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A Knock on Knick's Revival of Federal Takings Litigation

Stewart Sterk
Benjamin N. Cardozo School of Law, sterk@yu.edu

Michael C. Pollack
Benjamin N. Cardozo School of Law, michael.pollack@yu.edu

A KNOCK ON *KNICK*'S REVIVAL OF FEDERAL TAKINGS LITIGATION

Stewart E. Sterk[*] *& Michael C. Pollack*[**]

Abstract

In *Knick v. Township of Scott*, the United States Supreme Court held that a landowner who claimed to have suffered a taking at the hands of state or local officials could seek redress in federal court without the need to first seek compensation through state proceedings. This holding raises serious theoretical and practical concerns. On the theoretical side, *Knick* rests on the implicit assumption that states separate powers among branches of government in the same way the federal government does. It also relies on a second assumption: that relegating taking claims to state court makes them unique. Neither is true.

Beyond the opinion's shaky theoretical foundation, *Knick* will require federal courts to determine precisely when an alleged "taking" is in fact complete and final—an issue they have heretofore been spared. Moreover, nothing in the Court's opinion limits its scope to regulatory takings. The opinion simply does not deal with the host of ways in which state and local government can interfere with private property rights. These include taking actions on adjacent property that have adverse impacts on a landowner's parcel (like sewage backups or flooding) and explicitly exercising the eminent domain power. Unless the Court narrows its opinion, the Court's conceptual separation of takings from just compensation threatens to open the doors of federal courts to a variety of claims that the Court does not appear to have anticipated and that federal courts are ill-equipped to address—including but not limited to claims for valuation of property taken through exercise of the eminent domain power.

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* Mack Professor of Law, Benjamin N. Cardozo School of Law.

** Assistant Professor of Law, Benjamin N. Cardozo School of Law. The authors thank David Carlson, Michael Herz, and Seth Kreimer for their helpful comments and thank the Stephen B. Siegel Program in Real Estate Law for helping to fund this project.

INTRODUCTION

When a landowner contends that government action has effected a taking of her property without just compensation in violation of the Fifth Amendment to the U.S. Constitution,[1] where can she sue? Until the United States Supreme Court decided *Knick v. Township of Scott*[2] in June 2019,[3] the answer was clear: State court and only state court. This was so because the Court held over thirty years ago in *Williamson County Regional Planning Commission v. Hamilton Bank*[4] that a takings claim brought in federal court was unripe until after the aggrieved landowner had used state procedures to seek compensation.[5] More recently, in *San Remo Hotel, LP v. City of San Francisco*,[6] the Court applied preclusion principles to deny a federal forum to a plaintiff who came to federal court after having unsuccessfully pursued a takings claim in state court.[7] The result: federal redress was available to a landowner only if the United States Supreme Court was to entertain review of a final state court determination.[8]

No longer. Concerned that its case law had transformed the Constitution's takings protection into a uniquely second-class

1. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").
2. 139 S. Ct. 2162 (2019).
3. *Id.* at 2167.
4. 473 U.S. 172 (1985), *overruled by Knick*, 139 S. Ct. 2162.
5. *Id.* at 195.
6. 545 U.S. 323 (2005).
7. *Id.* at 347.
8. *See* Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251, 283, 300–01 (2006).

constitutional right,[9] the Court in *Knick* overruled *Williamson County* and held that a landowner who claimed to have suffered a taking at the hands of state or local officials could seek redress in federal court without the need to first seek compensation through state proceedings.[10] The Court accomplished this result by separating the state's alleged "taking" of property from its denial of "just compensation."[11] The Court held that the federal claim ripened when the alleged taking was complete, without regard to whether the state had in place a procedure for providing just compensation.[12]

While many have cheered this result,[13] the Court's reasoning and its conclusion both raise serious problems—and those problems go beyond those identified by the dissenting justices. First, *Knick* rests on a questionable theoretical foundation, for it effectively assumes that states separate powers among branches of government in the same way the federal government does. But there is no federal constitutional requirement that they do so, and the states generally do not. The Court's concern that relegating taking claims to state court makes them unique is also questionable, to say the least. Quite the contrary, the Court's preclusion doctrine limits access to federal courts for plaintiffs who contend that state or local officials have violated numerous other constitutional rights, including the Fourth Amendment.

Second, beyond the opinion's shaky theoretical foundation, *Knick* raises a whole host of unaddressed and apparently unnoticed practical questions. The Court's opinion will require federal courts to determine precisely *when* an alleged "taking" is in fact complete and final—an issue they have heretofore been spared given *Williamson County*'s compensation-seeking requirement. Moreover, the Court's opinions do not account for the many ways in which taking claims can arise—a product of the host of ways in which state and local government can interfere with private property rights. These include regulating property through the zoning process, making pronouncements that reduce the

9. *Knick*, 139 S. Ct. at 2169 ("The state-litigation requirement relegates the Takings Clause 'to the status of a poor relation' among the provisions of the Bill of Rights." (quoting Dolan v. City of Tigard, 512 U.S. 374, 392 (1994))).

10. *Id.* at 2168.

11. *Id.* at 2170.

12. *Id.*

13. *See, e.g.*, Michael Ramsey, *A Small Step Forward in* Knick, ORIGINALISM BLOG (June 22, 2019), https://originalismblog.typepad.com/the-originalism-blog/2019/06/a-small-step-forward-in-knickmichael-ramsey.html [https://perma.cc/9M8P-QSZJ]; Ilya Somin, *Supreme Court Overrules Precedent that Created "Catch-22" for Property Owners Attempting to Bring Takings Cases in Federal Court*, REASON (June 21, 2019, 12:04 PM), https://reason.com/2019/06/21/supreme-court-overrules-precedent-that-created-catch-22-for-property-owners-attempting-to-bring-takings-cases-in-federal-court/ [https://perma.cc/WC78-K9HN].

value of property like announcing a future condemnation,[14] taking actions on adjacent property that have adverse impacts on a landowner's parcel like sewage backups or flooding,[15] explicitly exercising the eminent domain power,[16] and more. *Knick* dealt with regulation, but the Court's conceptual separation of takings from just compensation might open the doors of federal courts to a variety of other sorts of taking claims that the Court does not appear to have anticipated. In particular, federal courts might even have jurisdiction over claims by condemnees seeking to avoid state substantive rules and procedures for valuing property taken for public use.

This Article critiques *Knick* along both these theoretical and practical lines. This Article does not predict how courts will ultimately resolve the practical issues. It will not be long, however, before the Court will be faced with the need to clean up the mess it made.

I. *KNICK V. TOWNSHIP OF SCOTT* AND ITS PREDECESSORS

An understanding of *Knick* and its flaws requires an examination of two earlier cases that channeled takings litigation into the state courts. This Part examines those two cases before turning to the *Knick* opinions.

A. Williamson County *and* San Remo

In *Williamson County*, the Supreme Court held that a Tennessee developer's taking claim in federal district court was unripe for two reasons: First, the developer had not obtained a final decision on its application for a new residential subdivision.[17] Second, the developer had not used the relevant state procedures for obtaining just compensation.[18] In defending the second ripeness requirement, the Court emphasized that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."[19] As a result, the Court concluded that so long as the state provides a procedure for a landowner to obtain just compensation, the landowner cannot proceed to federal court until she has used that procedure and been denied compensation.[20]

This resolution was somewhat unexpected. When the Supreme Court first granted certiorari in *Williamson County*, the assumption was that it would resolve a then-unresolved question: Are damages available as a

14. *See, e.g.*, Johnson v. City of Minneapolis, 667 N.W.2d 109, 116 (Minn. 2003).

15. *See, e.g.*, State *ex rel.* Gilbert v. Cincinnati, 928 N.E.2d 706, 714 (Ohio 2010).

16. *See. e.g.*, Kelo v. City of New London, 545 U.S. 469, 520 (2005).

17. Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186–94 (1985), *overruled by Knick*, 139 S. Ct. 2162.

18. *Id.* at 194–97.

19. *Id.* at 194.

20. *Id.* at 194–95.

remedy for unconstitutional land use regulation, or is the affected landowner limited to injunctive relief?[21] The plaintiff developer in that case had obtained preliminary subdivision approval and spent $3.5 million on a golf course and sewer facilities, only to see the county amend its zoning ordinance to reduce permissible density in that area.[22] County agencies disagreed about what to do next: The Planning Commission concluded that the new ordinance should apply to the developer's subdivision, and though the Board of Zoning Appeals disagreed, the Planning Commission concluded that the Board of Zoning Appeals could not overrule it.[23] Hamilton Bank, which had obtained title to the parcel through foreclosure, then sued in federal court, alleging a taking.[24] A jury agreed and awarded $350,000 in damages.[25] But the trial court, while issuing an injunction, entered a judgment notwithstanding the verdict on the damages claim, concluding that temporary deprivations could not constitute a taking as a matter of law.[26] The U.S. Court of Appeals for the Sixth Circuit reversed and held that damages were available.[27]

The Court punted the damages question by concluding that the claim was unripe, but the Court's ripeness holding was more than a convenient ruse for avoiding a controversial issue. The Court could have accomplished that objective by focusing on finality alone—without articulating the requirement that a taking plaintiff use state procedures—because of the disagreement between county agencies, and because the developer still had administrative options available like seeking a variance from either the Board of Zoning Appeals (which had the power to vary the density limits in the zoning ordinance) or from the Planning Commission (which had power to depart from several subdivision regulations). But the Court went further and held that the landowner had not used available state procedures to seek compensation, emphasizing that Tennessee state courts allow recovery through "inverse condemnation" suits when restrictive development regulations effect a taking.[28]

The *Williamson County* opinion appeared to contemplate that a landowner could ripen a federal court takings claim by seeking all relief available under state law. But the Court's subsequent opinion in *San Remo Hotel, LP v. City of San Francisco* made it clear that a landowner

21. That was the question on which the court granted certiorari. *See id.* at 185.

22. *Id.* at 178.

23. *Id.* at 179–82.

24. *Id.* at 182.

25. *Id.* at 183.

26. *Id.*

27. Hamilton Bank v. Williamson Cty. Reg'l Planning Comm'n, 729 F.2d 402, 409 (6th Cir. 1984), *rev'd*, 473 U.S. 172 (1985), *overruled by* Knick v. Township of Scott, 139 S. Ct. 2162 (2019).

28. *Williamson Cty.*, 473 U.S. at 196.

who raised the takings claim in state court would instead be precluded from subsequently raising the same claim in federal court by operation of the federal Full Faith and Credit Statute.[29] The Court held that a landowner who had raised a state constitutional takings claim in state court could not subsequently raise a federal takings claim in federal court because the issues underlying the two claims were identical.[30] Its reasoning appeared to rely on *issue* preclusion doctrine,[31] but because the takings plaintiff *could have* also raised its federal takings claim in that state court proceeding, *claim* preclusion doctrine would have precluded it from subsequently raising that federal claim in federal court too, even if the plaintiff chose not to raise it in the state proceeding.[32] In effect, then, *Williamson County* and *San Remo* together operated to channel all takings claims (other than those against the federal government) into state court.

B. *The* Knick *Opinions*

Williamson County and *San Remo* generated concern from those who contended that, by limiting takings plaintiffs' access to federal courts, the Court had relegated takings protection into the status of a second-class constitutional right.[33] In *Knick*, the landowner, represented by the Pacific

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29. San Remo Hotel, LP v. City of San Francisco, 545 U.S. 323, 347–48 (2005); *see also* 28 U.S.C. § 1738 (2012) (explaining how full faith and credit applies).

30. *San Remo*, 545 U.S. at 347.

31. The Court observed that the U.S. District Court for the Northern District of California and the U.S. Court of Appeals for the Ninth Circuit had relied on issue preclusion principles to hold landowner's claim barred. *Id.* at 334–35. In affirming, the Court emphasized that the landowner had advanced in state court the same constitutional issues it later asked the federal courts to resolve. *Id.* at 341. The Court's opinion states that "we are presently concerned only with issues *actually decided* by the state court that are dispositive of federal claims raised under § 1983." *Id.* at 343. The focus on issues actually decided suggests that the Court, like the courts below, had issue preclusion doctrine in mind. *Cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. LAW INST. 1982) (noting that issue preclusion applies to issues "actually litigated and determined by a valid and final judgment").

32. *See* Sterk, *supra* note 8, at 281–82.

33. *See, e.g.*, J. David Breemer, *Ripeness Madness: The Expansion of* Williamson County *'s Baseless "State Procedures" Takings Ripeness Requirement to Non-Takings Claims*, 41 URB. LAW. 615, 650 (2009) (lamenting exclusion of individual rights in property from the class of civil rights protected by § 1983); J. David Breemer, *You Can Check Out but You Can Never Leave: The Story of* San Remo Hotel*—The Supreme Court Relegates Federal Takings Claims to State Courts Under a Rule Intended to Ripen the Claims for Federal Review*, 33 B.C. ENVTL. AFF. L. REV. 247, 281 (2006) (arguing that *San Remo* "has singled out property owners as second-class constitutional claimants"); Gideon Kanner, *"[Un]Equal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065, 1073 (2007) (characterizing property owners complaining of takings as "legal pariahs who, unlike other constitutionally aggrieved plaintiffs, are barred from seeking their federal constitutional remedy from the federal courts").

Legal Foundation, urged the Court to overrule *Williamson County*. By a vote of 5–4, the Court did just that.[34]

1. The Facts

Rose Knick's ninety-acre Pennsylvania parcel included a small family cemetery.[35] In 2012, the Township of Scott enacted an ordinance requiring that cemeteries be open to the public during the day.[36] When town officials discovered the cemetery on Ms. Knick's parcel the following year, they informed her that she was violating the ordinance.[37] Ms. Knick then proceeded to state court, seeking declaratory and injunctive relief on the ground that the ordinance worked a taking of her property.[38] She did not seek compensation. The town responded by withdrawing the violation notice and agreeing to stay enforcement pending resolution of the state court proceeding.[39] The state court, however, declined to rule on Ms. Knick's request for declaratory and injunctive relief because, in the absence of enforcement by the town, she could not show the irreparable harm necessary for obtaining injunctive relief.[40]

Ms. Knick then sued in federal district court, alleging that the ordinance constituted a taking.[41] The district court dismissed her claim as unripe,[42] citing the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*,[43] and the U.S. Court of Appeals for the Third Circuit affirmed.[44]

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34. Knick v. Township of Scott, 139 S. Ct. 2162, 2167 (2019).
35. *Id.* at 2168.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 2169.
43. Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 200 (1985), *overruled by Knick*, 139 S. Ct. 2162.
44. Knick v. Township of Scott, 862 F.3d 310, 314 (3d Cir. 2017), *vacated*, 139 S. Ct. 2162 (2019).

2. The Majority Opinion

Writing for five Justices, Chief Justice John Roberts started by opining that "[t]he *San Remo* preclusion trap should tip us off that the state-litigation requirement [in *Williamson County*] rests on a mistaken view of the Fifth Amendment."[45] In the Court's view, the requirement was inconsistent with the supposed "guarantee" provided by the Civil Rights Act of 1871 (commonly referred to as "Section 1983") of a federal forum for claims of unconstitutional treatment at the hands of state officials.[46]

While noting that *Williamson County*'s finality requirement "is not at issue here,"[47] the majority concluded that "[t]he state-litigation requirement relegates the Takings Clause 'to the status of a poor relation' among the provisions of the Bill of Rights."[48] By overruling that requirement, the Court claimed to be "restoring takings claims to the full-fledged constitutional status the Framers envisioned."[49]

Analytically, the Court rejected the contention underlying the *Williamson County* state-litigation requirement that no constitutional violation occurs until the state actually denies compensation.[50] Instead, the Court held, "If a local government takes private property without paying for it, that government has violated the Fifth Amendment—just as the Takings Clause says—without regard to subsequent state court proceedings."[51] As a result, an aggrieved landowner can bring the takings claim in federal court at the moment of the alleged taking, regardless of any post-taking remedies the state might make available.[52]

The Chief Justice then turned to whether stare decisis counseled in favor of retaining *Williamson County*, however incorrect its reasoning.[53] Because the *Williamson County* analysis was "exceptionally ill founded" and because the state-litigation requirement had generated no reliance interests, the Court concluded, the reasons for retaining the requirement were weak.[54]

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45. *Knick*, 139 S. Ct. at 2167.
46. *Id.*; *see* 42 U.S.C. § 1983 (2012).
47. *Knick*, 139 S. Ct. at 2169.
48. *Id.* (quoting Dolan v. City of Tigard, 512 U.S. 374, 392 (1994)).
49. *Id.* at 2170.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 2177–79.
54. *Id.*

3. The Dissent

Justice Elena Kagan, writing for four dissenting Justices, rejected the majority's effort to analogize the Takings Clause to other constitutional protections. She argued that "[t]he distinctive aspects of litigating a takings claim merely reflect the distinctive aspects of the constitutional right."[55] As an example, she noted that a Fourth Amendment claim arises when "a police officer uses excessive force, because the Constitution prohibits that thing and that thing only," while a takings claim arises "only [when] *two* things occur: (1) the government takes property, and (2) it fails to pay just compensation."[56]

The dissent also contended that overruling *Williamson County* would have two damaging consequences: it will "turn . . . well-meaning government officials into lawbreakers[, a]nd it will subvert important principles of judicial federalism."[57] In support of the federalism point, Justice Kagan emphasized that—unlike other constitutional claims—takings claims require a court to decide "whether, under state law, the plaintiff has a property interest in the thing regulated."[58] The state law questions that underlie taking claims, she noted, are not familiar to federal courts,[59] and she lamented that the Court's decision will "send[] a flood of complex state-law issues to federal courts"[60] and "make[] federal courts a principal player in local and state land-use disputes."[61]

Justice Kagan offered several examples of state law issues that federal courts will now have to resolve—starting with the background cemetery law in Pennsylvania necessary to resolve the question in *Knick* itself.[62] She also noted differences in the scope of state public trust doctrine, differences which might affect the validity of state regulation of beachfront land.[63]

Finally, Justice Kagan lamented the short shrift the Court's opinion gave to stare decisis, especially because Congress had the power to eliminate the so-called "preclusion trap" by amending the federal law that requires federal courts to afford preclusive effect to these sorts of state court judgments.[64]

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55. *Id.* at 2184 (Kagan, J., dissenting).
56. *Id.*
57. *Id.* at 2187.
58. *Id.*
59. *Id.* at 2188.
60. *Id.* at 2188–89.
61. *Id.* at 2189.
62. *Id.* at 2187–88.
63. *Id.* at 2188.
64. *Id.* at 2189. For a defense of the Court's decision on stare decisis grounds, see Ilya Somin & Shelley Ross Saxer, *Overturning a Catch-22 in the Knick of Time:* Knick v. Township of Scott *and the Doctrine of Precedent*, 48 FORDHAM URB. L.J. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3523194 [https://perma.cc/E296-UWDW].

II. THEORETICAL ISSUES

As the foregoing discussion demonstrates, the Court's opinion in *Knick* turns on two theoretical premises: first, that whether the government's supposed taking is unconstitutional is conceptually separate from whether the government has provided just compensation, and second, that a federal forum must be available for constitutional violations by state or local officials. Both of those premises are at least contestable, if not just wrong.

A. *Separating "Taking" from "Just Compensation"*

The Court's primary argument relies on the idea that the government taking of property is conceptually complete prior to the ultimate determination by the state that compensation is not owed (or that compensation will not be rendered in what the plaintiff owner believes is a sufficient amount).[65] So when the Court said that "a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it,"[66] it meant that a property owner has a claim so long as the state or municipality does not provide "*immediate*[]" compensation.[67] The subsequent determination by a state court that compensation is owed has nothing to do with whether the Takings Clause was violated, according to the Court; instead, it speaks to whether the state has remedied a violation that already took place.[68]

As Justice Kagan explained in her dissent, this is a novel characterization of the Takings Clause that departs from over a century of precedent.[69] But the Court's error is not simply a doctrinal one. This conceptual severance between the alleged taking of property, on the one hand, and the determination of whether compensation is owed for that taking, on the other, assumes a separation of powers and functions at the state level that is not compelled by the U.S. Constitution—and that, in fact, does not strictly exist. The Court never explicitly articulates its notion of state government processes, but from its viewpoint, an alleged taking is complete and ready to be litigated on the merits as soon as some entity of state or local government takes an action or imposes a

65. *See supra* text accompanying notes 50–52.

66. *Knick*, 139 S. Ct. at 2170.

67. *See id.* at 2172 (emphasis added) (discussing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315, 318 (1987)).

68. *Id.* ("A later payment of compensation may remedy the constitutional violation that occurred at the time of the taking, but that does not mean the violation never took place.").

69. *Id.* at 2182–83, 2185–87 (Kagan, J., dissenting).

regulation.[70] That entity might be a city council or a town board,[71] or it might be a statewide entity like the South Carolina Coastal Council.[72] Either way, in the Court's view, once that entity takes action and fails to pay compensation immediately, any Takings Clause violation is complete. All that remains is determining the remedy available to the property owner. For that, the property owner can turn away from the city council or statewide agency and proceed directly to federal court.

If state and local governments were required to maintain a strict separation of powers, or if they did in fact maintain such a strict separation, the Court would have been on somewhat more stable theoretical footing, at least as concerns this aspect of its decision. But neither is true. The U.S. Constitution says next to nothing about how states are to structure their governments beyond the thin requirement that states have a "Republican Form of Government."[73] As the Court has previously observed,

> Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons . . . belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State.[74]

And the states have in turn taken a "varied, pragmatic approach in establishing government[]" that often scrambles the more rigid separation of powers that exists at the federal level—and that the *Knick* Court seems to have had in mind.[75]

One result of this blurry separation of powers at the state level that is particularly relevant here has to do with state courts. As one of us has explored in depth, state law throughout the country charges the state courts with handling a wide array of functions beyond resolving disputes and remedying violations of law alleged to have occurred in the past.[76]

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70. *See* Robert H. Thomas, *Sublimating Home Rule and Separation of Powers in* Knick v. Township of Scott, 48 FORDHAM URB. L.J. (forthcoming 2020) (manuscript at 27), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3490905 [https://perma.cc/8W3L-QKD5] (similarly observing, though without disagreement, that the Court "assumed that when a municipal government is doing the taking, state law making a state court inverse condemnation lawsuit available was not 'the [same] government' doing the compensating").

71. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 110–11 (1978).

72. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1007–08 (1992).

73. U.S. CONST. art. IV, § 4.

74. Dreyer v. Illinois, 187 U.S. 71, 84 (1902).

75. Avery v. Midland Cty., 390 U.S. 474, 482–83 (1968) (quoting ROBERT C. WOOD, POLITICS AND GOVERNMENT IN THE UNITED STATES 891–92 (1965)).

76. *See* Michael C. Pollack, The State Courts Beyond Judging (Feb. 12, 2020) (unpublished manuscript) (on file with author).

Indeed, some of the roles state courts routinely play are fairly characterized as quasi-administrative in that they entail making initial determinations about a person's entitlement to legal benefits like a formal name change, a license to practice law, or an abortion without parental notification or consent.[77] Some state court roles are also fairly characterized as quasi-legislative in that they entail setting policy outside the context of dispute resolution. Determining the boundaries of legislative districts and creating new specialty criminal courts like drug treatment courts and veterans courts are just two examples.[78] And while there are normative reasons to question or reform some of those allocations,[79] there is no legal limitation preventing a state from choosing to make its courts an integral component of all sorts of regulatory schemes. This includes land use regulation—both its more legislative aspects like zoning and its more administrative aspects like granting or denying variances or other permits.[80]

Indeed, some states have done just that. The New Jersey Supreme Court, for example, has intermittently required judicial approval of all local zoning ordinances to make sure each municipality provides its "fair share" of the area's affordable housing needs.[81] If a New Jersey municipality enacted a zoning ordinance that a property owner believed effected a taking, would the *Knick* Court think the taking complete when the municipality enacted the ordinance? Or when the appropriate New Jersey state court approved it? Adhering to the *Knick* Court's cramped conception of what state legislatures and state courts respectively do might lead one to conclude the taking was complete upon municipal enactment. But that would be incoherent because the ordinance would not

77. *See id.* at 8–22.

78. *See id.* at 26–33.

79. *See id.* at 37–63.

80. It is therefore not necessarily the case, as a matter of any constitutional principle, that state courts are "not acting as an arm of local government" in the takings setting. Thomas, *supra* note 70, at 24. Far from being "outmoded," *id.*, the idea that local governments and state courts are all instrumentalities of the same state government remains at the foundation of local government law. *See, e.g.*, *Avery*, 390 U.S. at 480 ("The actions of local government *are* the actions of the State."); Hunter v. City of Pittsburgh, 207 U.S. 161 (1907) ("Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them."). Even localities with the power to act independently of the state legislature only have that power because state law—either constitutional or statutory—affords them it. *See, e.g.*, LYNN A. BAKER, CLAYTON P. GILLETTE & DAVID SCHLEICHER, LOCAL GOVERNMENT LAW 247 (5th ed. 2015) ("[T]here is nothing either inevitable or immutable about the relationship between the states and their political subdivisions....[E]ven those jurisdictions that nominally grant a significant scope of 'home rule' authority to their localities may ultimately define the areas of autonomy so narrowly as to permit [state] legislative control of local activity in most areas of substantive importance.").

81. *See* S. Burlington Cty. NAACP v. Township of Mount Laurel, 456 A.2d 390, 438–41 (N.J. 1983).

actually be effective until the court approves it. At the same time, if the action did not ripen until court approval, then a citizen's right to bring her claim in federal court under *Knick* would turn entirely on how the state happened to structure its regulatory system and distribute its regulatory power: In states like New Jersey, takings plaintiffs would have to run at least some of their claim through state court before accessing a federal forum, while in states without this sort of rule, takings plaintiffs could access a federal forum as soon as the municipality made its decision. There is no principled basis under the U.S. Constitution for that distinction, but by overlooking the multiplicity of state and local government forms, *Knick*'s logic demands it. By contrast, under *Williamson County*, that sort of distinction made no difference at all, and takings plaintiffs were treated the same across the states in terms of when they could access federal court.

The problem comes into bolder relief if we think about a state that goes further and confers on its courts of general jurisdiction the power to decide in the first instance and all at once whether particular land use restrictions should proceed with compensation, without compensation, or not at all. While these sorts of decisions are more typically reserved to local legislative or administrative bodies, the foregoing discussion illustrated that state courts are in fact charged with a number of tasks more typically assigned to legislative or administrative bodies. Suppose, then, that a state delegated to its courts precisely this decision-making authority. No property owner could access a federal forum for his federal takings claim until the state court had made its decision. This state would therefore have essentially returned its property owners to the *Williamson County* regime simply by structuring its decision-making authority in a particular way. The *Knick* Court's reasoning not only fails to account for this possibility, but affirmatively enables it by leaving the trigger for access to federal court up to the happenstance of how any given state structures its land use decision-making process.

Given the flexibility of state separation of powers, there is little limit to these hypotheticals (and next to none as a matter of federal law). States could therefore allocate regulatory authority in ways that give state courts greater or lesser roles at earlier or later stages of the zoning and land use process. The result under *Knick* is that plaintiffs' abilities to access federal court in vindication of a federal constitutional right will depend on how states happen to make this choice. The Court appears to have assumed that state and local regulatory authority would consistently belong on the front end to some recognizably "legislative" or "administrative" body, and that compensation would come on the back end from some recognizably "judicial" body like a state court. But because none of that is necessarily true, the Court's holding treats plaintiffs differently depending on the structure of their state government.

Worse, the fact that so much now turns on aspects of state law that have no relevance to when a plaintiff ought to be able to press her takings claim in federal court suggests that it is indeed quite difficult to conceptually and consistently separate the alleged taking from the provision of compensation.

B. *Availability of Federal Relief: The "Preclusion Trap"*

The balance of the Court's opinion rests on the supposed "preclusion trap." The so-called "trap" is that *Williamson County*'s second ripeness prong—requiring property owners to fully litigate their claims for compensation in state court before turning to federal court—does not merely postpone federal review. Rather, it prevents review altogether when joined with the conclusion in *San Remo* that takings plaintiffs are precluded by the federal Full Faith and Credit Statute from relitigating the issues actually litigated in their state court takings cases in federal district court.[82] The result, according to the *Knick* Court, is an intolerable "Catch-22": A takings plaintiff "cannot go to federal court without going to state court first [under *Williamson County*]; but if he goes to state court and loses, his claim will be barred in federal court" under *San Remo*.[83] Meanwhile, the Civil Rights Act of 1871 is said to "provide access to a federal forum for claims of unconstitutional treatment at the hands of state officials."[84] The *Williamson County–San Remo* obstacle to that federal forum certainly existed, certainly sounds unfair, and certainly makes for powerful rhetoric.[85] Perhaps that is why the *Knick* opinion features the "preclusion trap" phrase three times.[86]

But the rhetoric belies a few deeper problems with the argument. The first is one that Justice Kagan gestured to in her dissent in *Knick*.[87] As she explained, *San Remo* interpreted a federal statute.[88] If there is any inconsistency between that statute and the Civil Rights Act, it is one that Congress created, and one that Congress could fix. Justice Kagan's point was primarily one about stare decisis; that is, because Congress "can reverse the *San Remo* preclusion rule any time it wants," the Court ought to adhere to its prior precedents.[89] Justice Kagan is certainly right that Congress could have overturned *San Remo*, and she was also right to

82. San Remo Hotel, LP v. City of San Francisco, 545 U.S. 323, 335–39, 342 (2005).

83. Knick v. Township of Scott, 139 S. Ct. 2162, 2167 (2019); *see* Somin & Saxer, *supra* note 64, at 10.

84. Heck v. Humphrey, 512 U.S. 477, 480 (1994).

85. *See* Sterk, *supra* note 8, at 276–77 (acknowledging that "claim preclusion, combined with the *Williamson County* ripeness requirements, provides a nearly insurmountable obstacle for claimants seeking federal court litigation of federal takings claims").

86. *Knick*, 139 S. Ct. at 2167, 2174, 2179.

87. *Id.* at 2189 (Kagan, J., dissenting).

88. *Id.*

89. *Id.*

continue sounding the alarm bells about the majority's treatment of precedent throughout the Term.[90]

But the point that the preclusion "trap" is set by a federal statute (and by *San Remo*) goes to the substance of the Court's position as well, in two ways. First, if the Court had a problem with the preclusive effect of state court takings judgments and was unwilling to wait for Congress to fix it, then the Court should have trained its focus on the case which confirmed that preclusive effect: *San Remo*. *Williamson County* merely held that takings claims are not fully ripe until the plaintiff has been finally denied compensation through a state's processes.[91] Nothing about that holding entraps anyone. And in light of the variety of institutional forms for state takings processes discussed above, as well as the practical considerations discussed below, *Williamson County* sensibly reflected the reality of land use decision-making. It was *San Remo* that lowered the boom on takings plaintiffs, and not unintentionally. Indeed, the Court in *San Remo* knew exactly what it was doing. This was no mistake or oversight: The Court explained in *San Remo*,

> At base, petitioners' claim amounts to little more than the concern that it is unfair to give preclusive effect to state-court proceedings that are not chosen, but are instead *required* in order to ripen federal takings claims. Whatever the merits of that concern may be, we are not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum.[92]

In other words, little if anything about the "preclusion trap" argument speaks to why *Williamson County* was wrongly decided on its own terms.[93]

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90. *See id.* at 2189–90; Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting) ("Today's decision can only cause one to wonder which cases the Court will overrule next.").

91. Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194–95 (1985), *overruled by Knick*, 139 S. Ct. 2162.

92. San Remo Hotel, LP v. City of San Francisco, 545 U.S. 323, 347 (2005).

93. *See Knick*, 139 S. Ct. at 2167, 2174, 2179. A further oddity of the Court's approach in *Knick* is that, while purporting to overrule *Williamson County* and not *San Remo*, the Court never explained why *San Remo*'s preclusion rule did not mandate dismissal of Ms. Knick's federal action. Ms. Knick, after all, had brought a taking claim in Pennsylvania state court before bringing her federal action. *Id.* at 2168. She could have sought, but did not seek, monetary compensation in that state court action. *Id.* Under the logic of *San Remo*, the Court should have invoked claim preclusion doctrine to dismiss her action. *See infra* notes 110–11 and accompanying text. The Court did not do so—without any suggestion that it was overruling or limiting *San Remo*. In any event, one can only hope that the Court's opinion in *Knick* does not give future takings plaintiffs two bites at the apple—one in state court followed by a second in federal court. That result would clearly be inconsistent with the Court's full faith and credit jurisprudence discussed below.

But for those upset about the "trap," overruling *Williamson County* was far more attractive than limiting *San Remo*. This was so because *San Remo*'s interpretation of the Full Faith and Credit Statute is far from an outlier. That is, revisiting *San Remo* would have altered the terrain for a whole host of civil rights plaintiffs. Overruling *Williamson County* to open the "trap"—backwards though that path may have been—ensured that it opens only for takings plaintiffs.

In case after case long preceding *San Remo*, the Court has used the Full Faith and Credit Statute to bar plaintiffs from federal litigation of federal constitutional claims, and has expressed no concern about the same trap. Indeed, the *Knick* Court's insistence that the Civil Rights Act "guarantees" a federal forum for state violations of constitutional rights simply does not accord with the Court's prior encounters with these statutes.[94] What appears like unfair treatment for takings plaintiffs is thus not nearly so unique.

In *Allen v. McCurry*,[95] for example, the Court held that a state court's rejection of a plaintiff's Fourth Amendment case brought under the Civil Rights Act precluded him from relitigating that issue in federal court.[96] In that case, undercover police officers in St. Louis approached Willie McCurry's front door and asked to buy some heroin while other officers hid nearby.[97] McCurry responded by shooting at and wounding the undercover officers. Police returned fire, and McCurry surrendered.[98] The officers then entered his home without a warrant and found heroin in plain view and in drawers.[99] At McCurry's drug possession trial, he moved to suppress all of the heroin the officers found.[100] A Missouri court granted his motion with respect to the heroin found in drawers but denied it with respect to the heroin found in plain view.[101] After his conviction, McCurry sued the officers in federal district court under the Civil Rights Act, alleging that they conspired to violate his Fourth Amendment rights.[102] The district court held, and the Supreme Court agreed, that the state court judgment issued in his criminal trial prevented him from

94. *Knick*, 139 S. Ct. at 2167. The original phrase the Court quotes is that the statute "provide[s]" such a federal forum. Heck v. Humphrey, 512 U.S. 477, 480 (1994). Similarly misplaced, as the following discussion will illustrate, is the suggestion that access to federal courts is always available to provide a "minimum floor of constitutional rights." Somin & Saxer, *supra* note 64, at 12.

95. 449 U.S. 90 (1980).

96. *Id.* at 103–05.

97. *Id.* at 92.

98. *Id.*

99. *Id.*

100. *Id.* at 91.

101. *Id.* at 92.

102. *Id.*

litigating the issue in federal court.[103] Interpreting the Full Faith and Credit Statute, the Court explained that, while the Civil Rights Act "create[d] a new federal cause of action," it changed "nothing about the preclusive effect of state court judgments."[104] And in language that seems to have anticipated and rebutted the *Knick* majority's reasoning thirty years in advance, the Court expressly rejected the notion "that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises."[105] Indeed, there is "no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding *in which he would rather not have been engaged at all*."[106] That is, even plaintiffs who did not voluntarily choose a state court forum in which to advance their constitutional rights are bound in federal court by the results of those state court proceedings. This is hardly a "guarantee" of a federal forum for alleged violations of the Fourth Amendment by states.

The Court reached a similar conclusion with respect to alleged violations of the First and Fourteenth Amendments by states. In *Migra v. Warren City School District*,[107] the Court considered whether a state court judgment might be preclusive, not only as to issues actually litigated in state court, but as to issues the plaintiff "*could have* raised but did not raise" in those state proceedings.[108] In this case, a public school supervisor claimed in federal court to have been terminated by her school board in violation of the First Amendment as retaliation for protected speech. She also raised due process and equal protection claims under the Fourteenth Amendment.[109] But in earlier state court proceedings about the same termination, she made only state law breach of contract and tortious interference arguments.[110] She prevailed there, and the Supreme Court concluded that she was not entitled to another bite at the apple in federal court on her constitutional claims. The Civil Rights Act, the Court held, "does not override state preclusion law and guarantee petitioner a right to proceed to judgment in state court on her state claims and then turn to federal court for adjudication of her federal claims."[111]

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103. *Id.* at 92–93, 105.
104. *Id.* at 98.
105. *Id.* at 103.
106. *Id.* at 104 (emphasis added).
107. 465 U.S. 75 (1984).
108. *Id.* at 83 (emphasis added).
109. *Id.* at 79.
110. *Id.* at 78.
111. *Id.* at 85.

Finally, the Court held in *Matsushita Electric v. Epstein*[112] that settlement of a class action in state court that purported to release even federal claims *that could not have been brought in state court* operated to preclude class members from litigating those claims in federal court.[113] There, a Delaware court approved the settlement of a state law class action which expressly released alleged violations of the U.S. Securities and Exchange Commission rules promulgated under the Exchange Act.[114] Some class members pressed ahead with those securities claims in federal court on the theory that the Exchange Act confers exclusive jurisdiction on federal courts and that the Delaware judgment could therefore not preclude them from litigating that claim in federal court.[115] The Supreme Court disagreed, holding that the same Full Faith and Credit Statute at issue in *San Remo*, *Allen*, and *Migra* is "generally applicable in cases in which the state-court judgment at issue incorporates a class-action settlement releasing claims solely within the jurisdiction of the federal courts."[116] And just like it did in *Allen* and *Migra* with respect to the Civil Rights Act, the Court concluded that nothing in the Exchange Act expressly or impliedly altered the federal courts' obligation under the Full Faith and Credit Statute to give preclusive effect to state court judgments—even those having to do with causes of action that could never have been brought in state court to begin with.[117]

So criminal defendants who by necessity litigated their Fourth Amendment claims in their state court criminal trials cannot relitigate those claims in federal court. Civil rights plaintiffs who never litigated their First and Fourteenth Amendment claims in state court cannot raise them in federal court if they could have raised them in state court. And plaintiffs who not only did not but *could not* have litigated their federal law claims in state court cannot raise them in federal court if a state court settlement purports to release those claims. If takings plaintiffs faced a "preclusion trap," then they were in very good company. In an earlier opinion urging the Court to overrule *Williamson County*, Justice Clarence Thomas claimed that this treatment of takings claims "has downgraded the protection afforded by the Takings Clause to second-class status,"[118] but if that were true, then the Takings Clause was in good company too.

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112. 516 U.S. 367 (1996).

113. *Id.* at 375.

114. *Id.* at 387.

115. *Id.* at 380; 15 U.S.C. § 78aa (2012).

116. *Matsushita Elec.*, 516 U.S. at 375.

117. *Id.* at 380–81. The Court reached a similar conclusion with respect to the preclusive effect of a state court judgment over antitrust claims under the exclusive jurisdiction of federal courts. *See* Marrese v. Am. Acad. of Orthopedic Surgeons, 470 U.S. 373, 382 (1985).

118. Arrigoni Enters. v. Town of Durham, 136 S. Ct. 1409, 1411 (2016) (Thomas, J., dissenting).

This is not the place to explore whether all of these cases were rightly or wrongly decided. But they are nonetheless the law in these other arenas, and they call into serious question the *Knick* Court's indignation that the federal courts were uniquely closed to takings plaintiffs, rendering the takings clause a second-class constitutional right. They also expose the Court's inconsistent efforts at making that forum more easily accessible. Contrast the Court's approach in these earlier cases—which privileges federalism, comity, respect for state courts, and finality over the interests of individual plaintiffs[119]—with its approach in *Knick*—which does the opposite. The majority (and dissent, unfortunately) do not even mention *Allen*, *Migra*, or *Matsushita*, let alone attempt to reconcile the solicitude *Knick* offers to takings plaintiffs with the lack of such solicitude for other civil rights plaintiffs. This inconsistency is all the more ironic in light of the fact that there are especially good reasons to channel takings claims into state court—primarily that takings claims necessarily turn on a baseline of state property law, as we discuss in the next Part—and very few good reasons to do the same for other civil rights claims.[120] Indeed, one might be forgiven for concluding that the Court *likes* precluding some plaintiffs from relitigating their state court losses in federal court—class action plaintiffs and First, Fourth, and Fourteenth Amendment plaintiffs—just not takings plaintiffs.

III. PRACTICAL ISSUES

The Court's decision in *Knick* will present federal courts with a number of practical difficulties—some of which the Justices clearly understood, and others that garnered no discussion in either the majority opinion or the dissent. Justice Kagan's dissent highlighted some, but not all, of the federalism concerns raised by federal litigation whose outcome largely turns on state property law.[121] But neither the majority nor the dissent focused on two other issues certain to provoke future litigation: When is a taking "final" within the meaning of *Williamson County*'s first ripeness requirement, and does the *Knick* ruling open the doors of the federal courthouse to the myriad valuation claims that arise when state and local governments institute condemnation proceedings?

A. *Peculiarities of State Substantive Law*

Resolution of takings claims will frequently rest on the substance of state property law, which often varies from state to state. State court

119. *See, e.g.*, *Matsushita Elec.*, 516 U.S. at 385–86; Migra v. Warren City Sch. Dist., 465 U.S. 75, 84 (1984); Allen v. McCurry, 449 U.S. 90, 104–05 (1980).

120. Sterk, *supra* note 8, at 286–92, 300 ("[T]he unusual *Williamson County* ripeness doctrine tracks the unusual nature of federal takings claims, which are heavily dependent on the content of background state law.").

121. Knick v. Township of Scott, 139 S. Ct. 2162, 2187–89 (2019) (Kagan, J., dissenting).

judges, who confront these issues with greater frequency, are in a better position to understand the background of their respective state's property law than are federal judges who rarely deal with property disputes.[122] Moreover, especially at the appellate level, the federal judges deciding takings cases may be from states other than the state in which the alleged taking occurred.

Although Justice Kagan's dissent recognized the federalism concerns raised by the Court's decision,[123] her opinion did not fully articulate the range of state law issues that are likely to arise in future takings litigation.

1. Regulatory Takings

Justice Kagan cited two examples in which underlying state law might be critical to evaluating regulatory takings claims. The first is *Knick* itself.[124] Whether the township's requirement that Ms. Knick keep the graveyard on her property open to the public effects a taking depends, in considerable measure, on Pennsylvania's background law governing cemeteries and burials. That law may differ materially from cemetery law in other states.[125]

Justice Kagan's second example involved divergent state approaches to beachfront land.[126] In a number of states, the public trust doctrine provides a background limitation on development rights along the beachfront, so that legislative regulation of the beachfront does not significantly change background law.[127] In other states that subscribe to a narrower conception of the public trust doctrine, similar regulation might raise a more persuasive taking claim.[128]

The Court's recent decision in *Murr v. Wisconsin*[129] provides yet another illustration of the importance of state property law in evaluating regulatory takings claims. *Murr* concerned a Wisconsin regulation that

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122. *Id.* at 2188.

123. *Id.*

124. *Id.* at 2187.

125. Professor Alfred Brophy's exploration of cemetery law reveals a number of differences among the states. For instance, Indiana grants a right of access across cemetery land one day each year, while other states grant much broader access not merely across cemetery land, but across land necessary to arrive at cemetery land. Alfred L. Brophy, *Grave Matters: The Ancient Rights of the Graveyard*, 2006 BYU L. REV. 1469, 1482–88.

126. *Knick*, 139 S. Ct. at 2188 (Kagan, J., dissenting).

127. *See, e.g.*, Jack Potash, *The Public Trust Doctrine and Beach Access: Comparing New Jersey to Nearby States*, 46 SETON HALL L. REV. 661, 672–73 (2016) (noting that New Jersey's public trust doctrine requires public access to the dry sand area of privately owned land).

128. For instance, in Maryland and Delaware, private owners have the right to exclude members of the public from the dry sand area of beaches. *Id.* at 673–77. In these states, a regulation limiting a right to exclude might present a more plausible taking claim than the same regulation in New Jersey.

129. 137 S. Ct. 1933 (2017).

increased the minimum lot size for development along a waterway.[130] The owner of what had previously been two separate lots challenged the regulation because it made development on one of the lots unlawful, leading the landowner to contend that the regulation had deprived that lot of all economic value and was therefore a per se taking under the doctrine articulated in *Lucas v. South Carolina Coastal Council*.[131] The underlying question was whether the two parcels together constituted the "denominator" against which the taking claim should be measured, or whether each parcel individually was its own "denominator."[132] Both the majority and the dissent concluded that state law was relevant to that inquiry,[133] but Chief Justice Roberts, in dissent, argued that the case should be remanded to the state court because the state law on the issue should be dispositive.[134]

These examples are far from exhaustive. The point is that in a host of regulatory taking cases, *Knick* will now require federal courts to make decisions about the content of underlying state property law in the first instance, often with limited guidance from state courts. If, as the Chief Justice indicated in *Murr*, defining property rights is ultimately a state law function, concerns about intervention by federal courts insufficiently attuned to the nuances surrounding those rights should have militated against the Court's result in *Knick*.

2. Other Implicit Takings

Regulatory takings of the sort at issue in *Knick* comprise a subset—albeit an important one—of a broader set of actions that landowners often challenge as takings. An implicit taking claim can also arise when, acting in an enterprise capacity, government causes harm that would, if committed by a private owner, be compensable under state nuisance or trespass law.[135] For instance, a local government might operate a waste

130. *Id.* at 1939–40.

131. 505 U.S. 1003 (1992); *see Murr*, 137 S. Ct. at 1941, 1943.

132. *Murr*, 137 S. Ct. at 1946–49.

133. *Id.* at 1945 (noting that courts should give substantial weight to treatment under state law); *id.* at 1950 (Roberts, C.J., dissenting) (concluding that state law should determine the private property at issue).

134. *Id.* at 1956 (Roberts, C.J., dissenting).

135. In an influential article, Professor Joseph Sax first identified "enterprise capacity" taking claims as a distinct category. *See* Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 62 (1964). Sax argued that when government caused harm while acting in its enterprise capacity, the adversely affected landowner was entitled to compensation. *Id.* at 64. Sax later repudiated that mechanical rule. *See* Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 150 n.5 (1971). Sax's insight that enterprise capacity claims are different from claims of excessive regulation remains significant, and enterprise capacity claims are statistically more likely to be successful than claims of excessive regulation. *See* James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 59 tbl.2 (2016).

disposal facility that devalues neighboring land or an airport that causes disruptive noise.[136] Alternatively, government might act as a public utility, and its provision of water might cause private wells to run dry,[137] or its operation of a sewer system might cause harmful backups.[138] Although in each of these cases, the harms suffered are similar to those generally covered by tort law, governmental immunity doctrines applicable in many states have precluded tort actions against the state or other governmental entities.[139] State constitutions, however, have taking clauses that trump legislatively-created immunity doctrines.[140] As a result, landowners have often styled their claims as claims under the takings clauses of the federal and state constitutions rather than as tort claims.[141] In light of *Knick*, these claims are apparently cognizable in federal court too.

The importance of state law extends beyond immunity doctrine. Underlying state substantive property law may affect whether government's harm-causing activity is actionable at all. For instance, in some states, landowners may have no right to prevent others from drilling wells that interfere with subsurface water levels, while other states

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136. *See, e.g.*, Wilson v. Key Tronic Corp., 701 P.2d 518, 521 (Wash. Ct. App. 1985).

137. *See, e.g.*, Jones v. E. Lansing-Meridian Water & Sewer Auth., 296 N.W.2d 202, 203 (Mich. Ct. App. 1980) (per curiam).

138. *See, e.g.*, State *ex rel.* Gilbert v. City of Cincinnati, 928 N.E.2d 706, 709 (Ohio 2010) (per curiam).

139. *See* Maureen E. Brady, *The Damagings Clauses*, 104 VA. L. REV. 341, 362 (2018) (noting that state statutes enacted in the early twentieth century granted government immunity from tort suits, restricting the ability of landowners to bring nuisance suits against the government). Professor Robert Brauneis has noted, however, that in the nineteenth century, state courts had developed exceptions to immunity doctrine that held government entities and government officials liable for trespass and other injuries to real property. Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 75–82 (1999). Even when sovereign immunity waivers permit suits against the state, though, the remedies available to the landowner may be limited by damage caps. Brady, *supra*, at 397.

140. *See* Carlos A. Ball, *The Curious Intersection of Nuisance and Takings Law*, 86 B.U. L. REV. 819, 853–54 (2006) (noting that state constitutional taking clauses were treated as waivers of sovereign immunity).

141. In a number of modern cases, courts have dismissed tort claims but permitted taking claims to prevail. In many of these cases, plaintiffs relied on the takings clause in the state constitution. *See, e.g.*, Brewer v. State, 341 P.3d 1107, 1118, 1120–21 (Alaska 2014) (holding the state immune in tort for damages caused by fire set to deprive an advancing wildfire of fuel); Peterman v. Dep't. of Nat. Res., 521 N.W.2d 499, 511–12, 514 (Mich. 1994) (holding that destruction of fast lands does not fall within trespass–nuisance exception to sovereign immunity but does give rise to taking claim); Colman v. Utah State Land Bd., 795 P.2d 622, 630–35 (Utah 1990) (holding that a sovereign immunity statute does not apply to taking claims). In other cases, plaintiffs have also relied on the federal constitution's takings clause. *See, e.g.*, Brief of Appellants at 25–27, Bingham v. Roosevelt City Corp., 235 P.3d 730 (Utah 2010) (No. 20081061), 2009 WL 6811344, at *25–28.

recognize such a right.[142] Those differences may dictate different approaches to taking claims when government entities drill wells that cause a drop in the water table, resulting in difficulties for neighboring landowners who rely on their own wells for water. By the same token, the strength of a taking claim arising from the government's operation of a landfill may depend in part on the state's common law of nuisance. If a private actor would not be liable for analogous activities, there is less basis for holding that the government has taken the neighbor's property.

Knick also threatens to enmesh federal courts in construction of state constitutional provisions, which play a significant role in taking claims arising out of nonregulatory government actions. Many states provide broader property protection than the federal constitution, requiring compensation not just for taking of property, but also for "damaging" of property.[143] In states whose constitutions include these "damaging" clauses, claimants typically allege that the government action constituted both a (federal and state) taking and a (state) damaging.[144] Until *Knick*, these actions would be heard in state court, and any state constitutional claims would ultimately be resolved by the state supreme court.[145] *Knick*, however, suggests that a plaintiff who alleges a taking may proceed to federal court on the federal taking claim, putting the federal court in the position of resolving the pendent state constitutional claims as well. The *Knick* opinion appears to foreclose federal abstention, pending resolution of these state constitutional claims.[146] As a result, federal courts will have to either certify these state constitutional questions to state courts (increasing the delay and cost of litigation)[147] or decide these important questions of state constitutional law themselves.

B. *The* Williamson County *"Final Decision" Requirement*

The second practical issue raised by *Knick* arises from the fact that *Williamson County* imposed two ripeness requirements, not one.

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142. *Compare Bingham*, 235 P.3d at 739 (no taking), *with Jones*, 296 N.W.2d at 205 (taking).

143. *See generally* Brady, *supra* note 139, at 344, 355–60 (discussing how the Constitution does not include the word "damage" but many states have takings clauses that include the words "damage" or "damaging").

144. *See id.* at 393–94, 398.

145. *See id.* at 378–82 (discussing different state courts struggling to interpret damages clauses).

146. If the Court in *Knick* had contemplated federal abstention pending resolution of state law claims, it would not be true that a property owner who has suffered a taking may, without regard to subsequent state court proceedings, "sue the government at that time in federal court for the 'deprivation' of a right 'secured by the Constitution.'" Knick v. Township of Scott, 139 S. Ct. 2162, 2170 (2019) (quoting 42 U.S.C. § 1983 (2012)).

147. *See* Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1697 (2003) (noting that temporal and monetary costs of certification are not insignificant).

Williamson County's now-abandoned requirement that federal taking plaintiffs first use state compensation procedures had initially shielded federal courts from litigation about the first requirement: a taking claim does not become ripe until the relevant state or municipal body has made the final decision that works a taking of property.[148] The landowner in *Knick* did not challenge the first requirement, which in the Court's words was "not at issue here."[149]

But *Knick*'s abolition of the state compensation requirement will generate more pressure on the final decision requirement. Federal courts will now have to determine when a local decision becomes final. Moreover, the Court has not made it clear whether that inquiry should be governed by local law or by federal constitutional law. Take *Williamson County* for example. In that case, the landowner faced the common situation in which a proposed development required the approval of multiple bodies.[150] The county's legislative body was responsible for first amending a zoning ordinance to reduce the permissible density in the district.[151] The Zoning Board of Appeals then had authority to interpret the ordinance and to grant variances from its terms.[152] County ordinances further required a third body—the County Planning Commission—to approve all subdivisions of land.[153] The landowner faced the following dilemma: After the legislative body reduced the permissible density on the subject parcel by amending the ordinance, the Planning Commission denied the landowner's subdivision, in part relying on the excess density.[154] The Zoning Board of Appeals concluded that the older ordinance was applicable, obviating the need for any variance,[155] but the Planning Commission concluded that the Zoning Board of Appeals had no authority to review its determination that the amended ordinance governed (a state law issue).[156] The landowner then brought a taking claim in federal district court.[157]

In holding that the landowner's claim was not ripe because the landowner had not received a final decision on its development proposal, the Supreme Court focused on the landowner's failure to seek variances

148. *See Knick*, 139 S. Ct. at 2169.

149. *Id.*

150. Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 175–76, *overruled by Knick*, 139 S. Ct. 2162. For general discussion of the various bodies involved in the land use approval process, see PATRICIA E. SALKIN, AMERICAN LAW OF ZONING §§ 4:5 to :7 (5th ed. 2008).

151. *Williamson Cty.*, 473 U.S. at 178.

152. *Id.* at 180 n.3.

153. *Id.* at 176.

154. *Id.* at 178–79.

155. *Id.* at 180–81.

156. *Id.* at 181–82.

157. *Id.* at 182.

the Zoning Board of Appeals could have granted from the terms of the zoning ordinance and variances the Planning Commission could have granted from the county's subdivision regulations.[158] On the merits—which the Court did not reach—the landowner's taking claim faced significant problems. The landowner had already obtained final approval for 212 units on a portion of the development,[159] and even its expert conceded at trial that it could accommodate all of the Planning Commission's objections and still build an additional 67 units.[160] But the issue that federal courts now will face is not the issue on the merits, but how to determine when the alleged taking became final—an issue that so far has plagued even the state courts that are more likely to be familiar with local zoning processes.

First, in the common case of multi-board review, must the landowner seek relief from each involved board before courts will deem the claim ripe? The *Williamson County* court noted the need to seek variances from both the Planning Commission and the Zoning Board of Appeals—even though the latter had interpreted the ordinance in a way that would have made variances unnecessary.[161] Moreover, suppose both the Zoning Board of Appeals and the Planning Commission had denied variances. The landowner still could have applied to the local legislative body—the body that tightened the zoning requirements—for an amendment of the ordinance. Because the difference between local legislative bodies and local administrative bodies has no particular federal constitutional significance, it is difficult to see why the finality requirement would not also encompass the need to seek a zoning amendment.[162]

Second, does the nature of the variance matter? It would be easy for a landowner to seek a variance that would clearly be denied if that would be enough to ripen a taking claim. But denial of that variance would not establish the local board's resistance to a more modest variance request. The local board is typically a reactive body; it does not generate development plans on its own. The typical approval process involves a give-and-take between developer and board in which the developer

158. *Id.* at 188.

159. *Id.* at 178.

160. *Id.* at 182.

161. *Id.* at 181. The Zoning Board of Appeals had determined that the Commission should apply the prior ordinance and subdivision regulations, and it also determined that the Planning Commission should resolve other disputed issues in a manner favorable to the developer. *Id.* Had the Planning Commission accepted the Zoning Board's determination, the need for further variances would have been obviated.

162. *See, e.g.*, Southdown, Inc. v. Jackson Twp. Zoning Hearing Bd., 809 A.2d 1059, 1068 (Pa. Cmmw. Ct. 2002) (holding that "[w]hen a use [of property] is proscribed . . . the party seeking the non-conforming use must request, *inter alia*, a variance or zoning change").

proposes and the board reacts.[163] If the goal of ripeness is to sharpen a court's understanding of what a board would ultimately approve, the ripeness requirement might require a developer to make multiple applications to ripen its claim.

Third, should courts engraft a futility exception onto the requirement that a landowner obtain variances? Landowners sometimes assert that applications would be fruitless because the local board has made it clear that any applications would be denied.[164] If courts were to develop a futility exception to the ripeness requirement, the next hurdle would be determining what evidence suffices to trigger the exception.

Knick also raises difficult finality questions with respect to taking claims that do not involve regulation. Consider, for instance, a landowner who has suffered flooding as the result of a road construction project. Suppose, under state law, the flooding would constitute a nuisance. Suppose further that the landowner would have a claim for injunctive relief, money damages, or both. Does she have a ripe taking claim? If, as the court suggests in *Knick*, the taking is separate from the remedy, the landowner could argue that the taking claim is ripe as soon as the flooding starts—even if state law doctrine makes it clear that the landowner has other remedies outside of taking law for the harm she has suffered.

These are only a few of the ripeness issues federal courts will now face in light of *Knick*.[165] One might take the Court's statement that the finality requirement is not at issue as a signal that the Court will revisit that requirement as well. But it is difficult to imagine how takings litigation can proceed without crystallization of the government's position, a function that *Williamson County*'s first ripeness requirement currently serves. *Knick* means federal courts will inevitably be drawn into these thickets now.

C. *The Impact of* Knick *on Condemnation Proceedings*

Although implicit taking cases attract the lion's share of attention in academia and at the Supreme Court, explicit taking cases are the bread and butter of many property lawyers. Sometimes, as in *Kelo v. City of*

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163. *See* Stewart E. Sterk & Kimberly J. Brunelle, *Zoning Finality: Reconceptualizing Res Judicata Doctrine in Land Use Cases*, 63 FLA. L. REV. 1139, 1165 (2011) (noting the give-and-take process that educates landowners about objections and enables landowners to present a new application that better accommodates neighborhood concerns).

164. *See, e.g.*, Hendee v. Putnam Twp., 786 N.W.2d 521, 532 (Mich. 2010) (rejecting an argument that futility exception ripened landowner's taking claim against allegedly exclusionary zoning ordinance).

165. Suppose, for instance, a landowner who wants to demolish a historic building seeks to challenge a historic district designation as a taking. Must the landowner first obtain a final denial of an application for a demolition permit? *See* Casey v. Mayor of Rockville, 929 A.2d 74, 107–09 (Md. 2007) (answering in the affirmative).

New London,[166] the issue is whether the government's taking is for public use.[167] In the more common case, the dispute is over the valuation of the property taken.

These explicit taking cases have largely been fodder for state courts. In light of *Williamson County* and *San Remo*, a landowner unhappy with a state's resolution of an explicit taking claim was effectively limited to state court. *Knick*, however, appears to open federal court doors to some or all of these explicit taking claims, potentially raising a host of issues the Court did not anticipate.

The Court in *Knick* expressly separated the "taking" inquiry from the "just compensation" inquiry, and on top of the problems we have already discussed, it is no easy matter to determine when an *explicit* taking occurs. Perhaps the taking occurs when title vests in the condemnor. Alternatively, the taking might occur when the condemnor becomes entitled to possession. State law varies materially. For instance, in Massachusetts, a government condemnor acquires title and the right to possession without the need for any judicial proceeding.[168] Once the condemnor adopts and records an order of taking, title transfers to the condemnor and the condemnee obtains a right to damages for the taking.[169] By contrast, in Ohio, the condemnor does not acquire title or the right to possession until after judicial condemnation proceedings are complete.[170] And in Nebraska, title does not vest in the condemnor until the condemnor actually puts the property to use.[171] *Knick*'s conceptual separation of the "taking" from the "just compensation" might suggest that in Massachusetts, an aggrieved landowner could seek just compensation in federal court as soon as the condemning agency orders the taking, while in Ohio and Nebraska, no federal claim would ever become available, because the claim would not become ripe until the state court had determined just compensation—a determination that would then preclude relitigation of the compensation issue in federal court under *San Remo*. Like the ones we explored in Section II.B, this disparity in result—again based solely on differences in state procedure—appears difficult to justify as a matter of federal constitutional law.

Moreover, even in states that generally hold that title does not vest until the close of condemnation proceedings, statutes sometimes provide for quick take proceedings which give the condemnor a right to

166. 545 U.S. 469 (2005).
167. *Id.* at 472.
168. MASS. GEN. LAWS ch. 79, § 3 (2019).
169. *Id.*
170. OHIO REV. CODE ANN. § 163.15 (LexisNexis 2019).
171. NEB. REV. STAT. § 76-714 (2019).

possession upon payment into court of an estimated value.[172] In Ohio, the payment by the condemnor into court, and the condemnee's withdrawal of the funds "shall in no way interfere with the action [for just compensation] except that the sum so withdrawn shall be deducted from the sum of the final verdict or award."[173] Would use of the quick take procedure ripen a federal claim, in the midst of the state condemnation proceeding? Nothing in the *Knick* opinion answers the question.

Robert Thomas has suggested that *Knick* might not apply to explicit exercises of the eminent domain power because, in those sorts of cases, the government admits it owes compensation.[174] But, of course, valuation disputes arise because the government does not admit that it owes the compensation the landowner believes the Constitution requires. The difference between the parties' respective assessments of what the Constitution requires can be vast.[175] Moreover, in some eminent domain cases, the issue is whether a particular interest constitutes constitutionally compensable property—the very same issue that arises in implicit taking cases.[176]

If a federal taking claim does become ripe before a state determines just compensation, the federal court hearing the claim faces another set of questions: May it (or must it) bypass state procedures for determining compensation? In many states, the initial compensation decision is made by commissioners, often with expertise in valuation matters.[177] In others, the compensation determination is made by courts without the benefit of a jury.[178] Some states provide that the condemnee is entitled to attorney's fees. In some states, courts have discretion to award fees where the order is in excess of the condemnor's offer.[179] In other states, fees are awarded only if, at trial, the judgment exceeds the condemnor's initial offer by a specified amount.[180] For example, in Florida, the fees are based on how

172. *See, e.g.*, OHIO REV. CODE ANN. § 163.06. *See generally* 7 NICHOLS ON EMINENT DOMAIN § G2.04 (2019) (summarizing differences between normal and quick takings).

173. OHIO REV. CODE ANN. § 163.06(c).

174. Thomas, supra note 70, at 24.

175. For instance, in *Borough of Harvey Cedars v. Karan*, 70 A.3d 524 (N.J. 2013), the government offered $300 in compensation to a landowner for losses resulting from a dune construction project, while the landowner claimed entitlement to $500,000 for loss of an ocean view. The government argued—and the New Jersey Supreme Court agreed—that because the project increased the value of landowner's parcel as a whole, the landowner was not entitled to separate compensation for loss of the view.

176. *See, e.g.*, *id.*

177. *See, e.g.*, KAN. STAT. ANN. § 26-504 (2018).

178. *See, e.g.*, N.Y. EM. DOM. PROC. LAW § 501(B) (McKinney 2019).

179. *See, e.g.*, *id.* § 701.

180. *See, e.g.*, WIS. STAT. § 32.28(3) (2018) (awarding litigation expenses when award exceeds condemnor's highest offer by at least 15%).

much benefit the lawyer achieved for the condemnee.[181] If these claims are brought in federal court, are federal courts required to apply some or all of these state rules?[182] Resolution of the issue might depend on the purpose of the state law rules and, in any event, would require further litigation.

Federal courts would also have to face substantive explicit taking issues from which they have so far been spared. Two examples are illustrative. First, suppose a governmental entity condemns land already subject to regulation. Certainly the landowner's compensation should not be measured by the value of the land if it were unregulated. But in computing just compensation, should a court consider the likelihood that, absent condemnation, the landowner might be able to obtain modification of the regulations? Some state courts have concluded that compensation should consider the possibility of modification,[183] but the likelihood of modification will depend heavily on background state law. Federal courts are at a comparative disadvantage in assessing that likelihood.

Second, when a government entity condemns only part of a landowner's land, the condemnation might affect the value of the remainder of the landowner's land—either positively or negatively.[184]

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181. The Florida statute defines benefits as the difference "between the final judgment or settlement and the last written offer made by the condemning authority before the defendant hires an attorney." FLA. STAT. § 73.092(1)(a) (2019). The statutory fees are 33% of any benefit up to $250,000, plus 25% of any portion of the benefit between $250,000 and $1,000,000, plus 20% of any portion of the benefit exceeding $1,000,000. *Id.* § 73.092(1)(c).

182. *See* 28 U.S.C. § 1652 (2012) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.").

183. *See, e.g.*, Spriggs v. State, 54 A.D.2d 1080, 1081 (N.Y. App. Div. 1976) (holding that valuation should consider likelihood that condemnee's property would be rezoned to permit more intensive use). New York courts have also indicated that valuation should take into account the possibility that the existing zoning would be invalidated as a taking. *See In re* New Creek Bluebelt, Phase 3, 156 A.D.3d 163, 166–67 (N.Y. App. Div. 2017) (holding that when condemnor takes property already regulated as wetlands, condemnee is entitled to incremental increase to reflect the reasonable probability that the wetlands regulations themselves would have been found to constitute a regulatory taking).

184. *Borough of Harvey Cedars v. Karan*, 70 A.3d 524 (N.J. 2013), illustrates both the positive and negative effects of condemnation. The borough condemned beachfront land to construct a dune that would connect to other dunes and protect homes and businesses of the area against ocean storms. *Id.* at 526. The condemnation had two effects on the remainder of condemnees' land: it protected the remainder of their property from storms, and it interfered with the view of the ocean from their home. *Id.* The New Jersey Supreme Court held that the condemnation award should be determined by subtracting fair market value after the taking from fair market value before the taking. *Id.* at 527. The court acknowledged that other states had held that only "special" benefits, not "general" benefits could be considered to reduce the amount of compensation available in cases of partial taking, but it indicated that determining what constitutes a "special" benefit varies significantly from jurisdiction to jurisdiction. *Id.* at 539, 540.

States differ on how just compensation should account for those changes in the value of landowner's remaining land,[185] presenting another set of substantive issues federal courts will be called upon to resolve if they now have jurisdiction over just compensation for explicit takings.

Finally, aside from valuation issues, *Knick* may open the federal courts to "public use" challenges of the sort the Supreme Court faced in *Kelo v. City of New London*. Although *Kelo* leaves little room for federal constitutional challenges based on the absence of public use,[186] the Court's opinion,[187] and particularly Justice Kennedy's concurrence,[188] keeps the door open—at least a crack—for public use challenges. Permitting such challenges to proceed in federal court in the first instance would be problematic, especially since many states impose public use limitations that restrict governments more than those articulated by the Supreme Court do.[189]

CONCLUSION

The Court's decision in *Knick* removes the barrier to federal court that the Court had previously erected in its *Williamson County* and *San Remo*

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185. *See* Brittany Harrison, Note, *The Compensation Conundrum in Partial Takings Cases and the Consequences of* Borough of Harvey Cedars, 2015 CARDOZO L. REV. DE-NOVO 31, 42–51, http://cardozolawreview.com/wp-content/uploads/2018/08/HARRISON.36.denovo.pdf [https://perma.cc/9HPZ-A2HT] (surveying different state approaches).

186. The Court indicated that public purpose was to be defined broadly, "reflecting our longstanding policy of deference to legislative judgments in this field." Kelo v. City of New London, 545 U.S. 469, 480 (2005).

187. The Court's opinion concedes that "the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation." *Id.* at 477.

188. Justice Kennedy wrote:

> My agreement with the Court that a presumption of invalidity is not warranted for economic development takings in general, or for the particular takings at issue in this case, does not foreclose the possibility that a more stringent standard of review than that announced in *Berman* and *Midkiff* might be appropriate for a more narrowly drawn category of takings. There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.

Id. at 493 (Kennedy, J., concurring).

189. *See* Dana Berliner, *Looking Back Ten Years After* Kelo, 125 YALE L.J.F. 82, 84, 85 (2015) (noting that forty-four states had changed their laws in response to *Kelo*, and that thirty of them had tightened definitions of public use or public purpose); *see also* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2103–05 (2009) (noting widespread response to *Kelo*, but concluding that much of it has been ineffective); *cf. In re* Condemnation by the Re-development Auth. of Lawrence Cty., 962 A.2d 1257, 1263 (Pa. Cmmw. Ct. 2008) (concluding that state law imposed stricter public use requirements than *Kelo* did).

decisions. *Knick*, however, rests on deeply questionable assumptions about the structure and operation of state and local government and on the incorrect premise that all constitutional claimants—other than taking claimants—have been guaranteed a federal forum. Moreover, the decision's focus on regulatory takings ignores *Knick*'s potential implications for other takings—both implicit and explicit. Federal courts may now be drawn into resolving a host of difficult state law issues outside their areas of expertise. Not even Justice Kagan's dissent focused on the decision's potential scope, which will inevitably become fodder for further litigation until the Court fashions a strategy to retreat from its ill-founded and its ill-advised pronouncements.