24 (1998); Delaney & Desiderio, *supra* note 70; Berger & Kanner, *supra* note 14; and Overstreet, *supra* note 30 (all arguing in favor of legislatively revising *Williamson's* ripeness requirements) with S. REP. NO. 105-242, at 30-33, 42-49 (1998) (minority report); Sugameli, *supra* note 73; Buccino, *supra* note 73; and Schiffer, *supra* note 14 (all arguing against revising *Williamson's* ripeness requirements).

75. See CRS Report, *supra* note 3, at 1 & n.2; Glenn P. Sugameli, *Takings Bills Threaten Private Property, People, and the Environment*, 8 FORDHAM ENVTL. L.J. 521, 532-50 (1997); see also *id.* at 532-50 (describing congressional property rights proposals introduced from 1990 through 1996); Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509 (1998) (critical description of intellectual underpinnings of movement for legislative revision of takings law); John D. Echeverria, *The Politics of Property Rights*, 50 OKLA. L. REV. 351 (1997) (critical analysis of political dimension of property-rights debate).

76. See Omnibus Property Rights Act of 1996, S. 1954, 104th Cong. § 204(a)(2)(D) (1996) (requiring compensation for government action reducing value of property by 50% or more); Omnibus Property Rights Act of 1995, S. 605, 104th Cong. § 204(a)(2)(D) (33% or more); Private Property Protection Act of 1995, H.R. 925, 104th Cong. § 2 (1995) (33% or more); Job Creation and Wage Enhancement Act of 1995, 104th Cong. § 9000(a)(2)(B) (10% or more); Private Property Owners Bill of Rights of 1994, S. 1915, 103rd Cong. § 8(a) (50% or more); Private Property Owners Bill of Rights of 1994, H.R. 3875, 103rd Cong. § 8(a) (50% or more); Just Compensation Act of 1993, H.R. 1388, 103d Cong. § 5(a) ("any diminution in value"); see also Omnibus Property Rights Act of 1997, S. 781, 105th Cong. § 204(a)(2)(D) (1997) (requiring compensation for government action that deprives owner of 33% or more of property); Comprehensive Wetlands Conservation & Management Act of 1991, H.R. 1330, 102d Cong. § 3 (requiring compensation of fair market value for certain land classified as wetland); R.G. Converse, *Property Rights Legislation: Some Questions*, in TAKINGS 255 (David L. Callies ed. 1996) (describing H.R. 925, 104th Cong. (1995), in detail).

77. Sugameli, *supra* note 77, at 528, 553 (stating that "compensation"-type takings bills essentially create new property entitlements).

proposals, supporters of property-rights legislation came up with a new approach in the 105th Congress.⁷⁸ They introduced bills that changed the process for bringing regulatory takings claims against local agencies in federal courts by changing *Williamson's* ripeness requirements.⁷⁹ These bills disclaimed any intention of changing the substance of takings law,⁸⁰ and the supporters of the bills contended that they made only "procedural" changes for the federal courts.⁸¹

The main bill in the 105th Congress that contained a provision modifying *Williamson's* ripeness requirements was H.R. 1534,⁸² and it serves as the model for the bill introduced in the current (106th) Congress.⁸³ H.R. 1534 passed the House by a wide margin (248-178) in October 1997 and then went to the Senate.⁸⁴ The Senate Judiciary Committee reported out a bill that was still called H.R. 1534 and that contained essentially the same ripeness provision.⁸⁵ Before H.R. 1534 was debated in the Senate, it was replaced by another bill, Senate Bill

78. See CRS Report, *supra* note 3, at 1; see also 143 CONG. REC. H8938 (daily ed. Oct. 22, 1997) (statements of Rep. Frost) (describing process-oriented taking bill as a "far cry" from past takings bills); 143 CONG. REC. H8948 (daily ed. Oct. 22, 1997) (statement of Rep. Skaggs) (stating that bill "takes a different approach" from past takings bill because bill "at least in form, is a procedural measure, not one to revise the basic substantive law in this area").

79. See *infra* notes 84-121 and accompanying text (discussing and citing bills). Some of these bills would also have altered the process for asserting takings claims against the federal government. See, e.g., H.R. 1534, 105th Cong. §§ 5 and 6(a) & (b) (1997) (as reported in the Senate on Feb. 26, 1998); S. 781, 105th Cong. § 205 (1997). That aspect of the bills is not addressed in this paper.

80. See S. 2271, 105th Cong. § 6(a)(1)(c) (1998); H.R. 1534, 105th Cong. § 6(c) (1998) (as reported in Senate).

81. See 144 CONG. REC. S8022, S8024 (daily ed. July 13, 1998) (statements of Sen. Hatch) (arguing that one purpose of S. 2271 is "to provide private property owners claiming a violation of the Fifth Amendment's taking clause some certainty as to when they may file the claim in federal court" by "addressing the procedural hurdles of the ripeness and abstention doctrines"); *id.* at S8041 (statement of Sen. Coverdell) ("S. 2271 is strictly procedural in nature"); *id.* at S8044 (statement of Sen. Craig); 143 CONG. REC. H8952 (daily ed. Oct. 22, 1997) (remark of Rep. Dooley) ("H.R. 1534 is only a procedural bill"); *id.* at H8957 (statement of Rep. Coble); S. REP. NO. 105-242, at 6, 21 (1998); *House Hearing, supra* note 70, at 46 (statement of Rep. Gallegly); Berger & Kanner, *supra* note 14, at 874.

82. H.R. 1534, 105th Cong. (1997). In this paper, we discuss the version of H.R. 1534 that was reported out of committee in the Senate on February 26, 1998. See 144 CONG. REC. S1068 (daily ed. Feb. 26, 1998). As discussed in the text *infra*, the main bill on the Senate side was S. 2271, 105th Cong. (1998). Three other bills in the 105th Congress contained provisions that would have altered *Williamson's* ripeness requirements. See S. 2271, 105th § 6(a)(1) (1998); S. 1204, 105th § 2 (1997); S. 1256, 105th § 8(c) (1997).

83. See Citizens Access to Justice Act of 1999, S. 1028, 106th Cong. § 6(c), *reproduced* at 145 CONG. REC. S5267-68 (daily ed. May 13, 1999).

84. See 143 CONG. REC. H8964 (daily ed. Oct. 22, 1997).

85. See S. REP. NO. 105-242, at 7 (1998) (stating that substitute for H.R. 1534 reported out of Senate committee "included the substance" of H.R. 1534).

2271, that retained the substance of H.R. 1534's ripeness provision.⁸⁶ That bill did not pass.⁸⁷ Bills virtually identical to the one that failed were recently introduced in each House of the current Congress.⁸⁸

The provision in H.R. 1534 modifying *Williamson's* ripeness requirements would have added a new subsection to section 1343.⁸⁹ That new subsection, designated subsection "(e)," applied to "[a]ny claim" brought under section 1983 "to redress the deprivation of a property right or privilege secured by the Constitution."⁹⁰ Subsection (e)(1) declared that any such claim "shall be ripe" upon the rendering of a "final decision" that caused the claimant "actual and concrete injury."⁹¹ Subsection (e)(2) described when a "final decision" occurs.⁹² Finally, subsection (e)(3) said that, to have a final decision, it was not necessary for the claimant to exhaust state judicial remedies.⁹³ Thus, subsections (e)(1) and (e)(2) modified *Williamson's* final deci-

86. See S. 2271, 105th Cong. § 6(a)(1)(C) (1998).

87. See 144 CONG. REC. S8048-49 (daily ed. July 13, 1998). The supporters of S. 2271 sought to have it considered on the floor of the Senate without making the bill first go through a committee. To accomplish this procedurally, they had to make a motion in the Senate to consider S. 2271. After that motion to consider was debated on the floor of the Senate, there was a motion for cloture of the debate on the motion to consider S. 2271. A vote in favor of cloture signified that the voter wanted the Senate to vote on the merits of S. 2271. A majority of Senators voted in favor of the cloture motion; the vote was 52 in favor of cloture, and 42 against cloture. To ensure a vote on the bill, however, 60 votes were needed. See Senate Manual Rule XXII.2. Since the supporters of S. 2271 did not have 60 votes, they ultimately withdrew their motion to proceed to consider the merits of S. 2271. That action effectively killed the bill.

88. See S. 1028, 106th Cong. § 6(b)(1) (1999); H.R. 2372, 106th Cong. § 2 (1999).

89. See *supra* note 41 and accompanying text (noting use of Section 1343 as jurisdictional basis for takings claim in federal court against local agencies). As noted above (*supra* note 84), the description of H.R. 1534's ripeness provision in this article is based on the version of H.R. 1534 that was reported out of the Senate Judiciary Committee on Feb. 26, 1998. See 144 CONG. REC. S1068 (daily ed. Feb. 26, 1998); S. REP. No. 105-242, at 2-6 (1998) (reproducing bill as reported out of committee).

90. H.R. 1534, 105th CONG. § 6(c) (1997).

91. *Id.*

92. *Id.* A "final decision" would exist under three conditions: (1) the defendant agency had made a "definitive decision regarding the extent of permissible uses on the property that has been allegedly infringed or taken"; (2) "one meaningful application" to use the property had been submitted to the defendant agency but had not been approved within a reasonable time, and one appeal from, and one request for waiver of, the agency's disapproval of that application had been sought; and (3) in a case involving real property and where such review was available, the plaintiff had unsuccessfully sought review by elected officials. *Id.* This part of the ripeness provision then provided for an exception, under which a property owner did not have to apply for an appeal or waiver "if no such appeal or waiver is available, if it cannot provide the relief requested, or if the application or reapplication would be futile." *Id.*

93. H.R. 1534, 105th Cong. § 6(c) (1997).

sion requirement, and subsection (e)(3) eliminated *Williamson's* exhaustion requirement.⁹⁴

It matters for two reasons that the drafters of H.R. 1534 made its ripeness provision applicable only to claims under section 1983. First, this ensured that the ripeness provision would not apply to states or state agencies.⁹⁵ Those entities are not subject to liability under section 1983 because they are not "person[s]" within the meaning of that statute.⁹⁶ Thus, the ripeness provision would apply primarily to suits against local entities, such as cities and counties and their agencies.⁹⁷ This focus reflects the drafters' chief concern with land-use restrictions, which are imposed primarily by local rather than state governments.⁹⁸ Second, the decision to make the ripeness provision applicable only to section 1983 claims ensured that it would encompass claims for awards of just compensation. Such monetary relief is one type of relief available in actions under section 1983.⁹⁹ The drafters of the ripeness provision plainly intended to allow a federal court not only to decide whether a local agency had engaged in a regulatory taking but also to award just compensation (and perhaps other damages) if the agency had done so.

The provision in H.R. 1534 modifying *Williamson's* "final decision" requirement provoked no constitutional objections, for good

94. As a formal matter, the ripeness provision of H.R. 1534 should not have been drafted as an amendment to section 1343 because the federal district courts have subject-matter jurisdiction of takings claims against local agencies not only under section 1343 but also under section 1331. See *Senate Hearing, supra* note 39, at 117 (Letter from Leonidas Ralph Mecham, Secretary, Judicial Conference of the United States, to Rep. Howard Coble, Chairman, House Judiciary Subcomm. on Courts and Intellectual Property (Sept. 29, 1997), stating the Judicial Conference's position that, "by codifying the takings provisions within 28 U.S.C. § 1343," H.R. 1534 "may create confusion because of the availability of the general jurisdictional statute, 28 U.S.C. § 1331").

95. See 144 CONG. REC. S8035-36 (daily ed. July 13, 1998) (statement of Sen. Hatch) ("The Supreme Court has long held that the Eleventh Amendment makes state governments acting under state law immune from suits filed under U.S.C. section 1983 . . . S. 2271 does nothing to change that.").

96. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989).

97. See *Senate Hearing* at 94 (statement of John C. Dwyer, Acting Assoc. Attorney General, DOJ) Section 1983 has also been used to assert a taking claim against an agency created by an interstate compact. See *Suitum*, 520 U.S. at 728-29; see also *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 399-400 (1979) (holding that agency created by an interstate compact was a "person" within meaning of section 1983).

98. See, e.g., 144 CONG. REC. S8035 (daily ed. July 13, 1998) (remarks of Sen. Hatch) (observing that S. 2271, unlike H.R. 1534, was limited to claims regarding real property).

99. See 42 U.S.C. § 1983 (authorizing "action at law, suit in equity, or other proper proceeding for redress"); see also, e.g., *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624, 1645 (1999) (Scalia, J., concurring in part and concurring in the judgment) (stating that section 1983 authorizes money damages and injunctive relief).

reason. One reason for the lack of constitutional objection was that the provision described a “final decision” in a way that largely tracked federal-court precedent applying *Williamson*.¹⁰⁰ Both the provision and the precedent emphasize the need for an owner to make a “meaningful application” to a local agency and for the agency to make a “definitive” decision on the permissible uses of property before a “final decision” will be deemed to occur.¹⁰¹ A second reason for the lack of constitutional objection was that the provision deemed ripe only claims involving final decisions that caused the claimant “actual and concrete injury,”¹⁰² thereby obviating any Article III objections. Overall, the provision changed current law by ensuring that property owners would not have to make an endless number of applications to a local agency in order to get a final decision.¹⁰³ Although opponents attacked that change as unwise, unnecessary, and unclear, they did not challenge it as unconstitutional; consequently it is not the focus of this paper.¹⁰⁴

100. See *Senate Hearing, supra* note 39, at 55 (statement of Professor Daniel R. Mandelker) (stating that *Williamson County* is the “patent” inspiration for provision in H.R. 1534 defining “final decision”); *House Hearing, supra* note 70, at 73-74.

101. Compare *MacDonald Sommer & Frates v. Yolo County*, 477 U.S. 340, 352 n.8 (1986) (referring to the need for “meaningful application”), with H.R. 1534, 105th Cong. § 6(c), and compare *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985) (referring to need for agency to reach “definitive position” as to permissible uses of land), with H.R. 1534, § 6(c) (requiring agency to make “definitive decision”).

102. H.R. 1534, § 6(c).

103. See S. REP. NO. 105-242, at 12 (1998) (asserting that under H.R. 1534, “a claimant is required to obtain as few as three and as many as five decisions by local entities before her claim will be ripe for review by a Federal court”); *Senate Hearing, supra* note 39, at 87-88 (Congressional Research Service Memo on H.R. 1534 stating that bill prescribes “a per se rule that ripeness is established by one final decision as to permitted property uses and one waiver/one appeal, [which] contrasts with existing law” under which “one or more re-applications” could be required); *House Hearing, supra* note 70, at 37 (statement of John C. Dwyer, Acting Assoc. Attorney General, DOJ) (noting that H.R. 1534 changed existing ripeness requirements by requiring only one application to local agency by landowner and relaxing “futility” exception to exhaustion requirement); *id.* at 46 (statement of Rep. Gallegly) (“The bill would define ‘final decision’ as one time through the application process and one time through the [administrative] appeals process.”)

104. See, e.g., S. REP. NO. 105-242, at 38 (referring to H.R. 1534’s definition of “final decision” as complicated); Sen. Hearing, *supra* note 39, at 95 (statement of John C. Dwyer, Acting Assoc. Attorney General, DOJ) (arguing that modification of *Williamson*’s final decision requirement was unwise); *id.* at 104 (letter from Andrew Fois, Assistant Attorney General, DOJ). At least one opponent of the ripeness changes is one of the current takings bills, H.R. 2372, 106th Cong. (1999), has challenged the constitutionality of the portion of the provision that modifies *Williamson*’s final decision requirement. Hearings on H.R. 2372. Before the subcommittee on the Constitution of the House Committee on the Judiciary, 106th Cong. (Sept. 15, 1999) (statement of Barbieri, Deputy Attorney General for California, on behalf of California Attorney General Bill Lockyer) (visited Oct. 23, 1999)

Instead, the opponents of H.R. 1534 challenged the constitutionality of the provision eliminating *Williamson's* exhaustion requirement,¹⁰⁵ “the exhaustion provision.” Their attack on the exhaustion provision was twofold. First, some opponents claimed that the exhaustion provision violated Article III. Specifically, they argued that, “to the extent that ripeness is a constitutionally driven doctrine,” Article III prevented Congress from changing it.¹⁰⁶ This Article III objection was equivocal, as the opponents did not say that the exhaustion

(<http://www.house.gov/judiciary/barb0915.htm>). General Barbieri testified that “there can be no injury and therefore, no taking, unless the government has taken final action.” *Id.* This is incorrect. A property owner suffers injury in fact sufficient to satisfy Article III when a government regulation (1) requires the owner to get permission to use the property in the way that he or she wishes (and is capable of doing so); and (2) prohibits the desired use until the permission is granted. In this situation, the injury consists of the present restriction on the desired use pending a “final decision” on the owner’s application for permission. In short, the injury occurs before a final decision is made. *Cf. infra* notes 139-151 and 159-165 and accompanying text (discussing Article III requirements in relation to *Williamson's* exhaustion requirement). A separate question is whether a taking (as distinguished from an injury) has occurred before the government rules on a property owner’s application for permission to use his or her property in a particular way. Although the answer to that question will depend on the circumstances of each case, it certainly is a question that the federal courts are competent to answer. *See Stearns Co. v. United States*, 34 Fed. Cl. 264, 272 (1995) (Court of Federal Claims will hold trial on whether a requirement to obtain a compatibility determination for a minerals estate constitutes a taking). General Barbieri was therefore wrong, we respectfully submit, when he said that this question would be “impossible” for the court to decide before a final decision was made. The Deputy Attorney General overlooked that, even before a final decision is made, a federal court can decide whether a taking has been caused by a property-use restriction that applies until a final decision is made. *Cf. First English Evangelical Lutheran Church*, 482 U.S. 304, 319 (1987) (government must pay for a taking even if it later invalidates the regulation and the taking becomes temporary).

105. *See, e.g.*, H.R. REP. NO. 105-323, at 11 (1997) (letter from Andrew Fois, Ass’t Attorney General, DOJ), describing DOJ’s earlier hearing testimony as raising “constitutional objections” only “to the proposed elimination of the existing requirement that a property owner seek compensation in state court before filing a Federal takings action”); *Senate Hearing, supra* note 39, at 96 (statement of John C. Dwyer, Acting Assoc. Attorney General, DOJ) (including among “serious constitutional issues” the elimination of exhaustion requirement but not alteration of final decision requirement); *see also Delaney & Desiderio, supra* note 70, at 197 (observing that “[t]he main contention of [H.R. 1534’s] detractors” concerned proposed elimination of exhaustion requirement). The legislative history contains some expressions by opponents of doubt about the constitutionality of H.R. 1534’s ripeness provision as a whole, but the specific concerns invariably target the portion of the provision that eliminated *Williamson's* exhaustion requirement.

106. H.R. REP. NO. 105-323, at 20; *see Senate Hearing, supra* note 39, at 112 (Letter from Michael W. Blommer, Assistant Director, Office of Legislative Affairs, Judicial Conference of U.S., to Sen. Orrin G. Hatch, Chairman, Sen. Judiciary Committee (Oct. 6, 1997), stating Judicial Conference’s view that senate version of H.R. 1534 “might violate Article III insofar as the legislation-by expediting a federal court’s consideration of a takings claim before a property owner has been denied compensation—may circumvent the requirement of a cognizable injury in the context of a constitutional taking”).

requirement, in particular, was “constitutionally driven.”¹⁰⁷ Second, many opponents argued that the exhaustion provision exceeded Congress’ power.¹⁰⁸ This lack-of-power argument rested on the premise that the exhaustion provision would change the “substance” of the Just Compensation Clause.¹⁰⁹ The Department of Justice (“DOJ”) put it this way:

If the proposed legislation is interpreted to allow developers and other property owners to bring takings claims against local governments in federal court without first seeking compensation in state courts, it would alter not only ripeness principles but the substantive standard under which district courts adjudicate takings claims against state and local authorities. This would be inconsistent with the Supreme Court’s guidance that the obligation to seek compensation in state court before alleging an uncompensated taking derives from the nature of the right defined by the Just Compensation Clause. We believe this interpretation of H.R. 1534 would violate constitutional limits on congressional power.¹¹⁰

To support its contention that such a “substantive” change in takings law would exceed Congress’ power, the DOJ cited *City of Boerne v. Flores*.¹¹¹ The Attorneys General of forty states likewise cited

107. H.R. REP. NO. 105-323, at 20; *see id.* at 30 (“[I]f ripeness is constitutionally based, or even partly so, Congress’ actions to limit it will itself be futile. If this aspect of ripeness is prudential, Congress may legislate jurisdictional requirements. But, the difficulty of this constitutional question argues for more hearings and testimony”); *see also* S. REP. NO. 105-242, at 31, 49-50 (stating that the courts very likely could not resolve claims which are declared ripe by this bill but which fail to meet the constitutional standard of “finality.”)

108. *See* 144 CONG. REC. S8030 (daily ed. July 13, 1998) (Statement of Administration Policy on S. 2271) (“The bill would violate constitutional limits on congressional power if read, as its supporters intend, to allow for a ruling that an uncompensated taking has occurred even where the claimant fails to pursue available State compensation remedies.”); *Senate Hearing, supra* note 39, at 124 (Letter from 40 State Attorneys General, stating “Congress lacks the authority to interfere so directly in the operation of State and local governments and to authorize suits against the States in federal court beyond its power to enforce the Fourteenth Amendment.”); *House Hearing, supra* note 70, at (statement of Elizabeth M. Osenbaugh, Solicitor General, Iowa) (“By permitting suit in federal court before state remedies are exhausted, the statute would authorize actions where there has been no constitutional violation. We question whether federal courts could constitutionally hear such claims against State officials.”).

109. *See, e.g.*, 143 CONG. REC. H8941 (daily ed. Oct. 22, 1997) (statements of Rep. Lofgren) (asserting that H.R. 1534 “could alter the substantive law of takings in favor of developers”).

110. *House Hearing, supra* note 70, at 38 (statement of John C. Dwyer, Acting Associate Attorney General, DOJ); H.R. REP. NO. 105-323, at 12 (Letter from Andrew Fois, Assistant Attorney General, DOJ) (stating that “[C]ongress . . . lacks the power to alter the constitutional obligations of the states” by eliminating exhaustion requirement).

111. *City of Boerne v. Flores*, 521 U.S. 507 (1997), *cited in House Hearing, supra* note 70, at 39 (statement of John C. Dwyer, Acting Associate Attorney General, DOJ).

Boerne in contending that H.R. 1534's exhaustion provision would make a "substantive" change that exceeded Congress' power.¹¹² The Judicial Conference of the United States joined these executive-branch officials in stating that the exhaustion provision would eliminate one of the "substantive elements of a taking [claim]" (though the Conference did not argue that Congress lacked power to enact the provision).¹¹³ Other opponents complained more generally that H.R. 1534 would make "substantive," rather than "procedural," changes to takings law.¹¹⁴

To counter these arguments, congressional supporters of H.R. 1534 contended that the compensation requirement was "merely prudential in nature."¹¹⁵ Accordingly, they argued it was "a court-created barrier which Congress may alter."¹¹⁶ To support the argument that the exhaustion requirement is prudential, the supporters of H.R. 1534 cited *Suitum v. Tahoe Regional Planning Agency*,¹¹⁷ and cases in which the Court decided takings issues without addressing whether the takings claimants were required to exhaust compensation remedies.¹¹⁸ The supporters' characterization of the exhaustion requirement as "prudential" seemingly underlay their assertion that its elimination would make only a "procedural" change in takings law.¹¹⁹

112. *Senate Hearing, supra* note 39, at 124 (reproducing Letter from 40 State Attorneys General) (citing *Boerne* for proposition that "Congress lacks the power to substantively redefine [*sic*] constitutional limits on the States").

113. *Senate Hearing, supra* note 39, at 112 (Letter from Michael W. Blommer, Assistant Director, Office of Legislative Affairs, Judicial Conference of U.S.) (stating that even if H.R. 1534 eliminated prudential concerns underlying exhaustion requirement, cases brought under H.R. 1534 "might nevertheless be dismissed at the pleading stage for failure to satisfy the substantive elements of a taking under the Fifth and Fourteenth Amendments").

114. See 143 CONG. REC. H8941 (daily ed. Oct. 22, 1997) (statement of Rep. Lofgren) ("In addition to providing developers with special procedural advantages, [H.R. 1534] could alter the substantive law of takings in favor of developers"); *id.* at H8946 (statement of Rep. Boehlert) (stating that H.R. 1534 "violates the most basic principles of federalism . . . That is not, as some say, a narrow procedural fix.").

115. S. REP. NO 105-242, at 12 (1998).

116. *Id.*

117. 520 U.S. 725 (1997).

118. See S. REP. NO 105-242, at 12-15; 144 CONG. REC. S8025-26 (daily ed. July 13, 1998) (statements of Sen. Hatch).

119. See 144 CONG. REC. S8025 (daily ed. July 13, 1998) (statement of Sen. Hatch) ("[T]he second prong of *Williamson County* is now merely prudential in nature . . . In other words, the requirement of exhaustion is a court-created barrier which Congress may alter."); S. Rep. No. 105-242, at 12 (1998) (to the same effect); *Senate Hearing, supra* note 39, at 106 (Letter from Prof. Daniel Mandelker) (stating that ripeness requirements are "prudential" and are therefore "court-created barriers" that "Congress is fully empowered to address").

III. Analysis of the Legislative Debate on the Constitutionality of the Exhaustion Provision of the Proposed Legislation

Each side in the congressional debate over the provision in H.R. 1534 that eliminates *Williamson's* exhaustion requirement was partially correct. The supporters of H.R. 1534 correctly contended that the bill's exhaustion provision would not violate Article III, because *Williamson's* exhaustion requirement is not mandated by Article III. The opponents of H.R. 1534 were correct in contending that *Williamson's* exhaustion requirement is substantive in the sense that it inheres in the nature of the right protected by the Just Compensation Clause. Indeed, the exhaustion requirement has a dual nature. It resembles the prudential rules of justiciability associated with Article III, yet it also is an element of a cause of action for a violation of the Just Compensation Clause. Because neither side in the debate fully comprehended the nature of the exhaustion requirement, neither side explored the question whether Congress has power to eliminate it.

A. The Exhaustion Requirement as a Rule of Prudence

By calling exhaustion a "ripeness" requirement, the Court has linked exhaustion to justiciability, of which ripeness is a component.¹²⁰ The justiciability doctrine reflects both Article III limits and "prudential" rules of judicial "self-governance."¹²¹ The Article III limits of the justiciability doctrine restrict the power of both federal courts and Congress. Article III restricts the federal courts to deciding "[c]ases" and "[c]ontroversies."¹²² By the same token, Article III bars Congress from authorizing federal courts to hear disputes that are not "cases or

120. See *Suitum*, 520 U.S. at 733 n.7 (citing case law on general doctrine of ripeness in discussing takings-ripeness requirements); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012-13 (1992) (contrasting taking claimant's allegation of "Article III injury in fact" with his failure to pursue administrative remedy, which "goes only to the prudential 'ripeness' of [plaintiff's] challenge"); *Thomas v. Union Carbide*, 473 U.S. 568, 580 (1985) (comparing plaintiff's standing to make Article III challenge with plaintiff's standing to make takings challenge to same federal statute); Gene R. Nichol, *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 164-70 (1987) (discussing takings-ripeness precedent as one strain of Court's ripeness precedent).

121. See *Flast v. Cohen*, 392 U.S. 83, 95 (1968); *Allen v. Wright*, 468 U.S. 737, 751 (1984).

122. See U.S. CONST. Art. III, § 2, cl. 1; see also, e.g., *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 151 (1970) ("Article III . . . restricts judicial power to 'cases' and 'controversies.'"). History leaves unclear the difference between "cases" and "controversies." See, e.g., David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 149 n.278 (citing conflicting commentary); cf. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 723 (1838) (suggesting that,

controversies.”¹²³ Article III would therefore bar Congress from authorizing federal courts to hear takings claims by plaintiffs who had not met *Williamson*’s exhaustion requirement, if that requirement were a necessary ingredient of an Article III “case or controversy.”¹²⁴ Article III would impose no such bar, however, if the exhaustion requirement were instead “prudential.”¹²⁵ The Court has not decided whether the exhaustion requirement is dictated by Article III. The Court’s precedent nonetheless strongly suggests that the requirement is not an Article III dictate; rather, it is akin to a prudential rule of justiciability.

In *Suitum*, the Court described both of *Williamson*’s ripeness requirements (including the exhaustion requirement) as “prudential.”¹²⁶ *Suitum* does not settle the matter, however, because its description of the exhaustion requirement as prudential was dictum. The only issue before the Court in *Suitum* was whether the plaintiff had satisfied the final decision requirement; there was no dispute about the exhaustion requirement.¹²⁷ Moreover, the Court in *Suitum* did not explain why the exhaustion requirement is prudential. The absence of an explanation reduces the precedential weight of its dictum.¹²⁸ Finally, some people have perceived *Suitum*’s dictum on the exhaustion requirement to be inconsistent with other statements by the Court.¹²⁹ For

whereas “controversies” encompasses only civil actions, “cases” encompasses both civil and criminal actions).

123. See, e.g., *Raines v. Byrd*, 117 S. Ct. 2312, 2318 n.3 (1997) (“It is settled that Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.”).

124. See *id.*, 117 S. Ct. at 2315-22 (holding that Members of Congress lacked Art. III standing to challenge constitutionality of Line Item Veto Act, despite provision in act authorizing such a challenge to be brought by any Member of Congress); see also *Association of Data Processing Serv. Orgs.*, 397 U.S. at 154 (explaining that Congress can alter standing rules “save as the requirements of Article III dictate otherwise”).

125. See, e.g., *Raines*, 117 S. Ct. at 2318 n.3 (acknowledging that statutory provision authorizing a particular plaintiff to sue “eliminates any prudential standing limitations”); See generally CHEMERINSKY, *supra* note 9, § 2.1, at 42-43 (2d ed. 1994) (“The distinction between constitutional and prudential limits on federal judicial power is important because Congress, by statute, may override prudential, but not constitutional, restrictions.”).

126. *Suitum*, 520 U.S. at 734.

127. See *id.*

128. See *Humphrey’s Executor v. United States*, 295 U.S. 602, 627 (1935) (stating that dicta of prior cases “may be followed *if sufficiently persuasive* but they are not controlling”) (emphasis added); cf. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (“As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases but also to their explications of the governing rules of law.”).

129. See *Senate Hearing*, *supra* note 39, at 91 (Congressional Research Service Report) (stating that the Court “has sent mixed signals” about whether exhaustion requirement is

these reasons, it is worth examining Supreme Court case law that supports *Suitum's* dictum. That case law includes decisions concerning the general doctrine of ripeness and the nature of an Article III "case or controversy."

The Court has said that the general doctrine of ripeness "is drawn both from Article III limitations on judicial power and from prudential reasons,"¹³⁰ but it has not explained how to distinguish prudential ripeness rules from Article III ripeness rules. Instead, the Court has described the ripeness doctrine, in its composite form, as having "a twofold aspect, requiring [a federal court] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."¹³¹ The Court has not specified to what extent the "fitness" prong and the "hardship" prong partake of Article III and prudential concerns.¹³² Such specificity may be impossible. Both the "fitness" of an issue for judicial review and the "hardship" of postponing review are matters of degree, and Article III requirements shade into prudential concerns without any discernible boundary.¹³³

The Court's precedent on the general doctrine of ripeness nonetheless sheds light on the Court's specialized takings-ripeness doctrine. Roughly speaking, the "fitness" prong of the general doctrine parallels the "final decision" requirement of the specialized doctrine. Likewise, the "hardship" prong of the general doctrine roughly paral-

prudential or Article III rule); *see also id.* ("This takings-specific ripeness debate is playing out against the backdrop of a broad Supreme Court trend toward regarding ripeness as largely, though not exclusively, prudential.").

130. *Reno v. Catholic Social Servs.*, 509 U.S. 43, 57 n.18 (1993), *quoted in Suitum*, 520 U.S. at 733 n.7; *accord, e.g.*, *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974) ("[i]ssues of ripeness involve, at least in part, the existence of a live 'Case or Controversy,'" as well as "the exercise of judicial restraint from unnecessary decision of constitutional issues").

131. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

132. *Cf. Regional Rail Reorganization Act Cases*, 419 U.S. at 138 (stating that, in determining ripeness, Court cannot be bound by parties' wishes, because ripeness partakes of Article III requirements as well as discretionary considerations, both of which are for court alone to determine).

133. *See Flast v. Cohen*, 392 U.S. 83, 97 (1968) ("The many subtle pressures which cause policy considerations to blend into the constitutional limitations of Article III make the justiciability doctrine one of uncertain and shifting contours.") (internal quotation marks and footnote omitted); CHEMERINSKY, *supra* note 9, § 2.1, at 43 ("A clear separation of the constitutional and prudential aspects of the justiciability doctrines is often difficult because both reflect the same basic policy considerations."); *see also Warth v. Seldin*, 422 U.S. 490, 500 (1975) (prudential rules of standing are "closely related to Art. III concerns").

lels the “exhaustion” requirement of the specialized doctrine.¹³⁴ The Court has not acknowledged these parallels, but they are evident in the Court’s explanations for the two specialized ripeness requirements. The Court has said that a “final decision” is necessary so a federal court can determine whether a restriction on property use is so severe that it causes a regulatory taking.¹³⁵ Thus, a “final decision” ensures that a regulatory taking claim is “fit” for judicial review. By comparison, the Court has not suggested that the exhaustion requirement is necessary to make a regulatory taking claim fit for review. Rather, the Court has said that exhaustion is required because, until a state has denied just compensation for the taking of an owner’s property, no violation of the Just Compensation Clause has occurred.¹³⁶ Before exhaustion, in other words, the property owner has not suffered a “hardship” forbidden by the Constitution.

Article III does not require the plaintiff to suffer a hardship forbidden by the Constitution or by any other federal law.¹³⁷ To the contrary, any actual or imminent concrete hardship will do. This point underlies the Court’s shift in the 1960s and ‘70s from the “legal injury” test of standing in favor of an “injury in fact” test.¹³⁸ More recently, the Court has blurred the distinction by defining “injury in fact” to

134. See *Hage v. United States*, 35 Fed. Cl. 147, 162 (1996) (citing general ripeness factors articulated in *Abbot Laboratories* in discussing ripeness of takings claim); but see Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 23 (1995) (“The state compensation [i.e. exhaustion] portion of [*Williamson*] finds no parallel in the ripeness cases from other areas of the law.”).

135. See, e.g., *MacDonald Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986) (“A court cannot determine whether a regulation has gone ‘too far’ unless it knows how far the regulation goes.”).

136. See, e.g., *Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson*, 473 U.S. 172, 195 (1985) (“[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.”).

137. See, e.g., *Ohio Forestry Ass’n v. Sierra Club*, 118 S. Ct. 1665, 1670-71 (1998) (analyzing hardship by asking whether plaintiff confronted “adverse effects of a strictly legal kind,” or “significant practical harm,” or was immediately forced by challenged government action “to modify its behavior in order to avoid future adverse consequences”).

138. See *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153-154 (1970) (recognizing that precedent used “legal interest” test to assess standing but refusing to follow that precedent, using “injury in fact” inquiry instead); *Barlow v. Collins*, 397 U.S. 159, 164 (1970) (plaintiffs had “personal stake” required by Article III according to *Association of Data Processing Serv. Orgs.*); see also *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972) (noting that in *Association of Data Processing Serv. Orgs.* and *Barlow*, the Court eschewed “legal interest” test of its precedent by holding “more broadly” that injury required by Article III was “injury in fact”).

mean “an invasion of a legally protected interest.”¹³⁹ Even this definition, however, does not require a takings claimant to show an unconstitutional denial of compensation in order to prove hardship sufficient to satisfy Article III. If the claimant challenges an actual government appropriation of the claimant’s property, the injury occurs when the appropriation occurs, regardless whether the claimant later receives just compensation for the taking.¹⁴⁰ Similarly, if the claimant challenges a regulatory restriction on the use of property, the injury occurs as soon as the restriction takes effect, regardless of later compensation.¹⁴¹ In each situation, the claimant suffers “an invasion of a legally protected interest”¹⁴² in the use of his or her property.¹⁴³ As the Court noted in *First English*, “Though . . . an illegitimate taking might not occur until the government refuses to pay, the interference that effects a taking might begin much earlier.”¹⁴⁴ In short, it is the taking, rather than the denial of just compensation, that inflicts the hardship - *i.e.*, the injury in fact - required by Article III, even though the taking itself does not violate the Constitution.¹⁴⁵

139. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also* *Raines*, 117 S. Ct. at 2317 (stating for Article III standing, “the alleged injury must be legally and judicially cognizable”); *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (defining “injury in fact” as “an invasion of a judicially cognizable interest”); *Engdahl*, *supra* note 124, at 164-65 (accusing Justice Scalia of “turn[ing] what had been a dichotomy” between legal interest, on the one hand, and injury in fact, on the other hand, “into an apposition”).

140. *See* *United States v. Clarke*, 445 U.S. 253, 258 (1980) (“When a taking occurs by physical invasion . . . the usual rule is that the time of the invasion constitutes the act of taking, and [i]t is that event which gives rise to the claim for compensation . . .”) *quoting* *United States v. Dow*, 357 U.S. 17, 22 (1958); *see also* *Kirby Forest Indus. v. United States*, 467 U.S. 1, 5 (1984) (holding that, when government physically occupied land, owner could bring inverse condemnation action to recover value of land measured on date of occupation); *see also* *Soriano v. United States*, 352 U.S. 270, 272-77 (1957) (assuming that cause of action under Just Compensation Clause against federal government for requisitioning of military supplies accrued on date that government took the supplies); *but cf.* *United States v. Dickinson*, 331 U.S. 745, 747-50 (1947) (stating that the statute of limitations on a takings claim had not run where taking occurred by “a continuing process of physical events”).

141. *See* *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 320 n.10 (1987) (stating that “the interference that effects a taking might begin much earlier” than the denial of compensation); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012 (1992) (holding that plaintiff had established Art. III standing with respect to “constraints placed on the use of his parcels”); *see also* *United States v. Dickinson*, 331 U.S. 745, 748 (1947) (“Property is taken in the constitutional sense when inroads are made upon an owner’s use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time.”).

142. *Defenders of Wildlife*, 504 U.S. at 560.

143. *See* *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 137, 140 (1939) (including right “of property” among “legal right[s]” that confer “a cause of action or a right to sue”).

144. 482 U.S. at 320 n.10.

145. *See* *Stein*, *supra* note 136, at 27-29 (describing this as the “Effective Moment”).

Moreover, an interference with an owner's use of property constitutes "injury in fact" even if it is not so severe as to constitute a regulatory taking.¹⁴⁶ For example, the brickyard owner in *Hadacheck v. Sebastian* undoubtedly had Article III standing to challenge a law that prevented him from continuing to operate his brickyard, even though the Court held that the law did not cause a taking of his property.¹⁴⁷ The application of the law caused injury in fact, and hence supplied a necessary ingredient for an Article III case or controversy cognizable in federal court.¹⁴⁸ It did not, however, constitute a taking, proof of which was a necessary element of the brickyard owner's cause of action for a violation of the Just Compensation Clause.¹⁴⁹

The distinction between the elements of an Article III case or controversy and the elements of a cause of action for a violation of the Just Compensation Clause is important to remember.¹⁵⁰ The supporters of H.R. 1534 lost sight of it.¹⁵¹ Yet the distinction between the elements of a case or controversy and the elements of a cause of action are well-established, as reflected, among other places, in the Federal Rules of Civil Procedure.¹⁵² Had the brickyard owner in *Hadacheck* sued in federal court to challenge the law prohibiting his brickyard operation, the court could have dismissed his suit under Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 12(b)(6) because of his failure to plead an essential element of his claim (*i.e.*, a tak-

146. See *Andrus v. Allard*, 444 U.S. 51, 64 n.21 (1979) (noting that plaintiffs had standing to bring a takings challenge to a federal regulation that did not cause a taking: "Because the regulation [plaintiffs] challenge restricts their ability to dispose of their property, [plaintiffs] have a personal, concrete, live interest in the controversy.>").

147. *Hadacheck v. Sebastian*, 239 U.S. 394, 405, 407, 410-12 (1915) (upholding a city ordinance that prevented plaintiff from operating his brickyard, thereby allegedly reducing the value of property from \$800,000 to \$60,000).

148. See *Allard*, 444 U.S. at 64 n.21.

149. The text discusses *Hadacheck* to illustrate the distinction between government conduct that causes injury in fact and government conduct that gives rise to a cause of action for a violation of the Just Compensation Clause. In *Hadacheck*, however, the plaintiff did not bring a civil action for such a violation, rather, he challenged the law in a petition for habeas corpus after he was convicted and jailed for violating the law. See *Hadacheck*, 239 U.S. at 404-05.

150. See, *e.g.*, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 96 (1998) (referring to "fundamental distinction" between an argument that the plaintiff lacks cause of action and an argument that the plaintiff has not satisfied an element of Article III standing); *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) (noting that the lower court apparently confused issue of whether plaintiff had standing with issue of whether plaintiff had cause of action); *but cf.* William Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988) (arguing that standing inquiry should be subsumed in merits inquiry).

151. See *infra* notes 204-210 and accompanying text.

152. FED. R. CIV. P., 28 U.S.C. App.

ing).¹⁵³ His suit, however, would not have been subject to dismissal under Fed. R. Civ. P. 12(b)(1), for lack of Article III standing, because the law's interference with his use of his property caused him Article III injury.¹⁵⁴

The conclusion that Article III does not require exhaustion is reinforced by precedent holding that the exhaustion requirement does not apply to facial takings challenges.¹⁵⁵ In a facial challenge, the plaintiff alleges that the mere adoption of a property restriction - for example, by enactment of a law or promulgation of a land-use regulation - causes a taking.¹⁵⁶ The Court has said that such facial challenges "are generally ripe" the moment the restriction is adopted.¹⁵⁷ This general principle reflects that a property owner suffers injury as soon as the government adopts a rule that bars him or her from using the property the way he or she wants and is able to.¹⁵⁸ The qualification to the principle - i.e., that facial challenges are only "generally" ripe upon adoption of the challenged provision¹⁵⁹—reflects that a facial challenge will not always involve an Article III case or controversy. For example, it may be doubtful that the challenged law or

153. See FED. R. CIV. P. 12(b)(6) (providing that defense of failure to state claim for which relief can be granted can be raised by motion); see also, e.g., *Taylor v. FDIC*, 132 F.3d 753, 761 (D.C. Cir. 1997) (plaintiff's failure to plead a material element of his claim warranted dismissal under Fed. R. Civ. P. 12(b)(6)).

154. See *Lucas*, 505 U.S. at 1012 (holding that plaintiff had properly established Article III standing by alleging injury in fact with respect to laws that restricted use of his land.); see also *American Fed'n of Gov't Employees, Local 2119 v. Cohen*, 171 F.3d 460, 464 (7th Cir. 1999) ("[I]f a plaintiff cannot establish standing to sue . . . dismissal under [FED. R. CIV. P.] 12(b)(1) is the appropriate disposition."); *In re Joint E. & S. Dist. Asbestos Litigation*, 14 F.3d 726, 733 (2d Cir. 1993) (holding that plaintiff's failure to satisfy Article III warranted dismissal under Fed. R. Civ. P. 12(b)(1), for lack of subject-matter jurisdiction, rather than under Fed. R. Civ. P. 12(b)(6), for failure to state claim for which relief could be granted).

155. See *Suitum*, 520 U.S. at 736 n.10; see also *supra* notes 44-45 and accompanying text (discussing facial challenges as exception to both exhaustion and final decision requirements).

156. See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295 (1981) ("Because [plaintiffs'] taking claim arose in the context of a facial challenge . . . the only issue properly before [the courts] . . . is whether the 'mere enactment' of the Surface Mining Act constitutes a taking.") (*citing Agins v. City of Tiburon*, 447 U.S. 255 260 (1980)).

157. See *Suitum*, 520 U.S. at 736 n.10.

158. Cf. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 14 (1984) (holding that no taking occurred before the government tendered compensation because "[u]ntil title passed to the United States, petitioner was free to make whatever use it pleased of its property.").

159. *Suitum*, 520 U.S. at 736 n.10.

regulation even applies to the plaintiff's property.¹⁶⁰ Moreover, even if the challenged government rule does apply to the plaintiff's property, it may be unclear whether the government will enforce the rule against the plaintiff or whether the rule will restrict only uses that the plaintiff is unlikely to want, or be able to engage in.¹⁶¹ These situations fall short of presenting Article III cases or controversies because it is not sufficiently clear that the plaintiff is injured or realistically threatened with an injury.¹⁶² In any event, the existence of an injury in fact has nothing to do with whether the plaintiff asserting a facial challenge has sought compensation for that injury.¹⁶³

Likewise, Article III does not require a plaintiff to meet the exhaustion requirement before asserting an "as applied" takings challenge in federal court. Whereas a facial claim challenges government action that takes legislative form, an as-applied claim challenges government action in its adjudicatory form. Because of this difference, Article III may demand in the latter context that an adjudication actually occur, or that its result be foreordained, before the challenge is brought. Furthermore, prudential concerns may demand an adjudication that is definitive and that immediately affects the owner's property rights—*i.e.*, a "final decision." But as long as the rules that are to be applied in the challenged adjudication actually restrict the plaintiff's use of property (or imminently threaten an actual restriction), Article III is satisfied whether or not the plaintiff who brings an as-applied takings challenge has sought just compensation or is entitled to it.

Support for this conclusion can be found in the Court's recent decision in *City of Chicago v. International College of Surgeons*.¹⁶⁴ There, the Court held that a federal district court had subject-matter

160. See *Virginia Surface Mining*, 452 U.S. at 293 n.35, & 294-95 (challenge to statutory provisions was not ripe because plaintiffs had not identified any specific properties that they owned and to which challenged provisions would apply).

161. See *Pennell v. City of San Jose*, 485 U.S. 1, 9-11 (1988) (holding that landlords' challenge to provision in rent control ordinance was premature because provision had yet to be applied to restrict their rents).

162. See *Public Serv. Comm'n v. Wycoff*, 344 U.S. 237, 242 (1952) (holding action for declaratory judgment unripe because "[c]laims based merely upon assumed potential invasions of rights are not enough to warrant judicial intervention") (internal quotation marks omitted); see also *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 733 (1999) ("When . . . there is no immediate effect on the plaintiff's primary conduct, federal courts normally do not entertain pre-enforcement challenges to agency rules and policy statements.").

163. Cf. *Regional Railroad Reorganization Act Cases*, 419 U.S. at 137-46 (holding ripe the issue whether a Tucker Act remedy was available if challenged federal statute caused a taking).

164. 118 S. Ct. 523 (1997).

jurisdiction over a case removed from state court.¹⁶⁵ The plaintiffs in that case asserted an as-applied taking challenge to local regulatory action.¹⁶⁶ The plaintiffs did not seek compensation in their state-court lawsuit,¹⁶⁷ even though it appears that compensation was available in the state courts.¹⁶⁸ If exhaustion of the state compensation remedy were required by Article III, the Court should not have upheld the federal district court's removal jurisdiction over the takings claim.¹⁶⁹ Although the exhaustion issue was not before the Court, its decision upholding jurisdiction implies that exhaustion is not an Article III requirement for as-applied, regulatory takings claims.¹⁷⁰

Although Article III does not require exhaustion, *Williamson's* exhaustion requirement is, like other prudential rules, justifiable as a "matter[] of judicial self-governance."¹⁷¹ One of the reasons for prudential justiciability rules, including prudential ripeness rules, is that they conserve federal-court resources.¹⁷² The exhaustion requirement

165. *See id.* at 529-34.

166. *See id.* at 527.

167. *See id.* at 529 (observing that plaintiffs asserted their constitutional claims under Illinois Administrative Review Law, 735 ILL. COMP. STAT., §§ 5/3-101-13 (West 1992)); *see also* 735 ILL. COMP. STAT., § 5/3-111(a)(4)-(a)(7) (Supp. 1997) (including among reviewing court's powers under Illinois Administrative Review Law the powers to reverse, affirm, or remand, but not the power to award compensation); *see also* *Beverly Bank v. Illinois*, 579 N.E.2d 815, 824 (Ill. 1991) (holding that an action for damages based on a taking cannot be brought under Illinois Administrative Review Law).

168. *See* *Zeitz v. Village of Glenview*, 592 N.E.2d 384, 387-89 (Ill. Ct. App. 1992) (holding that a complaint alleging regulatory taking stated a cause of action for inverse condemnation), *appeal denied*, 602 N.E.2d 479 (Ill. 1992).

169. *See, e.g.,* *Finley v. United States*, 490 U.S. 545, 548 (1989) ("to create jurisdiction" in lower federal courts, "[t]he Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it"), *quoting* *Mayor v. Cooper*, 73 U.S. 247, 252 (1867).

170. *See* *Eastern Enters. v. Apfel*, 118 S. Ct. 2131, 2145 (1998) (plurality opinion) (in holding that the federal district court had original jurisdiction, and the Court had appellate jurisdiction, over a takings claim, the Court relied partly on prior decisions in which it had upheld takings challenges on the merits without questioning the district court's or its own jurisdiction); *see also* *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 379-80 (1949) (upholding its own and lower courts' jurisdiction based on a prior case in which the Court had decided a similar case on the merits); *Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962) (acknowledging that the Court is not bound by exercises of jurisdiction in prior cases that reached the merits without considering jurisdiction; but also attaching weight to a long line of such cases with respect to a particular issue of jurisdiction before it).

171. *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

172. *See* *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 118 S. Ct. 1665, 1671 (1998) ("The ripeness doctrine reflects a judgment that the disadvantages of premature review that may prove too abstract or *unnecessary* ordinarily outweigh the additional costs of—even repetitive—post-implementation litigation.") (emphasis added); *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 568-81 (in gauging ripeness, Court takes into account that threatened injury "may not occur at all"); *CHEMERINSKY*, *supra* note 9, § 2.4.1, at 116 (stat-

serves that function. It ensures that a federal court will not hear a claim based on a local agency's taking of property until after a state court has had the chance to award just compensation for the taking. If the state court makes such an award, federal court intervention will not be necessary to protect the claimant's right to just compensation, and federal-court resources will be saved.¹⁷³

Because the exhaustion requirement is not dictated by Article III, but is instead "prudential," Congress can eliminate it without violating Article III.¹⁷⁴ The opponents of H.R. 1534 were therefore wrong in suggesting that the bill's exhaustion provision violated Article III.¹⁷⁵ But the conclusion that H.R. 1534's exhaustion provision would not have violated Article III does not resolve the opponents' other constitutional argument, which was that Congress lacked the power to enact the provision.¹⁷⁶ That argument rested on the assertion that the exhaustion provision would have changed the substance of takings law,¹⁷⁷ an assertion that we examine next.

B. The Exhaustion Requirement as an Element of a Cause of Action

In *Williamson*, the Court said that the exhaustion requirement is not only a rule of "ripeness" but also an element of a cause of action for a violation of the Just Compensation Clause.¹⁷⁸ By eliminating this element, H.R. 1534's exhaustion provision would have allowed federal courts to award just compensation to plaintiffs who had not proven a violation of the Clause. The opponents of H.R. 1534 were therefore correct in contending that its exhaustion provision would

ing that "the ripeness requirement, like all justiciability doctrines, enhances judicial economy by limiting the occasion for federal court jurisdiction and the expenditure of judicial time and revenues"); *see also* *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974) (prudential ripeness rules reflect "the exercise of judicial restraint from unnecessary decision of constitutional issues"); *cf.* *Warth*, 422 U.S. at 500 (explaining that, without prudential rules of standing, federal courts would have to decide cases "even though judicial intervention may be unnecessary to protect individual rights").

173. *Cf.* *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) (explaining that judicially developed doctrine requiring exhaustion of administrative remedies "promot[es] judicial efficiency" because "a judicial controversy may well be mooted" by administrative remedy).

174. *See supra* notes 121-127 and accompanying text and *infra* notes 325-330 and accompanying text (discussing Congress' power to eliminate "prudential" rules).

175. *See supra* notes 108-109 and accompanying text (describing opponents' Article III argument).

176. *See supra* notes 110-115 and accompanying text (describing opponents' lack-of-power argument).

177. *See supra* notes 111-116 and accompanying text (describing opponents' contention that H.R. 1534's exhaustion provision changed the "substance" of takings law).

178. *See infra* notes 185-187 and accompanying text.

“alter . . . the substantive standard under which [federal] district courts adjudicate takings claims.”¹⁷⁹

The supporters of H.R. 1534, however, believed that *Williamson* is not “binding authority.”¹⁸⁰ They also believed that other Court precedent established that “a governmental action can be considered an unconstitutional taking” regardless whether the victim of the taking has sought or is owed compensation.¹⁸¹ The supporters accurately labeled some of the Court’s precedent in this area “seemingly contradictory.”¹⁸² None of that precedent, however, casts doubt on the Court’s conclusion in *Williamson* that the exhaustion requirement is an element of a cause of action for a violation of the Just Compensation Clause.

1. *Williamson’s discussion of exhaustion as an element of a cause of action*

In *Williamson*, the Court determined that the plaintiff’s failure to exhaust state compensation procedures had two effects: it rendered the plaintiff’s taking claim “not yet ripe,” and it prevented the plaintiff from “claim[ing] a violation of the Just Compensation Clause.”¹⁸³ The *Williamson* Court found support for that dual determination in precedent on taking claims against the federal government. Under that precedent, the Court explained, “taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act.”¹⁸⁴ Furthermore, until the owner has exhausted that process and been denied compensation, it

179. *House Hearing, supra* note 70, at 38 (prepared statement of John C. Dwyer, Acting Associate Attorney General, DOJ).

180. S. REP. NO. 105-242, at 12 (1998).

181. *Id.* at 13.

182. *Id.* at 14.

183. *Williamson*, 473 U.S. at 194-95.

184. *Id.* at 195 (citing *Monsanto*, 467 U.S. at 1016-20); *see also* *Preseault v. Interstate Commerce Comm’n*, 494 U.S. 1, 11-17 (1994) (holding that challenge in that case was “premature” because plaintiff had not sought remedy available under Tucker Act); *see also* *Duke Power Co. v. Carolina Env’tl Study Group, Inc.*, 438 U.S. 59, 94 n.39 (1978) (holding that plaintiffs’ taking challenge to federal statute was “a matter appropriately left for another day” in light of availability of compensation under Tucker Act). The Tucker Act waives the federal government’s sovereign immunity from, among other claims, claims founded on the Constitution. *See* 28 U.S.C. §§ 1346(a), 1491 (1994). The Act is only jurisdictional; it does not create a substantive right to a remedy against the government. *See* *United States v. Mitchell*, 463 U.S. 206, 217 (1983) *quoting* *Eastport S.S. Corp. v. United States*, 372 F. 2d 1002, 1009 (Ct. Cl. 1967) (holding that a Tucker Act claimant must identify some other federal law that can “be interpreted as mandating compensation”); *see also* *United States v. Testan*, 424 U.S. 392, 400 (1976) (because Tucker Act is “merely jurisdictional,” a Tucker Act plaintiff must plead with specificity source of right of action).

“has no claim” against the federal government for a violation of the Just Compensation Clause.¹⁸⁵ Thus, *Williamson* makes clear that exhaustion is both an element of ripeness and an element of a cause of action for a violation of the Just Compensation Clause.

The *Williamson* Court’s treatment of the exhaustion requirement as having a dual nature—partaking of both justiciability and the substance of a cause of action—is neither unique nor internally inconsistent. The requirement that a taking claimant demand just compensation from the state before suing in federal court for a violation of the Just Compensation Clause operates somewhat like the “demand” requirement of other causes of action.¹⁸⁶ In each situation, the denial of the demand invariably occurs, if at all, after the obligation arises upon which the demand is premised. That temporal relationship, coupled with the possibility that the demand will be granted, makes it appropriate to say that a case is not “ripe” until the demand requirement is met. It may also be appropriate, however, to say that

185. *Williamson*, 473 at 194-95 (quoting *Monsanto*, 467 U.S. at 1013, 1018 n.21); *accord*, e.g., *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1985) (reciting “the principle that so long as compensation is available for those whose property is in fact taken, the government action is not unconstitutional”); *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 297 n.40 (1981) (“an alleged taking is not unconstitutional unless just compensation is unavailable”).

186. *See, e.g.*, FED. R. CIV. P. 23.1 (requiring plaintiff in shareholder derivative suit to allege efforts made to obtain relief from corporate authority), described as a “demand” requirement in 7C CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1831 (2d ed. 1986); N.Y. C.P.L.R. § 206(a) (McKinney 1990) (“where a demand is necessary to entitle a person to commence an action, the time within which the action must be commenced shall be computed from the time when the right to make the demand is complete”); *Williams Management Enter., Inc. v. Buonauro*, 489 So. 2d 160, 164 n.8 (Fla. Dist. Ct. App. 1986) (“many causes of action require a demand as an element”); U.C.C. § 3-122(2)-(3) (providing that various causes of action accrue “upon demand”); 60 AM. JUR. 2D PAYMENT § 139 (1987) (including among checklist of allegations required for nonpayment of debt “[a]n allegation of demand (unless unnecessary under the circumstances)”); ROBERT I. WEIL ET AL., *CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL*, §1:843 (1998) (“There are a number of causes of action in which plaintiff is required to give some sort of notice or demand to the defendant before filing suit.”); 15A RONALD A. ANDERSON, *COUCH ON INSURANCE* § 58:83 (Mark S. Rhodes ed., rev. 2d ed. 1983) (noting that, “under some [insurance] statutes an express demand for payment of the claim must be made as a condition precedent to liability” for penalty for wrongful refusal to pay); Bradley T. Ferrell, Note, *A Hybrid Approach: Integrating the Delaware and the ALI Approaches to Shareholder Derivative Litigation*, 60 OHIO ST. L.J. 241, 246-47 (1999) (stating that “[a]ll jurisdictions have a demand requirement as one of the procedural steps in bringing a derivative action”). Of course, the exhaustion requirement differs from other demand requirements in one critical way. Under the exhaustion requirement, the claimant must demand compensation from a state court, which is not the same entity as the entity that has taken the property and that will be the defendant in any suit on the takings claim. In contrast, in other contexts, the plaintiff makes the demand on the entity that becomes the defendant.

the demand requirement is an element of the plaintiff's cause of action, especially if the defendant's denial of the demand is necessary to make the defendant's conduct wrongful, as is true of the demand upon a state court for just compensation for a local agency's taking.¹⁸⁷ For this reason, while there is a clear distinction between the elements of an Article III case or controversy and the elements of a cause of action,¹⁸⁸ there is no such clear line between the prudential feature and the substantive feature of *Williamson's* exhaustion requirement.¹⁸⁹

To say that exhaustion is an element of a cause of action for a violation of the Just Compensation Clause does not mean that it is an *invariable* element. As discussed above, a takings claimant does not need to exhaust state compensation procedures if compensation would not be available through those procedures and hence exhaustion would be futile.¹⁹⁰ In that situation, it is fair to say that, even if a violation of the Just Compensation Clause has not occurred (because compensation has not actually been denied), a violation is imminent.¹⁹¹ In addition, a claimant does not have to exhaust state compensation procedures that are unfair or otherwise inadequate.¹⁹² That is because the state's failure to provide adequate compensation procedures at the time of the taking constitutes a violation of the Constitution that is distinct from the constitutional violation that arises from the state's denial of compensation.¹⁹³ Thus, the exhaustion require-

187. See *First English*, 482 U.S. at 320 n.10 ("an *illegitimate* taking might not occur until the government refuses to pay") (emphasis added); *Williamson*, 473 U.S. at 194 n.13 (assuming existence of state procedures for obtaining just compensation, "no constitutional violation occurs until just compensation has been denied"); cf., e.g., *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 429 (N.Y. Ct. App. 1991) (holding that the demand requirement for replevin reflects that, "[u]ntil demand is made and refused, possession of the stolen property . . . is not considered wrongful").

188. See *supra* notes 152-156 and accompanying text (discussing distinction between elements of an Article III case or controversy and elements of a cause of action).

189. See *Nichol*, *supra* note 122, at 164-67 (arguing that in *Williamson*, among other cases, "the ripeness determination is inescapably intertwined with both the substance of the claim on the merits and the procedural posture of the case on review").

190. See *supra* notes 52-56 (describing exception to exhaustion requirement applicable when compensation is not available through state procedures). Similarly, there is often a futility exception to the demand requirement that is an element of other causes of action. See, e.g., *Hawes v. Oakland*, 104 U.S. 450, 460-61 (1882).

191. Cf. *Railroad Reorganization Act Cases*, 419 U.S. at 143 ("One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.") quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923).

192. See *supra* notes 57-61 and accompanying text (describing exception to exhaustion requirement applicable when state compensation procedures are inadequate).

193. See *supra* notes 59-61 and accompanying text (describing constitutional requirement that states provide adequate compensation procedures at time of taking).

ment has a pragmatically justified futility exception, and, in addition to the constitutional cause of action that arises when a state denies compensation after a claimant has sought it, a separate cause of action arises when a state fails, at the time of the taking, to provide adequate compensation procedures. The existence of the futility exception and the other cause of action does not undermine *Williamson's* holding that exhaustion is an element of a cause of action for a violation of the Just Compensation Clause.

2. *The direct attack on Williamson by the supporters of H.R. 1534*

The supporters of H.R. 1534 believed that, for four reasons, *Williamson* was no longer good law insofar as it held that exhaustion is an element of a cause of action for a violation of the Just Compensation Clause.¹⁹⁴ We respectfully submit that the supporters were wrong.

First, the supporters believed that *Williamson* was "outdated" in light of *First English*.¹⁹⁵ As the supporters observed, *First English* did "clarif[y]" the law of takings.¹⁹⁶ It did so by holding that it is not enough for a state court prospectively to invalidate a regulation that has already caused a taking; the Just Compensation Clause requires compensation for the taking.¹⁹⁷ The supporters reasoned, "Now that this Federal remedy has been clarified, there is no reason to compel a citizen to litigate State court remedies in State court first."¹⁹⁸ That reasoning appears to rest on the erroneous belief that the original purpose of the exhaustion requirement was to allow state courts to determine what type of remedy was available under state law for a taking. Instead, *Williamson* made clear that the purpose of the exhaustion requirement is to give the state a chance to provide the compensation remedy required by the U.S. Constitution and thereby to avoid a constitutional violation.¹⁹⁹ *First English* reaffirmed that a taking is not

194. See S. REP. NO. 105-242, at 12-13 (1998).

195. *Id.* at 12.

196. *Id.*

197. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 319 ("Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause."); *id.* at 321 ("We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."); see also *supra* notes 62-68 and accompanying text (discussing *First English*).

198. S. REP. NO. 105-242, at 12 (1998).

199. See *Williamson*, 473 U.S. at 194-95 & n.13; see also *infra* notes 287-290 and accompanying text (explaining that exhaustion requirement reflects federalism concerns).

“illegitimate . . . until the [state] refuses to pay.”²⁰⁰ That principle is also reaffirmed by post-*Williamson* precedent involving takings by the federal government.²⁰¹ The exhaustion requirement thus is not outdated; it continues to serve the important function of giving the state an opportunity to legitimize a local agency’s taking before a federal court intervenes.

Second, the supporters asserted that *Williamson*’s exhaustion requirement “is now merely prudential in nature.”²⁰² In support of that assertion, they cited *Suitum*’s statement that both of *Williamson*’s ripeness requirements are “prudential.”²⁰³ As discussed above, the Court’s precedent does establish that the exhaustion requirement is prudential.²⁰⁴ To say that the exhaustion requirement is “prudential,” however, means only that it is not an essential ingredient of an Article III case or controversy. Thus, a takings claimant who has not met the exhaustion requirement may still bring a case that meets the requirements of Article III. By the same token, Congress would not violate Article III if it authorized federal courts to award just compensation to a plaintiff who proved a taking but had not met the exhaustion requirement. Yet the “prudential” nature of exhaustion does not make it dispensable as an element of a claim for a violation of the Just Compensation Clause. On the contrary, to establish such a violation, a plaintiff must exhaust available and adequate state compensation remedies.²⁰⁵ A federal statute that dispensed with that requirement would therefore recognize a cause of action that is distinct from a

200. *First English*, 482 U.S. at 320 n.10.

201. *See Preseault v. Interstate Commerce Comm’n*, 494 U.S. 1, 11 (1990) (“If the government has provided an adequate process for obtaining compensation, and if resort to that process ‘yield[s] just compensation,’ then the property owner ‘has no claim against the Government’ for a taking.”) (quoting *Monsanto*, 467 U.S. at 1013, 1018 n.21); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1985) (reciting “the principle that so long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional”).

202. S. REP. NO. 105-242, at 12 (1998).

203. *Id.* (citing *Suitum*, 520 U.S. at 734).

204. *See supra* notes 128-176 and accompanying text.

205. *See, e.g., Williamson*, 473 U.S. at 194-96. The Congressional Research Service (“CRS”) observed that the Court in *Suitum* described the exhaustion requirement as both “prudential” and “constitutionally based.” *Senate Hearing, supra* note 39, at 91 n.36 (reproducing CRS Report). The CRS wondered, “If the state compensation [*i.e.*, exhaustion] prong is constitutionally based, how can it be only prudential (discretionary)?” *Id.* The answer, as discussed in the text, is that the exhaustion requirement is “prudential” in the sense that it is not dictated by Article III; it is nonetheless “constitutionally based,” because it is rooted in the text of the Just Compensation Clause and is an element of a cause of action for a violation of the Clause.

cause of action for a violation of the Clause.²⁰⁶ This is why the opponents of H.R. 1534 said that the bill's exhaustion provision would "alter . . . the substantive standard under which [federal] district courts adjudicate takings claims against state and local authorities."²⁰⁷ When the supporters of H.R. 1534 countered that assertion by relying on the "prudential" nature of the exhaustion requirement, they were confusing the elements of an Article III case or controversy with those of a cause of action for a constitutional violation.²⁰⁸

Third, the supporters of H.R. 1534 erroneously believed that *Williamson's* discussion of the exhaustion requirement was "only dicta."²⁰⁹ The *Williamson* Court held that the takings claim before it was not ripe for two reasons: because of (1) the plaintiff's failure to meet the final decision requirement; and (2) the plaintiff's failure to meet the exhaustion requirement.²¹⁰ The plaintiff's failure to obtain a final decision was enough, standing alone, to justify the Court's ripeness holding. The supporters of H.R. 1534 reasoned that, because the Court's discussion of the exhaustion requirement "was neither essential nor necessary to support the decision," it was dicta.²¹¹ That reasoning contradicts "[t]he usual rule in th[e] Court" that "when two independent reasons are given to support a judgment, 'the ruling on neither is obiter [dicta], but each is the judgment of the court and of equal validity with the other.'"²¹² The supporters' reasoning also ig-

206. See *Senate Hearing, supra* note 39, at 112 (reproducing Letter from Michael W. Blommer, Assistant Director, Office of Legislative Affairs, Judicial Conference of U.S., to Sen. Orrin Hatch, Chairman, Sen. Judiciary Comm. (Oct. 6, 1997), stating Judicial Conference's position that cases brought under H.R. 1534 "might nevertheless be dismissed at the pleading stage for failure to satisfy the substantive elements of a taking under the Fifth and Fourteenth Amendments"); *House Hearing, supra* note 70, at 35-36 (statement of John C. Dwyer, Acting Assoc. Attorney General, DOJ) ("[I]f the [taking] claimant has failed to seek compensation from the State, the claimant will have failed to establish a constitutional claim for a taking without just compensation. The Federal court will have no choice but to dismiss the action.").

207. *House Hearing, supra* note 70, at 38 (prepared statement of John C. Dwyer, Acting Associate Attorney General, DOJ).

208. See *Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1013 (1998) (referring to "fundamental distinction" between argument that plaintiff lacks cause of action and argument that plaintiff lacks standing); see also *supra* notes 139-156 and accompanying text (discussing the distinction).

209. S. REP. NO. 105-242, at 12 (1998).

210. See *Williamson*, 473 U.S. at 186-97.

211. S. REP. NO. 105-242, at 13 (1998).

212. *California v. United States*, 438 U.S. 645, 689 n.10 (1978) (White, J., dissenting) (quoting *United States v. Title Ins. Co.*, 265 U.S. 472, 486 (1924)); accord *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

nores a later case in which the Court relied on *Williamson's* discussion of the exhaustion requirement to hold a takings claim unripe.²¹³

Finally, the supporters of H.R. 1534 simply disagreed with *Williamson's* reading of the Just Compensation Clause. *Williamson* concluded that "the nature of the constitutional right" conferred by the Just Compensation Clause "requires that a property owner utilize procedures for obtaining compensation" before claiming a violation of the Clause.²¹⁴ The supporters, in contrast, concluded that "the text of the takings clause does not require that property owners must exhaust State or local compensation procedures."²¹⁵ It does not matter which conclusion is correct.²¹⁶ Congress' mere disagreement with the Supreme Court's interpretation of the Constitution does not empower Congress to enact legislation overruling the Court's interpretation.²¹⁷

3. *The collateral attack on Williamson by the supporters of H.R. 1534*

In addition to attacking *Williamson* directly, the supporters of H.R. 1534 challenged it collaterally. They lumped it, as well as *First*

213. See *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11-17 (1990) see also *United States v. Riverside Bayview Homes Inc.*, 474 U.S. 121, 127-29 (citing *Williamson* in holding that, because compensation would be available for instances in which federal regulatory program caused a taking, statute establishing program should not have been narrowly construed to avoid supposed constitutional concerns).

214. 473 U.S. at 194 n.13.

215. S. REP. NO. 105-242, at 13 (1998). Based on their view that the Just Compensation Clause does not require exhaustion, the supporters of H.R. 1534 contended that a government taking "is still considered an unconstitutional taking," regardless of payment of compensation. 144 CONG. REC. S8026 (daily ed. July 13, 1998) (statements of Sen. Hatch). Since the taking itself violated the Constitution, their argument ran, "the compensation requirement of the Takings Clause is merely a remedy that may or may not be awarded in a state or federal court, depending on the fairness of the situation." S. REP. NO. 105-242, at 14 (1998). On this view, when a federal court awarded just compensation for a taking, it would merely be exercising its traditional authority to remedy constitutional violations. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."); see also *Bell v. Hood*, 327 U.S. 678, 684 (1945) (referring to federal courts' power to remedy constitutional violations).

216. The supporters of H.R. 1534 buttressed their interpretation by observing that the exhaustion requirement, coupled with the preclusion doctrines, often prevents takings claimants from having their claims against state and local agencies decided by the federal courts. See S. REP. NO. 105-242, at 13 (1998). The supporters doubted that this situation accorded with "the intent of the drafters and ratifiers who promulgated and adopted Federal rights amendments [*i.e.*, the Fifth and Fourteenth Amendments] and established the Federal forums to protect them." *Id.*

217. See *City of Boerne v. Flores*, 521 U.S. 507, 523-24, 529, 535-36 (1997) (discussing separation-of-powers concerns that would arise if Congress had unrestrained power to reinterpret its constitutional powers in an way that deviated from Court's interpretation).

English, together with a body of Court precedent that was “seemingly contradictory.”²¹⁸ Indeed, the Court’s precedent on the power of federal courts to decide takings claims “ha[s] not been consonant.”²¹⁹ Furthermore, the dissonance has created confusion in the lower courts.²²⁰ Properly read, however, none of the Court’s precedent establishes that federal courts can award just compensation to takings claimants who have not exhausted available and adequate state compensation remedies.²²¹ The precedent accordingly does not undermine *Williamson*’s holding that exhaustion is an element of a cause of action for a violation of the Just Compensation Clause.

The supporters observed that, in *Loretto v. Teleprompter Manhattan CATV Corp.*,²²² the Court decided a taking issue without deciding whether the plaintiff was owed compensation for the taking.²²³ *Loretto* does not, however, establish that federal courts can decide takings claims regardless whether the claimant has exhausted compensation remedies. The *Loretto* case came to the U.S. Supreme Court from the state courts, where Ms. Loretto had sought and been denied compensation.²²⁴ Thus, Ms. Loretto satisfied the exhaustion requirement before presenting her taking claim to a federal court (which in that case was the U.S. Supreme Court). Accordingly, the Court’s decision to address the merits of her taking claim in no way undermines *Williamson*’s holding that a taking claimant must exhaust state com-

218. S. REP. NO. 105-242, at 14 (1998).

219. *In re Chateaugay Corp.*, 53 F.3d 478, 492 (2d Cir. 1995), *cert. denied*, 516 U.S. 913 (1995).

220. *See* *Bay View, Inc. v. Ahtna, Inc.*, 105 F.3d 1281, 1285 (9th Cir. 1997) (discussing “common and oft-overlooked error” by federal courts in determining when they have jurisdiction to address takings claims and tracing that error to Court’s precedent); *see also* *Eastern Enters. v. Apfel*, 118 S. Ct. 2131, 2158 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (declining to join plurality’s discussion of “a jurisdictional question . . . which has divided the Courts of Appeals”); *id.* at 2145 (plurality opinion) (discussing disagreement among federal courts of appeals on whether plaintiffs with takings claims against federal government can seek relief in federal district court without first seeking compensation). *Compare* *Chevron Chem. Co. v. Costle*, 499 F. Supp. 732, 743 (D. Del. 1980) (holding that Court’s precedent authorized district court to determine whether Tucker Act compensation remedy was available but, if court determined that such remedy was available, “a declaratory judgment or other injunctive relief on the taking issue was unwarranted”), *aff’d*, 641 F.2d 104 (3d Cir.), *cert. denied*, 452 U.S. 961 (1981), *with* *Amchem Prods., Inc. v. Costle*, 481 F. Supp. 195, 199 (S.D.N.Y. 1979) (suggesting that, without regard to availability of compensation under the Tucker Act, Court’s precedent allowed district court to issue declaratory judgment determining whether taking was caused by same statute that was at issue in *Chevron*).

221. *See infra* notes 224-64 and accompanying text.

222. 458 U.S. 419, 437 n.15 (1982).

223. *See* S. REP. NO. 105-242, at 13-14 (1998).

224. 458 U.S. at 424.

pensation remedies before a federal court can review the taking claim.²²⁵

The supporters also cited *Duke Power Co. v. Carolina Environmental Study Group, Inc.*²²⁶ as a case establishing “that a Federal court may decide takings issues before compensation is ascertained.”²²⁷ To the contrary, the Court in *Duke Power* declined to decide the takings claim because of the availability of compensation for the asserted taking.²²⁸ Specifically, the Court determined that, if the federal statute that the plaintiffs challenged did cause a taking at some future point, compensation from the federal government would be available under the Tucker Act.²²⁹ *Duke Power* reflects that, when there is an “actual controversy” about the availability of compensation for an alleged taking, a federal district court can issue a declaratory judgment resolving the controversy.²³⁰ If the court determines

225. *See id.*; *cf.* *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 312 n.6 (1987) (holding that plaintiff’s taking claim was ripe for review by U.S. Supreme Court because state courts in that case had dismissed plaintiff’s taking claim, establishing “that ‘the inverse condemnation procedure is unavailable’”) (quoting *Williamson*, 473 U.S. at 197); *see also* *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1011-12 (1992) (holding that plaintiff’s taking claim was ripe in light of state supreme court’s decision holding that challenged state law did not cause a taking).

226. 438 U.S. 59 (1978).

227. S. REP. NO. 105-242, at 15 (1998). In *Duke Power*, the plaintiffs challenged a federal statute that capped the tort liability of private nuclear power plants for nuclear accidents. *See* 438 U.S. at 67-68. The plaintiffs brought their challenge to this federal statute in a federal district court, arguing, among other things, that the statute violated the Just Compensation Clause. *See id.* at 68. They based that argument on the assertion that a nuclear accident would destroy their property. *See id.* at 68 n.12 68-69, 94 n.39. They contended that, to the extent that the federal statute capped their recovery in state tort actions for the loss of their property, it took that property without just compensation. *See id.* at 94 n. 34. They asked the federal district court for a declaratory judgment that the federal statute was unconstitutional. *See id.* at 67. They did not seek compensation for the taking that the federal statute would allegedly cause. *See Duke Power*, 438 U.S. at 71 n. 15.

228. *See Duke Power*, 438 U.S. at 94 n.39.

229. *See id.*

We find it unnecessary to resolve the claim that . . . [a nuclear] accident would constitute a ‘taking’ . . . since on our reading the [challenged federal statute] does not withdraw the existing Tucker Act remedy . . . [Plaintiffs] concede that if the Tucker Act remedy would be available in the event of a nuclear disaster, then their constitutional challenge . . . under the Just Compensation Clause must fail. The further question of whether a taking claim could be established under the Fifth Amendment is a matter appropriately left for another day. (citations omitted).

230. *See* 28 U.S.C. § 2201(a) (Declaratory Judgment Act) (empowering a federal court to issue a declaratory judgment “[i]n a case of actual controversy within its jurisdiction”). The Court in *Duke Power* held that the Declaratory Judgment Act “allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained.” 438 U.S. at 71 n.15. The plaintiffs in *Duke Power* initially confronted “potentially uncompensable”

that compensation would be available, however, *Duke Power* indicates that the court cannot decide whether a taking has actually occurred.²³¹ The court's inability to decide the taking issue in that situation stems from the fact that a taking for which compensation is available does not violate the Constitution.²³² Thus, *Duke Power* is consistent with the principle of *Williamson* that, until a taking claimant has exhausted available compensation remedies, no violation of the Just Compensation Clause has occurred.²³³

Despite *Duke Power*, in some later cases the Court has decided takings claims without addressing whether compensation was available for the alleged taking.²³⁴ All of these cases, with the possible exception of *Phillips v. Washington Legal Foundation*,²³⁵ can be reconciled with *Duke Power*.²³⁶ Several of these cases do, however, raise an unsettled issue about federal-court power over takings claims. The

damages only because of uncertainty about the availability of compensation under the Tucker Act. *See id.* at 94 n.39. The Court's declaration that a Tucker Act remedy was available amounted to "a declaration of the constitutionality of the disputed governmental action." *Id.* The challenged federal law was constitutional—*i.e.*, it did not violate the Just Compensation Clause—because it left the Tucker Act remedy undisturbed. *Cf.* *Dames & Moore v. Regan*, 453 U.S. 654, 689-90 (1981) (holding that, because plaintiff contended that government action would effect a taking for which no compensation was available, there was a ripe question about whether Tucker Act remedy was available); *Cities Serv. Co. v. McGrath*, 342 U.S. 330, 335-36 (1952) (declaring that parties before the Court would have right of recoupment against federal government if, after making payment to federal government under federal statute, they were later held liable to private party for additional payment). Thus, *Duke Power* signifies that a taking for which compensation is available does not violate the Constitution.

231. *See Duke Power*, 438 U.S. at 94 n.39; *see also Preseault*, 494 U.S. at 11-17 (declining to address plaintiffs taking challenge to federal statute after determining that challenged statute did not withdraw Tucker Act remedy); *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 21-22 (1940) (declining to decide whether challenged government action caused a taking because, if it did, compensation was available under Tucker Act); *but see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004-14 & 1017-19 (1984) (deciding whether federal statute caused a taking in action by non-exhausting plaintiffs); *see also Bay View*, 105 F.3d at 1285-1286 (stating that *Monsanto* is inconsistent with other precedent of Court).

232. *See supra* note 232 (discussing *Duke Power*'s construction of Declaratory Judgment Act).

233. *See Williamson*, 473 U.S. at 194-95 & n.13; *see also supra* note 232.

234. *See Phillips v. Washington Legal Found.*, 524 U.S. 156, 118 S. Ct. 1925, 1929-34 (1998); *Babbitt v. Youpee*, 519 U.S. 234, 236-45 (1997); *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 641-47 (1993); *Hodel v. Irving*, 481 U.S. 704, 713-18 (1987); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 221-28 (1986); *see also Eastern Enter., Inc. v. Apfel*, 118 S. Ct. 2131, 2145 (1998) (plurality opinion) (discussing these cases); S. Rep. No. 105-242, at 14-15 (1998) (citing most of these cases).

235. 524 U.S. 156 (1998).

236. *See supra* note 236 (citing these cases); *infra* notes 240-264 and accompanying text (explaining why these cases, with one possible exception, are consistent with *Duke Power*).

issue is whether a federal court can enjoin a statute that causes a taking if compensation is not available for the taking. One of us believes that the cases indicating that federal courts do have such power are incorrect.²³⁷ In any event, these cases concern the power of federal courts when compensation for a taking is *not* available. The cases therefore do not undermine *Williamson's* holding that federal courts lack power to decide a takings claim when the plaintiff has not proven the unavailability of compensation.

The key to the post-*Duke Power* cases in which the Court has addressed takings claims without addressing the availability of compensation is *Eastern Enterprises v. Apfel*.²³⁸ A plurality of the Court in *Eastern Enterprises* upheld an as-applied, regulatory takings challenge to a federal statute by a plaintiff who had not sought compensation for the alleged taking.²³⁹ The plurality held that the plaintiff's failure to seek compensation did not prevent the U.S. Supreme Court from deciding the takings claim—nor did it so prevent the federal district court or court of appeals—because compensation was not available for the alleged taking.²⁴⁰ Compensation was not available, the plurality determined, because the federal statute that the plaintiff challenged had presumptively withdrawn the Tucker Act remedy.²⁴¹ The Court based that presumption on the nature of the challenged statute.²⁴² The statute required the plaintiff, a coal mining company, to make payments into a statutorily created fund to pay the health care costs of widows and relatives of the mining company's former

237. See Richard H. Seamon, *An Analysis of the Jurisdictional Analysis in Eastern Enterprises v. Apfel*, 61 ALA. L. REV. (forthcoming Spring 2000).

238. 118 S. Ct. 2131 (1998), cited in 144 CONG. REC. S8026 (daily ed. July 13, 1998) (remarks of Sen. Hatch), and S. Rep. No. 105-242, at 14 (1998).

239. See *id.* at 2144-53 (plurality opinion). Whereas a plurality of four Justices determined that the challenged statute violated the Just Compensation Clause, a fifth Justice (Justice Kennedy) determined that the statute violated substantive due process. See *id.* at 2154, 2158-61 (Kennedy, J., concurring in the judgment and dissenting in part). Because Justice Kennedy did not rely on the Just Compensation Clause, he did not address the question whether the lower courts and the Court itself had jurisdiction to review the takings claim. See *id.* at 2158 (Kennedy, J., concurring in the judgment and dissenting in part) (declining to join the plurality's jurisdictional ruling). The Justices who dissented in *Eastern Enterprises* did not discuss the jurisdictional issue, either. See *id.* at 2160-61 (Stevens, J., dissenting); *id.* at 2161-68 (Breyer, J., dissenting).

240. See *id.* at 2144-46 (plurality opinion).

241. See *id.* at 2144 (plurality opinion) (“[T]he presumption of Tucker Act availability must be reversed where the challenged statute, rather than burdening real or physical property, requires a direct transfer of funds’ mandated by the Government”) (quoting *In re Chateaugay*, 53 F.3d at 493).

242. See *id.* at 2145 (plurality opinion) (upholding district court jurisdiction “[b]ased on the nature of the taking alleged in this case”).

employees.²⁴³ The plurality reasoned that, when Congress enacts a law requiring someone to transfer funds to the government or a third party, it presumably intends to bar that person from recovering the funds from the government under the Tucker Act.²⁴⁴ Thus, the plurality addressed a takings claim by a non-exhausting plaintiff because compensation was presumptively unavailable and it therefore would have presumably been futile for the plaintiff to seek it.²⁴⁵

The reasoning of the *Eastern Enterprises* plurality explains two of the cases in which the Court has decided takings claims without addressing the availability of compensation: *Concrete Pipe & Prods. v. Construction Laborers Pension Trust Fund*²⁴⁶ and *Connolly v. Pension Benefit Guar. Corp.*²⁴⁷ Like *Eastern Enterprises*, *Concrete Pipe* and *Connolly* involved as-applied, regulatory takings challenges to federal statutes that required the plaintiffs to transfer funds to third parties.²⁴⁸ Under *Eastern Enterprises*, such “transfer-of-funds” statutes presumptively withdrew the Tucker Act remedy that otherwise would have been available to the plaintiffs in the Court of Federal Claims.²⁴⁹ Because compensation was unavailable, the plaintiffs did not have to

243. See *id.* at 2141-43 (plurality opinion).

244. See *id.* at 2145 (plurality opinion).

245. See *supra* notes 46-51 and accompanying text (describing futility exception to exhaustion requirement). In addition to reflecting the futility exception, *Eastern Enterprises* indicates that, when compensation is not available for an alleged taking by the federal government, a federal district court can decide whether a taking has indeed occurred. See *Eastern Enterprises*, 118 S. Ct. at 2146-53 (plurality opinion) (addressing takings claim on the merits after determining that compensation for alleged taking was unavailable). Similarly, a district court should be able to decide whether action by a state or local government has caused a taking when compensation for the alleged taking is unavailable from the state. If so, and if the holding in *Duke Power* is likewise applicable to alleged takings by state and local governments, the *Eastern Enterprises* plurality and *Duke Power* establish clear rules for the federal district courts to follow when confronted with takings claims brought against state and local agencies by non-exhausting plaintiffs. The district court can resolve any controversy about the availability of just compensation from the state for the alleged taking or the adequacy of the state compensation procedures. If the district court determines that compensation would be available and that the procedures are adequate, it should refuse to address the taking claim on the merits. If, on the other hand, the district court determines that compensation is unavailable or that the procedures for obtaining it are inadequate, the district court may decide whether a taking has occurred and embody that decision in a declaratory judgment.

246. 508 U.S. 602 (1993), cited in 144 CONG. REC. S8026 (daily ed. July 13, 1998) (remarks of Sen. Hatch), and S. REP. NO. 105-242, at 15 (1998).

247. 475 U.S. 211 (1986).

248. *Concrete Pipe*, 508 U.S. at 605-11 (describing statute); *id.* at 641-47 (addressing takings challenge to statute); *Connolly*, 475 U.S. at 214-16 (describing statute); *id.* at 221-28 (addressing takings challenge to statute).

249. See *Eastern Enterprises*, 118 S. Ct. at 2144-46 (plurality opinion).

seek it before asking a federal district court to decide the merits of their taking claim.

The *Eastern Enterprises* plurality may also account for the Court's decision addressing a takings claim without regard to the availability of compensation in *Phillips v. Washington Legal Foundation*. Like *Eastern Enterprises* (and *Concrete Pipe* and *Connolly*), *Phillips* involved an as-applied takings challenge to a statute that required the plaintiffs to transfer funds to a third party.²⁵⁰ Unlike those three cases, however, *Phillips* concerned a state law, not a federal law.²⁵¹ It might be appropriate under *Eastern Enterprises* for a federal court to presume that, when a state enacts a transfer-of-funds statute, the state intends to withdraw any compensation remedy that would otherwise be available in state court.²⁵² If such a presumption were appropriate, the Court's decision in *Phillips* to address the merits of a takings claims would be justified because compensation for the alleged taking was not available.

Unless such a presumption is read into *Phillips*, the Court's decision to address the merits of an as-applied takings claim in that case conflicts with the Court's refusal to do so in its earlier *Williamson* decision. The Court in *Williamson* refused to address the claim because the plaintiff had not exhausted state compensation procedures and had not shown that those procedures were unavailable or constitutionally inadequate.²⁵³ The same was true of the plaintiffs in *Phillips*.²⁵⁴

250. 524 U.S. 156, 118 S. Ct. 1925, 1927-29 (1998), cited in 144 CONG. REC. S8026 (daily ed. July 13, 1998); S. REP. NO. 105-242, at 14 (1998). The state law challenged in *Phillips* transferred the interest earned on lawyer trust accounts to a nonprofit corporation established by the Texas Supreme Court. The corporation used the money primarily to fund legal services for low-income people. See *Phillips*, 118 S. Ct. at 1928-29.

251. See *id.* at 1929.

252. The *Eastern Enterprises* plurality reasoned that it would be "pointless" for Congress in one statute to require a person to transfer funds to the government or a third party but thereafter permit the person to recover the funds from the government under the Tucker Act. See 118 S. Ct. at 2145 (plurality opinion). The same reasoning appears applicable when a state government enacts a transfer-of-funds law. Moreover, similar reasoning may justify a presumption that compensation is unavailable in other contexts involving takings challenges to state and local action. For example, a presumption that compensation was unavailable might be appropriate if a state expressly "disavow[ed] traditional property interests long recognized under state law" by declaring that what had been regarded as a property interest would no longer be regarded as such. *Phillips*, 118 S. Ct. at 1931; see also *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) ("[A] State by *ipse dixit*, may not transform private property into public property without compensation[.]").

253. See *Williamson*, 473 U.S. at 194 ("A second reason that the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so."); *id.* at 196-97 ("Respondent has not shown that the inverse con-

We believe that *Phillips* is better read as resting on a presumption that compensation was unavailable than as silently creating a conflict with *Williamson*. So read, *Phillips*—like *Eastern Enterprises*, *Concrete Pipe*, and *Connolly*—merely reflects the futility exception to the exhaustion requirement and, like those cases, is consistent with *Williamson*'s application of the exhaustion requirement in a case that did not fall within the futility exception.

The futility exception also accounts for the two remaining cases in which the Supreme Court has decided takings claims without addressing the availability of compensation: *Babbitt v. Youpee*²⁵⁵ and *Hodel v. Irving*.²⁵⁶ In each case, the Court decided the merits of an as-applied, regulatory takings challenge to a federal law by plaintiffs who had not sought compensation for the alleged taking.²⁵⁷ The Court did not address the exhaustion requirement in either case.²⁵⁸ The Court's decision to reach the merits of the takings claim in *Youpee* and *Irving* cannot be justified by the *Eastern Enterprises* presumption. Unlike the federal law at issue in *Eastern Enterprises*, the federal law challenged in *Youpee* and *Irving*, the Indian Land Consolidation Act ("ILCA"), did not compel a transfer of *funds* to the government or a third party.²⁵⁹ Instead, the ILCA caused certain interests in *land* owned by private individuals to be transferred to Native American tribes.²⁶⁰ It is doubtful that Congress' enactment of such a transfer-of-property-interests statute should, like its enactment of a transfer-of-

demnation procedure [recognized under state law] is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature.").

254. The plaintiffs in *Phillips* apparently brought their taking claim in federal district court without first seeking compensation in state court. *See* Wash. Legal Found. v. Tex. Equal Access to Justice Found., 873 F. Supp. 1, 3 (W.D. Tex. 1995) (describing procedural history), *aff'd in part & rev'd in part*, 94 F.3d 996 (5th Cir. 1996), *aff'd*, 524 U.S. 156, 118 S. Ct. 1925 (1998); Brief for Petitioners, *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998) (No. 96-1578, at 10-12 (same)); Brief for Respondents, *Phillips*, at 7-10 (same). At the time of their suit, however, Texas courts recognized a cause of action in inverse condemnation. *See* *DuPuy v. City of Waco*, 396 S.W.2d 103, 107-10 (1965) (holding that Texas Constitution authorized property owner to bring inverse-condemnation action to recover compensation for taking).

255. 519 U.S. 234 (1997), cited in 144 CONG. REC. S8026 (daily ed. July 13, 1998) (remarks of Sen. Hatch); S. REP. NO. 105-242, at 15 (1998).

256. 481 U.S. 704 (1987), cited in 144 CONG. REC. S8026 (daily ed. July 13, 1998) (remarks of Sen. Hatch); S. REP. NO. 105-242, at 15 (1998).

257. *See Youpee*, 519 U.S. at 236-45; *Irving*, 481 U.S. at 708-18.

258. *See Eastern Enterprises*, 118 S. Ct. at 2145 (citing *Youpee* and *Irving* as cases in which Court "granted equitable relief for Takings Clause violations without discussing the applicability of the Tucker Act").

259. *See* 25 U.S.C. § 2206, *discussed in Youpee*, 519 U.S. at 236-41.

260. *See id.*

funds statute, invariably be presumed to withdraw the Tucker Act compensation remedy.²⁶¹ Nonetheless, *Youpee* and *Irving* fell within the futility exception, because the federal government conceded in each case that compensation was not available to the plaintiffs under the Tucker Act.²⁶²

We have shown that, in the cases after *Duke Power* in which the Court has decided takings claims without addressing the availability of compensation, including *Phillips*, it was either conceded or fair to presume that compensation was not available. That showing establishes that these post-*Duke Power* cases do not undermine *Williamson's* application of the exhaustion requirement in a case where compensation was not shown to be unavailable. Nonetheless, there is a significant, unsettled issue raised by two of these post-*Duke Power* cases, as well as by the plurality opinion in *Eastern Enterprises*. The Court in *Youpee* and *Irving*, and a plurality of the Court in *Eastern Enterprises*, upheld federal-court injunctions against federal statutes that were found to cause a taking.²⁶³ As one of us has argued elsewhere, that ruling conflicts with precedent establishing that federal courts lack the power to enjoin an authorized governmental taking of private property for public use when compensation for the taking is available.²⁶⁴ For present purposes, however, this aspect of the Court's precedent is irrelevant. It concerns the power of a federal court to remedy a taking for which compensation is *unavailable*. The precedent therefore does not cast doubt on *Williamson's* requirement that taking claimants exhaust compensation remedies that *are* available. Nor does the precedent support the power granted to federal courts under H.R. 1534's exhaustion provision to award just compensation regardless of the availability of compensation.

261. Cf. *Eastern Enterprises*, 118 S. Ct. at 2144 (plurality opinion) (suggesting that presumption of Tucker Act unavailability is not appropriate if challenged statute "burden[s] real or physical property") (quoting *In re Chateaugay*, 53 F.3d at 493).

262. See Brief for the Petitioners in *Youpee* at 13 n.5 (No. 95-1595); Brief for the Appellant in *Irving* at 25 n. 16 (No. 85-637). The Court did not expressly acknowledge the government's concession of Tucker Act unavailability in either *Youpee* or *Irving*, perhaps because, had it done so without resolving the issue, it could have been accused of reaching the takings issue under the later-rejected doctrine of "hypothetical jurisdiction." See *Steel Co.*, 118 S. Ct. at 1012-1016.

263. See *Eastern Enterprises*, 118 S. Ct. at 2146; *Youpee*, 519 U.S. at 243-45; *Irving*, 481 U.S. at 716-18.

264. See Richard H. Seamon, *An Analysis of the Jurisdictional Analysis in Eastern Enterprises v. Apfel*, 61 ALA. L. REV. (forthcoming Spring 2000); see also, e.g., *Monsanto*, 467 U.S. at 1016 ("Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking.") (footnote omitted).

4. *Summary*

The part of *Williamson* that H.R. 1534's exhaustion provision would have overruled is still good law. *Williamson* held that a takings challenge against a local agency was "not yet ripe" and stated "no claim against the Government" because the plaintiff "did not seek compensation through the procedures the State has provided for doing so" and did not show that those procedures were "unavailable or inadequate."²⁶⁵ That holding reflects that, to prove that a local agency's taking of private property for public use violates the Constitution, the victim of the taking must show one of three things: (1) he or she has been denied just compensation after exhausting state compensation procedures; (2) it would be futile to exhaust state compensation procedures because compensation would not be available under the state procedures; or (3) the state compensation procedures are unfair or otherwise inadequate. The first showing, which entails satisfaction of the exhaustion requirement, is thus an element, but not an invariable element, of a cause of action for a violation of the Just Compensation Clause.

The exhaustion holding in *Williamson* is not undermined by any of the precedent cited by the supporters of H.R. 1534, with the possible exception of *Phillips*. The precedent establishes that federal district courts can issue declaratory judgments to resolve uncertainty about whether compensation would be available for an alleged taking. Furthermore, when a court determines that compensation is not available or that adequate compensation procedures do not exist, the court can address a takings claim on the merits. Only *Phillips* can be read to suggest that federal courts can decide takings claims on the merits regardless of the availability or adequacy of compensation procedures. *Phillips* is better read, however, as a case in which a federal court's decision on the merits of a takings claim was justified by the unavailability of compensation.

C. The Dual Nature of the Exhaustion Requirement

We must still examine an apparent paradox about the exhaustion requirement. We showed in Section A that the exhaustion requirement is not dictated by Article III; instead, it is akin to prudential rules of justiciability because, like those rules, it saves federal-court resources.²⁶⁶ We showed in Section B that the exhaustion require-

265. *Williamson*, 473 U.S. at 194-97.

266. See *supra* notes 122-79 and accompanying text.

ment is rooted in the text of the Just Compensation Clause and is an element of a cause of action for a violation of that Clause.²⁶⁷ Thus, the exhaustion requirement partakes of prudential justiciability, but, unlike other prudential justiciability rules, it is rooted in the Just Compensation Clause; it is not associated with Article III. This dual or hybrid nature is paradoxical, for it causes the exhaustion requirement to straddle the borders between procedure and substance and between nonconstitutional and constitutional rules.

The paradox inheres in the Court's reading of the Just Compensation Clause. As the Court reads the Clause, it is not violated—and a cause of action for a violation of the Clause does not arise—until the victim of a taking has unsuccessfully exhausted available and adequate compensation remedies.²⁶⁸ Yet the Court has also read the Clause to give rise to a cause of action in inverse condemnation whenever the government takes property without instituting condemnation proceedings.²⁶⁹ Thus, when a state or local agency engages in a regulatory taking, the Clause itself furnishes a claim for compensation enforceable in any state court of appropriate jurisdiction.²⁷⁰ The exhaustion requirement imposed by that same Clause, however, generally bars federal district courts from hearing those inverse-condemnation claims, even though the claims would otherwise fall within the district courts' federal-question jurisdiction.²⁷¹ The federal district courts generally must wait until a state court's denial of just compensation causes an inverse-condemnation claim to ripen into a

267. See *supra* notes 180-267 and accompanying text.

268. See *supra* notes 185-195 (describing case law establishing that exhaustion is element of cause of action for violation of Just Compensation Clause).

269. See *First English*, 482 U.S. at 315-17; see also *supra* notes 62-68 and accompanying text and *infra* notes 282-284 and accompanying text (discussing *First English*).

270. See *id.* at 315 (“[A] landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provision with respect to compensation.”) (internal quotation marks omitted); *id.* at 316 (“[I]n the event of a taking, the compensation remedy is required by the Constitution.”) One commentator has argued that, under *Williamson County*, a federal taking claim is not ripe in *either* state court *or* federal court until a property owner has been denied just compensation after exhausting state-law remedies. See *Kovacs, supra*, note 39, at 18, 23, 30. We respectfully disagree. This argument ignores that the Just Compensation Clause gives rise to two discrete causes of action: (1) a cause of action in inverse condemnation, which arises when the taking occurs and which can be asserted in a state court of appropriate jurisdiction; and (2) a cause of action for a violation of the Just Compensation Clause, which arises only after the state has denied compensation for the taking.

271. See 28 U.S.C. § 1331 (federal-question statute); *Williamson*, 473 U.S. at 196 (taking claim not ripe in light of availability of state inverse-condemnation procedure).

claim based on a violation of the Just Compensation Clause.²⁷² In sum, the Court has interpreted the Clause to generate two distinct causes of action – a cause of action in inverse condemnation and a cause of action for a violation of the Clause – as well as a “prudential” restriction that prevents federal courts from hearing the first cause of action.²⁷³

The multifaceted nature of the Just Compensation Clause, as construed by the Court, accounts for the legislative dispute about the effect that enactment of H.R. 1534’s exhaustion provision would have had. The provision seems procedural if one views it as merely removing the “prudential” barrier that prevents federal district courts from exercising their federal-question jurisdiction over inverse-condemnation claims against local agencies.²⁷⁴ The provision seems substantive, however, if one views it as eliminating an element of a cause of action for a violation of the Just Compensation Clause and thereby empowering federal district courts to award just compensation against local agencies in cases in which the courts currently lack such power and in which no violation of the Constitution by the local agency has been proven.

The federal district courts’ inability to hear inverse-condemnation claims against local agencies is reflected in, but not explained by, the text of the statute under which many of these claims are asserted, 42 U.S.C. § 1983.²⁷⁵ Section 1983 requires proof of a “deprivation” of a

272. See *Williamson*, 473 U.S. at 194 n.13 (“[B]ecause the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.”) (emphasis in original). As discussed above, *supra* notes 44-68 and accompanying text, the general rule requiring exhaustion is subject to several exceptions.

273. In addition, a third cause of action arises when, at the time of a taking, the state fails to provide adequate compensation procedures. See *supra* notes 59-61 and 194-195 and accompanying text.

274. See, e.g., 143 CONG. REC. H8952 (daily ed. Oct. 22, 1997) (remarks of Rep. Dooley) (H.R. 1534 “creates no new cause of action against local governments. H.R. 1534 is only a procedural bill.”).

275. As noted above, *supra* note 39, there is some dispute about the extent to which section 1983 is used as the basis for regulatory takings claims against local agencies. Compare *Senate Hearing*, *supra* note 39, at 87 n.23 (reproducing Congressional Research Service Report according to which “[t]he majority of takings actions against nonfederal defendants are brought under section 1983”) and Mark S. Dennison, *Zoning: Proof of Wrongful Land Use Regulation Pursuant to Section 1983*, in 30 AM. JUR.3d, *Proof of Facts* § 2, at 508-09 (1995) (stating that Section 1983 “has been used extensively * * * in inverse condemnation cases”), with THOMPSON ON REAL PROPERTY, *supra* note 39, § 81.05(d), at 271 (describing section 1983 as “little used * * * alternative” to action in inverse condemnation).

federal right.²⁷⁶ The Just Compensation Clause does not give property owners a right to be free from governmental takings of their property for public use.²⁷⁷ Thus, such a taking does not, standing alone, cause a “deprivation” of a federal right under section 1983.²⁷⁸ It would nonetheless be a mistake to consider the exhaustion requirement a limitation imposed by section 1983. For one thing, the Court has not tied the exhaustion requirement to the text of section 1983 but, instead, to the text of the Just Compensation Clause.²⁷⁹ More fundamentally, any attempt to tie the exhaustion requirement to section 1983 would be a shell game. *First English* establishes that the Just Compensation Clause itself creates a cause of action in inverse condemnation.²⁸⁰ Because “it is the Constitution that dictates the remedy for interference with property rights amounting to a taking,” “[s]tatutory recognition [of the cause of action] [i]s not necessary.”²⁸¹ Section 1983 is therefore irrelevant to the power of federal courts over inverse-condemnation claims against local agencies. All that the federal courts would need to hear those claims, but for the exhaustion requirement, is a valid statutory grant of subject-matter jurisdiction,

276. 42 U.S.C. § 1983, reproduced *supra* note 39.

277. See, e.g., *First English*, 482 U.S. at 314 (Just Compensation Clause “does not prohibit the taking of private property, but instead places a condition on the exercise of that power”); *Williamson*, 473 U.S. at 194 (“The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.”); cf. *Rose Acre Farms, Inc. v. Madigan*, 956 F.2d 670, 673 (7th Cir. 1992) (observing that, although Just Compensation Clause “does not forbid” takings by federal government, “Congress could of course create an entitlement to be free” of such takings).

278. See *Williamson*, 473 U.S. at 194 n.13 (“[B]ecause the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.”) (emphasis in original); see also *Del Monte Dunes*, 119 S. Ct. at 1644 (“A federal court, moreover, cannot entertain a takings claim under § 1983 unless or until the complaining landowner has been denied an adequate post-deprivation remedy.”)

279. See *Williamson*, 473 U.S. at 194 n.13. Because a taking claimant must meet the exhaustion requirement to establish a “deprivation” under section 1983, the elimination of that requirement proposed in H.R. 1534 was “in tension with, and arguably [would have] amend[ed] by implication, section 1983 itself.” *Senate Hearing, supra* note 39, at 91 (reproducing CRS report).

280. See *First English*, 482 U.S. at 315 (“a landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provision with respect to compensation”) (internal quotation marks and citations omitted); *id.* at 316 (“in the event of a taking, the compensation remedy is required by the Constitution”); see also *Wis. Cent. Ltd. v. Public Serv. Comm’n*, 95 F.3d 1359, 1368 (7th Cir. 1996) (stating that “the Takings Clause provides both the cause of action and the remedy” for a state’s taking of private property) (citing *First English*).

281. *First English*, 482 U.S. at 315 (quoting *Jacobs*, 290 U.S. at 16), and 316 n.9.

which is supplied by the federal-question statute.²⁸² Thus, the exhaustion requirement does not stem from section 1983; instead, the exhaustion requirement prevents inverse-condemnation claims from being cognizable—either in their own right or under section 1983—in the federal district courts.²⁸³

We think that the key to understanding the exhaustion requirement lies in the Court's description of it as a rule of "prudence" rooted in the text of the Just Compensation Clause. Like the "prudential" rules of justiciability associated with Article III, the exhaustion requirement conserves federal-court resources.²⁸⁴ Unlike the prudential rules surrounding Article III, however, the exhaustion requirement serves federalism concerns rather than separation-of-powers concerns.²⁸⁵ Specifically, the exhaustion requirement prevents federal courts from intervening until it is clear that state courts will not provide relief for a taking. That bar to federal-court intervention finds support in the Just Compensation Clause. Although the *Williamson* Court described the exhaustion requirement as inhering in the "nature of the * * * right" conferred by the Clause,²⁸⁶ the requirement can also be explained in terms of the nature of the *obligation* imposed by the Clause. When a local agency takes private property for public use, the Clause imposes the obligation to pay just compensation on that agency and the state of which it is a part; the obligation does not fall on the federal courts or any other part of the federal government.²⁸⁷ At least as a prudential matter, federal courts should not assume from the mere occurrence of a taking that the local agency

282. 28 U.S.C. § 1331.

283. *See, e.g., Williamson*, 473 U.S. at 194-95 ("If the government has provided an adequate process for obtaining compensation, and if resort to that process yield[s] just compensation, then the property owner has no claim against the Government for a taking.") (internal quotation marks and citations omitted) (brackets supplied by Court in *Williamson*).

284. *See supra* notes 174-175 and accompanying text (explaining how exhaustion requirement conserves federal-court resources).

285. *See, e.g., Raines*, 117 S. Ct. at 2318 ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.") (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)); *Allen*, 468 U.S. at 750 ("The 'case or controversy' requirement defines with respect to the Judicial Branch the separation of powers on which the Federal Government is founded.").

286. *Williamson*, 473 U.S. at 194 n.13.

287. *See Del Monte Dunes*, 119 S. Ct. at 1642 ("Although the government acts lawfully when, pursuant to proper authorization, it takes property and provides just compensation, the government's action is lawful solely because it assumes a duty, imposed by the Constitution, to provide just compensation."); *Jacobs*, 290 U.S. at 16 (upon occurrence of taking, "a promise [to pay just compensation] was implied"), quoted in *First English*, 482 U.S. at 315.

and the state will breach their obligation to pay just compensation.²⁸⁸ Indeed, the contrary assumption is appropriate unless the state actually denies compensation; or the victim of the taking shows that compensation would not be available or that the procedures for obtaining it are inadequate.

A similar assumption underlies the Court's precedent on the Due Process Clause and is justified by the text of that Clause.²⁸⁹ The Clause obligates states to provide adequate procedures when they (or their local subdivisions) deprive people of life, liberty, or property.²⁹⁰ The Court has held that, for certain types of deprivations, adequate procedures consist of post-deprivation remedies for wrongful deprivations.²⁹¹ The main types of deprivations for which such post-deprivation remedies suffice are (in addition to government takings of private property for public use)²⁹²: (1) random and unauthorized deprivations of liberty or property²⁹³ and (2) unconstitutional collection of taxes.²⁹⁴ One could reasonably argue that federal courts should be

288. See *Alden v. Maine*, 119 S. Ct. 2240, 2266 (1999) ("We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States."); see also *Trainor v. Hernandez*, 431 U.S. 434, 440-41 (1977) (explaining that *Younger* abstention doctrine rests in part on assumed ability of state courts to enforce federal rights); cf. *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 107-16 (1981) (holding that principle of comity barred federal-court action under Section 1983 for damages caused by allegedly unconstitutional administration of state tax system, given availability of relief in state courts).

289. See *Williamson*, 473 U.S. at 195 (relating exhaustion requirement of takings-ripeness doctrine to due process case law), discussed *supra* note 61.

290. See U.S. CONST. amend. XIV, § 1 ("No State shall * * * deprive any person of life, liberty, or property, without due process of law."). In addition to its procedural component, the Due Process Clause has a substantive component that limits government action that is arbitrary or that intrudes on fundamental rights. See, e.g., *Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

291. See generally Richard H. Seamon, *The Sovereign Immunity of States in Their Own Courts*, 37 BRANDEIS L.J. 319, 394-405 (1999).

292. See, e.g., *Hurley v. Kincaid*, 285 U.S. 95, 104 (1940); see also *supra* notes 59-61 and accompanying text (discussing constitutional requirement that, at time of taking, states provide adequate procedures for post-taking compensation).

293. See *Zinermon*, 494 U.S. at 131-32 (holding that due process would be satisfied by post-deprivation tort remedies for random and unauthorized deprivations of liberty); *Hudson*, 468 U.S. at 530-34 (holding same with respect to random and unauthorized, but intentional, deprivations of property); *Parratt*, 451 U.S. at 538-44 (holding same with respect to random and unauthorized negligent deprivations of property), *overruled in part* by *Daniels*, 474 U.S. at 328, 330 (holding that negligent acts of state official causing unintended loss of, or injury to, life, liberty, or property do not violate Due Process Clause); cf. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-38 (1982) (holding that post-deprivation remedies did not satisfy due process when deprivation occurred under "established state procedure").

294. See, e.g., *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 587 (1995) ("As long as state law provides a clear and certain remedy, the States may deter-

able to remedy these wrongful deprivations as soon as they occur, and without regard to whether the victim of the deprivation has sought a remedy from the state.²⁹⁵ After all, the occurrence of the deprivation supplies injury in fact that satisfies Article III, and section 1983 could be read to supply a cause of action for the wrongful deprivation. The Court, however, has not construed the Due Process Clause that way with respect to deprivations for which post-deprivation remedies suffice. Instead, the Court has held that a violation of the Clause does not occur, and thus a cause of action under section 1983 does not arise, until the victim of the wrongful deprivation has unsuccessfully exhausted any post-deprivation procedures that are made available by the state and are adequate to remedy the deprivation.²⁹⁶ That holding, which effectively adopts an exhaustion requirement for certain due process claims, seems to reflect the same federalism concerns that underlie *Williamson's* exhaustion requirement.²⁹⁷

D. Summary and Transition

The exhaustion requirement is not dictated by Article III. It is, instead, a rule of prudence that, like the prudential rules of justiciability associated with Article III, conserves federal-court resources. Unlike the prudential rules surrounding Article III, however, the exhaustion requirement is rooted in the text of the Just Compensation Clause and reflects federalism concerns rather than separation-

mine whether to provide a pre-deprivation process (*e.g.*, an injunction) or instead to afford post-deprivation relief (*e.g.*, a refund)" for wrongful taxation) (internal quotation marks and citations omitted).

295. See Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979, 989 (1986) ("The Court is quite wrong in thinking that the point in time at which a substantive deprivation occurs is a function of the point in time at which the state can reasonably provide corrective process.").

296. See *Williamson*, 473 U.S. at 195 (with respect to random and unauthorized deprivations, "the State's action is not 'complete' in the sense of causing a constitutional injury unless or until the State fails to provide an adequate post-deprivation remedy for the property loss") (quoting *Hudson*, 468 U.S. at 532 n.12); see also *Parratt*, 451 U.S. at 542 (quoting with approval decision in *Bonner v. Coughlin*, 517 F.2d 1311, 1319 (7th Cir. 1975) (Stevens, J.), *modified en banc*, 545 F.2d 565 (7th Cir. 1976), *cert. denied*, 435 U.S. 932 (1978), stating that, when misconduct of state officers damages property, "the state action is not necessarily complete," given state remedies for such misconduct).

297. See Monaghan, *supra* note 297, at 987 (arguing that *Parratt* and its progeny are defensible if construed as adopting "a special abstention doctrine," because federal courts "seem ill-used if their task is to superintend the routine administration of state government where the states are themselves willing to correct abuses and no fundamental rights are involved"); see also Mark R. Brown, *De-Federalizing Common Law Torts: Empathy for Parratt, Hudson, and Daniels*, 28 B.C. L. REV. 813 (1987) (arguing that *Parratt* and its progeny reflect federalism concerns).

of-powers concerns. The Just Compensation Clause obligates states and local agencies, not the federal government, to pay just compensation for their takings. As a matter of prudence, federal courts should not assume a breach of that obligation upon the mere occurrence of such a taking. Such an assumption is warranted only when: (1) just compensation is denied; (2) it is clear that just compensation is unavailable; or (3) the state has failed at the time of the taking to have in place adequate procedures for providing just compensation.

The question remains whether Congress has the power to eliminate the exhaustion requirement. Neither the supporters nor the opponents of H.R. 1534 explored that question. The supporters assumed that, because H.R. 1534 made only a "procedural" change by eliminating a "prudential" requirement, Congress had the power to enact it.²⁹⁸ The opponents asserted that, because H.R. 1534 made a "substantive" change, Congress lacked the power to enact it.²⁹⁹ We hope that this Part of our article has demonstrated that neither side completely understood the exhaustion requirement or the effect that its elimination would have on takings law. This Part has tried to shed light on those issues as a prelude for exploring the unexamined issue of Congress' power.

IV. Congress' Power to Eliminate the Exhaustion Requirement

The supporters of H.R. 1534 apparently believed that the elimination of the exhaustion requirement fell within Congress' power to make rules for the federal courts.³⁰⁰ Congress' rulemaking power would have worked fine if the exhaustion requirement were only a rule of prudence akin to the prudential rules of justiciability associated with Article III.³⁰¹ Because the exhaustion requirement is also an element of a cause of action for a violation of the Just Compensation Clause and is rooted in that Clause, however, its elimination exceeds Congress' rulemaking power.³⁰² Congress potentially has the power to eliminate the exhaustion requirement under Section 5 of the Fourteenth Amendment.³⁰³ The power is only potential, though, because Congress has not yet met the stringent conditions for invoking

298. See *supra* note 121 and accompanying text.

299. See *supra* notes 110-116 and accompanying text.

300. See *infra* notes 308-324 and accompanying text.

301. See *infra* notes 325-330 and accompanying text.

302. See *infra* notes 325-343 and accompanying text.

303. See *infra* notes 344-456 and accompanying text.

Section 5 under the Court's recent decisions in *City of Boerne v. Flores*³⁰⁴ and *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*.³⁰⁵

A. Congress' Power to Make Rules for the Federal Courts

The legislative material on H.R. 1534 does not clearly identify the source of Congress' power to enact the bill's exhaustion provision. The House report on H.R. 1534 cited the Necessary and Proper Clause as the sole authority for the entire bill.³⁰⁶ At the hearings on the bill, in contrast, the only supporters to address the question asserted that H.R. 1534 fell within Article III, Section 1, which, according to those supporters, empowered Congress "to shape and qualify the jurisdiction of the United States district and circuit courts."³⁰⁷ For their part, the opponents of H.R. 1534 denied that Congress had power to eliminate the exhaustion requirement.³⁰⁸ In short, the issue of congressional power to eliminate the exhaustion requirement generated little discussion and no agreement in the legislative debate on H.R. 1534.

Nonetheless, it is fair to infer that the supporters of H.R. 1534 believed that the bill's exhaustion provision fell within Congress' power to make rules for the federal courts. The key evidence of that belief is the supporters' repeated insistence that the exhaustion requirement is a "prudential" rule the elimination of which would effect

304. 521 U.S. 507 (1997).

305. 119 S. Ct. 2199 (1999).

306. H.R. REP. NO. 105-323, at 9 (1997) ("the Committee finds the authority for this legislation in Article I, clause 18, section 8 of the Constitution"); see U.S. CONST. art. I, § 8, cl. 18 (Necessary and Proper Clause) (empowering Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

307. *Senate Hearing, supra* note 39, at 45 (reproducing Letter from John J. Delaney and Duane J. Desiderio, Linowes & Blocher law firm, to Andrew Fois, Assistant Attorney General, DOJ (Sept. 5, 1997)); *House Hearing, supra* note 70, at 167 (same); see also *Senate Hearing, supra* note 39, at 106 (reproducing Letter from Prof. Daniel R. Mandelker to Sen. Orrin Hatch, Chairman, Sen. Judiciary Comm. (Oct. 14, 1997), stating that *Williamson's* ripeness requirements are "jurisdictional hurdles" that "Congress is fully empowered to address * * * as it sees fit"). Article III, § 1, vests judicial power in the Supreme Court and "such inferior Courts as the Congress may from time to time ordain and establish." Although this provision refers to Congress' power to "ordain and establish" the lower federal courts, the provision itself does not confer that power. The power is conferred, instead, in Art. I, § 8, cl. 9 (Tribunals Clause) (empowering Congress "[t]o constitute Tribunals inferior to the Supreme Court").

308. See *supra* notes 110-116 and accompanying text (describing opponents' lack-of-power argument).

only a “procedural” change.³⁰⁹ They apparently had in mind Supreme Court precedent indicating that Congress can abolish prudential, as distinguished from constitutional, rules of justiciability.³¹⁰ Although most of that precedent concerns the prudential rules of standing, it also applies to prudential rules of ripeness.³¹¹

Unfortunately, the Court has never identified the source of Congress’ power to eliminate prudential justiciability rules.³¹² All the Court has said is that the congressional elimination of prudential rules, unlike the congressional elimination of rules mandated by Article III, would not violate Article III.³¹³ As Professor David Engdahl

309. *See, e.g.*, 143 CONG. REC. H8952 (daily ed. Oct. 22, 1997) (remark of Rep. Dooley) (“Simply put, [H.R. 1534] * * * amends Federal procedural laws governing the jurisdiction of the U.S. district courts.”); *see also supra* notes 83, 117-121 and accompanying text (describing and citing additional instances in which supporters asserted that H.R. 1534 made only “procedural” changes to a “prudential” rule).

310. *See* *Dep’t of Commerce v. U.S. House of Representatives*, 119 S. Ct. 765, 772 (1999) (stating that “Congress ha[d] eliminated any prudential concerns in th[at] case” by authorizing suits by any aggrieved persons); *Raines*, 117 S. Ct. at 2318 n.3 (stating that federal statute describing who could challenge Line Item Veto Act in federal court “eliminate[d] any prudential standing limitations,” but holding that statute did not give plaintiffs Art. III standing); *Bennett v. Spear*, 520 U.S. 154, 162, 164-65 (1997) (stating that prudential standing requirements, unlike Article III requirements “can be modified or abrogated by Congress;” holding that federal statute authorizing “any person” to bring federal-court suit “negate[d]” or “expand[ed]” prudential zone-of-interests test for standing); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372-73 (1982) (stating that federal statute extended standing “to the full limits of Art. III” and therefore courts “lack the authority to create prudential barriers” to suits under statute; upholding plaintiffs’ standing based on this construction) (internal quotation marks and citations omitted); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100, 109 (1979) (stating that “Congress may * * * expand standing to the full extent permitted by Art. III, thus permitting litigation by one who otherwise would be barred by prudential standing rules;” holding that plaintiffs had standing under federal statute that authorized standing to extent permitted by Art. III) (internal quotation marks and citations omitted); *Warth*, 422 U.S. at 501 (stating that, as long as Article III requirements are satisfied, “Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules”); *see also* *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 19 (1998) (evaluating plaintiff’s standing under federal statute that, in authorizing suit by “aggrieved” persons, suggested “a congressional intent to cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which ‘prudential’ standing traditionally rested”); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972) (agreeing with lower court that federal statute “defined standing as broadly as is permitted by Article III,” and upholding plaintiffs’ standing under that statutory interpretation).

311. *See, e.g.*, *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891 (1990) (observing that Congress can statutorily authorize judicial review of a regulation even though review otherwise would not be ripe before the regulation was enforced against the plaintiff).

312. *See* David E. Engdahl, *supra* note 124, at 166 (stating that “no attempt seems ever to have been made to articulate any rationale supporting a general power of Congress to dictate or dispense with prudential standing rules”).

313. *See* cases cited *supra* note 312.

has pointed out, however, those statements mean only that Article III does not constrain Congress' use of its enumerated powers to eliminate prudential justiciability rules.³¹⁴ The statements do not resolve the separate question of what enumerated powers enable Congress to do so.

The modern Court has traced Congress' general authority to make rules for the lower federal courts to the Tribunals Clause, as referenced in Article III and as supplemented by the Necessary and Proper Clause,³¹⁵ and for the U.S. Supreme Court to the Exceptions Clause (with respect to cases within the Court's appellate jurisdiction).³¹⁶ These powers underlie Congress' authority to prescribe rules limiting subject-matter jurisdiction,³¹⁷ rules of evidence,³¹⁸ rules of civil and criminal procedure,³¹⁹ and rules authorizing declaratory judgments.³²⁰ The same powers probably allow Congress to eliminate

314. See Engdahl, *supra* note 124, at 77 ("The fact that Congress lacks the power to dispense with rules that are 'constitutional' in character does not imply that it has the power to make or unmake rules about everything so long as those rules are non-constitutional in character").

315. U.S. CONST. art. I, § 8, cl. 9 (Tribunals Clause) (empowering Congress "[t]o constitute Tribunals inferior to the supreme Court"); *id.* art. III, § 1 (vesting judicial power in Supreme Court and "such inferior Courts as the Congress may from time to time ordain and establish"); *supra* note 308 (reproducing Necessary and Proper Clause); see, e.g., *Willy v. Coastal Corp.*, 503 U.S. 131, 136 (1991) (citing Tribunals Clause, together with Necessary and Proper Clause, as authorizing Congress to "enact laws regulating the conduct of those courts [*i.e.*, lower federal courts] and the means by which their judgments are enforced"); *Burlington N. R. Co. v. Woods*, 480 U.S. 1, 5 n.3 (1987) ("Article III * * *, augmented by the Necessary and Proper Clause * * * empowers Congress * * *, impliedly, to establish procedural Rules governing litigation in [the lower federal] courts"); *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) ("For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts * * * .").

316. U.S. CONST. art. III, § 2, cl. 2 (Exceptions Clause) (giving U.S. Supreme Court appellate jurisdiction over various cases "with such Exceptions, and under such Regulations as the Congress shall make"); see *Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (federal statute authorizing Supreme Court to grant, vacate, and remand cases fell within Tribunals and Exceptions Clauses); cf. *South Carolina v. Regan*, 465 U.S. 367, 396 (1984) (O'Connor, J., concurring in the judgment) (observing that Exceptions Clause does not apply to cases within Court's original jurisdiction).

317. See, e.g., *Kline v. Burke Constr. Co.*, 260 U.S. 226, 233-34 (1922) (Article III, § 2, does not grant jurisdiction to lower federal courts over any cases but instead "delimit[s] those in respect of which Congress may confer jurisdiction upon such courts as it creates").

318. Cf. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 31 (1976) (stating that Congress "has plenary power over the promulgation of evidentiary rules for the federal courts").

319. See *Palermo v. United States*, 360 U.S. 343, 353 & n.11 (1959) (recognizing Congress' power to make rules of criminal procedure); *Hanna*, 380 U.S. at 472 (recognizing Congress' power to make rules of civil procedure).

320. See *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937).

prudential justiciability rules. Prudential ripeness rules, in particular, involve the proper timing of a federal court suit.³²¹ Rules of timing are at least arguably procedural, which is all that is necessary under the Court's modern precedent for them to fall within Congress' rulemaking power.³²²

The Court's precedent nonetheless would not allow Congress to use its rulemaking power to eliminate the exhaustion requirement. The precedent that most directly blocks it is *Williamson* and other precedent establishing that the exhaustion requirement is an element of a cause of action for a violation of the Takings Clause.³²³ Nothing is more substantive than the elements of a cause of action.³²⁴ To hold that the rulemaking power authorizes the elimination of the exhaustion requirement, the Court would have to adopt the position that, contrary to its precedent, the requirement is only a rule of justiciability.

Such a repudiation of precedent is particularly unlikely considering its ramifications. Consider how the Court would explain a decision holding that Congress could use its rulemaking power to enact a statute eliminating the exhaustion requirement. The Court would have to highlight the procedural character of the exhaustion requirement. To do so, the Court presumably would emphasize that the federal statute eliminating the requirement merely allowed federal courts to hear a cause of action (that of inverse condemnation) that arises directly under the Constitution. That is true, but the same could be said of 42 U.S.C. § 1983. Indeed, in a way section 1983 is even more procedural, and less substantive, than a statute eliminating the exhaus-

321. See, e.g., *Anderson v. Green*, 513 U.S. 557, 558 (1995) (per curiam) ("ripeness is peculiarly a question of timing") (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. at 140).

322. See, e.g., *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988) (upholding federal statute authorizing transfer of venue as falling within Congress' power "to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either") (quoting *Hanna*, 380 U.S. at 472).

323. See, e.g., *Williamson*, 473 U.S. at 194-95; see also *supra* notes 185-191 and accompanying text (discussing and citing this precedent).

324. See *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96-97 (1991) (holding that demand requirement for shareholder derivative action "clearly is a matter of 'substance,' not 'procedure,'" and therefore that it was not consistent with Rules Enabling Act, 28 U.S.C. § 2072(b), to construe Fed. R. Civ. P. 23.1 as imposing federal demand requirement in shareholder derivative action based on Investment Company Act of 1940, 15 U.S.C. § 80a-1(a) *et seq.*); see also *Felder v. Casey*, 487 U.S. 131, 146-50 (1988) (holding that Wisconsin "notice of claim" provision, which required civil rights plaintiffs to notify defendants before bringing suit, was preempted as applied to suits under Section 1983, partly because the provision functioned as an exhaustion provision and, as such, was integrally related to nature of substantive rights made actionable by Section 1983).

tion requirement would be.³²⁵ Section 1983 conditions a remedy on proof of a violation of some other federal law,³²⁶ whereas no such violation would be necessary to recover just compensation under a federal law that eliminated the exhaustion requirement.³²⁷ Still, no one has ever thought that section 1983 falls within Congress' rulemaking power. Instead, the Court has always supposed, with the clear support of history, that section 1983 is an exercise of Congress' power to enforce the Fourteenth Amendment.³²⁸

Another statute that has been thought to rest on Congress' power over substantive matters is the Federal Arbitration Act.³²⁹ The Act declares valid and enforceable only arbitration provisions in contracts that involve interstate commerce or admiralty.³³⁰ Consistent with that scope, the Court has held that the Act "is based upon and confined to the federal foundations of control over interstate commerce and over

325. See *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979) (predecessor of Section 1983 "did not provide for any substantive rights" but instead had a "procedural character").

326. See, e.g., *Del Monte Dunes*, 119 S. Ct. at 1645 (Scalia, J., concurring in part and concurring in the judgment) ("the legal duty which is the basis for relief [under section 1983] is ultimately defined not by the claim-creating statute [*i.e.*, section 1983] itself, but by an extrinsic body of law to which the statute refers, namely 'federal rights elsewhere conferred.'") (quoting *Baker v. McCollan*, 443 U.S. 137, 144, n. 3 (1979)); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989) (to state cause of action under section 1983, "[f]irst, the plaintiff must assert the violation of a federal right.>").

327. The text accompanying this note discusses the way in which section 1983 seems more "procedural" than a provision eliminating the exhaustion requirement. In another way, however, section 1983 seems more substantive than such a provision. Section 1983 gives federal courts the power to grant remedies for deprivations of federal rights. See 42 U.S.C. § 1983; *but cf.* Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289 (1995) (arguing that section 1983 is unnecessary to federal courts' power to remedy constitutional violations). A provision eliminating the exhaustion provision, in contrast, would not give federal courts any new remedial powers. The remedy of just compensation springs from the Just Compensation Clause. See *First English*, 482 U.S. at 315-316. Therefore, no statute is necessary to give courts the power to grant that remedy.

328. See, e.g., *Hafer v. Melo*, 502 U.S. 21, 28 (1991) (Congress enacted § 1983 "to enforce provisions of the Fourteenth Amendment") (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974), and *Monroe v. Pape*, 365 U.S. 167, 171-72 (1961)); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 722 (1989) ("What is now § 1983 was enacted as § 1 of 'An Act to Enforce the Provisions of the Fourteenth Amendment to the Consitution of the United States and For Other Purposes,' Act of April 20, 1871, ch. 22, 17 Stat. 13); *Paul v. Davis*, 424 U.S. 693, 699-700 (1976) (section 1983 and the criminal statute counterpart were "intended by Congress to enforce the guarantees of the Fourteenth Amendment"); *Mitchum v. Foster*, 407 U.S. 225, 240 (1972) ("It is clear from the legislative debates surrounding passage of § 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment * * *").

329. 9 U.S.C. §§ 1 *et seq.*

330. See 9 U.S.C. § 2.

admiralty.”³³¹ Moreover, the Court has said that the Act might raise a constitutional question if its application in diversity actions rested solely on Congress’ power to regulate the procedure of the federal courts.³³² Nonetheless, the Federal Arbitration Act is, in a sense, more procedural than a provision eliminating the exhaustion requirement would be. The Act does not give federal courts jurisdiction over any claims that they previously could not hear.³³³ Rather, the Act merely prescribes a means of dispute resolution (*i.e.*, arbitration) in certain cases of which the federal courts already have jurisdiction. In contrast, a provision eliminating the exhaustion requirement would give federal courts jurisdiction over claims—namely, inverse-condemnation claims against local agencies—of which they do not now have jurisdiction (because of the exhaustion requirement). Furthermore, many of the plaintiffs asserting these claims would never get to federal court under current law. Their inverse-condemnation claims would never ripen into claims for violation of the Just Compensation Clause because the plaintiffs would get just compensation in state court. Thus, a federal law eliminating the exhaustion requirement would give federal courts jurisdiction over many cases that they cannot now hear and, concomitantly, would give many claimants a right to relief in federal court that they do not now have. Such a law seems much more substantive than the Federal Arbitration Act, which has no such effects.³³⁴

331. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967); see *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 201-02 (1956) (construing provision in Arbitration Act in light of legislative history stating that “one foundation” of the Act was “the Federal control over interstate commerce and over admiralty”); see also *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984) (“The Federal Arbitration Act rests on the authority of Congress to enact substantive rules under the Commerce Clause.”); but see *id.* at 25 (O’Connor, J., dissenting) (arguing that the Congress that enacted Federal Arbitration Act believed it derived “largely from the federal power to control the jurisdiction of the federal courts”); see also *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 271-72 (1995) (acknowledging that “some initially assumed that the Federal Arbitration Act represented an exercise of Congress’s Article III power to ‘ordain and establish’ federal courts”; but declining to reconsider *Prima Paint* and other cases treating Act as exercise of commerce and admiralty powers).

332. See *Bernhardt*, 350 U.S. at 202 (“a constitutional question might be presented” if Arbitration Act provision were construed to apply in diversity action; question would be “whether arbitration touched on substantive rights, which *Erie R. Co. v. Tompkins* [304 U.S. 64 (1938)] held were governed by local law, or was a mere form of procedure within the power of the federal courts or Congress to prescribe”).

333. See *Southland Corp.*, 465 U.S. at 15 n.9 (“While the Act creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise.”).

334. Cf. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 77 n.29 (1982) (plurality opinion) (Congress’s power to assign adjudicatory functions to adjuncts to

The only precedent arguably supporting Congress' use of its rulemaking power to eliminate the exhaustion requirement is the precedent holding that federal district courts can grant declaratory judgments in connection with some takings claims.³³⁵ The Court has upheld the Declaratory Judgment Act as an exercise of Congress' rulemaking power.³³⁶ As the Court has interpreted the Act, it does not allow a federal court to decide a taking claim when compensation for the alleged taking is available.³³⁷ The Court has not expressly based that interpretation on any intrinsic limits on Congress' rulemaking powers, though, and it therefore would not prevent Congress from amending the Declaratory Judgment Act to permit federal courts to issue declaratory judgments deciding takings claims without regard to whether the claimant met the exhaustion requirement. Indeed, such an amendment may well fall within Congress' rulemaking power. After all, the amendment would not change the nature of the Act or of proceedings currently authorized under the Act. It would merely expand the circumstances under which federal district courts could address takings claims by allowing the courts to address claims asserted by plaintiffs who had not met the exhaustion requirement. And, if Congress could use its rulemaking powers to allow federal courts to issue declaratory judgments resolving such claims, why could it not use those powers to authorize the federal courts to award just compensation on those claims?³³⁸

Article III judges depends in part on whether "Congress' adjustment of the traditional manner of adjudication can be sufficiently linked to its legislative power to define substantive rights.").

335. See, e.g., *Duke Power*, 438 U.S. at 71 n.15; see also *supra* notes 228-239 and accompanying text (discussing *Duke Power*).

336. See *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937) ("[T]he operation of the Declaratory Judgment Act is procedural only. In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish.").

337. See *Duke Power*, 438 U.S. at 94 n.39; see also *Preseault*, 494 U.S. at 10-17 (holding that takings claim raised in federal-court review of ICC order was premature because of availability of compensation under the Tucker Act); *but see Monsanto*, 467 U.S. at 1004-14 & 1017-19 (deciding whether challenged federal statute caused a taking despite availability of compensation for alleged taking).

338. See *Green v. Mansour*, 474 U.S. 64 (1985) (holding that Eleventh Amendment barred declaratory relief that would have the effect of creating monetary obligation by state); cf. *Jefferson County v. Acker*, 119 S. Ct. 2069, 2076 (1999) (Court has "[r]ecogniz[ed] that there is 'little practical difference' between an injunction and anticipatory relief in the form of a declaratory judgment") (quoting *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982)).

Although such a use of the rulemaking power might not exceed any intrinsic limits on that power, it probably would violate the extrinsic limits imposed on Congress' use of Article I powers imposed by our system of dual sovereignty.³³⁹ As discussed above, the exhaustion requirement serves federalism concerns by assuming that state and local governments will honor their obligations under the Just Compensation Clause.³⁴⁰ The requirement thereby avoids exposing those governments to unnecessary federal-court money judgments entered without proof that the governments had violated the Just Compensation Clause.

The federalism concerns that would arise if the exhaustion requirement were eliminated do not arise when Congress, as it has done in the past, eliminates prudential justiciability rules for lawsuits against the *federal* government or *private* parties.³⁴¹ This is why the precedent indicating that such congressional action falls within the rulemaking power does not support the use of that power to eliminate *Williamson's* exhaustion requirement.

339. See generally *Printz v. United States*, 521 U.S. 898, 918-22 (1997) (discussing dual sovereignty system); see also *Senate Hearing, supra* note 39, at 88 (reproducing Congressional Research Service Report, which stated that H.R. 1534 implicated federalism issue "by requiring federal judges to rule on takings and other claims against local government that formerly could have been deflected to the state courts or postponed pending further local proceedings"); *id.* at 111 (reproducing letter from Michael Blommer, Assistant Director, Office of Legislative Affairs, Judicial Conference of the U.S., to Sen. Orrin Hatch, Chairman, Sen. Judiciary Comm. (Oct. 6, 1997), stating Judicial Conference's position that H.R. 1534 "would alter deeply-ingrained federalism principles by prematurely involving the federal courts in property regulatory matters that have historically been processed at the state and local levels"); cf. *Samuels v. Mackell*, 401 U.S. 66, 69 (1971) (companion case to *Younger v. Harris*, 401 U.S. 37 (1971), holding that, in light of principle of comity, federal court should have denied declaratory as well as injunctive relief with respect to state statute under which plaintiff was being prosecuted in state-court prosecution initiated before federal-court suit); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 296-302 (1943) (holding that, in light of comity principle, federal court should have declined declaratory relief against allegedly unconstitutional administration of state tax system).

340. See *supra* notes 288-290 and accompanying text.

341. For example, Congress often authorizes federal courts to hear "pre-enforcement" challenges to federal regulations even though those challenges would not otherwise be ripe. See *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 118 S. Ct. 1665, 1672 (1998) (citing federal statutes authorizing pre-enforcement review of various federal actions in federal courts); *Lujan*, 497 U.S. at 891 (1990) (indicating that such statutes are valid). Thus, DOJ erred when it said at a congressional hearing on H.R. 1534, "It is virtually unprecedented for a federal statute to deprive federal courts of the ability to keep their dockets free from unripe claims." *Senate Hearing, supra* note 39, at 104 (reproducing Letter from Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, DOJ, to Sen. Patrick Leahy, U.S. Senate (Aug. 15, 1997)). In addition to relaxing prudential rules of ripeness for actions challenging conduct of the federal government, Congress has relaxed the prudential rules of standing for certain private actions under the federal Fair Housing Act. See *supra* note 312 and *infra* notes 448-451 and accompanying text.

B. Congress' Power to Enforce the Fourteenth Amendment

The logical basis for H.R. 1534's exhaustion provision is Section 5 of the Fourteenth Amendment, which empowers Congress to "enforce" the Fourteenth Amendment by "appropriate" legislation.³⁴² That is a logical basis because the purpose of H.R. 1534's exhaustion provision was to enforce the Just Compensation Clause as it applies to local agencies under the Due Process Clause of the Fourteenth Amendment.³⁴³ Moreover, the federalism concerns that limit Congress' use of Article I powers to eliminate the exhaustion requirement carry little weight when Congress legislates under Section 5.³⁴⁴ Ironically, it was primarily the opponents of H.R. 1534, rather than its supporters, who recognized that Section 5 provided an arguable basis for the exhaustion provision. The opponents cited *City of Boerne v. Flores*, a case involving Section 5, in arguing that the exhaustion provision exceeded Congress' power.³⁴⁵ The opponents thought that the provision exceeded Congress' power under Section 5, however, because it changed the "substance" of takings law.³⁴⁶ We showed in Part III that

342. U.S. CONST. amend. XIV, § 5.

343. See *infra* note 402 (citing instances in which supporters of H.R. 1534 described its purpose as enforcing the Just Compensation Clause). The Section 5 power includes enforcement of the Due Process Clause. See *Boerne*, 521 U.S. at 519 ("The 'provisions of this article,' to which § 5 refers, include the Due Process Clause of the Fourteenth Amendment."); *United States v. Price*, 383 U.S. 787, 789 (1966) ("We have no doubt of the power of Congress to enforce by appropriate criminal sanction every right guaranteed by the Due Process Clause of the Fourteenth Amendment.") (internal quotation marks and citation omitted). As noted above (*supra* note 13), the Court has consistently construed the Fourteenth Amendment's Due Process Clause to incorporate the Just Compensation Clause.

344. See, e.g., *Rome v. United States*, 446 U.S. 156, 179 (1980) ("[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.'"); see also *Alden*, 119 S. Ct. at 2267 (Congress can override state sovereign immunity under Section 5 of Fourteenth Amendment); cf. *Gregory v. Ashcroft*, 501 U.S. 452, 469 (1991) ("the Fourteenth Amendment does not override all principles of federalism").

345. See *Senate Hearing*, *supra* note 39, at 96 (prepared statement of John C. Dwyer, Acting Associate Attorney General, DOJ, also citing *Boerne*); *id.* at 124 (*Senate Hearing*, *supra* note 39, at 124 (reproducing Letter from (40) State Attorneys General to Sen. Henry Hyde, Chairman, Sen. Judiciary Comm. (Sept. 24, 1997), citing *Boerne*); *House Hearing*, *supra* note 70, at 38 (prepared statement of John C. Dwyer, Acting Associate Attorney General, DOJ) (citing *Boerne*); see also *State Approaches to Protecting Property Rights: Hearing Before Subcomm. on the Constitution of House Judiciary Comm.* (Sept. 23, 1997) (testimony of Prof. Steven J. Eagle) (arguing that "the Congress has the right to expand the Constitutional protections for property rights beyond the Supreme Court's current interpretation using its powers under Section 5 of the Fourteenth Amendment"; citing *Boerne*), available at 1997 WL 626959.

346. See, e.g., *House Hearing*, *supra* note 70, at 38 (prepared statement of John C. Dwyer, Acting Associate Attorney General, DOJ), stating that H.R. 1534's exhaustion provision would "alter * * * the substantive standard under which district courts adjudicate

the “substantive” label does not fully capture the nature of the exhaustion requirement. We now show that the supporters erred in assuming that the “substantive” nature of the requirement precluded Congress’ use of Section 5 to eliminate the requirement.

1. *The Court’s two-part test for Section 5 legislation*

In *Boerne*, the Court emphasized that Section 5 empowers Congress to pass laws that remedy past violations, or prevent future violations, of the Fourteenth Amendment.³⁴⁷ In contrast, the *Boerne* Court said, Section 5 does not empower Congress to enact laws that change the substance of the Fourteenth Amendment.³⁴⁸ The Court recognized in *Boerne* that “the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern.”³⁴⁹ In *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, the Court clarified where the line lies by stating that Congress must meet two requirements “to invoke § 5.”³⁵⁰ “[I]t must identify conduct transgressing the Fourteenth Amendment’s substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.”³⁵¹ An examination of *Boerne* and *Florida Prepaid* further clarifies what Congress must do to meet those two requirements. It is not easy.

At issue in *Boerne* was the Religious Freedom Restoration Act (“RFRA”).³⁵² The RFRA required all generally applicable laws that substantially burdened the free exercise of religion to be supported by a compelling governmental interest and to reflect the least restrictive means of furthering that interest.³⁵³ A violation of that requirement created a claim or a defense that could be asserted in court (for example, in a civil action to invalidate a law, or in a prosecution under a

takings claims against state and local authorities”); see also *supra* notes 110-116 and accompanying text (describing opponents’ lack-of-power argument); Kovacs, *supra* note 39, at 9 n.48 (asserting that, “[s]ince *Williamson County* is based upon the Supreme Court’s interpretation of the text of the Fifth Amendment rather than prudential considerations, it is beyond Congress’ authority to override that decision, regardless of which constitutional provision provides the source for its enactment”; and that H.R. 1534 and similar bills therefore “are unconstitutional”).

347. See 521 U.S. at 519-29.

348. See *id.* at 527-29.

349. *Id.* at 519.

350. 119 S. Ct. at 2207.

351. *Id.*

352. See *Boerne*, 524 U.S. at 512-16 (discussing RFRA, 42 U.S.C. §§ 2000bb *et seq.*).

353. See *id.* at 515-16.

law, that violated the RFRA requirement).³⁵⁴ In imposing this requirement, the RFRA sought to “restore” the level of protection that the Court accorded under the Free Exercise Clause of the First Amendment³⁵⁵ before the Court’s decision in *Employment Div. v. Smith*.³⁵⁶ *Smith* had held that “neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.”³⁵⁷

The Court in *Boerne* held that, as applied to generally applicable laws enacted by state and local governments, the RFRA exceeded Congress’ power under Section 5.³⁵⁸ The Court explained that, for a federal statute to fall within Section 5, “[t]here must be a congruence and proportionality between the injury to be prevented and the means adopted to that end.”³⁵⁹ “Lacking such a connection,” the Court declared, “legislation may become substantive in operation and effect.”³⁶⁰ The Court determined that the RFRA lacked the required connection.³⁶¹ For one thing, the legislative record disclosed few constitutional injuries for the RFRA to remedy or prevent.³⁶² Congress had almost no evidence of generally applicable state or local laws in the modern day that violate the Free Exercise Clause.³⁶³ The Court determined, however, that “[t]his lack of support in the legislative record * * * [was] not RFRA’s most serious shortcoming.”³⁶⁴ Its most serious shortcoming was that it was “so out of proportion to a supposed remedial or preventive object.”³⁶⁵ The RFRA applied to all sorts of state and local laws, from zoning laws to prison regulations.³⁶⁶ Moreover, where applicable, the RFRA required the state or local

354. See 42 U.S.C. § 2000bb(b)(2).

355. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *”).

356. 494 U.S. 872 (1990); see 42 U.S.C. § 2000bb(b)(1) (stating as one of purposes of RFRA “to restore the compelling interest test as set forth” in specified Supreme Court decisions pre-dating *Smith*).

357. *Boerne*, 521 U.S. at 514 (describing *Smith*); see also *Smith*, 494 U.S. at 877-90.

358. See 521 U.S. at 529-36.

359. *Id.* at 520.

360. *Id.*

361. See *id.* at 529-36.

362. See *id.* at 529-31 (discussing “lack of support” for RFRA “in the legislative record”).

363. See *id.* at 530 (“RFRA’s legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry.”).

364. *Id.* at 531.

365. *Id.* at 532.

366. See *id.* at 532 (“Sweeping coverage ensures [RFRA’s] intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.”).

government to satisfy an extremely demanding legal test to save the challenged law (by proving that it furthered a compelling governmental interest using the least restrictive means).³⁶⁷ The Court thought that these features illustrated “the substantive,” and hence impermissible, “alteration of [*Smith*] attempted by RFRA.”³⁶⁸

In contrast to the RFRA, the federal statute at issue in *Florida Prepaid*, the Patent Remedy Act, did not seek to overturn any Supreme Court decision and was narrower in scope.³⁶⁹ The Act “clarified” that the federal patent laws authorized private infringement actions against states in federal court and was expressly premised on Congress’ power to authorize such suits under Section 5 of the Fourteenth Amendment.³⁷⁰ These features of the Act responded to Supreme Court decisions holding that: (1) when Congress intends to abrogate state sovereign immunity in federal court, it must express its intent to do so unequivocally in the abrogation statute³⁷¹; and (2) Congress cannot abrogate that immunity using Article I powers, such as the Patent Clause, but can do so under Section 5 of the Fourteenth Amendment.³⁷²

In holding that the Patent Remedy Act exceeded Congress’ power under Section 5, the Court focused more on the lack of evi-

367. *See id.* at 533 (“The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. * * * Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law.”).

368. *See id.* at 534 (Court’s observations on scope of RFRA “illustrate the substantive alteration of [*Smith*’s] holding attempted by RFRA”).

369. *See Florida Prepaid*, 119 S. Ct. at 2203 (discussing Patent and Plant Variety Protection Remedy Clarification Act, 35 U.S.C. § 271(a), which the Court called “Patent Remedy Act” for short).

370. Patent Remedy Act, Pub. L. No. 102-560, preamble, 106 Stat. 4230 (purpose of the Act is to “clarify that States, instrumentalities of States, and officers and employees of States acting in their official capacity, are subject to suit in Federal court by any person for infringement of patents and plant variety protections”), *quoted in Florida Prepaid*, 119 S. Ct. at 2203; *see also Florida Prepaid*, 119 S. Ct. at 2205 (citing legislative history indicating that Patent Remedy Act was based on, among other powers, Section 5 of Fourteenth Amendment).

371. *See Florida Prepaid*, 119 S. Ct. at 2203 (observing that Patent Remedy Act responded to lower court decisions construing existing patent laws in light of *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242-43 (1985), which held that, when Congress intends to abrogate states’ Eleventh Amendment immunity, it must express that intent clearly and unambiguously).

372. *See Florida Prepaid*, 119 S. Ct. at 2208 n.7; *see also Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996) (reaffirming Congress’ power to abrogate state sovereign immunity under Section 5 of Fourteenth Amendment, while holding that Congress lacked power to do so using Article I powers).

dence supporting the Act than on its breadth.³⁷³ Congress had evidence of some instances of patent infringement by states.³⁷⁴ The evidence did not, however, establish a “pattern” of state patent infringements.³⁷⁵ More fundamentally, the Court observed, “a State’s infringement of a patent * * * does not by itself violate the Constitution.”³⁷⁶ “Instead,” the Court explained, “only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent could a deprivation of property without due process result.”³⁷⁷ Thus, the chief defect of the Patent Remedy Act was that it was based on only “a handful of instances of state patent infringement that did not necessarily violate the Constitution.”³⁷⁸ Although the Court faulted the Act mostly because of this lack of evidence, the Court also disapproved the Act’s breadth.³⁷⁹ The Court remarked that “[a]n unlimited range of state conduct” could expose a State to liability for patent infringement.³⁸⁰ The Court complained, in particular, that Congress had done “nothing to limit the coverage of the Act to cases involving arguable constitutional violations.”³⁸¹ The Court concluded that, in light of “the scant support for the predicate unconstitutional conduct that Congress intended to remedy” and the Act’s “indiscriminate scope,” it “simply cannot be said that ‘many of [the acts of infringement] affected by the congressional enactment have a significant likelihood of being unconstitutional.’”³⁸²

In sum, Congress can exercise its Section 5 powers only by: (1) “identifying” violations of the Fourteenth Amendment that need to be remedied or prevented; and (2) “limit[ing] the coverage” of its legislation so that, for the most part, it reaches only state or local action that violates the Fourteenth Amendment or has a “significant likelihood”

373. See *Florida Prepaid*, 119 S. Ct. at 2207-11. The Court devoted more than three pages in the Supreme Court Reporter to discussing the lack of evidence in the legislative record to support the Patent Remedy Act. See *id.* at 2207-2210. By comparison, it devoted only one paragraph to discussing the breadth of the Act. See *id.* at 2210.

374. See *id.* at 2207.

375. See *id.* (“In enacting the Patent Remedy Act, * * * Congress identified no pattern of patent infringements by the States, let alone a pattern of constitutional violations.”).

376. *Id.* at 2208.

377. *Id.* (citing *Parratt*, 451 U.S. at 539-41; *Hudson*, 468 U.S. at 532-33 (O’Connor, J., concurring)).

378. *Id.* at 2210.

379. See *id.*

380. *Id.*

381. *Id.*

382. *Id.* at 2210 (quoting *Boerne*, 521 U.S. at 532) (bracketed text supplied by Court in *Florida Prepaid*).

of doing so.³⁸³ Moreover, *Florida Prepaid* makes clear that, as a “critical part” of the “identif[ication]” process, Congress must have evidence of actual violations.³⁸⁴ Although the Court did not require evidence of any particular number of such violations, it strongly suggested that they need to be fairly “widespread,” approaching a “pattern.”³⁸⁵

383. See *id.* at 2210.

384. See *id.* (“Though the lack of support in the legislative record is not determinative, identifying the targeted constitutional wrong or evil is still a critical part of our § 5 calculus”) (citation omitted).

385. See *id.* at 2207 (“Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations.”); *id.* at 2210 (“The legislative record thus suggests that the Patent Remedy Act does not respond to a history of ‘widespread and persisting deprivation of constitutional rights’ of the sort Congress has faced in enacting proper prophylactic § 5 legislation”) (quoting *Boerne*, 521 U.S. at 526). The twin issues of violations by the States and state law remedies for such violations received further attention in *Kimel v. Florida Bd. of Regents*, 120 S.Ct. 631 (2000), which was handed down by the Court after this article was completed. *Kimel* struck down the Age Discrimination in Employment Act, 29 U.S.C. 621 et seq. (1994 ed. & Supp. III), as exceeding Congressional power under Section 5 of the Fourteenth Amendment.

Applying the “congruence and proportionality” framework, the Court first attacked the range of applicability of the ADEA. It found that “[t]he Act, through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would be likely be held unconstitutional under the applicable equal protection, rational basis standard.” 120 S.Ct. at 647.

Second, the Court examined the legislative record of ADEA and concluded that “Congress’ 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem.” *Id.* at 648-49. The Court chided plaintiffs-petitioners for presenting evidentiary record that “falls well short of the mark,” that is, of “any pattern of age discrimination by the States.” *Id.* As described by the majority, such insufficient evidence consisted “almost entirely of isolated sentences clipped from floor debates and legislative reports,” as well as a report on age discrimination practices in the State of California and in the private industry. The Court appeared to count for naught the legislators’ statements about constituent correspondence detailing multiple and systemic violations of the elderlies’ constitutional rights by state agencies. To buttress its point, the majority pointed out that Senator Bentsen actually relied on press articles about age discrimination by federal agencies while touting extending ADEA protections to the states. The Court also found that California’s purported violations, standing alone, “would have been insufficient to support Congress’ 1974 extension of the ADEA to every State of the Union.” 120 S.Ct. at 649. Finally, findings of private-sector violations were “beside the point,” for Congress made no findings regarding the States and “extrapolat[ion]” of findings from the private to the public sector was doubtful. See *id.*

The Court’s analysis confirms that, in considering legislation modifying *Williamson*’s ripeness requirements, Congress must provide as much specificity as possible regarding the states in which the violations occur. It would do Congress little good to cite, for example, cases involving state agencies or creatures of an interstate compact as evidentiary justification for takings bills that appear to local agencies and municipalities.

The Justices in *Kimel* also debated the availability of remedies under state anti-discrimination laws. The majority did not rely on the availability of state remedies in its application of the “congruence and proportionality” text, but invoked it apparently to console the public about the long-range policy implications of rendering federal ADEA pro-

tections unenforceable. Justice O'Connor, writing for the Court, observed "[o]ur decision today does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers, . . . [because s]tate employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union. Those avenues of relief remain available today, just as they were before this decision." *Kimel*, 120 S.Ct. at 650.

The problem immediately posed for Congress by the Court's statement is that these remedies were not nearly as available at the time of the enactment of ADEA Amendments in 1974 as they were at the time of the decision in the year 2000. In 1974, state remedies for age discrimination varied widely and were available against public employers only in 24 states. *See Kimel*, 120 S.Ct. at 651, n.2. Four dissenting Justices observed, in our opinion correctly, that "[w]henver Congress passes a statute, it does so against the background of state law already in place; the propriety of taking national action is thus measured by the metric of existing state norms that Congress seeks to supplement or supplant." *Id.* at 651. (opinion of Stevens, Souter, Ginsburg, and Breyer, J.J., dissenting in part and concurring in part.

Logically, the Court's observation on state remedies appears to be dicta, for it is nearly impossible to reconcile the present-look approach with the Court's focus on discerning legislative intent. Nevertheless, both sides engaged in the takings debate must carefully examine comparable legislative protections at the state level. Congress should identify the various kinds of protections for private property rights available under state statutes and make finding on whether those protections are adequate to redress the different constitutional violations cognizable under the Due Process Clause and the Just Compensation Clause. In September of 1997, while H.R. 1534 was percolating through the House Judiciary Committee, its Subcommittee on the Constitution actually conducted such a hearing. *See State Approaches to Protecting Private Property Rights: Hearing before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 58-268 (1997). The purpose of the hearing was "to examine State approaches to protecting private property owners by providing compensatory or regulatory relief." *Id.* at 7 (Statement of Chairman Charles T. Canady). The testimony from the hearing noted considerable diversity of state protections for property rights. About twenty States have adopted some form of property rights protections, although some have later rescinded their protections through referenda or otherwise. *See, e.g. id.* at 87, 101 (Statement of Prof. Steven J. Eagle, George Mason University) (listing 17 States); *id.* at 106-107 (Statement of Prof. Harvey M. Jacobs, University of Wisconsin) (citing references listing up to 25 States); *id.* at 120 (Statement of Nancie G. Marzulla, President and Chief Legal Counsel, Defenders of Property Rights) (22 States). There are several recognized categories of state laws, including: (1) takings impact assessment bills, (2) compensation bills; (3) conflict resolution bills, or (4) combinations of any or all of the above. *See id.* at 106-111 (Statement of Prof. Jacobs); *id.* at 131 (Statement of Ms. Marzulla); *see also id.* at 12-21 (Statement of former Florida State Rep. Dean Saunders) and 45-51 (Statement of South Carolina State Rep. Chip Campsen) (discussing alternatives considered). The record reflected that these laws vary widely in the scope of government actors and actions covered, the relief provided, and the practical impact on decisions of land use regulators. *See id.* at 23-27. (Statement of New Hampshire State Sen. Richard L. Russman); *id.* at 27-44 (Statement of Jane Cameron Hayman, Deputy Gen. Counsel, Florida League of Cities); *id.* at 88, 100-101 (Statement of Prof. Eagle); *id.* at 102-103 (Statement of Prof. Jacobs); and *id.* at 141-145 (Statement of Ms. Marzulla). These statutes do not universally provide the kind of availability of judicial redress for constitutional violations that the Court found so comforting in *Kimel*. Congress should view similar hearings as part and parcel of its deliberations on the takings legislation and tailor the legislation to the considered evils.

2. *The applicability of the Court's two-part test to H.R. 1534's exhaustion provision*

To decide if H.R. 1534's exhaustion provision falls within Section 5, we must initially determine whether the provision would even get a chance to meet the Court's two-part test. One could plausibly argue that, the exhaustion provision should not get that chance but should instead be found, as a threshold matter, to lie outside of Section 5. First, none of the legislative material cited Section 5 as a basis for the exhaustion provision.³⁸⁶ Second, the provision was designed to overrule *Williamson's* holding on the exhaustion issue.³⁸⁷ Although these facts pose problems for the provision when it is analyzed under the two-part test for Section 5 legislation, they do not preclude that analysis.

a. Congress' failure specifically to invoke Section 5

For a long time, the lower federal courts and commentators have believed that Congress does not need to invoke Section 5 for a law to be upheld under Section 5.³⁸⁸ That belief rests primarily on *EEOC v. Wyoming*.³⁸⁹ There, the Court rejected the notion that "Congress need anywhere recite the words 'section 5' or 'Fourteenth Amendment'" for a law to be upheld under Section 5.³⁹⁰ The Court explained that "the nature of [judicial] review of congressional legislation defended on the basis of * * * § 5" demands only that the court "be able to discern some legislative purpose or factual predicate that supports the exercise of" Section 5.³⁹¹ This portion of the Court's opinion was dictum.³⁹² Nonetheless, most lower courts and commen-

386. See *infra* notes 390-406 and accompanying text.

387. See *infra* notes 407-418 and accompanying text.

388. See Richard H. Seamon, *Damages for Unconstitutional Affirmative Action: An Analysis of the Monetary Claims in Hopwood v. Texas*, 71 *TEMPLE L. REV.* 839, 870 n.188 (1998) (citing case law); Jacqueline D. Ewenstein, *Seminole Tribe: Are States Free to Pirate Copyrights With Impunity?*, 22 *COLUM.-VLA J.L. & ARTS* 91, 114 (1997) (asserting that "it is irrelevant whether Congress mentions the Fourteenth Amendment in the legislative text or legislative history of a statute"); Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of Boerne v. Flores*, 32 *IND. L. REV.* 163, 172 n.59 (1998) (commenting that, "when Congress legislates under Section 5, it need not do so explicitly").

389. 460 U.S. 226 (1983).

390. *Id.* at 243-44 n.18.

391. *Id.*

392. The Court in *EEOC v. Wyoming* held that, as applied in the case before it, the Age Discrimination in Employment Act ("ADEA") was a "valid exercise of Congress' powers under the Commerce Clause." 460 U.S. at 243. The Court accordingly found it unnecessary to decide whether the ADEA "could also be upheld under § 5 of the Fourteenth Amendment." *Id.* Thus, it was likewise unnecessary for the Court to discuss whether Con-

tators have assumed that the dictum was solid, even after the Court applied strict scrutiny in *Boerne* to a law challenged as exceeding Congress' power under Section 5.³⁹³

After *Florida Prepaid*, that assumption may no longer be warranted. In a footnote to its opinion, the *Florida Prepaid* Court refused to consider whether the Patent Remedy Act could be upheld under Section 5 on the theory that it enforced the Just Compensation Clause.³⁹⁴ The Court observed that "[t]here is no suggestion in the language of the statute itself, or in the House or Senate Reports of the bill which became the statute, that Congress had in mind the Just Compensation Clause of the Fifth Amendment."³⁹⁵ The Court determined that, "[s]ince Congress was so explicit about invoking its authority under Article I and its authority to prevent a State from depriving a person of property without due process of law under the Fourteenth Amendment," Congress' failure specifically to rely on the Just Compensation Clause "preclude[d] consideration of [it] as a basis for the Patent Remedy Act."³⁹⁶

It is hard to know what to make of this. The Court might have meant to adopt a hard-and-fast rule that requires Congress not only to say that it is relying on Section 5 but also to specify which Fourteenth Amendment right it intends to enforce. On the other hand, the Court might have meant only as a matter of prudence to decline to entertain a theory that seems to have been devised for the first time in litigation and that did not occur to Congress despite Congress' careful consideration of the constitutional source of its power to enact the statute. The latter, prudential interpretation seems more likely given the Court's treatment of the issue in a footnote. The narrower, prudential interpretation is also more consistent with the dictum in *EEOC v. Wyoming*. Narrowly read, the *Florida Prepaid* footnote appears to reflect prudential concerns related to "the nature of judicial review,"³⁹⁷

gress must express an intent to rely on Section 5 for a law to be upheld under that grant of congressional power. At least one commentator has nonetheless described the Court's discussion as a "holding." Ewenstein, *supra* note 390, at 114. The authors of this article respectfully disagree with that description.

393. See, e.g., *Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698, 703 (4th Cir. 1999) (in determining whether statute fell within Section 5, court did not need to find that Congress specifically cited Section 5 as basis for the statute; citing *EEOC v. Wyoming*); *Oregon Short Line R.R. Co. v. Department of Revenue Oregon*, 139 F.3d 1259, 1265-66 (9th Cir. 1998) (same); Rotunda, *supra* note 390, at 172 n.59 (same).

394. See *Florida Prepaid*, 119 S. Ct. at 2208 n.7.

395. *Id.*

396. *Id.*

397. *EEOC v. Wyoming*, 460 U.S. at 243-44 n.18.

rather than categorical precepts about how Congress should legislate. The *EEOC v. Wyoming* dictum likewise required Congress to provide evidence of an intent to rely on Section 5 only to the extent required by “the nature of judicial review.”³⁹⁸ Whatever it means exactly, the *Florida Prepaid* footnote makes it important for Congress to express clearly its intention to rely on Section 5.

It is debatable whether the 105th Congress spoke with enough clarity in proposing to eliminate the exhaustion requirement. On the one hand, neither the text of H.R. 1534 nor its supporters expressly relied on Section 5.³⁹⁹ On the other hand, both the text of the bill and the legislative material showed that it was meant to enforce the right to just compensation.⁴⁰⁰ It appears that Congress omitted reference to Section 5 because of its belief that Congress’ rulemaking power supported H.R. 1534’s exhaustion provision.⁴⁰¹ This article has argued that this belief is erroneous.⁴⁰² The belief is certainly understandable, though, given the Supreme Court’s own unexplained suggestions that Congress can freely eliminate prudential rules.⁴⁰³ In these circumstances, the Supreme Court would not be in the best position to refuse to consider whether the exhaustion requirement falls within Section 5.⁴⁰⁴

398. *Id.*

399. *Cf.* *Florida Prepaid*, 119 S. Ct. at 2208 n.7.

400. *See, e.g.*, 144 Cong. Rec. S8037 (daily ed. July 13, 1998) (remarks of Sen. Gramm) (“The real issue before us is that there are * * * many locally elected officials who do not support our fifth amendment rights.”); 143 CONG. REC. H8940 (daily ed. Oct. 22, 1997) (remarks of Rep. Coble) (“H.R. 1534 is about Congress’ duty to implement the 5th and 14th amendments to the Constitution[, which] * * * protects individuals from having their private property ‘taken’ by the Government without receiving just compensation.”); *id.* at H8944 (remarks of Rep. Hutchinson) (identifying just compensation principle as one of two principles “at stake in” H.R. 1534); *id.* at H8959 (remarks of Rep. Stenholm) (paraphrasing Just Compensation Clause and describing H.R. 1534 as “guarantee[ing] the protection of the fifth amendment”); S. REP. NO. 105-242, at 6 (1998) (identifying one purpose of H.R. 1534 as “to provide private property owners claiming a violation of the fifth amendment’s taking clause some certainty as to when they may file the claim in Federal court”); H.R. REP. NO. 105-323, at 3 (1997) (same); *House Hearing, supra* note 70, at 2 (statement of Rep. Coble) (“This bill [*i.e.*, H.R. 1534] is about the Congress’ duty to implement the fifth amendment to the Constitution.”).

401. *See supra* notes 308-324 and accompanying text.

402. *See supra* notes 325-343 and accompanying text.

403. *See supra* notes 312-324 and accompanying text (discussing and citing precedent establishing Congress’ broad power to eliminate prudential justiciability rules).

404. *Cf.* Scott P. Glauber, *Citizen Suits Against States: The Exclusive Jurisdiction Dilemma*, 45 J. COPYRIGHT SOC’Y U.S.A. 63, 93 (1997) (arguing that it “would prove uselessly formalistic” to invalidate a federal statute just because Congress passed it under the “‘wrong’ power”).

b. Congress' intent to "overrule" Williamson

No one can read *Boerne* without sensing the Court's indignation at Congress' attempt in the RFRA to overrule *Smith*.⁴⁰⁵ One might initially think that similar indignation would greet a law that overruled *Williamson's* holding on the exhaustion issue.⁴⁰⁶ Indeed, both laws change the "substance" of constitutional law in a sense.⁴⁰⁷ That is not fatal, however, for the Court has not condemned every law defended as an exercise of Section 5 that in some sense could be said to change the substance of constitutional law.

In *Boerne*, the Court defined an impermissibly substantive law as one that was not congruent or proportional to the constitutional violations that the law aimed to remedy or prevent.⁴⁰⁸ In other words, the Court used the term "substantive" merely to denote a law that failed what, in *Florida Prepaid*, became a two-part test.⁴⁰⁹ Thus, if someone challenging a law shows that it fails that test, the law will be labeled "substantive" and, hence, found to exceed Congress' Section 5 power. But it does not work the other way: A person challenging a law cannot establish that the law exceeds Section 5 by arguing, without reference to the two-part test, that the law is substantive in some sense.

This is clear from the Court's reaffirmance of its voting rights cases in *Boerne* and *Florida Prepaid*.⁴¹⁰ One such case upheld, as

405. See, e.g., *Boerne*, 521 U.S. at 535-36 (last paragraph of majority opinion ending with the statement that "it is this Court's precedent, not RFRA, which must control").

406. See S. REP. NO. 105-242, at 38 (1998) (minority report) (H.R. 1534 "attempt[s] to overturn the U.S. Supreme Court's decision in *Williamson County*"); *Senate Hearing, supra* note 39, at 117 (reproducing Letter from Leonidas Ralph Mecham, Secretary, Judicial Conference of U.S., to Rep. Howard Coble, Chairman, House Judiciary Subcomm. on Courts and Intellectual Property (Sept. 29, 1997), stating Judicial Conference's position that, by "allow[ing] cases to be filed in federal court before the property owner has pursued all available remedies at the state level," H.R. 1534 "would be contrary to the principles announced [*sic*] in" *Williamson*).

407. See *supra* notes 180-267 and accompanying text (explaining why H.R. 1534's exhaustion provision can fairly be characterized as changing "substance" of takings law).

408. See *Boerne*, 521 U.S. at 520 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. *Lacking such a connection*, legislation may become substantive in operation and effect.") (emphasis added).

409. See *id.*; *id.* at 532 ("RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections."); see also *Florida Prepaid*, 119 S. Ct. at 2206-07 (construing *Boerne* to require two-part test for federal statute defended as exercise of Section 5 power).

410. See *Florida Prepaid*, 119 S. Ct. at 2210 (contrasting conduct to which Patent Remedy Act responded with "the sort Congress has faced in enacting proper prophylactic § 5 legislation"); *Boerne*, 521 U.S. at 525-27, 530-34 (same); see also, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

within Congress' power to enforce the Fifteenth Amendment, a federal law that prohibited all literacy tests for voting despite the Court's holding that only tests adopted or maintained with invidious intent violate the Fifteenth Amendment.⁴¹¹ The literacy-test ban was "substantive" in the sense that it invalidated tests without proof of a necessary element of a constitutional violation.⁴¹² The Court has explained that the law nevertheless fell within Congress' enforcement power because it was congruent and proportional to the constitutional violations at which the law was aimed.⁴¹³ Although the literacy-test ban was an exercise of Congress' power to enforce the Fifteenth Amendment, the Court's rationale for upholding the ban applies to Congress' "parallel" power to enforce the Fourteenth Amendment.⁴¹⁴

H.R. 1534's exhaustion provision was substantive in roughly the same way as was the federal statutory ban on literacy tests. The statutory ban on literacy tests authorized federal courts to grant a remedy (invalidation) in cases that did not involve a violation of the Constitution: namely, cases involving literacy tests that were not adopted or maintained with invidious intent.⁴¹⁵ Similarly, the exhaustion provision would have authorized a federal-court remedy without proof of an element (exhaustion of state-court compensation remedies) that would otherwise be required to establish a constitutional violation. If anything, though, the exhaustion provision was less "substantive" than the literacy-test ban. The exhaustion provision would have authorized a judicial remedy (an award of just compensation) only in cases in which the Constitution required that remedy: namely, cases in which a taking was proven.

411. See *Katzenbach*, 383 U.S. at 308, 333-34; *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45 (1959); see also *Boerne*, 521 U.S. at 518 (discussing these two cases).

412. See *City of Rome v. United States*, 446 U.S. 156, 176 (1980) (stating that *South Carolina v. Katzenbach* "makes clear that Congress may * * * prohibit state action that, though in itself not violative of [the Fifteenth Amendment], perpetuates the effects of past discrimination").

413. See *Boerne*, 521 U.S. at 526 (describing *South Carolina v. Katzenbach* and later cases as recognizing "the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights"); *id.* at 530 ("The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.") (citing *Katzenbach*); see also *Florida Prepaid*, 119 S. Ct. at 2210 (quoting, in part, these passages from *Boerne*).

414. *Boerne*, 521 U.S. at 518 (describing Congress' power to enforce Fourteenth Amendment in light of precedent on Congress' "parallel power" to enforce Fifteenth Amendment). Compare U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.") with U.S. CONST. amend. XIV, § 5 (substantially identical wording).

415. See *City of Rome*, 446 U.S. at 176.

Thus, the opponents of H.R. 1534 were right to say that H.R. 1534's exhaustion provision made "substantive" changes in the law of takings.⁴¹⁶ Nonetheless, that does not resolve the question whether the provision fell within Section 5. The resolution of that question turns on whether the provision satisfied the two-part test of *Florida Prepaid*.

3. *Application of the Court's two-part test to H.R. 1534's exhaustion provision*

a. Evidence of Fourteenth Amendment violations

Under part one of the *Florida Prepaid* test, "we must first identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy."⁴¹⁷ A "critical part" of this identification process is assessing evidence that the evil or wrong actually existed.⁴¹⁸ When we apply this process to H.R. 1534's exhaustion provision, we conclude that the evidence of constitutional violations did not satisfy part one of the *Florida Prepaid* test.

The main concern of the supporters of H.R. 1534 was that people were not getting just compensation for takings by local land-use agencies.⁴¹⁹ They believed that there were two main causes of this problem. First, some local agencies used long and complicated procedures for reaching a final decision about permissible land uses.⁴²⁰ Second,

416. See *supra* notes 111-15 (citing instances in which opponents of H.R. 1534 attacked it as changing "substance" of takings law); see also *supra* notes 180-267 (discussing precedent establishing that *Williamson's* exhaustion requirement is substantive in the sense that exhaustion is an element of cause of action for violation of Just Compensation Clause).

417. *Florida Prepaid*, 119 S. Ct. at 2207.

418. *Id.* at 2210.

419. See, e.g., S. REP. NO. 105-242, at 10 (1998) (stating that, under current law, "property owners * * * are effectively denied their fifth amendment rights"); see also *supra* note 402 and accompanying text (explaining that purpose of H.R. 1534 was to enforce Just Compensation Clause against local agencies).

420. See, e.g., 144 CONG. REC. S8040 (daily ed. July 13, 1998) (statement of Sen. Hatch) ("Many localities have erected labyrinths of hurdles that property owners must go through before a final decision is rendered on the disposition of the uses of their property. As a result, federal takings claims rarely ripen but instead are usually choked-off on the vine by weeds of bureaucratic red tape and regulatory review."); S. REP. NO. 105-242, at 6 (1998) (identifying one main purpose of H.R. 1534 as "to provide private property owners * * * some certainty as to when they may file the [taking] claim in Federal Court" and stating that this purpose was accomplished by, among other things, "defin[ing] when a final agency decision has occurred"); *id.* at 10 (asserting that "property owners * * * are effectively denied their fifth amendment rights" because process for obtaining final decision from local agency "can take years"); *id.* at 22 ("Currently, a property owner can go through multiple attempts to get a permit without ever getting a definite answer as to what the property owner can or cannot do on the property owner's property.").

federal courts used the takings-ripeness doctrine to avoid deciding the merits of takings claims against local agencies in most cases.⁴²¹

The second cause cannot support Section 5 legislation. Section 5 empowers Congress to remedy or prevent only violations of the Fourteenth Amendment. Federal courts cannot violate the Fourteenth Amendment by refusing to decide takings claims against local agencies, because the Amendment is aimed exclusively at state, not federal, action.⁴²² Of course, the federal courts have refused to decide these claims at the instance of defendant local agencies relying on the takings-ripeness doctrine.⁴²³ Still, one can hardly fault these defendant agencies, much less charge them with violating the Fourteenth Amendment, for taking advantage of the takings-ripeness doctrine developed by the federal courts. Thus, the use of Section 5 to support H.R. 1534's exhaustion provision must rest on the other problem identified by the bills' supporters: the procedures used by local agencies to reach a final decision.

Congress had scant evidence that these procedures were constitutionally inadequate.⁴²⁴ Most of the evidence before Congress concerned two propositions: (1) federal courts usually dispose of regulatory taking claims, often on ripeness grounds, without reaching the merits of the claims; and (2) it takes an average of about 10 years for a regulatory takings claimant to pursue a case from the local agency to completion in federal court.⁴²⁵ The evidence on the first

421. See, e.g., 144 CONG. REC. S8022 (daily ed. July 13, 1998) (statement of Sen. Hatch) ("Many citizens who attempt to protect their property rights guaranteed by the Fifth Amendment * * * are barred from the doors of the federal courthouse. "); *id.* (one purpose of H.R. 1534 is to "address[] the procedural hurdles * * * which currently prevent [takings claimants] from having fair and equal access to federal court"); *id.* at 8023-24 (discussing failure of federal courts to address takings claims against local land-use agencies on the merits).

422. See *District of Columbia v. Carter*, 409 U.S. 418, 424 (1973) ("actions of the Federal Government and its officers are beyond the purview of the [Fourteenth] Amendment").

423. See *Senate Hearing, supra* note 39, at 69 (testimony of attorney Jeff Garvin) ("[W]hat has happened in Florida, and * * * across the country is the governmental agencies, a lot of them, use the existing case law on jurisdiction as a means of keeping the case from being heard on the merits.").

424. See 143 CONG. REC. H8941 (daily ed. Oct. 22, 1997) (remarks of Rep. Lofgren) (referring to "the absence of any quantitative evidence that justifies this [*i.e.*, H.R. 1534's] massive intrusion into States [*sic*] rights"); H. REP. NO. 105-323, at 16 (minority report, stating, "There is no hard or quantifiable data which supports this ill-considered intrusion into the law of takings.").

425. See 144 CONG. REC. S8034 (daily ed. July 13, 1998) (remarks of Sen. Hatch) (under current ripeness law, property owners "have to go 9½ years to vindicate their claims"); 143 CONG. REC. S12482 (daily ed. Nov. 10, 1997) (remarks of Sen. Gorton) ("More than 80 percent of the time when property owners try to access Federal courts, they are thrown out

point cannot support the use of Section 5, for the reason discussed above: It does not involve misconduct by state actors. The evidence on the second point might have been relevant if it had shown how much of the 10 year period is spent seeking a final decision from the local agency or just compensation in state court. Undue delay in those processes might well violate the Fourteenth Amendment.⁴²⁶ As it was, however, the evidence did not provide a breakdown.⁴²⁷

There was anecdotal evidence of delays by local agencies in making land use decisions, but it suffers from several problems.⁴²⁸ First,

on procedural grounds * * *. Of the 20 percent who are successful in having their cases heard in Federal court, it takes an average of nearly 10 years of litigation and negotiation to get it through the process.”); *id.* at E2100 (remarks of Rep. Hill) (to the same effect); *id.* at H8947 (remarks of Rep. Pryce) (to the same effect); S. REP. NO. 105-242, at 9 (1998) (citing article by Gregory Overstreet, *supra* note 30, and describing it as “conclud[ing] that federal judges had avoided reaching a determination on the merits in a takings claim for ripeness reasons in over 94 percent of all takings cases litigated between 1983-88”; also citing study of more recent reported federal court cases finding that “over 80% of the takings cases originating in the U.S. district courts between 1990-97 were dismissed before the merits were ever reached due to the ripeness doctrine”); *House Hearing, supra* note 70, at 52 (prepared statement of Donald Betsworth, President, N.C. Home Builders Ass’n, on behalf of National Ass’n of Home Builders, referring to study showing that “over 80 percent of all compensation claims in Federal district court never get a hearing on the merits” and that “it takes on average some ten years to gain a hearing on the merits”); *id.* at 168-86 (reproducing Memorandum from John J. Delaney and Duane J. Desiderio, Linowes & Blocher law firm, to Subcomm. on Courts and Intellectual Property of House Judiciary Comm. (Sept. 22, 1997), surveying federal case law and concluding, *id.* at 169, that “[o]f those 12 Appellate Cases where takings claims were found ripe, it took property owners, on the average, 9.5 years to have an appellate court reach its determination”) (emphasis omitted); *Senate Hearing, supra* note 39, at 22-38 (same).

426. *See* *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 677 (1923) (Just Compensation Clause is satisfied by “prompt” ascertainment and payment of compensation); *cf.*, *e.g.*, *Doggett v. United States*, 505 U.S. 647, 654-55 (1992) (delay at certain stages in criminal process can violate due process); *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 267 (1987) (delay in civil regulatory process at issue could violate due process); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547 (1985) (same).

427. *Cf.* S. REP. NO. 105-242, at 10 (1998) (stating that process of getting final decision from local land-use agency “can take years for property owners who are left in regulatory limbo”).

428. *See, e.g.*, 144 CONG. REC. S8023 (daily ed. July 13, 1998) (remarks of Sen. Hatch) (describing *Schulz*, 849 F. Supp. 708 (N.D. Cal. 1994), *aff’d in part & rev’d in part*, 98 F.3d 1346 (9th Cir. 1996), in which “property owners submitted a total of thirteen (13) revised plans over 3 years to renovate their home” without obtaining local agency’s approval); S. REP. NO. 105-242, at 8 (1998) (also citing *Schulz* as case illustrating need for legislation); 143 CONG. REC. E2100 (daily ed. Oct. 28, 1997) (remarks of Rep. Hill) (describing a project that took local officials eleven and a half years to approve); *id.* at H8942 (describing a land-use dispute that lasted five years at the local-agency level); *Senate Hearing, supra* note 39, at 16-18 (testimony of Jeff Garvin) (attorney describing six years that his clients spent seeking approval from local bodies for land use); *id.* at 43 (reproducing Letter from John J. Delaney and Duane Desiderio, Linowes & Blocher, to Andrew Fois, Assistant Attorney General, DOJ (Sept. 5, 1997), that cited three cases involving lengthy or improper agency

long delays do not necessarily violate the Fourteenth Amendment. It depends on how long they are and what causes them.⁴²⁹ Without information on those points, it is not even clear that the delays to which the legislative material referred had a “significant likelihood” of being unconstitutional.⁴³⁰ Second, even supporters of H.R. 1534 acknowledged that the anecdotes were exceptional and that most local land-use agencies behave responsibly.⁴³¹ Indeed, the exceptional nature of

action on private land-use proposals). In addition to this anecdotal evidence of local agency delay, H.R. 1534 included a finding that “local authorities, through complex, costly, repetitive and unconstitutional permitting, variance, and licensing procedures, have denied property owners their fifth and fourteenth amendment rights.” H.R. 1534, § 2(8), 105th Cong. (as reported in Sen. on Feb. 26, 1998). That finding deserves weight, but it would not prevent the Court from examining the underlying evidence. *See* *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 195-96 (1997); *United States v. Lopez*, 514 U.S. 549, 562-63 (1995). After all, if legislative findings were conclusive, the ability of statutes to withstand constitutional challenges would depend in large part on the ingenuity of legislative staff. *See Lucas*, 505 U.S. at 1025 n.12; Max Kidalov, *Recent Developments in Legislative Law, H. 3591: Affirming Traditional Principles of Protection of Private Property and the Environment*, 6 S.C. ENVTL. L.J. 295, 301 (1997) (*Lucas* makes clear that legislative findings cannot be used as a “clever way to justify regulatory growth” without regard to Just Compensation Clause).

429. *See, e.g.,* *Loudermill*, 470 U.S. at 546 (holding that plaintiff did not establish violation of due process by relying on 9-month delay in administrative adjudication, because plaintiff did not explain the reason for the delay); *see also* *United States v. Eight Thousand Eight Hundred and Fifty Dollars (\$8,850) in U.S. Currency*, 461 U.S. 555, 562-65 (1983) (adopting multi-factor test for determining whether government’s delay in filing forfeiture action violated due process, under which reason for, and length of, delay, among other factors, would be considered).

430. *Cf. Florida Prepaid*, 119 S. Ct. at 2210 (“it simply cannot be said” that state actions subject to Patent Remedy Act “have a significant likelihood of being unconstitutional”); *Boerne*, 521 U.S. at 532 (“Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.”). The Senate Report on H.R. 1534 observed that “local land-use authorities * * * can abuse the system by purposely withholding a final agency decision.” S. REP. No. 105-242, at 10 (1998). The report did not cite any evidence that such deliberate delays were occurring. *Cf. id.* at 29 (minority report asserting that, “[n]o evidence has been presented to support the thinly veiled suggestions * * * that local governments are either incompetent or routinely act in bad faith in their dealings with developers”). Some witnesses at the legislative hearings on H.R. 1534, however, did assert that local agencies were guilty of deliberate delay or other abuses. *See Senate Hearing, supra* note 39, at 49 (prepared statement of Professor Daniel R. Mandelker) (asserting that “[l]and-use agencies across the country have applied the ripeness requirement to frustrate as-applied takings claims in federal court” and describing three such cases); *House Hearing, supra* note 70, at 68 (same); *id.* at 49-50 (prepared statement of Donald Betsworth, President, North Carolina Homebuilders Association, on behalf of National Association of Homebuilders) (stating that “government agencies * * * do not always act in good faith when making land use decisions”; describing one case in which agency required land owners to dedicate almost half of their parcel as condition for subdividing it).

431. *See* 143 CONG. REC. S12482 (daily ed. Nov. 10, 1997) (remarks of Sen. Gorton) (while complaining about federal court delays in processing takings claims, asserting that

the instances of agency delay seems to be confirmed by the fact that the same instances, amounting only to a handful, were repeatedly cited by different supporters of H.R. 1534.⁴³² There is a final problem with the evidence of constitutional violations supporting H.R. 1534's exhaustion provision; the problem is intertwined with the need for "congruence" between the exhaustion provision and the established violations.⁴³³ Even proof of a pattern of unconstitutional delays by local agencies would not have supported H.R. 1534's exhaustion provision. That is because the exhaustion provision would not have alleviated delays by *local agencies*. The exhaustion provision would have avoided only the delays that takings claimants would otherwise encounter in *state courts*.⁴³⁴ To support the exhaustion provision, Con-

"[m]ost State and local governments use their power responsibly, respecting the rights of private property owners when making land use decisions"); *id.* at H8942 (remarks of Rep. Canady) ("In most zoning cases, * * * abuse does not occur."); *id.* at 8945 (remarks of Rep. Gallegly) ("Most government agencies use [land-use] powers very responsibly."); *Senate Hearing, supra* note 39, at 73 (testimony of Hal Daub, Mayor of Omaha, Nebraska) ("It is not an issue of impugning anyone's integrity or arguing if someone operates in bad faith or even maybe intentionally in a dilatory matter, in my opinion, because I think all local officials that are appointed by mayors and city councils, and city attorneys and county attorneys, are all trying to do the right thing."); *see also House Hearing, supra* note 70, at 35 (testimony of John C. Dwyer, Acting Assoc. Attorney General, DOJ) ("The 'horror' stories that are recounted in support of H.R. 1534 are few in number. There seems to be little, if any, evidence of a systemic nationwide problem.").

432. Seven cases illustrative of the need for H.R. 1534's ripeness provision were cited at least three times, and as many as seven times, in the legislative material on H.R. 1534 or one of the other bills in the 105th Congress that contained a ripeness provision: (1) *Suitum*, 520 U.S. 725, cited in 144 CONG. REC. S8024 (daily ed. July 13, 1998) (remarks of Sen. Hatch); 143 CONG. REC. H8945 (daily ed. Oct. 22, 1997) (remarks of Rep. Gallegly); S. REP. NO. 105-242, at 10-11; *Senate Hearing, supra* note 39, at 43; *House Hearing, supra* note 70, at 46, 164, 188-89; (2) *Schulz*, 849 F. Supp. 708 (N.D. Cal. 1994), *aff'd in part & rev'd in part*, 98 F.3d 1346 (9th Cir. 1996), cited in 144 CONG. REC. S8023 (daily ed. July 13, 1998) (remarks of Sen. Hatch); S. REP. NO. 105-242, at 8; *Senate Hearing, supra* note 39, at 42, 55; (3) *Southview Assocs. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993), cited in 144 CONG. REC. S8023 (daily ed. July 13, 1998) (remarks of Sen. Hatch); S. REP. NO. 105-242, at 8; *Senate Hearing, supra* note 39, at 42, 55; *House Hearing, supra* note 70, at 74, 163; (4) *Santa Fe Village Venture v. City of Albuquerque*, 914 F. Supp. 478 (D.N.M. 1995), cited in 144 CONG. REC. S8023 (remarks of Sen. Hatch); S. REP. NO. 105-242, at 9; *Senate Hearing, supra* note 39, at 44, 57; *House Hearing, supra* note 70, at 76, 165-66; (5) *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496 (9th Cir. 1990), cited in *Senate Hearing, supra* note 39, at 42, 49, 55; *House Hearing, supra* note 70, at 68, 163; (6) *Glendon Energy Co. v. Borough of Glendon*, 836 F. Supp. 1109 (E.D. Pa. 1993), cited in *Senate Hearing, supra* note 39, at 43, 50; *House Hearing, supra* note 70, at 68-69; (7) *Healing v. California Coastal Comm'n*, 27 Cal. Rptr. 2d 758 (Cal. App. 1994), cited in *Senate Hearing, supra* note 39, at 43, 50; *House Hearing, supra* note 70, at 69, 164-65.

433. *See Boerne*, 521 U.S. at 520 (articulating "congruence" requirement).

434. One of the legislative findings in H.R. 1534 implicitly recognized that delays by local agencies were addressed by the bill's modification of the final decision requirement

gress needed evidence of unconstitutional delays or other constitutional violations in the compensation procedures provided in state courts.⁴³⁵ Congress had no such evidence when it considered H.R. 1534.⁴³⁶

Congress would get no help from evidence that regulatory takings by state and local governments were widespread.⁴³⁷ That evidence does not support legislation under Section 5 because it does not establish violations of the Fourteenth Amendment. Just as a state's infringement of a patent does not by itself violate the Due Process Clause of Fourteenth Amendment,⁴³⁸ a state or local government's regulatory taking of property does not by itself violate the Just Compensation Clause.⁴³⁹ A violation of the Just Compensation Clause oc-

rather than by its elimination of the exhaustion requirement. *See* H.R. 1534, § 2(8), 105th Cong. (as reported in Sen. on Feb. 26, 1998) (finding that local land-use procedures "have denied property owners their fifth and fourteenth amendment rights," and that, "to safeguard those rights, there is a need to determine what constitutes a final decision of an agency in order to allow claimants the ability to protect their property rights in a court of law").

435. *Cf.* *Bob Jones Univ. v. Simon*, 416 U.S. 725, 746-48 (1974) (holding that even "serious problems of delay" that plaintiff would encounter in seeking administrative, followed by judicial, relief for allegedly illegal action of Internal Revenue Service did not violate Due Process Clause).

436. There were some "assertion[s] * * * that state courts in the large majority of states are biased in favor of local land-use regulators." *Senate Hearing, supra* note 39, at 89. The supporters of H.R. 1534 offered no evidence in support of these assertions, however. *See* S. REP. NO. 105-242, at 29 (1998) (minority report stating that there was no evidence "to suggest state courts lack the competence to fairly and efficiently address takings claims"); *Senate Hearing, supra* note 39, at 89 (reproducing Congressional Research Service Report, which found no "published empirical study clearly supporting the assertion of state-court bias on land-use matters"). In contrast to the scant evidence of constitutional violations supporting H.R. 1534, abundant evidence of such violations has supported some other modern federal statutes, such as Section 306 of the Railroad Revitalization and Regulatory Reform Act, that have been upheld by lower federal courts under Section 5. *See, e.g., Oregon Short Line R.R. Co. v. Department of Revenue Or.*, 139 F.3d 1259, 1265-67 (9th Cir. 1998); *see also* Brief of Amicus Curiae Ass'n of Am. R.R. in Support of Respondent at 19-22, *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199 (1999) (No. 98-531).

437. *See, e.g., House Hearing, supra* note 70, at 49-50 (prepared statement of Donald Betsworth, President, North Carolina Homebuilders Ass'n, on behalf of National Association of Homebuilders) (describing "typical scenario" in which local agency required land owners to dedicate almost half of their property in return for permission to subdivide land); *see also* H.R. 1534, § 2(1) (as reported in Sen., Feb. 26, 1998) (finding that "property rights have been abrogated by the application of laws, regulations, and other actions by all levels of government that adversely affect the value and the ability to make reasonable use of private property").

438. *See* *Florida Prepaid*, 119 S. Ct. at 2208.

439. *See, e.g., Williamson*, 473 U.S. at 195.

curs only when the state fails to provide just compensation or adequate procedures for getting it.⁴⁴⁰

b. Congruence and proportionality

Suppose that Congress could amass evidence that would satisfy the first part of the *Florida Prepaid* test. The evidence would have to show that states lacked adequate procedures for compensating regulatory takings by their local agencies. Thus, suppose the evidence showed that state compensation procedures were almost always incredibly lengthy and expensive, and that those procedures often resulted either in decisions erroneously finding that no taking had occurred, or in awards that under-compensated the victims of regulatory takings.⁴⁴¹ Also assume that the length, expense, and error rate

440. See *Williamson*, 473 U.S. at 195 (“The recognition that a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation is analogous to the Court’s holding in *Parratt v. Taylor*, 451 U.S. 527 * * * (1981),” where Court held that violation of Due Process Clause did not occur until state had failed to provide remedy for state officer’s tort); see also *Del Monte*, 119 S. Ct. at 1641 (“Even when the government takes property without initiating condemnation proceedings, there is no constitutional violation ‘unless or until the state fails to provide an adequate postdeprivation remedy for the property loss.’”) (quoting *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984), a procedural due process case following *Parratt*).

441. The *Williamson* exhaustion requirement appears to require a takings claimant to exhaust only those state procedures that can lead to compensation, such as suits in inverse condemnation. See *Williamson*, 473 U.S. at 195-96. It is conceivable, however, that states could attempt to require a takings claimant, as a prerequisite to invoking state compensation procedures, to bring a separate proceeding to determine whether the action challenged as a taking was authorized under state law. The rationale for such a requirement would be that a compensable taking can occur only through action that is governmentally authorized. See *United States v. North Am. Transp. & Trading Co.*, 253 U.S. 330, 333 (1920) (“In order that the government shall be liable [for just compensation] it must appear that the officer who has physically taken possession of the property was duly authorized so to do * * *.”); *Hooe v. United States*, 218 U.S. 322, 333-34 (1910) (to the same effect); *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1362-63 (Fed. Cir. 1995) (applying same principle to regulatory taking claim). Many states have statutes akin to the federal Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551 *et. seq.*, to determine whether an official’s action is authorized by state law. See, e.g., BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* § 1.13, at 32-33 (3rd ed. 1991). In proceedings under such state administrative procedure acts, a state court may not be able to award just compensation. See, e.g., *supra* note 169 (citing Illinois case law to this effect). If states on a widespread basis required takings claimants to resort to APA-style review, and if that requirement significantly increased the time and money needed to exhaust state compensation remedies, Congress might have the power under Section 5 of the Fourteenth Amendment to allow takings claimants who had gotten a final decision to bypass state procedures by filing in federal court. See *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656 (1884) (holding that, even though government erred by appropriating property without bringing formal condemnation proceedings, plaintiff can “elect[] to regard the action of the government as a taking” and seek just compensation); see also *Del-Rio Drilling*,

were so large that they violated the Fourteenth Amendment.⁴⁴² Given such evidence, the elimination of exhaustion requirement proposed in H.R. 1534 would have been sufficiently tailored to remedying or preventing these violations that it would satisfy the second part of the *Florida Prepaid* test.⁴⁴³

Most importantly, the exhaustion provision would not create any new liability.⁴⁴⁴ It would merely allow federal courts to hear inverse-condemnation claims that would otherwise have to be heard initially in state court. Thus, the exhaustion provision would give the claimant the option of a federal forum, but the claimant would still have to prove a regulatory taking to recover just compensation.⁴⁴⁵ In this respect, the exhaustion provision would have worked like the provisions in the federal Fair Housing Act ("FHA") that eliminate the prudential standing rules for plaintiffs asserting certain violations of the FHA.⁴⁴⁶ The FHA fell within Congress' power to enforce the Thirteenth Amendment,⁴⁴⁷ which parallels Congress' power to enforce the Fourteenth Amendment.⁴⁴⁸ The Court has not specifically linked the FHA's elimination of prudential standing rules to the enforcement provision of the Thirteenth Amendment. The Court's precedent is consistent with such a linkage, however, and reflects a valid use of that enforcement power.⁴⁴⁹

Because it would not have created any new liability, H.R. 1534's exhaustion provision differed from the federal laws struck down in

146 F.3d at 1363-64 (holding that plaintiff could sue for a taking even if government action was "legally flawed in some respect," as long as government action was not *ultra vires*).

442. Cf. *Stearns Co., Ltd. v. United States*, 34 Fed. Cl. 264, 272 (1995) (administrative procedures for property-use can be so burdensome that they violate the Just Compensation Clause).

443. See *Florida Prepaid*, 119 S. Ct. at 2207 ("for Congress to invoke § 5, it * * * must tailor its legislative scheme to remedying or preventing" identified violations of Fourteenth Amendment).

444. See H.R. 1534, 105th Cong. § 6(c) (proposed 28 U.S.C. § 1343(f), providing that "[n]othing in [specified subsections, including exhaustion provision] alters the substantive law of takings of property, including the burden of proof borne by the plaintiff"); see also, e.g., 144 CONG. REC. S8040 (daily ed. July 13, 1998) (remarks of Sen. Coverdell) (S 2271 "does not define a 'taking' or establish a trigger for when compensation is due").

445. See S. REP. NO. 105-242, at 19 (1998) (stating that "it is extremely difficult to prove a takings claim, and this bill does not in any way redefine what constitutes a taking").

446. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982); *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 103 n.9, 109 (1979); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972).

447. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413, 439 (1968).

448. See *Ex parte Virginia*, 100 U.S. (10 Otto) 339, 344-49 (1879) (discussing enforcement powers of 13th and 14th Amendment in similar terms).

449. See Engdahl, *supra* note 124, at 166 (arguing that enforcement power of Thirteenth Amendment supports FHA provisions eliminating prudential standing rules).

Boerne and *Florida Prepaid*. The RFRA imposed liability on state and local governments (and created defenses to legal proceedings brought by them) based on conduct for which the Constitution did not impose liability.⁴⁵⁰ Similarly, the Patent Remedy Act imposed liability for state conduct—patent infringement—that did not always trigger liability under the Due Process Clause.⁴⁵¹ The liability-creating features of the RFRA and the Patent Remedy Act diminished the congruence between those statutes and the Fourteenth Amendment violations at which they were aimed.⁴⁵² H.R. 1534's exhaustion provision did not have that problem.

H.R. 1534's exhaustion provision might have put additional burdens on local governments, but the burdens would not have invalidated the provision. Specifically, the exhaustion provision might have exposed local agencies to more litigation, especially if taking claimants thought they stood a better chance of getting relief in federal court than in state court. Moreover, the additional litigation in federal court might have been more burdensome for a local government than state-court litigation. After all, federal-court litigation is often more expensive, and many lawyers for local government agencies may be relatively unfamiliar with federal-court rules.⁴⁵³ On the other hand, these additional burdens would be offset if the exhaustion provision spared local-agency attorneys from having to litigate takings-ripeness issues in federal court.⁴⁵⁴ In any event, the additional burdens that H.R. 1534's exhaustion provision might have imposed would not have been heavy enough to make that provision fail the second part of the Court's two-part test, in light of the evidence of state constitutional violations that would have to exist to satisfy the first part of the test.

450. See *Boerne*, 521 U.S. at 534 (“Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise.”). Namely, RFRA prohibited the application of neutral, generally applicable laws in ways that substantially burdened a person's exercise of religion but that did not violate the Free Exercise Clause (because they did not reflect animus or discrimination toward individuals' exercise of religion).

451. See *Florida Prepaid*, 119 S. Ct. at 2210 (observing that the Patent Remedy Act exposed states to “expansive liability,” despite which “Congress did nothing to limit the coverage of the Act to cases involving arguable constitutional violations”).

452. Cf. *United States v. Reese*, 92 U.S. (2 Otto) 214, 216-22 (1875) (holding that federal statute was not “appropriate” to enforce Fifteenth Amendment because it imposed criminal liability regardless whether conduct discriminated on basis of race).

453. See *Senate Hearing*, *supra* note 39, at 13 (testimony of Larry Curtis, Mayor of Ames, Iowa) (asserting that “[i]n many cases, having to defend [takings] litigation in Federal court will be more costly than litigating the same claim in State courts”).

454. See S. REP. NO. 105-242, at 19 (1998) (observing that “localities already must litigate property rights claims on Federal ripeness grounds, which may take years to resolve”).

V. Conclusion

This article has explored unsettled, fundamental issues of constitutional law arising from recent congressional proposals that take a new tack toward property-rights reform. The proposals would revise the process by which a property owner can seek just compensation in federal court for a regulatory taking of his or her property by a local land-use agency. Specifically, the proposals would negate the U.S. Supreme Court precedent that requires the owner to exhaust available and adequate state compensation procedures before going to federal court. Opponents of the proposals argued that the legislative elimination of the Court's "exhaustion" requirement would violate Article III and exceed Congress' power.

This article concludes that the elimination of the exhaustion requirement would not violate Article III but would exceed Congress' power on the current legislative record. The elimination of the exhaustion requirement would not violate Article III because the requirement is not dictated by Article III. Instead, the exhaustion requirement is akin to the prudential rules of justiciability associated with Article III. Specifically, the exhaustion requirement conserves federal-court resources, as do the prudential rules of justiciability, by giving state courts a chance to award just compensation for regulatory takings by local agencies. Unlike the prudential rules of justiciability, however, the exhaustion requirement is rooted in the Just Compensation Clause, not in Article III, and is supported by federalism principles, not separation-of-powers principles.

Because of those differences, Congress cannot eliminate the exhaustion requirement using its power to make rules for the federal courts, even though Congress can use that rulemaking power to eliminate the prudential rules of justiciability associated with Article III. Congress potentially can eliminate the exhaustion requirement under section 5 of the Fourteenth Amendment. To do so, however, Congress needs evidence that state courts are violating the just compensation guarantee of the Fourteenth Amendment on a fairly widespread basis. Currently, Congress lacks such evidence.

