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Knick v. Township of Scott: A Source of New Uncertainty for State and Local Governments in Regulatory Takings Challenges to Land Use Regulation

Laura D. Beaton

Matthew D. Zinn

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KNICK V. TOWNSHIP OF SCOTT: A SOURCE OF NEW UNCERTAINTY FOR STATE AND LOCAL GOVERNMENTS IN REGULATORY TAKINGS CHALLENGES TO LAND USE REGULATION

Laura D. Beaton & Matthew D. Zinn***

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INTRODUCTION

Regulatory takings doctrine is famously muddled. But for the past three decades, one aspect of it has been completely clear: the procedure for initiating a regulatory takings claim. In *Williamson County Regional Planning Commission v. Hamilton Bank*, the U.S. Supreme Court held that plaintiffs claiming a Fifth Amendment regulatory taking allegedly caused by a state or local government must first seek compensation under whatever procedure is provided by the state.¹ Only when the claimant was denied compensation through that procedure could the claimant assert that her property was “taken for public use, *without just compensation*.”² Thus, until that point, no federal takings claim under the Fifth and Fourteenth Amendments could accrue.³

* Associate, Shute, Mihaly & Weinberger LLP.

** Partner, Shute, Mihaly & Weinberger LLP. The authors filed an amicus brief in *Knick* in support of the respondents on behalf of eight state and local government groups.

1. 473 U.S. 172, 194–95 (1985).

2. *Id.* at 175 n.1 (emphasis added) (quoting U.S. CONST. amend. V).

3. *Id.*

The state procedure for seeking compensation is an action for inverse condemnation filed in state court.⁴ Many state courts apply the Supreme Court's Fifth Amendment takings jurisprudence to such claims.⁵ To the extent they do so, under the Full Faith and Credit statute, the state court judgment could preclude relitigation of the issues decided in a further federal court action under the federal Takings Clause.⁶ Thus, claims for compensation for alleged takings by state or local agencies have been almost solely the province of state courts.⁷ That is, until last term when the Supreme Court decided *Knick v. Township of Scott*.⁸ There, the Court overruled the "state compensation" rule it had established in 1985 in *Williamson County* and had repeatedly reaffirmed thereafter.⁹ In *Knick*, the Court held that a federal takings claim may be asserted in federal court under 42 U.S.C. § 1983 as soon as the challenged regulatory action is final.¹⁰

On its face, the Court seemed to replace one simple procedural rule (you *must* file your claim in state court) with a new simple rule (you *may* file your claim in federal court). However, this apparently simple procedural change is likely to create a fair bit of confusion, on subjects both procedural and substantive. That confusion will be especially pronounced for the participants in the arena of local land use regulation — local governments and property owners — as much regulatory takings litigation arises there.

First and foremost, *Knick* will change the law applicable to takings claims in unknown ways. While state courts played the primary role of developing takings law under the *Williamson County* regime, that role will now pass to federal courts, which are not obligated to follow the case law developed in the states in which they sit. Takings plaintiffs

4. See, e.g., *Hensler v. City of Glendale*, 876 P.2d 1043, 1047 (Cal. 1994); see also CAL. CONST. art. 1, § 19.

5. See, e.g., *San Remo Hotel v. City & County of San Francisco*, 41 P.3d 87, 101 (Cal. 2002).

6. See *San Remo Hotel L.P. v. City & County of San Francisco*, 545 U.S. 323, 335 (2005) (applying 28 U.S.C. § 1738 (1978)).

7. As the Court noted in *San Remo*, "there is scant precedent for the litigation in federal district court of claims that a state agency has taken property in violation of the Fifth Amendment's Takings Clause. To the contrary, most of the cases in our takings jurisprudence . . . came to us on writs of certiorari from state courts of last resort." *Id.* at 347.

8. 139 S. Ct. 2162 (2019).

9. *Id.* at 2170.

10. *Id.* The Court did not overrule the other major holding of *Williamson County*, which provides that an as-applied takings challenge is not ripe until the local government has rendered a final decision on the allowable use or development of the plaintiff's property. *Id.* at 2169.

will undoubtedly take advantage of this new legal lacuna to bring claims previously barred by settled state law. State and local governments that have developed regulatory policy, particularly land use policy, in reliance on over thirty years of state court precedent, could be in for some uncomfortable surprises.

Second, despite the apparent simplicity of its holding, *Knick* promises new procedural uncertainty. Although federal takings claims may now be filed directly in federal court (or immediately removed there), litigants have several tools to try to force claims, in whole or in part, back into state courts. Unlike other federal constitutional claims, takings claims are fundamentally shaped by state law, particularly state property law. And land use cases frequently involve additional claims under state land use statutes or state administrative law. Thus, it can be expected that some litigants will seek to have those issues addressed in state court. Moreover, historically, lower federal courts have been deeply reluctant to referee land use disputes and may lack enthusiasm for a new category of claims in that field. As such, federal courts may be sympathetic to efforts to shift takings claims, or portions thereof, back to state courts.

I. SOURCES OF UNCERTAINTY AFTER *KNICK*

A. New Takings Law

Although on its face a procedural decision, *Knick* may profoundly affect the substance of takings law. Because the lower federal courts — aside from the Court of Federal Claims and Federal Circuit — were not much involved with takings cases under the *Williamson County* regime, they had little opportunity to develop the law under the Takings Clause.¹¹ Additionally, the Supreme Court decides few takings cases, from whatever source, and the resolution of those cases tends to be narrow.¹² Leadership in developing takings law has thus

11. See *supra* note 7. That is, with the exception of developing the nuances of *Williamson County*'s state compensation requirement itself. A wide variety of federal cases address procedural issues under *Williamson County* in numerous settings. See, e.g., *San Remo Hotel*, 545 U.S. at 330, 346; *Adam Bros. Farming, Inc. v. County of Santa Barbara*, 604 F.3d 1142, 1146–48 (9th Cir. 2010); *Los Altos El Granada Inv'rs v. City of Capitola*, 583 F.3d 674, 679–80 (9th Cir. 2009); *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 91 (1st Cir. 2003).

12. In the last 20 terms, the Court has decided only 13 takings cases, and only three since the 2012–13 term: *Knick*, 139 S. Ct. 2162, *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015), and *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017). See ROBERT MELTZ, CONG. RESEARCH SERV., TAKINGS DECISIONS OF THE U.S. SUPREME COURT:

been assumed by state courts, which have issued significant decisions in many areas of the doctrine.¹³ If takings cases migrate to federal court, lower federal courts will be writing on a mostly clean slate.

Indeed, it is hard to think of another field where the Court made a shift in the applicable law that left so much uncertainty about the new law to apply. When the Court abandoned federal common law in diversity cases in *Erie Railroad Co. v. Tompkins*,¹⁴ for example, everyone knew state law would replace it. Under *Knick*, by contrast, the Court has supplanted established state takings law with an as-yet largely nonexistent federal takings law.

Beyond the few pillars of the doctrine erected by the Supreme Court, state courts have taken the primary role in building the structure of takings doctrine. For example, the California Supreme Court has issued numerous significant decisions on the subject of exactions. Exactions involve the regulator's imposition of a condition of approval on a land use entitlement, such as a permit, for a development project that requires the developer to provide something of value to the regulator.¹⁵ Under *Nollan v. California Coastal Commission*¹⁶ and *Dolan v. City of Tigard*,¹⁷ exactions of property interests in the land-use-regulatory process are subject to somewhat heightened scrutiny.¹⁸ These conditions may be imposed to mitigate the project's environmental impacts or to offset the demands imposed by the project on public infrastructure or services. In our experience in representing public agencies in takings litigation, exactions challenges represent a large share of regulatory takings claims in the land use context.

The California court was seventeen years ahead of the U.S. Supreme Court in deciding that the *Nollan/Dolan* doctrine applies to fees imposed on development projects as well as the exaction of interests in real estate.¹⁹ Perhaps more significant, in *San Remo Hotel v. City and*

A CHRONOLOGY 3-6 (2015), <https://fas.org/sgp/crs/misc/97-122.pdf> [<https://perma.cc/N263-YWYV>].

13. As explained below, state courts have a number of comparative advantages in adjudicating such claims in the context of land use regulation. *See infra* Section I.B.i.

14. 304 U.S. 64 (1938).

15. *See* Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 990 (Cal. 2015) (discussing distinction between exactions and generally applicable land use regulation).

16. 483 U.S. 825, 853 (1987).

17. 512 U.S. 374, 391 (1994).

18. Both cases reached the Supreme Court from the state courts.

19. *Compare* Ehrlich v. City of Culver City, 911 P.2d 429, 433 (Cal. 1996), *with* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 612 (2013). California's extensive experience with development fees derives from the State's early embrace of the anti-tax movement with the adoption of Proposition 13, which has hamstrung

County of San Francisco,²⁰ the California court applied a more lenient standard of review for exactions that are generally applicable and adopted by quasi-legislative action, such as adoption of an ordinance, rather than imposed on a discretionary, ad-hoc basis.²¹ The distinction makes sense, as the risk the Supreme Court identified in *Nollan* and *Dolan* — extortionary use of land use permitting authority to extract unrelated goodies from permit applicants — is less of a concern where a local government applies uniform requirements to all new development in the jurisdiction.²² The Supreme Court has not yet considered the *San Remo* principle.²³

After *Knick*, it is unclear whether federal courts will look to state takings precedents for guidance, or, if they do, which precedents they will adopt. This is undoubtedly an opportunity for landowners and the takings plaintiffs' bar. Now in federal court, they can bring claims that were previously foreclosed by the takings doctrine in their state.

However, it will pose a real challenge for local governments as they make daily decisions about land use regulation. Particularly in states like California, where the state courts have developed significant bodies of takings law, agencies that have been able to rely for years on settled state court precedent face new uncertainty. Given the risk of large, unexpected takings verdicts, many local governments will undoubtedly be more conservative in their land use decisions, allowing landowners more intensive, and profitable, uses of their properties. Furthermore, previous decisions made in reliance on state takings cases may lead to unforeseen outcomes in the new venue of federal court.

efforts by the state and local governments to raise revenue. See MAC TAYLOR, CAL. LEGISLATIVE ANALYST'S OFFICE, COMMON CLAIMS ABOUT PROPOSITION 13, 37–39 (2016). By sharply restricting property and other taxes, Proposition 13 forced public agencies to raise revenue to fund infrastructure and public services by imposing fees on the projects and activities that generate the need for them. *Id.*

20. 41 P.3d 87 (Cal. 2002). This decision preceded the U.S. Supreme Court's later decision on the application of issue preclusion under the Full Faith and Credit statute. See *supra* note 6 and accompanying text.

21. *San Remo Hotel*, 41 P.3d at 103–04. Other states have since adopted this approach, while others have not. Compare *Rogers Mach., Inc. v. Washington County*, 45 P.3d 966, 982 (Or. Ct. App. 2002) (adopting approach), with *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 640 (Tex. 2004) (rejecting approach).

22. *San Remo Hotel*, 41 P.3d at 103–04.

23. See *Koontz*, 570 U.S. at 628 (Kagan, J., dissenting) (noting uncertainty about whether the Court would “approve the rule, adopted in several States, that *Nollan* and *Dolan* apply only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable”).

One area where *Knick* almost certainly promises a change in the applicable law is in the statutes of limitations governing takings claims. Inverse condemnation claims filed in state court were, of course, subject to state statutes of limitations. Insofar as *Knick* shifts takings litigation to federal court, the limitations periods applicable to takings claims will shift, and potentially dramatically, with repercussions for local government planning.

In some states — California is a clear example — local land use decisions are subject to extraordinarily short statutes of limitations. In California, any challenge to a decision on a proposed subdivision of land, for example, is subject to a strict 90-day limitations period.²⁴ California courts held that this short limitations period applies to inverse condemnation claims brought by landowners challenging subdivision decisions.²⁵ Other land use statutes in California impose similarly short — or even shorter — statutes of limitations.²⁶

By contrast, Section 1983 claims, including takings claims filed in federal court after *Knick*, are subject to the personal injury statute of limitations in the state in which the claim arises.²⁷ In California, that period is two years,²⁸ and in other states it can be as long as six years.²⁹ As a result, plaintiffs who previously had to challenge land use decisions within three months can now wait to bring a takings claim *years* later.³⁰

This far longer statute of limitations creates additional uncertainty for local governments. In applying the short limitations periods established by land use statutes, courts emphasized the importance of

24. CAL. GOV'T CODE § 66499.37 (2008).

25. *Hensler v. City of Glendale*, 876 P.2d 1043, 1046 (Cal. 1994); *Honchariw v. County of Stanislaus*, 189 Cal. Rptr. 3d 62, 63–64 (Cal. Ct. App. 2015).

26. *See, e.g.*, CAL. GOV'T CODE § 65009(d)(2)(C) (2014) (“An action or proceeding challenging an action . . . shall be served within 180 days after the accrual of the cause of action.”); CAL. PUB. RES. CODE § 30801 (1991) (establishing a 60-day limitations period to challenge decisions by the California Coastal Commission).

27. *See Action Apartment Ass'n v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1026–27 (9th Cir. 2007).

28. *Id.*

29. *See, e.g.*, ME. REV. STAT. ANN. tit. 14, § 752 (1963); N.D. CENT. CODE ANN. § 28-01-16 (1935).

30. Of course, if a landowner wishes to challenge a land use decision on grounds other than the Takings Clause, she may need to file within the shorter limitations periods applicable to such claims. In some jurisdictions, claim preclusion rules will require her to join her takings claim with these other claims. In others, however, a takings claim may be considered sufficiently distinct from such state statutory claims that it may be split off and filed separately — and much later. *See Crowley v. Katleman*, 881 P.2d 1083, 1090 (Cal. 1994) (applying “primary right” doctrine governing preclusion).

certainty in land use planning.³¹ Allowing claims for just compensation to be asserted years after the challenged decision upends both land use and fiscal planning. As the California Court of Appeal observed: “[If] persons were permitted to stand by in the face of administrative actions alleged to be injurious or confiscatory, and three or five years later, claim monetary compensation on the theory that the administrative action resulted in a taking for public use, meaningful governmental fiscal planning would become impossible.”³² Charged with protecting the public purse, local governments facing such long-term uncertainty about when claims could be brought against them are more likely to act conservatively in land use decisions.

In fact, local governments are likely to be more conservative generally in their land use decisions, given new uncertainty about which legal rules apply. Land use regulation inevitably affects the value of regulated properties in myriad ways.³³ Takings jurisprudence has been famously short on clear rules for drawing the line between noncompensable impacts on property value and compensable takings.³⁴ *Knick* makes that problem worse: now local governments cannot be sure that federal courts will apply even those principles from state takings cases that had been considered settled. Moreover, those local governments now may not know whether their actions will be challenged as takings until *years* later.³⁵ Rather than run the risk of potentially large monetary liabilities and accompanying litigation costs, many local governments will surely opt to regulate less stringently.³⁶ This, in turn, can have wide-ranging effects on communities that would otherwise enjoy the benefits of sound planning, including control of growth and exactions to fund public facilities like roads, parks, and schools.³⁷

31. See, e.g., *Hensler v. City of Glendale*, 876 P.2d 1043, 1060 (Cal. 1994); *Patrick Media Grp., Inc. v. Cal. Coastal Comm’n*, 11 Cal. Rptr. 2d 824, 836 (Cal. Ct. App. 1992); *Warner v. Planning & Zoning Comm’n of Salisbury*, 990 A.2d 1243, 1250 (Conn. App. 2010); *James v. County of Kitsap*, 115 P.3d 286, 294 (Wash. 2005) (en banc).

32. *Patrick Media*, 11 Cal. Rptr. 2d at 836.

33. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); see also *id.* at 417 (Brandeis, J., dissenting).

34. See, e.g., *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 340 n.17 (1987) (Stevens, J., dissenting).

35. See *supra* note 30 and accompanying text.

36. Cf. *First English*, 482 U.S. at 340–41 (Stevens, J., dissenting).

37. *Id.* at 341.

B. New Procedural Uncertainties

Knick also exchanged a clear procedural rule — takings plaintiffs must seek and be denied just compensation in state court — for a far murkier process in which the forum, at the end of the day, will be uncertain. *Knick* greatly increases the chance that a federal court will decide a plaintiff's claims, but it hardly guarantees it. Some issues, perhaps dispositive ones, may still be litigated in state court, with some back and forth between fora.

As an initial matter, *Knick* plainly means that either the plaintiff or the defendant in a Section 1983 takings suit³⁸ may decide to invoke federal jurisdiction: the plaintiff may file there in the first instance or the defendant may remove the case.³⁹ That is where the certainty ends.

The following Sections describe why local governments may seek to remain in, or return to, state court and the variety of mechanisms available to achieve that result despite *Knick*. We conclude that *Knick* therefore may provide a false promise to takings plaintiffs wishing to litigate in federal court.

i. Reasons to Prefer State Court

As noted above, property owners in some states will find federal court a useful escape from existing state takings doctrine.⁴⁰ Indeed, plaintiffs had for years unsuccessfully attempted to persuade the Supreme Court to grant certiorari to overturn *Williamson County*,⁴¹ while local governments largely supported *Williamson County*'s state compensation rule.⁴² Accordingly, despite *Knick*, local governments may seek to return cases, in whole or in part, to state court.

Litigation in federal courts located farther away can be more expensive than in local courts — a serious concern for local governments, which are more likely than landowners to be repeat

38. We assume, as the Court did in *Knick*, that these claims will be brought under Section 1983. See *Knick*, 139 S. Ct. at 2168. Some courts have required federal takings claims to be framed as Section 1983 claims, see, e.g., *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003), while others have recognized the possibility of a claim arising under the self-executing Takings Clause, see, e.g., *Bieneman v. City of Chicago*, 864 F.2d 463, 468 (7th Cir. 1988) (citing *First English*, 482 U.S. at 345).

39. 28 U.S.C. §§ 1441–45 (1948).

40. See *supra* Section I.A.

41. See, e.g., *Arrigoni Enters., LLC v. Town of Durham*, 136 S. Ct. 1409, 1409 (2016) (Thomas, J., dissenting from denial of cert.).

42. See *generally* Brief for National Governors Association et al. as Amici Curiae Supporting Respondents, *Knick*, 139 S. Ct. 2162 (No. 17-674).

takings litigants.⁴³ More importantly, state courts are more familiar with the state property and land use law at the heart of most takings claims. The Takings Clause differs from most of the other guarantees in the Bill of Rights in the privileged position it accords state law: the law that *creates* the property rights protected by the Clause.⁴⁴

Several interrelated strands of takings doctrine give state property law a central role in dictating the outcome of takings cases.⁴⁵ First and foremost, “the first step of the Takings Clause analysis is still to identify the relevant ‘private property.’”⁴⁶ In doing so, courts look to state law.⁴⁷ For example, courts have looked in principal part to state law in defining the “parcel as a whole” to evaluate the severity of the challenged regulation’s impact on the plaintiff’s property.⁴⁸ The determination of the relevant property, also referred to as the denominator in the “takings fraction,” can be critically significant to the outcome of the claim.⁴⁹ If the plaintiff’s interest is construed narrowly, the impact of the regulation is likely to be relatively more

43. See, e.g., Eduardo Peñalver & Lior Strahilevitz, *Judicial Takings or Due Process*, 97 CORNELL L. REV. 305, 354 (2012) (stating that “nearly all governments will be repeat players in property litigation, and only a few private actors will be”).

44. The Supreme Court has repeatedly emphasized “the basic axiom that ‘[property] interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.’” *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1001 (1984) (alterations in original) (quoting *Webb’s Fabulous Pharm., Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)); see also *Murr v. Wisconsin*, 137 S. Ct. 1933, 1950 (2017) (Roberts, C.J., dissenting) (“Our decisions have, time and again, declared that the Takings Clause protects private property rights as state law creates and defines them.”); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998); *Preseault v. Interstate Commerce Comm’n*, 494 U.S. 1, 21 (1990) (O’Connor, J., concurring) (citing *Ruckelshaus*, 467 U.S. at 1003–04, 1012).

45. See *Knick*, 139 S. Ct. at 2187–88 (Kagan, J., dissenting).

46. *Murr*, 137 S. Ct. at 1953 (Roberts, C.J., dissenting).

47. See, e.g., *Phillips*, 524 U.S. at 164 (interest accrued in trust accounts is property under Texas law); *Ruckelshaus*, 467 U.S. at 1001–02 (Missouri law recognized trade secrets as property); *Armstrong v. United States*, 364 U.S. 40, 44 (1960) (in Maine, materialman’s lien constituted compensable property interest); *Collopy v. Wildlife Comm’n, Dep’t of Nat. Res.*, 625 P.2d 994, 999 (Colo. 1981) (Colorado law does not recognize a compensable “right to hunt wild game upon one’s own land”); *New England Estates, LLC v. Town of Branford*, 988 A.2d 229, 243 (Conn. 2010) (option contract not compensable property interest under Connecticut law).

48. See *Murr*, 137 S. Ct. at 1948; see also *id.* at 1954 (Roberts, C.J., dissenting) (parcel-as-a-whole inquiry should be based solely on “state property principles”); see also *Coast Range Conifers, LLC v. Oregon*, 117 P.3d 990, 998 (Or. 2005) (holding that under Oregon law “timber is part of the underlying real property unless it is subject to a contract to be cut,” and refusing to sever timber for purposes of parcel as a whole rule).

49. See *Murr*, 137 S. Ct. at 1944 (definition of the relevant parcel can often be “outcome determinative”).

significant. Plaintiffs thus try to characterize their property interests as narrowly as possible.⁵⁰

Second, under the test adopted in *Penn Central Transportation Co. v. New York City*,⁵¹ which forms the bedrock of the Court's takings jurisprudence,⁵² a court must consider the extent to which the challenged action interferes with "distinct investment-backed expectations."⁵³ In rejecting the takings claim in *Penn Central*, for example, the Court relied in part on the fact that the challenged regulation did not interfere with the plaintiff's primary expectation for the use of its property, namely that it could continue the existing use as a railroad terminal.⁵⁴ The reasonableness of those expectations is shaped in substantial part by state property law.⁵⁵ As a result, a court considering a *Penn Central* claim must evaluate the applicable state property law to determine whether the plaintiff's expectations were objectively reasonable.⁵⁶

Finally, in *Lucas v. South Carolina Coastal Council*, the Court recognized an affirmative defense where the property owner's proposed land use is independently prohibited by pre-existing "background principles of nuisance and property law."⁵⁷ The background-principles defense has subsequently been applied to incorporate a variety of property rules created by state law.⁵⁸ The application of such principles may differ markedly from state to state.⁵⁹

50. *See id.* at 1952 (Roberts, C.J., dissenting).

51. 438 U.S. 104 (1978).

52. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538–39 (2005).

53. *Penn Cent.*, 438 U.S. at 124; *see also* *Ruckelshaus*, 467 U.S. at 1005–06.

54. *Penn Cent.*, 438 U.S. at 136.

55. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 634–36 (2001) (O'Connor, J., concurring); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034–35 (1992) (Kennedy, J., concurring); *see also* Philip Morris v. Reilly, 312 F.3d 24, 50 n.25 (1st Cir. 2002) (state law defined reasonable investment-backed expectations in trade secret); *Allegretti & Co. v. County of Imperial*, 138 Cal. App. 4th 1261, 1279 (Cal. Ct. App. 2006) (evaluating reasonableness of expectations based on state groundwater rights law).

56. *See, e.g.*, *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445, 452 (9th Cir. 2018).

57. 505 U.S. at 1031–32.

58. *See, e.g.*, *Sansotta v. Town of Nags Head*, 724 F.3d 533, 541 (4th Cir. 2013) (public trust doctrine and nuisance); *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978, 985–87 (9th Cir. 2002) (public trust doctrine); *Vanek v. State*, 193 P.3d 283, 292 (Alaska 2008) (fishing permits); *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (Or. 1993) (doctrine of custom).

59. *Compare* State *ex rel.* Thornton v. Hay, 462 P.2d 671, 676–77 (Or. 1969) (Oregon doctrine of custom mandates public access to dry sand beach), *with* Op. of the Justices (Pub. Use of Coastal Beaches), 649 A.2d 604, 610–11 (N.H. 1994) (dry sand beach private property to high-water mark).

Each of these aspects of takings doctrine provides a different view of the same landscape: the “objective rules and customs” created by state law that shape private property interests.⁶⁰ The nature of those state “rules and customs” may often dictate whether regulation effects a taking.

By contrast, no other Bill of Rights guarantee requires courts to wade so deeply, if at all, into state law.⁶¹ The existence of a property interest (or liberty interest) is a threshold requirement for a due process claim,⁶² but it is merely that: any interest will do. The nature and scope of the plaintiff’s asserted property interest plays comparatively little role in the outcome of the claim.⁶³ And state law questions play no role in claims under other provisions — the Free Exercise Clause or the Equal Protection Clause, for example.⁶⁴

Regulatory takings cases also implicate extensive bodies of state land use law, including planning and zoning statutes,⁶⁵ statutes limiting exactions,⁶⁶ statutes governing subdivision of land,⁶⁷ and state constitutional provisions.⁶⁸ As the Supreme Court has recognized,

60. *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring).

61. See Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 *YALE L.J.* 203, 218–19 (2004); see also *Knick v. Township of Scott*, 139 S. Ct. 2162, 2184 (2019) (Kagan, J., dissenting) (noting “the distinctive aspects of the constitutional right”).

62. See, e.g., *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569–70 (1972).

63. See, e.g., *id.* at 569–71 (“[W]e must not look to the ‘weight’ . . . of the interest at stake.”).

64. Those guarantees were cited by Chief Justice Rehnquist in his concurrence in *San Remo Hotel*, in which he questioned the rationale for the *Williamson County* rule repudiated in *Knick*. See *San Remo Hotel L.P. v. City & County of San Francisco*, 545 U.S. 323, 348–49 (2005) (Rehnquist, C.J., concurring).

65. See, e.g., *Edwards v. City of Warner Robins*, 807 S.E.2d 438 (Ga. 2017) (claim that adoption of zoning ordinance prohibiting mobile home park violated notice requirements of state law and effected a taking); *Iowa Coal Mining Co. v. Monroe County*, 494 N.W.2d 664 (Iowa 1993) (alleging zoning ordinance in violation of state enabling statute and regulatory taking based on denial of landfill permit); *State ex rel. Chiavola v. Village of Oakwood*, 931 S.W.2d 819 (Mo. Ct. App. 1996) (second appeal in action alleging zoning ordinance violated state planning statutes and state constitutional provisions and effected taking); *Mayhew v. Sunnyvale*, 774 S.W.2d 284 (Tex. App. 1989) (case alleging violation of Texas Zoning Enabling Act and takings claims).

66. See, e.g., *Ehrlich v. City of Culver City*, 911 P.2d 429, 436–37 (Cal. 1996) (applying state Mitigation Fee Act to avoid reaching takings claim based on monetary exaction imposed on developer).

67. See, e.g., *Marshall v. Bd. of Cty. Comm’rs*, 912 F. Supp. 1456 (D. Wyo. 1996) (claims for violation of subdivision statute and inverse condemnation); *Bd. of Supervisors v. Greengael, LLC*, 626 S.E.2d 357 (Va. 2006) (same).

68. See, e.g., *Moon v. N. Idaho Farmers Ass’n*, 96 P.3d 637 (Idaho 2004) (challenging statute that authorized agricultural field burning as taking and on multiple

land use regulation is “perhaps the quintessential state activity.”⁶⁹ Courts are thus called upon in these cases to construe and apply state land use statutes.⁷⁰ Indeed, the Supreme Court has recognized that “state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations.”⁷¹

Moreover, takings claims are routinely accompanied by claims that local governments have violated these land use statutes as well as straightforward administrative law claims that the agency’s decision is not supported by evidence in the administrative record.⁷² For example, in *Landgate, Inc. v. California Coastal Commission*,⁷³ the plaintiff challenged the Commission’s jurisdiction under the California Coastal Act, alleging that its assertion of jurisdiction over a lot-line adjustment effected a taking by delaying the plaintiff’s development project.⁷⁴ The court “recogni[z]ed that a judicial determination of the validity of certain pre-conditions to development is a normal part of the development process,” and noted that “[t]he resolution of these cases often turns on the construction and application of complex statutory schemes.”⁷⁵

State courts, of course, have the principal role in creating, construing, and applying these diverse bodies of state law.⁷⁶ In “cases that turn on whether the plaintiff has a property interest as defined by

state constitutional grounds); *Gacke v. Pork Xtra, LLC*, 684 N.W.2d 168 (Iowa 2004) (challenging statute granting animal feeding operations immunity from nuisance suit as taking and violation of state constitution).

69. *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982).

70. *See, e.g., Hill-Grant Living Tr. v. Kearsarge Lighting Precinct*, 986 A.2d 662 (N.H. 2009) (construing zoning statute to determine ripeness of inverse condemnation claim).

71. *San Remo Hotel L.P. v. City & County of San Francisco*, 545 U.S. 323, 347 (2005).

72. *See, e.g., Wilkinson v. Bd. of Cty. Comm’rs of Pitkin Cty.*, 872 P.2d 1269, 1273 (Co. App. 1993) (takings claim accompanied by claims under state and local land use laws); *Alpine Homes, Inc. v. City of W. Jordan*, 424 P.3d 95, 99 (Utah 2017) (takings claim accompanied by claims under state statutes regarding development fees); *Peste v. Mason County*, 136 P.3d 140, 143 (Wash. App. 2006) (takings claim accompanied by land use statute procedural and administrative law claims).

73. 953 P.2d 1188 (Cal. 1998).

74. *Id.* at 1192.

75. *Id.* at 1203 (citing numerous cases).

76. *See, e.g., Stop the Beach Renourishment v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 743 (2010) (Breyer, J., concurring); *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 276 (1997) (Kennedy, J.) (“[T]he elaboration of administrative law” is a “prime responsibilit[y] of the state judiciary.”); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975).

state law” — as noted above, a wide swath of takings cases⁷⁷ — *Williamson County*’s state compensation requirement “prevent[ed] a federal court from reaching the merits prematurely.”⁷⁸ *Williamson County*, therefore, appropriately gave state courts the first bite at the apple in applying their own law.⁷⁹ As Justice Kagan noted in her dissent in the case, *Knick* is likely to “channel a mass of quintessentially local cases involving complex state-law issues into federal courts.”⁸⁰

Local governments are frequently repeat litigants which have developed policies in reliance on consistent application of the state law under which they operate.⁸¹ Many local governments will thus seek to have state courts resolve these state law issues even after *Knick*.

ii. The Way Back to State Court

Knick theoretically opened the federal courthouse door to Section 1983 takings claims.⁸² However, as this Section describes, local governments still have a variety of ways to channel cases to state court, and they may find support from federal judges.

Knick may have provided federal courts the authority to hear takings challenges to land use regulation, but it did nothing to overcome the long history of federal court hostility to hearing land use disputes. Those courts have recognized that land use disputes present fundamentally local fights that federal courts should not referee. In *Hoehne v. County of San Benito*,⁸³ for example, the Ninth Circuit noted that the final-decision component of *Williamson County* “guard[s] against the federal courts becoming the Grand Mufti of local zoning boards.”⁸⁴ The courts have thus “repeat[ed] the admonition that federal courts should not become zoning boards of appeal. State courts are better equipped in this arena[, so federal courts] should respect principles of federalism . . . [and avoid] unnecessary state-federal conflict with respect to governing principles in an area

77. See *supra* notes 65–68 and accompanying text.

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

79. See *Williamson County Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 194–95 (1985).

80. *Knick v. Township of Scott*, 139 S. Ct. 2162, 2181 (2019) (Kagan, J., dissenting).

81. See *supra* note 43.

82. See *supra* note 10.

83. 870 F.2d 529 (9th Cir. 1989).

84. *Id.* at 532; see also *Murphy v. New Milford Zoning Comm’n*, 402 F.3d 342, 348 (2d Cir. 2005) (*Williamson County* recognizes that “land use disputes are uniquely matters of local concern more aptly suited for local resolution”).

principally of state concern.”⁸⁵ Given the alternatives of hearing a raft of new takings claims or punting the underlying issues back to state courts for decision, these cases suggest that many federal courts will take the latter approach.

Litigants looking to take advantage of that hostility have a variety of procedural tools to resolve issues in state court. First, in the common case involving state law claims in addition to a Section 1983 takings claim, a party can argue that the district court should exercise its discretion to decline supplemental jurisdiction over the state claim.⁸⁶ As noted previously, many takings cases also involve claims under state land use statutes or straightforward state administrative law claims.⁸⁷

Second, the party seeking to go to state court may ask the district court to abstain from exercising jurisdiction on one or more grounds. Indeed, district courts have abstained when confronted with takings claims that were not subject to *Williamson County*,⁸⁸ such as the now-repudiated claims that regulation failed to “substantially advance a legitimate state interest.”⁸⁹

The primary candidate for abstention in takings cases is likely to be *Pullman* abstention,⁹⁰ with *Younger* abstention possible in rare cases involving state or local proceedings to enforce building or zoning codes.⁹¹ Under *Pullman*, a federal court may stay the federal action “when: (1) the federal plaintiff’s complaint requires resolution of a

85. *Harlen Assocs. v. Incorporated Village of Mineola*, 273 F.3d 494, 505 (2d Cir. 2001) (internal quotations and citations omitted); *see also* *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 402 (3d Cir. 2003) (Alito, J.); *Gardner v. City of Baltimore*, 969 F.2d 63, 68 (4th Cir. 1992); *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 (8th Cir. 1992); *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1481 (7th Cir. 1990); *Creative Env’ts, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982).

86. *See* 28 U.S.C. § 1367(c) (1990).

87. *See supra* notes 65–68.

88. *See, e.g., San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1102–05 (9th Cir. 1998); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 409–10 (9th Cir. 1996); *Sea Cabin on the Ocean IV Homeowners Ass’n v. City of North Myrtle Beach*, 828 F. Supp. 1241, 1249–50 (D.S.C. 1993) (abstaining under *Pullman* to allow state court to evaluate case under local non-conforming use statute before deciding federal takings claim); *see also* *Anderson v. Charter Township of Ypsilanti*, 266 F.3d 487, 490–91 (6th Cir. 2001) (reversing district court’s abstention under *Pullman* because state and federal constitutional provisions were identical).

89. The Court held that such claims were not subject to *Williamson County*’s state compensation requirement because they did not seek compensation, but rather invalidation, of the challenged regulation. *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). The Court repudiated the “substantially advances” test in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543–44 (2005).

90. *R.R. Comm’n v. Pullman Co.*, 312 U.S. 496, 501 (1941).

91. *Younger v. Harris*, 401 U.S. 37 (1971).

sensitive question of federal constitutional law; (2) the constitutional question could be mooted or narrowed by a definitive ruling on the state law issues; and (3) the possibly determinative issue of state law is unclear.”⁹² Under *Younger*, a federal court may dismiss a federal action that collaterally attacks an ongoing state enforcement proceeding, such as a code enforcement or nuisance abatement proceeding.⁹³ *Younger* requires an ongoing state proceeding, while *Pullman* may require the federal plaintiff to initiate a state proceeding to resolve the question of state law.⁹⁴

As noted above, takings cases often involve a host of state law issues that will shape or even eliminate the federal claim and thus are natural candidates for *Pullman* abstention.⁹⁵ For example, a federal district court in a South Carolina regulatory takings case abstained under *Pullman* because there was an unsettled question of state law regarding legal, non-conforming land uses that was key to the plaintiff’s takings claim.⁹⁶ The district court recognized that whether the plaintiff suffered a taking turned on the outcome of the state courts’ determination on the non-conforming use issue, and it chose to avoid “making a tentative answer which may be displaced tomorrow by state adjudication.”⁹⁷

Finally, a federal court may certify a question of state law to the relevant state supreme court.⁹⁸ This has occasionally occurred when takings claims found their way to federal court. For example, in *West Linn Corporate Park L.L.C. v. City of West Linn*,⁹⁹ the Ninth Circuit certified several questions to the Oregon Supreme Court.¹⁰⁰ Two of the questions involved state inverse condemnation law and the application of *Williamson County*, questions which may not recur after *Knick*. But the third — a question about the state’s law applicable to municipalities’ decisions to vacate public streets¹⁰¹ — is the kind of

92. *San Remo Hotel*, 145 F.3d at 1104.

93. See *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975); *Herrera v. City of Palmdale*, 918 F.3d 1037, 1044–45 (9th Cir. 2019).

94. *San Remo Hotel*, 145 F.3d at 1104.

95. See *supra* Section I.B.i.

96. *Sea Cabin on the Ocean IV Homeowners Ass’n v. City of North Myrtle Beach*, 828 F. Supp.1241, 1249–50 (D.S.C. 1993).

97. *Id.* at 1250 (quoting *R.R. Comm’n v. Pullman Co.*, 312 U.S. 496, 500 (1941)).

98. See Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251, 293 (2006).

99. 534 F.3d 1091 (9th Cir. 2008), *certified question accepted*, 200 P.3d 147 (Or. 2008), *certified question answered*, 240 P.3d 29 (Or. 2010).

100. *Id.* at 1093.

101. *Id.* at 1104–05.

state law question that is likely to arise in cases involving land use regulation.

Thus, *Knick* brings more uncertainty: while *Williamson County* prescribed a clear rule, all of these doctrines are discretionary.¹⁰² It is therefore impossible to predict whether a court in any given suit will send the parties to state court. However, it *will* happen, and the federal courts' demonstrated reluctance to referee land use disputes suggests it will happen with much greater frequency after *Knick*. Moreover, until a body of case law develops that applies these approaches in takings cases, the lack of predictability about whether or how a court will retain jurisdiction guarantees additional litigation over these issues.

CONCLUSION

Williamson County established a straightforward rule: takings plaintiffs must sue in state, rather than federal, court. Plaintiffs may have chafed at the rule and routinely sought to avoid it, but the rule itself was clear. *Knick* replaced that rule with one that appears equally straightforward: takings plaintiffs may now bring takings claims under Section 1983 in federal court in the first instance. But that simplicity is an illusion. There remain many routes back to the state courts, and no one should be surprised if federal judges speed litigants on their way. But most importantly, *Knick* offers only new complexity for the local governments that have relied for decades on state takings law in developing land use regulation. It will be decades more before federal courts have developed their own body of takings law that local governments may rely on.

102. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966) (supplemental jurisdiction); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996) (abstention); *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (certification).