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# FEDERAL COURTS AND TAKINGS LITIGATION

*Ann Woolhandler* and Julia D. Mahoney***

## INTRODUCTION

Disagreement about takings claims extends to both substantive and jurisdictional issues. Those favoring deference to land use regulation as a substantive matter would minimize the role of the federal courts in takings disputes.[1] Those favoring less substantive deference to governmental land use decisions argue that takings claims should be treated as favorably as are other federal constitutional rights that can readily be brought in federal courts under the Civil Rights Act of 1871, 42 U.S.C. § 1983.[2]

Both sides of the dispute emphasize different aspects of the role that the federal courts have traditionally played with respect to takings

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1 *See* William E. Ryckman, Jr., *Land Use Litigation, Federal Jurisdiction, and the Abstention Doctrines*, 69 CALIF. L. REV. 377, 380–81 (1981) (arguing that local land use controversies are often appropriate for federal court abstention); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 206–07, 271 (2004) (arguing that state law often predominates in takings claims, and that the Supreme Court should intervene only where it can provide objective rules that do not depend on state law).

2 *See, e.g.*, Brian W. Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 HOFSTRA PROP. L.J. 73, 74 (1988); Michael W. McConnell, Horne *and the Normalization of Takings Litigation: A Response to Professor Echeverria*, 43 ENV'T L. REP. 10749, 10750 (2013); Ilya Somin & Shelley Ross Saxer, *Overturning a Catch-22 in the Knick of Time:* Knick v. Township of Scott *and the Doctrine of Precedent*, 47 FORDHAM URB. L.J. 545, 552–53 (2020) (indicating that takings claims under *Williamson County v. Hamilton Bank*, 473 U.S. 172 (1985), were treated less favorably for federal court access than other constitutional claims); Robert H. Thomas, *Sublimating Municipal Home Rule and Separation of Powers in* Knick v. Township of Scott, 47 FORDHAM URB. L.J. 509, 520 (2020) (same).

claims. Those favoring deference to government land use decisions treat the federal courts' assuming a more active role as an unjustified reversal of the New Deal's adoption of deferential review for economic rights.[3] On the other hand, property rights advocates argue that sidelining takings cases "was never intended by the Congress when it enacted the Civil Rights Act of 1871,"[4] and that federal court abstention in land use cases flouts the "Congressional mandate to adjudicate claims brought under 42 U.S.C. § 1983."[5]

These differences were brought into sharp relief by the Supreme Court's recent decision in *Knick v. Township of Scott*.[6] *Knick* overruled *Williamson County v. Hamilton Bank*,[7] which had treated many takings claims as unripe until the property owner had unsuccessfully sought just compensation in the state courts, on the theory that the Constitution only addressed deprivations for public use when compensation was found to be lacking. The owner could petition for Supreme Court review of the state court determination, but *San Remo Hotel v. San Francisco* made clear that preclusion would generally bar the disappointed owner from bringing a subsequent action in the lower federal courts.[8] In *Knick*, the Supreme Court held that a property owner could immediately resort to a lower federal court, without first pursuing compensation in state court.

While *Knick* clearly expands the lower federal court role in takings claims, many questions remain. We do not know how federal courts will respond to the increase in claims—whether they will embrace a robust federal role in land use cases, or use various abstention

3 *See* David A. Dana, *Not Just a Procedural Case: The Substantive Implications of* Knick *for State Property Law and Federal Takings Doctrine*, 47 FORDHAM URB. L.J. 591, 600 (2020) (stating that *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), "hints at a rejection of the post-*Lochner* idea that in a modern economy, economic regulation of the sort that implicates the use of and economic value in property must be more deferentially reviewed by the courts").

4 Blaesser, *supra* note 2, at 135; *see also id.* at 119 (use of abstention doctrines in land use cases undermines the fundamental purposes of § 1983); Brian T. Hodges, Knick v. Township of Scott, PA*: How a Graveyard Dispute Resurrected the Fifth Amendment Takings Clause*, 60 SANTA CLARA L. REV. 1, 24 (2020) (emphasizing the importance of the 1871 Civil Rights Act).

5 R.S. Radford & Jennifer Fry Thompson, *The Accidental Abstention Doctrine: After Thirty Years, the Case for Diverting Federal Takings Claims to State Court Under* Williamson County *Has Yet to Be Made*, 67 BAYLOR L. REV. 567, 612 (2015); *cf.* McConnell, *supra* note 2, at 10751 (arguing that exhaustion and deference to local knowledge are not generally required in § 1983 cases).

6 139 S. Ct. 2162 (2019).

7 473 U.S. 172 (1985).

8 545 U.S. 323 (2005).

doctrines to rein them in.[9] While pro-regulatory and pro-property rights scholars have predictably taken sharply contrasting positions as to the appropriate federal court role post-*Knick*,[10] this Article will recommend a middle-of-the-road approach, based partly on history and partly on an assessment of where the lower federal courts may most usefully contribute to the fair determination of takings claims.

This Article first gives an overview of the role of the federal courts in takings claims over time, with a view to providing a more complete picture than that supplied by focusing either on the *Lochner*/New Deal-era dichotomy or on the advent of the 1871 Civil Rights Act (current § 1983). It traces the fairly robust role of the federal courts in protecting property under a nonconfiscation norm both before and during the *Lochner* era. It also points out that the legislative history of the 1871 Civil Rights Act does not support a firm conclusion that Congress intended takings claims to be litigable under § 1983. And § 1983 thereafter played little role in takings cases, which were generally pursued as claims under diversity jurisdiction or under the federal question statute, 28 U.S.C. § 1331.[11]

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9 *The Supreme Court, 2018 Term—Leading Cases*, 133 HARV. L. REV. 322, 330–31 (2019) (noting issues of how the federal courts would proceed after *Knick*); Dwight Merriam, *Rose Mary Knick and the Story of Chicken Little*, 47 FORDHAM URB. L.J. 639, 650–51 (2020) (indicating that the effect of abstention remained to be seen); Stewart E. Sterk & Michael C. Pollack, *A Knock on* Knick*'s Revival of Federal Takings Litigation*, 72 FLA. L. REV. 419, 441 (2020) (suggesting that *Knick* may have foreclosed abstention pending resolution of state constitutional claims); John Echeverria, Knick v. Township of Scott*: A Procedural Boost for Takings Claimants*, TRENDS, Jan.–Feb. 2020, at 11 (discussing possibility of abstention and certification).

10 *Compare* David L. Callies & Ellen R. Ashford, Knick *in Perspective: Restoring Regulatory Takings Remedy in Hawai'i*, U. HAW. L. REV., Winter 2019, at 136, 146 (referring to "[t]he importance of access to the federal court system to resolve regulatory takings disputes"), *and* Ashley Vander Wal, Case Comment, *Assessing the Takings Clause and Ending the State-Litigation Requirement*, 95 N.D. L. REV. 229, 242 (2020) (arguing that *Knick* "restores property ownership as a fundamental right protected by the Constitution"), *with* Sterk & Pollack, *supra* note 9, at 437–38 (arguing that state courts are in a better position than federal courts to resolve the many state law property issues that arise in takings cases); Laura D. Beaton & Matthew D. Zinn, Knick v. Township of Scott: *A Source of New Uncertainty for State and Local Governments in Regulatory Takings Challenges to Land Use Regulation*, 47 FORDHAM URB. L.J. 623, 636–38 (2020) (recommending abstention and certification in light of the importance of state law to takings questions), Echeverria, *supra* note 9, at 11 (arguing that the nature of the property interest is always a threshold question that is appropriate for state courts), *and* James Pollack, Note, *The Takings Project Revisited: A Critical Analysis of this Expanding Threat to Environmental Law*, 44 HARV. ENV'T. L. REV. 235, 238 (2020) (stating that *Knick* is one of many cases that "strike at the core of government ability and willingness at all levels to regulate land and water to preserve the environment, protect public health, and mitigate damage caused by climate change").

11 *See* Michael G. Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493 (1989) (discussing the importance of § 1331 actions in economic rights cases); Ann Woolhandler, *The Common Law Origins of Constitutionally*

The New Deal saw the federal courts' retreat from the non-confiscation norm, and the rise of abstention doctrines that reduced the federal court role in adjudicating such claims. But the retreat from stringent substantive standards, as well as from federal court jurisdiction, were more muted in takings claims than in other types of economic claims. The history thus indicates that the lower federal courts maintained a moderately active role in land use decisions during the nineteenth century and during most of the twentieth century.

It was only with the Court's 1985 decision in *Williamson County* that the Supreme Court reduced the federal courts' role in takings to an extent comparable to the New Deal decline with respect to other economic rights. That decision offset for a time the potential increase of takings claims that might have arisen from the Court's 1978 decision in *Monell v. New York Department of Social Services*,[12] which held that municipalities were suable persons under § 1983.[13]

Going forward after *Knick*'s overturning *Williamson County*, we ask: What role should the federal courts play? The demise of *Williamson* suggests that the federal courts may significantly increase their role in land use decisions,[14] but it may also suggest that they will more actively use abstention doctrines to reduce *Knick*'s impact.[15] We evaluate the use of *Pullman*[16] and *Burford*[17] abstention doctrines in takings claims, and find them inapt. We suggest an abstention doctrine specially for takings cases that would sort out cases where the federal courts are most likely to contribute to fair applications of the law. Finally, we suggest that constitutionally-based actions brought under § 1331 may be better homes for takings cases than § 1983 actions.

Part I of this Article traces the role of the federal courts in the adjudication of takings claims both before and during the *Lochner* era.

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*Compelled Remedies*, 107 YALE L.J. 77 (1997) (discussing the importance of diversity actions for raising constitutional issues).

12 436 U.S. 658 (1978).

13 *See* Ryckman, *supra* note 1, at 390–91 (discussing increase in possible successful takings claims in federal courts with the decisions in *Monell* and *Owen v. City of Independence*, 445 U.S. 622 (1980)).

14 *Cf.* Pakdel v. City of San Francisco, 141 S. Ct. 2226, 2231 (2021) (per curiam) (holding that the claim met finality requirements, and indicating that taking claims should not be treated as of lesser constitutional status).

15 *Cf.* EHOF Lakeside II, L.L.C. v. Riverside Cnty. Transp. Comm'n, 826 Fed Appx. 669, 670 (9th Cir. 2020) (declining to decide "the precise scope of [Railroad Commission v.] *Pullman* [312 U.S. 496 (1941)] in the post-*Knick* world"); Thinh Tran v. Dept. of Plan., Civ. No.19-00654, 2020 WL 3146584, slip op. at *1, *7 (D. Haw. June 12, 2020) (indicating that *Knick* did not abrogate abstention doctrines and abstaining in a case involving restrictions on short term rentals).

16 R.R. Comm'n v. Pullman, 312 U.S. 496 (1941).

17 Burford v. Sun Oil Co., 319 U.S. 315 (1943).

Part II traces the New Deal development of abstention doctrines in areas of economic rights, but also addresses the somewhat lesser use of abstention for takings cases. It also describes the subsequent role of the federal courts, including the late addition of takings cases as encompassed within § 1983, the import of which was soon minimized by *Williamson County*. Part III addresses the role the federal courts should play post-*Knick*. It analyzes whether *Pullman* and *Burford* abstention are a good fit for takings claims.[18] It then outlines categories of claims for which lower federal court jurisdiction may be more and less warranted. Finally, it suggests that constitutional claims under the federal question statute rather than § 1983 may be a better vehicle for federal courts takings claims, *Knick* notwithstanding.

## I. PROPERTY BASED CLAIMS THROUGH THE LOCHNER ERA

### A. *Early Republic*

The American colonies' governance instruments often included protections for property rights.[19] Under the Articles of Confederation, however, many states failed to honor treaty provisions with Great Britain, including provisions that no further confiscations of British and Loyalist property should occur post-war, and that prewar British debts should be paid.[20] In addition, state legislatures' enactments of debtor relief statutes and issuance of paper currency alarmed many

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18 *Cf.* Blaesser, *supra* note 2, at 118–19 (arguing that greater familiarity with local conditions does not warrant use of abstention doctrines in takings cases); McConnell, *supra* note 2, at 10751 (arguing against local knowledge as a reason to deny a federal forum).

19 *See, e.g.*, The Body of Liberties § 8 (1641), *in* 8 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 216, 218 (F.C. Gray ed., Boston, Freeman and Bolles 1843) ("No mans Cattel or goods of what kinde soever shall be pressed or taken for any publique use or service, unlesse it be by warrant grounded up on some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford."); Charter of Liberties and Privileges § 15 (1683), *in* 1 THE CONSTITUTIONAL HISTORY OF NEW YORK, 1609–1822, at 95, 101 (Charles Z. Lincoln ed. 1906) ("Noe man of what Estate or Condition soever shall be putt out of his Lands or Tenements . . . without being brought to Answere by due Course of Law."); JAMES W. ELY JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 24–25 (3d ed. 2008) (discussing colonial policies as to compensation); Maureen E. Brady, *The Domino Effect in State Takings Law: A Response to* 51 Imperfect Solutions, 2020 U. ILL. L. REV. 1455, 1457–58 (discussing colonial authority).

20 *See* MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 43–45 (2016); *cf.* ELY, *supra* note 19, at 31 (indicating many state constitutions protected against uncompensated takings).

citizens and served as an impetus for 1787 Convention and the new Constitution.[21]

The Constitution of 1787 manifests the Framers' desire to protect interests in property and contract in various provisions, including in its provision for federal courts.[22] Concerns about confiscation and contract non-enforcement helped to motivate the Supremacy Clause's provision that treaties as well as other federal law would be the supreme law of the land.[23] And the Constitution prohibited states' impairing the obligations of contract, coining money, and issuing bills of credit.[24] The Bill of Rights proscribed the federal government's depriving life, liberty, and property without due process and taking property without just compensation.[25]

The anticonfiscation norm would prove central to the Supreme Court's nineteenth-century jurisprudence,[26] and the federal courts did not shy from entertaining cases raising takings issues. Prior to the Fourteenth Amendment and the Court's more explicit treatment of takings as violations of the Due Process Clause, the Court used treaty provisions,[27] the Contract Clause, and the general common law to provide redress for state and local takings.

Given the lack of general federal question jurisdiction before 1875, cases that raised takings issues in the lower federal courts invoked diversity[28] or some other existing basis for jurisdiction. The

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21 *See* KLARMAN, *supra* note 20, at 77–79 (discussing states' issuance of paper currency and bills of credit); *id.* at 81 (discussing debtor relief laws); *id.* at 86 (discussing concerns by "most well-to-do Americans" over such legislation).

22 *See id.* at 45, 47 (noting problems of relying on state courts for treaty enforcement); *id.* at 165 (citing to a letter from Jefferson to Madison as to problems a British creditor would face in state court without a federal tribunal); *id.* at 167 ("The delegates were especially determined to ensure that foreigners would have access to tribunals that would fairly adjudicate their rights under federal treaties. . . ."); *id.* (also noting that federal question jurisdiction was meant to keep state courts from nullifying treaties); Woolhandler, *supra* note 11, at 85–86 (noting general agreement among scholars that concern as to state debtor relief laws was an impetus for diversity jurisdiction).

23 KLARMAN, *supra* note 20, at 158 (noting Madison's concerns with state treaty violations); ELY, *supra* note 19, at 45 (indicating that the prohibitions on bills of attainder protected against confiscations).

24 U.S. CONST. art. I, § 10.

25 U.S. CONST. amend. V.

26 *See, e.g.*, Michael G. Collins, *October Term, 1896—Embracing Due Process*, 45 AM. J. LEG. HIST. 71, 77 (2001) (citing authority).

27 *See, e.g.*, Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813).

28 *See* Charles W. McCurdy, *The Problem of General Constitutional Law: Thomas McIntyre Cooley,* Constitutional Limitations, *and the Supreme Court of the United States, 1868–1878*, 18 GEO. J. L. & PUB. POL'Y 1, 3–4 (2020) ("Since 1810, if not before, the Court had considered a much broader array of constitutional principles in cases arising from its diversity jurisdiction (that is, civil cases with a constitutional cast that came up from federal trial courts) than it had in cases arising from challenges of state laws said to violate the

suits took a variety of forms. Where state legislation purported to divest a party of title, an action between private claimants could raise the issue of whether the state legislation could be given effect. For example, in *Fletcher v. Peck*, the Court, in a suit between private parties, held that the state could not retract a prior land grant without violating the Contract Clause.[29] Using general law principles in *Terrett v. Taylor*, the Court held that Virginia laws transferring Episcopal Church property to the county overseers of the poor should be treated as having no force, and it enjoined the overseers from claiming the property.[30] In addition, the federal courts, as did the state courts, enjoined private companies authorized by governments to build roads from invading the owners' property absent adequate provisions for compensation.[31] The federal courts might also award monetary relief. For example, in

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Constitution of the United States (that is, federal question cases that came up on writ of error to the highest state court).").

29 10 U.S. (6 Cranch) 87 (1810); *see also* Green v. Biddle, 21 U.S. 1 (1823) (noting that in a suit to recover land, it would violate the compact between Kentucky and Virginia whereby Virginia titles would be recognized under the law of Virginia, to require the owner to pay for improvements and to disallow mesne profits for the time before notice of the adverse claim); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888, at 128–36 (1985) ("It seems clear in *Fletcher* that there was nothing in the *federal* Constitution to make bribery a basis for striking down state legislation."); G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35, at 602 (1988) ("[E]arly Marshall Court cases interpreting the Contract Clause were notable . . . for being grounded not only on the text of the Constitution but on the first principles of republican theory.").

30 Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 52 (1815) (involving land in the District of Columbia); *see also* Van Horne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304 (C.C.D. Pa. 1795) (when parties claimed under titles of different states, holding that the Pennsylvania claimant should recover because the Connecticut statute giving compensatory lands was ineffective, given that the legislature could not determine the value of lands); Bonaparte v. Camden & A.R. Co., 3 F. Cas. 821, 831 (C.C.D.N.J. 1830) (in a case under alienage diversity, entering an injunction against the road building company because it had not yet filed the survey necessary for entering the land, and indicating that an injunction was proper where a certain means of compensation that the owner did not have to initiate was not provided).

31 *See* Yates v. Milwaukee, 77 U.S. (10 Wall.) 497, 507 (1870) (granting an injunction against removal of plaintiff's wharf absent provision for compensation); *see generally* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57 (1999) (particularly focusing on state courts, and concluding that early in the nineteenth century the courts did not so much order compensation as enjoin the implementation of statutes that allowed for takings without providing compensation). The federal courts also entertained ejectment actions against federal officials whom plaintiffs claimed were occupying their land. *See, e.g.*, Meigs v. McClung's Lessee, 13 U.S. (9 Cranch) 11, 18 (1815) ("The land is certainly the property of the Plaintiff below; and the United States cannot have intended to deprive him of it by violence, and without compensation."); Brown v. Huger, 62 U.S. (21 How.) 305 (1858) (in a removed ejectment action against a federal officer, ruling on the merits against the plaintiff).

*Pumpelly v. Green Bay Co.*, the Court in a diversity case upheld a damages action for trespass on the case against a company that had built a dam flooding plaintiff's land.[32]

When governments or their contractors employed eminent domain powers, many states provided for administrative proceedings with initial determinations of value by commissioners or juries, with a subsequent appeal de novo to a regular state court. Property owners sometimes brought the appeals as original actions against contractors or local governments[33] in lower federal courts in diversity. The condemnor/defendants argued against lower federal court jurisdiction, on the grounds that the review proceedings were not civil cases and that eminent domain involved the sovereign prerogatives of the state.[34] The Supreme Court repeatedly rejected these arguments, reasoning that out-of-staters should not be deprived of their opportunity to use the federal courts to receive a fair determination of their claims.

Overall, the federal courts played a fairly robust role in protecting property rights against state and local encroachments well before the advent of the Fourteenth Amendment. Of course, the state courts entertained an even greater number of cases involving takings.[35]

### *B. Passage of the Civil Right Act of 1871*

The 1871 Civil Rights Act (current 42 U.S.C. § 1983) would have no significant effect on takings claims until the latter part of the twentieth century. Modern property rights advocates, however, have

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32 80 U.S. (13 Wall.) 166, 175–81 (1871) (holding that the defense of statutory authorization was invalid due to exceeding the statutory authority and due to the state's not providing for compensation); Hollingsworth v. Par. of Tensas, 17 F. 109, 117–18 (C.C.W.D. La. 1883) (holding that an action involving building of a levee and flooding land could proceed under general law despite state law to the contrary). Monetary relief, however, was not awarded against sovereign entities. Brauneis, *supra* note 31, at 58.

33 *See, e.g.*, Pac. R.R. Removal Cases, 115 U.S. 1, 5–6 (1884) (approving removal of the company's appeal of the amount awarded against a city in an assessment of value and benefits).

34 *See, e.g.*, Boom Co. v. Patterson, 98 U.S. 403, 406–07 (1878) (rejecting arguments as to sovereign prerogative and that the dispute was not a case); *Removal Cases*, 115 U.S. at 18–19 (exercising jurisdiction based on federal railroad charter and holding that the initial determination, upon appeal to a court, became a case that the federal courts could entertain).

35 *See* Brauneis, *supra* note 31, at 61 (noting that states decided more takings cases than did the federal courts during the nineteenth century); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1577–1604 (2003) (discussing the tradition of state regulatory takings cases).

argued that the Congress that passed § 1983 clearly intended the statute to address just compensation claims.[36]

Section 1983 derives from § 1 of the 1871 Civil Rights Act, also known as the Ku Klux Klan Act.[37] The most familiar part of the Klan Act today is § 1983's provision allowing those whose constitutional rights have been violated to sue the wrongdoing "person" for damages and injunctive relief. But in keeping with its name, the Act also forbade private conspiracies to violate constitutional rights.[38] Indeed, the debates over the Act focused on whether the Constitution, including the Fourteenth Amendment, gave Congress power to prohibit private conspiracies.[39]

Given Klan depredations on former enslaved persons and their supporters, the Klan Act debates, as a whole, manifested concerns for property protections.[40] Congressmen referred to house burnings in addition to assaults on persons.[41] Section 1 of the 1871 Act, moreover, was based on § 2 of the 1866 Civil Rights Act, which provided for criminal penalties for "any person who, under color of any law, statute, ordinance, regulation, or custom" causes a deprivation of any rights protected by the act.[42] Rights protected by the 1866 Act included the rights of all citizens "of every race and color" to the "same right, in every State . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens."[43] The

36 *See supra* notes 4–5 and accompanying text.

37 Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871).

38 Ku Klux Klan Act § 2.

39 *See* GEORGE RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866, at 83–84 (2013).

40 *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. 339 (Rep. Kelley), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, at 503 (Alfred Avins ed., 1967) (discussing an instance where citizens of Pennsylvania who had purchased a mine in South Carolina appealed for Presidential help in the face of Klan threats).

41 *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. 78 (Rep. Perry), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 40, at 512 ("The [conspirators'] aim appears . . . to murder and mutilate them [blacks and their friends], disperse their families, burn their houses, and steal or destroy their property."); CONG. GLOBE, 42d Cong., 1st Sess. 413 (Rep. Roberts), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 40, at 521 ("Citizens of New York seeking homes in South Carolina and Alabama have had their roofs burned over them and have been driven away by violence."); CONG. GLOBE, 42d Cong., 1st Sess. 428 (Rep. Beatty), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 40, at 522 ("[M]en were murdered, houses were burned . . . .").

42 Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27, 27 (1866); RUTHERGLEN, *supra* note 39, at 83, 86–87.

43 Civil Rights Act of 1866 § 1.

Fourteenth Amendment itself was meant to validate the 1866 Act, given concerns as to congressional power to enact the 1866 Act.[44]

One might of course argue that protections for property implicitly encompass a just compensation guarantee. The argument for any more specific intentions as to takings, however, principally relies on statements of Representative John Bingham. In response to arguments that the 1871 Act exceeded congressional powers under the Fourteenth Amendment,[45] Bingham claimed that, in helping to draft section one of that Amendment, he intended to make the first Eight Amendments of the Constitution applicable to the states. He referred to *Barron v. Baltimore*, in which the Supreme Court had held that the Bill of Rights including the just compensation clause only applied to the federal government.[46] Bingham recited each of the first Eight Amendments,[47] and he seemed to see the 1871 Act generally as making those provisions enforceable.[48]

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44 *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1388–89 (1992) (noting agreement that § 1 of the Fourteenth Amendment was meant to empower Congress to pass the 1866 Civil Rights Act).

45 *See* CONG. GLOBE, 42d Cong., 1st Sess. 113 (1871) (Rep. Farnsworth), *discussed in* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 136 (1949).

46 32 U.S. (7 Pet.) 243, 250–51 (1833).

47 CONG. GLOBE, 42d Cong., 1st Sess. 84 (1871) (Rep. Bingham).

48 *See id.* at 85 ("As I have already said, the States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy. They denied trial by jury, and he had no remedy. They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. They bought and sold men who had no remedy. Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in States and by States, or combinations of persons?"). Rep. Dawes also apparently saw enforcement of the Bill of Rights as encompassed by the Act. *See* CONG. GLOBE, 42d Cong., 1st Sess. 475–76, *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 40, at 535–36. He recited several Bill of Rights provisions, although he did not mention just compensation. *See also* CONG. GLOBE, 42d Cong., 1st Sess. 499 (Sen. Frelinghuysen), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 40, at 541 (referring to protections against violence, and to "the right that private property shall not be taken without compensation" as a privilege protected by the Fourteenth Amendment); CONG. GLOBE, 42d Cong., 1st Sess. 310 (Rep. Maynard), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 40, at 503 (responding to a question as to which rights, privileges or immunities a conspiracy must be leveled against, referring to Article IV privileges and immunities, voting, and "any of the personal rights which the Constitution guaranties to the citizen—freedom of speech, of the press; in religion, in house, papers, and effects; from arrest without warrant, from being twice put in jeopardy for the same offense"). There was, however, little in the rest of the extensive debates over the 1871 Act to support this Bingham's incorporationist reading. *Cf.* CONG. GLOBE, 42d Cong., 1st Sess.

Bingham's argument that the 1871 Act enforced the Bill of Rights thus depended on his argument that section one of the Fourteenth Amendment incorporated the Bill of Rights as against the states, and thereby authorized Congress to enforce the Bill of Rights against state action in the 1871 Act. But the proposition that the Fourteenth Amendment, when promulgated, incorporated the Bill of Rights remains a highly contested proposition.[49] On one side are scholars championing incorporation, such as Akhil Amar.[50] They emphasize Bingham's statements, many of which were not made during the debates as to Fourteenth Amendment itself[51]—including Bingham's reference to *Barron* and the first Eight Amendments during the debates on the 1871 Ku Klux Klan Act several years later.[52] On the other hand are scholars such as Charles Fairman who argue that neither the congressional debates as a whole on the Fourteenth Amendment, nor the state ratification debates, support incorporation.[53] The argument that the 1871 Act definitely encompassed just compensation claims is

314 (Rep. Burchard), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 40, at 545 (disagreeing with views of Bingham and Dawes).

49 *See, e.g.*, WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT 123 (1988) ("Only one historical conclusion can therefore be drawn: namely, that Congress and the state legislatures never specified whether section one was intended to be simply an equality provision or a provision protecting absolute rights as well.").

50 *See generally* AKHIL REED AMAR, THE BILL OF RIGHTS 181–214 (1998) (reviewing scholarship); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986) (arguing incorporation was intended); *see also* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993) (same).

51 These scholars rely particularly on statements that were made as to an unadopted proposal prior to the one that would become section one of the Fourteenth Amendment. In that earlier debate Bingham referred to the Bill of Rights and *Barron v. Baltimore*, as he would in 1871. *See* AMAR, *supra* note 50, at 182 (citing CONG. GLOBE, 39th Cong., 1st Sess. 1088–94 (1866)) (referring to a February 28, 1866, speech); *cf.* Fairman, *supra* note 45, at 35–37 (1949) (indicating the proposal was tabled). Subsequently, Bingham proposed to the Joint Committee working on the amendments to add language "nor take private property for public use without just compensation," but that proposal was not adopted. *See id.* at 41–42; RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 142 (1977). Incorporationists also cite to Senator Howard who introduced the final version of the Fourteenth Amendment in the Senate, and who made specific reference to the first Eight Amendments, including just compensation. *See* AMAR, *supra* note 50, at 185–86; *cf.* Fairman, *supra* note 45, at 55–58; BERGER, *supra*, at 148.

52 AMAR, *supra* note 50, at 183 (relying, inter alia, on the 1871 statements); *see also* Adamson v. California, 332 U.S. 46 app. at 110–18 (1947) (Black, J., dissenting) (same).

53 *See generally* Fairman, *supra* note 45; BERGER, *supra* note 51, at 134–65; *cf.* Harrison, *supra* note 44, at 1388, 1397 (while hesitating "to attribute to most participants in the framing and ratification of the Fourteenth Amendment any precise notion of the meaning of Section 1, other than that it was designed to forbid Black Codes and constitutionalize the Civil Rights Act of 1866," arguing that the amendment was meant to assure equality as to rights such as those described in the 1866 Civil Rights Act); NELSON, *supra* note 49, at 123.

thus a subset of the argument that that Fourteenth Amendment as promulgated incorporated the first Eight Amendments. And that argument is inconclusive.

Bingham's reference to takings during the 1871 debates would end up playing an additional role in modern takings debates beyond the argument that takings claims were necessarily encompassed within the 1871 Act. As discussed below, the Court's decision in *Monell v. Department of Social Services*[54] that municipalities could be liable as "persons" under § 1983 would turn that statute into a significant vehicle for takings cases.[55] Justice Brennan used Bingham's reference to *Barron* during the 1871 debates[56] to support making municipalities liable as "persons" under § 1983 in *Monell*—not itself a takings case. Brennan's *Monell* argument was that Bingham explicitly referred to takings, and that takings remedies necessarily required municipal liability.[57] It thus followed that "persons" who could be liable under § 1983 included municipalities.

Brennan's reasoning, however, is problematic. First, it depends on reading Bingham's questionable incorporation views into the 1871 Act, as well as into the Fourteenth Amendment under which it was enacted. Second, it assumes that a takings remedy necessarily encompasses entity liability, although individual relief such as ejectment actions could provide at least some remedies.[58] And finally, *Monell* notwithstanding, there is little in the legislative history of the 1871 Civil

54 436 U.S. 658, 690 (1978).

55 *See infra* notes 107–13 and accompanying text.

56 436 U.S. at 686–87.

57 *Id.* at 687. Brennan also argued that the broad purposes of the Act supported municipal liability. *Id.* at 685–86. The *Monell* decision overturned the Court's prior unanimous determination in *Monroe v. Pape*, 365 U.S. 167, 187 (1961), that Congress had not made municipalities liable under § 1983. *Monell*, 436 U.S. at 663. In *Monroe*, the Court reasoned that Congress's rejection of the so-called Sherman Amendment—which would have made municipalities liable for mob violence—indicated that Congress did not intend municipalities to be liable under § 1983. 365 U.S. at 187–90. Brennan in *Monell* reasoned that the Sherman Amendment's rejection did not foreclose municipal liability for their own constitutional violations in § 1983. *Monell*, 436 U.S. at 669–683. He also rejected the *Monroe* court's determination that the inclusion of bodies politic as "persons" under the Dictionary Act did not control the interpretation of § 1983. *Id.* at 688–89; The Dictionary Act, ch. 71, § 2, 16 Stat. 431, 431 (1871) ("[I]n all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense."). The 1874 Revised Statutes, however, retroactively removed "bodies politic" from the definition of persons. *See* ch. 1, § 1, 18 Stat. 1, 1 (1874), *discussed in* CALEB NELSON, STATUTORY INTERPRETATION 785–86 (2011); Katherine Mims Crocker, *Reconsidering Section 1983's Nonabrogation of Sovereign Immunity*, 73 FLA. L. REV. 523, 568–74 (2021).

58 *See* ejectment actions cited *supra* note 31.

Rights Act to support municipal liability as opposed to individual liability for constitutional claims of any type.[59]

### *C. The Lochner Era*

Although not employing § 1983 as a vehicle for takings claims, the Court in the late nineteenth century held that the prohibition on takings without just compensation was one of the fundamental protections of the Due Process Clause.[60] During the *Lochner* era, the Court decided, for example, that a city-authorized railroad would have to provide compensation for interference with easements of light and air of adjoining property owners,[61] and also disapproved certain requirements to allow third party use.[62] While rejecting general

59 *See Monell*, 436 U.S. at 721 (Rehnquist, J., dissenting). As then-Justice Rehnquist pointed out in his *Monell* dissent, "As the Court concedes, only Representative Bingham raised a concern which could be satisfied only by relief against governmental bodies. Yet he never directly related this concern to § 1 of the Act. Indeed, Bingham stated at the outset, 'I do not propose now to discuss the provisions of the bill in detail,' CONG. GLOBE, 42d Cong., 1st Sess., App. 82 (1871), and, true to his word, he launched into an extended discourse on the beneficent purposes of the Fourteenth Amendment." *Id. But cf.* Nw. Fertilizing Co. v. Hyde Park, 18 F. Cas. 393, 394 (C.C.N.D. Ill. 1873) (holding that the plaintiff corporation that filed the bill in equity was a person who could sue under the 1871 Act on a Contract Clause claim, and suggesting that a corporation that acted under color of state law could be sued as a defendant). The case was brought against Hyde Park and its officers. *Id.* at 393. The case was ultimately heard in state court, and the Supreme Court on direct review affirmed a decision against the plaintiff on the merits of the Contract Clause claim. Fertilizing Co. v. Hyde Park, 97 U.S. 659, 666–70 (1878); *see also* Gaughan v. Nw. Fertilizing Co., 10 F. Cas. 91, 93 (C.C.N.D. Ill. 1873) (remanding the case to state court).

60 Chicago, Burlington & Quincy. R.R. Co. v. Chicago, 166 U.S. 226, 237, 241 (1896) (quoting inter alia from *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), decided under the Contract Clause, and *Loan Ass'n v. Topeka*, 87 U.S. 655 (1874), decided under general common law, and stating "a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment . . . ."); *id.* at 241, 258 (nevertheless upholding the one-dollar award in the case); Norwood v. Baker, 172 U.S. 269, 277, 279 (1898) (in a suit apparently brought as a federal question case, enjoining as violative of due process the village's condemning the property and then assessing the owner for the cost of the condemnation plus costs far in excess of special benefits).

61 *See* Muhlker v. N.Y. & Harlem R.R. Co., 197 U.S. 544, 570 (1905) (on direct review).

62 Mo. Pac. R.R. Co. v. Nebraska, 164 U.S. 403, 417 (1896) (applying, on direct review, a public use limitation to the commission's order that the railroad allow farmers to build a grain elevator on its property); Del., Lackawanna & W. R.R. Co. v. Morristown, 276 U.S. 182, 191, 195 (1928) (not stating the ground for jurisdiction; approving an injunction because the Fourteenth Amendment was violated by an ordinance compelling the railroad to make part of its property available for use as a hack stand).

challenges to zoning laws,[63] the Court sometimes disallowed particular applications or restrictions on use.[64] And while it often allowed governments to impose costs of grade improvements on railroads, it sometimes found that a particular imposition of costs was arbitrary.[65]

Many of the Court's takings decisions occurred by review of state court decisions ("direct review"),[66] but original federal actions were also common. The federal court actions were typically for injunctions—for example to enjoin an alleged expropriation without compensation.[67] Jurisdiction could be based on federal question[68] or diversity. And eminent domain valuations continued to be heard in the federal courts using diversity jurisdiction.[69]

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63 Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394–95 (1926) (apparently a federal question injunction action; rejecting a constitutional challenge to a zoning ordinance that included a prohibition on apartment houses); *id.* at 395 (indicating arbitrary applications could be challenged); *cf.* ELY, *supra* note 19, at 120 (noting it was "something of a paradox" why the Court approved land use control, but zoning may have been seen as generally helping property rights).

64 Dobbins v. City of Los Angeles, 195 U.S. 223, 241 (1905) (reversing the state supreme court, and reinstating a suit for an injunction against the enforcement of an ordinance that would disallow plaintiff's building of a gas works on her property; the new restriction on the use of the property brought it "within that class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power which amounts to a taking of property without due process of law and an impairment of property rights protected by the Fourteenth Amendment to the Federal Constitution."); Nectow v. City of Cambridge, 277 U.S. 183 (1928) (reversing the state supreme court in an injunctive action, to hold that the zoning classification as applied to the plaintiff violated the Fourteenth Amendment).

65 *See* Nashville, Chattanooga & Saint Louis Ry. v. Walters, 294 U.S. 405 (1935) (holding, on direct review of a declaratory action from state court, that on the specific facts of the case, the application of a statute that required railroads to pay one half of grade improvements possibly violated the Fourteenth Amendment); *id.* at 423–25 (indicating lack of prior serious safety problems and that the underpass was part of a highway project that would detract from railroad business); Panhandle E. Pipe Line Co. v. State Highway Comm'n, 294 U.S. 613 (1935) (holding, on appeal from a state court grant of mandamus to the highway commission to force compliance by the company, that the pipeline company could not be required to relocate pipelines without compensation from its right of way for highway construction).

66 *See, e.g.*, Muhlker v. N.Y. & Harlem R.R. Co., 197 U.S. 544, 548 (1905).

67 Cuyahoga River Power Co. v. City of Akron, 240 U.S. 462, 463–64 (1916) (reinstating a federal question injunction action in which the company alleged that the city planned to appropriate its water rights without initiating an action for compensation).

68 Dohany v. Rogers, 281 U.S. 362, 364 (1930) (apparently a federal question suit, unsuccessful on the merits, to enjoin state highway commissioners from acquiring land from the railroad as violative of the Fourteenth Amendment and the state constitution); *Euclid*, 272 U.S. at 384 (apparently federal question injunction action).

69 *See* Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U.S. 239, 247 (1905) (rejecting arguments against federal courts' entertaining such cases in allowing removal based on diversity); *id.* at 253–54 (discussing that the state could not deprive out-of-staters

The prohibition on uncompensated takings, moreover, infused the Court's decisions well beyond those more squarely tied to real property ownership and use. For example, the prohibition on confiscation was central to the federal courts' active policing of railroad rate regulation. The Court's decision in *Smyth v. Ames* requiring that rates provide a fair return on the current value of the railroad property was based on eminent domain's requiring reimbursement for fair market value.[70]

Another area where nonconfiscation figured prominently was in judicial review of the Texas Railroad Commission's allocation of petroleum drilling rights.[71] The Commission was charged with regulating drilling both to prevent waste and to assure the correlative rights of owners in the common pool. Drilling rights were thus to be proportional to the oil and gas attributable to a particular owner's holdings, and not unduly reduced by disproportional or wasteful drilling of others. Commission orders, however, often appeared to have favored smaller in-state holders. The Commission's orders were appealable to the courts in Travis County, where the state capital Austin was located. Both the state courts and federal courts in Travis County heard appeals from Commission orders. And the federal courts did not shrink from findings that orders were confiscatory on federal or state grounds.[72]

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of a fair tribunal, and that direct review would be insufficient as to issues of state law and as to amount).

70 *See, e.g.*, Smyth v. Ames, 169 U.S. 466, 528 (1898).

71 As the Court would describe the common law of Texas prior to further regulation,

> the owner of land has title to oil and gas in place and, likewise, to the oil and gas which migrate to formations under his land through drainage from other lands. Under that rule, he may produce all the oil and gas that will flow out of the well on his land, subject to the exercise by other landowners of the same right of capture through drilling offsetting wells, so as to get their full share . . . . [T]he common law of the State did not, apparently, afford a remedy against depleting the common supply by wasteful taking or use of oil or gas drawn from the wells on one's own property. But since 1899 the Legislature of the State has prohibited, or curbed, certain practices in the production of gas and oil which it recognized as wasteful.

Thompson v. Consol. Gas Utils. Corp., 300 U.S. 55, 68–69 (1937). State law thereafter provided that the Commission should police waste and preserve the correlative rights of owners. *Id.*

72 *See, e.g.*, *Thompson*, 300 U.S. at 78 (appeal from a federal district court). The Commission effectively limited production by large owners who had existing contracts for the gas they produced, thereby requiring them to purchase from smaller owners who would otherwise have to shut their wells for lack of a market for their gas. *Id.* at 62–63. Justice Brandeis's opinion stated,

> The necessary operation and effect of such orders is to take from complainant and others similarly situated substantial and valuable interests in their private marketing contracts and commitments and in the use of their pipe lines and other

It should be noted that *Lochner*-era land use and related takings cases were not § 1983 cases. Professor Collins has shown that the Court interpreted the rights "secured by" the Constitution in § 1983 to exclude rights that did not "take their origin in or derive 'directly' from the Constitution or federal law."[73] According to Professor Collins, property rights, "even though protected against deprivation by the due process clause, were defined and created by the common law; they pre-dated the Constitution and thus took their origin outside of it."[74] Rather than using § 1983 and its jurisdictional provision, lower federal court cases therefore typically were brought in diversity or as injunction actions under § 1331.[75]

## II. THE NEW DEAL AND BEYOND

### A. *The New Deal and the Anticonfiscation Norm*

Under the "New Deal Settlement" that took shape in the late 1930s, the federal courts, with limited exceptions, stepped back from "systematically enforcing constitutional rights against legislative majorities."[76] Substantive dilutions were accomplished by moving toward rational basis scrutiny in a number of areas where the *Lochner* court would have exercised more searching judicial review. And substantive dilutions were complemented by federal jurisdictional restrictions imposed by Congress and the Supreme Court.[77]

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> facilities for transmitting their gas to their markets, without compensation, and to confer same upon the owners of the approximately 180 sweet gas wells in the field not connected to pipe lines.

*Id.* at 78.

73 Collins, *supra* note 11, at 1503.

74 *Id.*

75 The amount in controversy requirements could often be met for the economic rights claimants complaining of noncompensatory rates or other regulatory confiscations, *see id.* at 1509, although the same would not necessarily be true as to potential diversity eminent domain claims.

76 David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 375 (2003); *see also* David P. Currie, *The Constitution in the Supreme Court: Civil Rights and Liberties, 1930–1941*, 1987 DUKE L.J. 800 (1987); Julia D. Mahoney, Kelo*'s Legacy: Eminent Domain and the Future of Property Rights*, 2005 SUP. CT. REV. 103, 109–15 (2006).

77 *See* Edward A. Purcell Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQUIRY 679 (1999) (indicating that Felix Frankfurter saw substantive and procedural decisions as forwarding the Progressive and New Deal agenda to reduce federal court invalidation of state law); Ann Woolhandler, *Between the Acts: Federal Court Abstention in the 1940s and '50s*, 59 N.Y.L. SCH. L. REV. 211, 215 (2014–2015) (noting the connection between deference to state legislatures and favoring state court review of regulation); *id.* at 215–16 (discussing legislative initiatives to rein in the federal courts, as well as efforts by Frankfurter, Charles Warren, and others to direct regulatory challenges to state courts).

### 1. *Pullman* Abstention

The jurisdictional retreat was partly manifested in the rise of various abstention doctrines. One of the early abstention cases, *Railroad Commission v. Pullman Co.*,[78] involved a claim of race discrimination—an area on which the Court had yet systematically to focus.[79] Although *Pullman*'s reduction of the lower federal court role in race discrimination cases would prove temporary, *Pullman* abstention would survive for other types of claims, including takings.

In *Pullman,* the Texas Railroad Commission had issued an order reallocating certain work from African American porters to white conductors. Although the porters challenged the order in federal court, the Court held that the unsettled state law issue of the Commission's authority to make the order should be decided by the state court, which would be able to provide a definitive resolution that the federal court could not.[80] The state court decision might also obviate the need to decide what the Court then perceived as a difficult Fourteenth Amendment issue. The case left behind the doctrine of *Pullman* abstention whereby a federal court may decline to hear a difficult and undecided issue of state law that would forestall the need to decide a sensitive issue of federal constitutional law.[81]

### 2. Railroad Rates, Drilling Rights, and *Burford* Abstention

The diminution of substantive standards and lower federal court jurisdiction would prove more lasting in economic rights areas.[82] Congress in 1934 passed the Rate Injunction Act, largely removing challenges to state and local rates from the lower federal courts. The Court weakened the substantive standard by abandoning *Smyth v. Ames*'s current value formulation for the rate base in favor of the more lenient multifactored test of *Hope Natural Gas.*[83]

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78 312 U.S. 496 (1941); *see also* Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368 (1949) (abstaining in a case challenging Hawaii's prohibition on foreign-language teaching).

79 Strauss, *supra* note 76, at 376 (stating that First Amendment law was "nascent" and decisions striking race discrimination were "not systematic").

80 Certification of issues to state courts was not at the time available. *See* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1116 n.6, 1117 (7th ed. 2015) (observing that all states except North Carolina now have some procedures for certification by federal courts of appeals, and most authorize certification by district courts).

81 *See Pullman*, 312 U.S. at 501.

82 The Court in the 1960s expanded substantive constitutional rights in a number of areas, and retreated from abstention, particularly with respect to civil rights cases. *See* Woolhandler, *supra* note 77, at 237–39.

83 Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591 (1944). Congress also reined in federal court jurisdiction over injunctive cases as to state and local taxation with

This combination of substantive and jurisdictional dilution of economic rights was also evident in cases involving allocation of drilling rights. In *Railroad Commission v. Rowan & Nichols Oil Co.*, a larger producer challenged a Texas Railroad Commission proration order limiting drilling that gave nearly equal drilling rights to productive and unproductive wells.[84] The Court reversed the lower federal court's grant of an injunction, and indicated that the Fourteenth Amendment would seldom be used to police such confiscation claims. It noted what it called the "inherent empiricism" of common pool allocation problems and that the order should be seen as part of a "continuous series of adjustments."[85]

In *Burford v. Sun Oil Co.*,[86] the Court effected a jurisdictional withdrawal. The lower court, at the instance of large neighboring tract owners, had enjoined a Commission order allowing an owner of a 2.33-acre tract to erect four wells. The Court held that the federal court below should not have heard the action. The Court indicated that federal court interference would confound the Commission's "series of adjustments" in allocating permits.[87] The case gave rise to *Burford*

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the Tax Injunction Act of 1937, 50 Stat. 738 (current version at 28 U.S.C. § 1341). *See* FALLON ET AL., *supra* note 80, at 1091–93. The Court later piled on by directing tax refund suits once often heard by federal courts to the state courts. *See id.* The Act was directed to federal courts' injunctions against taxes based on both state and federal grounds. Before the Act, federal courts had with some frequency enjoined state taxes based on state constitutional provisions directing equal assessments, which could be an easier claim to make out than a federal equal protection claim. *See* Woolhandler, *supra* note 11, at 145–46.

84 310 U.S. 573, 577 (1940) (describing the order that first allocated 20 barrels a day to low-capacity wells, then only 22 barrels a day to the remainder), *modified at* 311 U.S. 570, 576 (1941), *discussed in* Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CALIF. L. REV. 613, 648 (1999). When the oil company petitioned for rehearing on the ground that pendent state law claims remained, the Court declined to decide the pendent claim on the ground that: "What ought not to be done by the federal courts when the Due Process Clause is invoked ought not to be attempted by these courts under the guise of enforcing a state statute." R.R. Comm'n v. Rowan & Nichols Oil Co., 311 U.S. 614, 615 (1940); *see* Woolhandler, *supra* note 77, at 219–20.

85 *Rowan & Nichols*, 310 U.S. at 580, 584.

86 319 U.S. 315 (1943).

87 *Id.* at 332 (quoting *Rowan & Nichols*, 310 U.S. at 584); FALLON ET AL., *supra* note 80, at 1120 (stating that Justice Black "emphasized the complexity of the problems of oil and gas regulation and the role of state courts as collaborators with a state administrative agency in administering the state's regulatory scheme"). The Court also adverted to the fact that review of Commission orders was exclusively in the Courts of Travis County, and that "the Texas courts are working partners with the Railroad Commission in the business of creating a regulatory system for the oil industry." *Burford*, 319 U.S. at 325–26; *see also id.* at 318–19 (noting problems of maintaining pressure to force oil to the surface in a common pool). "Local factors" would also feature as a reason for *Burford* abstention. *See* Ala. Pub. Serv. Comm'n v. S. Ry. Co., 341 U.S. 341, 346–47 (1951) (abstaining on a question of confiscation in requiring a railroad to maintain certain unremunerative service).

abstention, said to be available when a federal court determination would undermine a complex state administrative scheme.

3. Land Use Cases

The substantive and jurisdictional effects of the decline of the nonconfiscation norm, however, were more muted in the land use context than in the rate regulation and petroleum drilling settings. Although substantively the Court was more tolerant of land use regulation,[88] the current value formulation could not easily be abandoned for eminent domain, in contrast to rate regulation. Nor could the Court dilute the notion of property and its confiscation in the real property context as readily as it did with respect to common pool drilling rights in *Rowan & Nichols.*

Jurisdictional effects were similarly mixed. The federal courts continued to hear eminent domain cases subsequent to the *Lochner* era,[89] and the 1951 Amendments to the Federal Rules had special provisions for the federal courts to handle state eminent domain cases.[90] And in *County of Allegheny v. Frank Mashuda Co.*, the Court held abstention inappropriate as to a diversity case raising a state law public use question as to which state law was apparently well established.[91] On the other hand, in *Louisiana Power & Light Co. v. City of Thibodaux*,[92] the Court directed abstention in a diversity case as to an unsettled issue of state law regarding the allowability of a city's partial condemnation of a utility company. Justice Frankfurter reasoned that eminent domain involved a matter of "sovereign prerogative" based on local settings.[93] And the Court in *Chicago, Rock Island & Pacific*

88 *See, e.g.*, Berman v. Parker, 348 U.S. 26, 33–36 (1954) (deferring to Congress and the agency in rejecting a Fifth Amendment challenge to a D.C. redevelopment project that condemned land to resell or lease to private parties, and that did not look to whether the particular property was blighted); Village of Belle Terre v. Boraas, 416 U.S. 1, 5–7 (1974) (approving single family zoning that forbad more than two unrelated persons to live in a home, and expressing deference to land use regulation).

89 *See* Cnty. of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 194–96 (1959) (citing numerous federal court eminent domain proceedings); *cf.* Bailey v. Anderson, 326 U.S. 203 (1945) (holding on direct review that the owner had not properly presented and preserved the federal issue of whether interest was due from the dates of entry on his land).

90 *See Frank Mashuda Co.*, 360 U.S. at 194 (referring to the 1951 Rules).

91 *Id.* at 187, 196 (also referring to the absence of a federal constitutional issue).

92 360 U.S. 25 (1959).

93 *Id.* at 28 ("The issues normally turn on legislation with much local variation interpreted in local settings."). The turn from earlier views is manifested by Frankfurter's quoting, *id.* at 26, from Justice Holmes's dissent in Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U.S. 239, 257 (1905). In *Madisonville*, the majority had rejected claims that review of state administrative determinations in eminent domain cases should not be heard in the federal courts. 196 U.S. at 247.

*Railroad Co. v. Stude*[94] somewhat weakened its prior willingness to treat "appeals" from the administrative portions of eminent domain proceedings as appropriate for federal courts.[95]

In summary, the New Deal era saw a retreat from the non-confiscation norm, and also a related retreat from lower federal court jurisdiction in the areas of rate regulation and drilling. The substantive and jurisdictional dilutions, however, were less dramatic in the area of land use.

### *B. The Waxing and Waning of Jurisdiction Under* Monell *and* Williamson County

In the post-New Deal era, the federal courts continued to follow a middling course in subsequent land use cases. The state courts, as had always been the case, remained the primary forums for such cases.[96] When the federal courts did hear such cases, their decisions were fairly deferential to local land use regulation in keeping with extant case law,[97] although they sometimes granted relief.[98] Some circuits

94 346 U.S. 574 (1954).

95 Note, *The Mystery of Rule 71A(k): The Elusive Right to Federal Diversity Jurisdiction over Condemnation Actions Authorized by State Statute*, 64 YALE L.J. 600, 601, 603–04, 609 (1955) (criticizing *Stude*, and indicating that there was uncertainty as to when a party in an eminent domain action could seek a federal forum if state law required an initial administrative appraisal). Federal courts, however, despite some hurdles, have continued to hear state eminent domain proceedings. *See, e.g.*, Harris County v. Union Pac. R.R. Co., 807 F. Supp. 2d 624, 628–29 (S.D. Tex. 2011) (holding that removal was timely because the eminent domain proceeding became a civil action when Union Pacific filed its objections to the special commissioners' damages award). *See generally* FED. R. CIV. P. 71.1(k) ("This rule governs an action involving eminent domain under state law.").

96 *See* Ryckman, *supra* note 1, at 378–79 (noting that bulk of land use claims were still in state court but that federal courts had recently become attractive).

97 *See, e.g.*, St. Paul v. Chi., St. Paul, Minneapolis & Omaha R.R. Co., 413 F.2d 762, 766 (8th Cir. 1969) (using a deferential standard, and overturning the district court's grant of an injunction against an ordinance that restricted building height on property that the railroad intended to sell); Blackman v. City of Big Sandy, 507 F.2d 935, 936–37 (5th Cir. 1975) (rejecting on the merits a challenge to a zoning ordinance that entailed that a gas station would not be able to sell beer because it was in a residential area); *cf.* McLarty v. Ramsey, 270 F.2d 232 (3d Cir. 1959) (dismissing a challenge to zoning that would have limited commercial use of the property); *id.* at 234–35 (indicating that dismissal was appropriate based on abstention and failure to seek a variance).

98 *See, e.g.*, Foster v. City of Detroit, 405 F.2d 138 (6th Cir. 1968) (giving relief under § 1331 for interim losses from a condemnation proceeding for a housing project, begun in 1950 but abandoned in 1960); *id.* at 142 (indicating that when the case was brought, Michigan case law indicated that damages would not be allowed for an abandoned condemnation proceeding); Robertson v. City of Salem, 191 F. Supp. 604 (D. Ore. 1961) (enjoining a city ordinance that restricted land use with a view to the state's later acquiring the property more cheaply).

frequently directed abstention in land use cases,[99] using *Pullman* and *Burford* alone or in combination.[100]

Eventually there were two developments in land use cases that pulled in different directions. One was the opening up in 1978 of § 1983 claims against municipalities in *Monell v. Department of Social Services*.[101] The other was *Williamson County*'s ripeness doctrine which, in 1985, mitigated the impact of allowing § 1983 land use claims against municipalities.[102]

As discussed above, § 1983 had generally not been considered appropriate for property claims, based in part on a narrow version of rights secured by the Constitution. The Court eventually abandoned a narrow view of which rights were "secured by" the Constitution in *Hague v. Committee for Industrial Organization*.[103] But that case nevertheless continued to treat property claims as outside of § 1983's ambit. In his plurality opinion, Justice Stone reasoned that because the jurisdictional provision for § 1983 had no amount in controversy, § 1983 was limited to personal rights rather than property rights.[104] The Court abandoned the distinction between property rights and personal rights in *Lynch v. Household Finance Corp.*, a procedural due process case.[105] Still, takings claims under § 1983 for a time remained relatively uncommon. Then-Justice Rehnquist in his *Monell* dissent observed: "It has not been generally thought, before today, that § 1983 provided an avenue of relief from unconstitutional takings. Those

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99 Blaesser, *supra* note 2, at 92–93 (stating that in § 1983 land use actions from 1974 to 1988, the federal courts had abstained under one or more of the abstention doctrines in close to 50% of the cases); Radford & Thompson, *supra* note 5, at 597–99 (discussing the use of abstention in takings cases prior to *Williamson County*).

100 *See* Blaesser, *supra* note 2, at 86–87 (noting that *Burford* was often used in combination with *Pullman*); Radford & Thompson, *supra* note 5, at 599–608 (discussing use of *Pullman* and *Burford*); Ryckman, *supra* note 1, at 412 (discussing use of *Pullman* and *Burford* as tending to merge in application to land use cases).

101 436 U.S. 658 (1978).

102 Thomas, *supra* note 2, at 512–13; *see also id.* at 511 ("The Court in *Williamson County* adopted the state procedures requirement with little briefing (and none of the usual percolation of issues)"); *id.* at 514 (indicated that the Court's analysis was "easily subject to attack because the Court based its holding on ripeness even though none of the parties raised or briefed it"); *id.* at 515 ("[T]he *Williamson County* Court was flatly wrong when it concluded the property owner could pursue a compensation remedy in a Tennessee court for a regulatory taking under state law" as the Tennessee Supreme Court had not interpreted the relevant state statute—and "would not do so for another three decades"— to allow property owners to seek and get "just compensation for a regulatory taking [in Tennessee's courts] in an inverse condemnation lawsuit.").

103 307 U.S. 496 (1939) (plurality opinion), *discussed in* Collins, *supra* note 11, at 1533.

104 *See id.* at 531–32, *discussed in* Collins, *supra* note 11, at 1534; Ryckman, *supra* note 1, at 384.

105 405 U.S. 538 (1972), *discussed in* Ryckman, *supra* note 1, at 384; Collins, *supra* note 11, at 1537.

federal courts which have granted compensation against state and local governments have resorted to an implied right of action under the Fifth and Fourteenth Amendments."[106]

*Monell*, however, would change that. In *Monell*, the Court reversed its prior holding that municipalities were not suable "persons" under § 1983, even if the challenged action reflected government policy. And in *Owen v. City of Independence*, the Court held that municipalities could not claim good faith immunity from damages as could individual persons sued under § 1983.[107] While neither of these decisions involved takings, they significantly enhanced the use of § 1983 for land use claims.[108] The local government could be sued, because land use decisions generally met *Monell*'s custom and policy requirement, and no qualified immunities were available as to damages as they were for individual defendants. Attorneys' fees, moreover, would also be available under § 1988.[109]

*Williamson County*'s finality requirement, however, soon checked the increase in § 1983 land use cases.[110] *Williamson County* held that a takings claim was not yet ripe until the owner was denied compensation by the state courts.[111] When combined with the somewhat inconsistent use of abstention doctrines, *Williamson* brought land use cases more in line with some of the substantive economic rights cases involving confiscation such as the railroad rate and oil drilling cases.[112] On the other hand, coming as it did in 1985 rather than in

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106 *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 721 n.4 (1978) (Rehnquist, J., dissenting) (citing Richmond Elks Hall Ass'n v. Richmond Redev. Agency, 561 F.2d 1327 (9th Cir. 1977), *aff'g* 389 F.Supp. 486 (N.D. Cal. 1975); Foster v. City of Detroit, 405 F.2d 138, 140 (6th Cir. 1968)); *cf.* Ryckman, *supra* note 1, at 382–84 (indicating that before 1972, § 1331 was the primary authority for land use challenges in federal court, and indicating some cases were brought under § 1983 after *Lynch v. Household Finance*, 405 U.S. 538 (1972)). Justice Rehnquist was responding to the majority's relying on remarks in the legislative history of § 1983 that referred to takings, which the majority read as supporting municipal liability. *See Monell*, 436 U.S. at 721.

107 Owen v. City of Independence, 445 U.S. 622 (1980), *discussed in* Ryckman, *supra* note 1, at 390–91.

108 *See* Ryckman, *supra* note 1, at 389–91.

109 The amount in controversy could also be a problem in § 1331 actions prior to its abolition in 1980. *Id.* at 382; *see also* FALLON ET AL., *supra* note 80, at 783 (as to the abolition of the amount in controversy for federal question jurisdiction).

110 *Williamson County* can be characterized as an abstention doctrine. *See* Radford & Thompson, *supra* note 5, at 571 (criticizing *Williamson County* as a form of abstention).

111 *Williamson County* involved a question of damages for a temporary taking by land use restrictions, which the Court avoided deciding through its decision that the claim was not final until the state courts had denied relief. *See* Sterk, *supra* note 1, at 239–240; Radford & Thompson, *supra* note 5, at 574.

112 It also could be seen as in line with the Court's interpreting the Tax Injunction Act and comity to require that taxpayers pursue refund remedies in state courts rather than federal or state court § 1983 actions. *See, e.g.*, Nat'l Priv. Truck Council v. Okla. Tax

the midst of the New Deal retreat from economic rights, *Williamson* may indicate that the Court was looking more to limit lower federal court exposure to takings claims rather than to dilute the nonconfiscation norm in land use cases. Indeed, the Court would shortly begin to bolster its substantive takings jurisprudence.[113]

## III. KNICK AND THE FUTURE OF FEDERAL COURTS TAKINGS CLAIMS.

The *Knick* decision removes the offset that *Williamson* provided to *Monell*'s and *Owen*'s encouragement of § 1983 takings cases. Not unexpectedly, the scholarly reaction to *Knick* has been mixed. Proponents of greater federal court involvement in land use cases tend to argue that takings should be treated as favorably as other constitutional claims litigated under § 1983 and welcome greater federal court involvement as providing for more sympathetic treatment of property rights.[114] By contrast, opponents deplore the increased federal role as "hint[ing] at a rejection of the post-*Lochner* idea that in a modern economy, economic regulation of the sort that implicates the use of and economic value in property must be more deferentially reviewed by the courts."[115]

*Knick* thus raises the question of the extent to which the federal courts should limit their exposure to takings claims by abstention doctrines or some other means.[116] We consider immediately below whether *Pullman* and *Burford* abstention are generally appropriate for land use cases.

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Comm'n, 515 U.S. 582 (1995). The Court in *Williamson,* 473 U.S. 172, 195 (1985), referred to the *Parratt* line of cases, whereby the Court treats some episodic intentional torts by government officials as potential procedural due process violations that may be redressed by the state's supplying a state court remedy. *See* Parratt v. Taylor, 451 U.S. 527 (1981).

113 *See, e.g.*, First Eng. Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) (holding that a temporary taking was compensable); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (disapproving a condition that a public easement be dedicated to obtain a building permit where there was no "essential nexus" between the condition and "the end advanced as the justification" for the government requirement).

114 *See, e.g.*, Hodges, *supra* note 4, at 1 (welcoming the end of the *Williamson* ripeness requirement); Jessica Webb, Knick v. Township of Scott: *Redefining a Constitutional Injury to Give Takings Plaintiffs Their Day in Federal Court,* 94 TUL. L. REV. ONLINE 51 (2020) (same); Vander Wal, *supra* note 10, at 229 (same).

115 Dana, *supra* note 3, at 600; *cf.* Pollack, *supra* note 10, at 238 (arguing that *Knick* and other cases undermine environmental goals and are often presented on oversimplified facts).

116 *See supra* notes 7–15 and accompanying text; *cf.* Ryckman, *supra* note 1, at 417 (suggesting that the increase in potential land use cases after *Lynch v. Household Finance,* 405 U.S. 538 (1972), and *Monell v. Department of Social Services,* 436 U.S. 658 (1978), called for greater use of abstention).

### *A.* Pullman *Abstention?*

Those opposing a more active federal role point out that property rights—even if federally protected—are primarily created by state law,[117] and that prohibition on takings "protects primarily against *change* in background state law."[118] Takings claims, they argue, are thus more state-law-dependent than other constitutional claims and state courts are best situated to evaluate state law.[119]

Given their emphasis on state law issues, scholars who seek to minimize the federal court role have particularly argued for *Pullman* abstention.[120] The Supreme Court in *Pullman* said that the lower federal court should have directed to the state court the determination of the unsettled issue of whether the Texas Railroad Commission had authority under state law to reallocate certain work from African American porters to white conductors. This determination of unsettled state law might obviate the need for the federal court to decide whether the order violated the Fourteenth Amendment.

The federal court minimalists particularly claim that state courts should determine unsettled "background principles" of state property law. The emphasis on background principles stems in part from the Court's opinion in *Lucas v. South Carolina Coastal Council*,[121] which held that regulation forbidding any economically viable use of property would often be a categorical taking, and thus not subject to the *Penn Central Transportation Co. v. New York City* multifactor test for determining a regulatory taking.[122] Justice Scalia's opinion in *Lucas*

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117 Beaton & Zinn, *supra* note 10, at, 631–32 (indicating that state law was important to determining the parcel to be considered for takings, to the reasonableness of expectations under *Penn Central* analysis, and to determining background principles that could limit property rights); *see also* Sterk & Pollack, *supra* note 9, at 437–38 (stating that state courts are in a better position than federal courts to resolve the many state law property issues that arise in takings cases).

118 Sterk, *supra* note 1, at 206; *see also* Echeverria, *supra* note 9, at 11 (stating that the nature and scope of property interests are almost always questions of state not federal law).

119 Sterk, *supra* note 1, at 206; *see also id.* at 234–35 (stating that developers are often local and less subject to prejudice and that state courts are more familiar with local law and conditions).

120 Beaton & Zinn, *supra* note 10, at 636 (arguing that *Pullman* was the most likely form of abstention); *see also* Ryckman, *supra* note 1, at 397–404 (discussing propriety of *Pullman* abstention due to unclear state law issues); Alicia Gonzalez & Susan L. Trevarthen, *Deciding Where to Take Your Takings Case Post-*Knick, 49 STETSON L. REV. 539, 572 (2020) (discussing *Pullman* as the most apt form of abstention). Presumably the minimalists would prefer the whole case to be decided by a state court rather than just the state law issues as in *Pullman*, but in any event they seem to anticipate that the state law determination would often defeat the federal takings claim.

121 505 U.S. 1003 (1992).

122 438 U.S. 104, 124 (1978). In *Penn Central* the Court emphasized its inability to "develop any 'set formula' for determining when 'justice and fairness' require that

also stated, however, that background principles might already limit the owner's property rights such that a particular restriction—even one that forbad all economically viable use—would not be a taking. He gave examples of nuisance law that forbids flooding a neighbor's property, and a preexisting navigational servitude that might prohibit use of submerged lands.[123]

The federal court minimalists take this reference to background principles as supplying an area of unsettled state law that should regularly evoke abstention.[124] For example, they see *Nies v. Town of Emerald Isle*[125] as a case appropriately decided by a state rather than a federal court. In *Nies,* the North Carolina intermediate appellate court determined that dry sand beaches were subject to the state public trust doctrine such as to allow certain motor vehicle access. The decision was in line with decisions by the supreme courts of Oregon and Hawaii that state custom or background principles gave the public easements to the dry sand beaches, rather than just the area up to the mean high water mark.[126] Some scholars, however, have criticized state courts' recognition of public easements in dry sand beaches as departing from normal common law methodology for determining custom,[127] thereby effectively placing retroactive limits on owners' entitlements.

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economic injuries caused by public action be compensated by the government." *Id.* The following year, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Court clarified its decision in *Penn Central,* stating that its practice in takings cases is to engage in "essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance." *Id.* at 175. These three factors are commonly referred to as the "*Penn Central* test." *See* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES & POLICIES 1252 n.4 (3d ed. 2017).

123 *Lucas*, 505 U.S. at 1028–29.

124 Beaton & Zinn, *supra* note 10, at 632 (noting background principles as an area where state law predominates).

125 780 S.E. 2d 187, 197 (N.C. Ct. App. 2015), *discussed in* Dana, *supra* note 3, at 612; *see also* Michael C. Blumm & Rachel G. Wolfard, *Revisiting Background Principles in Takings Litigation*, 71 FLA. L. REV. 1165, 1184 (2019) (discussing *Nies*'s use of the public trust doctrine); *cf.* Robert L. Glicksman, *Swallowing the Rule: The* Lucas *Background Principles Exception to Takings Liability*, 71 FLA. L. REV. 121, 135 (2020) (indicating that Blumm and Wolfard were describing a background principles exception that is "probably broader than Justice Scalia anticipated or intended" in *Lucas*).

126 Michael C. Blumm & Lucas Ritchie, Lucas*'s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENV'T. L. REV. 321, 343 & n.137 (2005) (discussing New Jersey's use of the public trust doctrine as to dry sand beaches, citing inter alia *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984)); *id.* at 350 (stating that Oregon, Hawaii, and Texas had used custom as a basis for recreational easements in beachfront property).

127 *See, e.g.*, David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1422–23 (1996) (criticizing the Oregon Supreme Court's handling of Blackstone's factors for custom); *id.* at 1441, 1447–48 (arguing that

The divergence in views as to the dry sand beaches manifests distinct views of background principles more generally. The background principles that the Court referred to in *Lucas* are supposed to exist at the time title was acquired,[128] even if some room for new applications is allowed.[129] Thus a background principle should rarely involve determination of a deeply "unsettled" issue of state law as opposed to a determination that should largely turn on existing precedent. To the extent the minimalists argue that state background principles and other qualifications of property interests are "undecided" applications and are more appropriate for state courts, they perhaps see such determinations not so much as involving evaluation of preexisting property law but rather as involving legislative-type policymaking.[130]

To say that a state court makes a legislative-type policy is not necessarily to condemn it, particularly in light of *Erie*'s treating state courts as analogous to legislators. Indeed, *Pullman* itself used *Erie*-based reasoning in stating that the federal court would only be making a prediction as to the extent of the commission's delegated power. But one might think that a more restricted judicial process based on precedent is appropriate to determine what qualifications on title

custom was generally more appropriate for parcel-by-parcel determinations based on local usage, rather than for "rewriting the jurisdiction's general property law, and, with one stroke of the judicial brush, to declare public easements in the entirety of the state's beaches"); David L. Callies, *Custom and Public Trust: Background Principles of State Property Law?*, 30 ENV'T. L. REV. 10003, 10005, 10016–18 (2000) (criticizing Oregon and Hawaii decisions for failure to follow the traditional requirements for custom).

128 *See* Lucas v. S.C. Coastal Comm'n, 505 U.S. 1003, 1029 (1992); Palazzolo v. Rhode Island, 533 U. S. 606, 627 (2001) (challenges to regulations that preceded acquisition are sometimes allowed); Blumm & Ritchie, *supra* note 126, at 327; Christine A. Klein, *The New Nuisance: An Antidote to Wetland Loss, Sprawl, and Global Warming*, 48 B.C. L. REV. 1155, 1190–91 (2007) (applauding a broad view of background principles); James L. Huffman, *Background Principles and the Rule of Law: Fifteen Years after* Lucas, 35 ECOLOGY L.Q. 1, 12 (2008) (criticizing scholars' views that the malleability of the common law allows for expansive background principles limiting land use); William W. Fisher III, *The Trouble with* Lucas, 45 STAN. L. REV. 1393, 1407–08 (1993) (criticizing the need to look at state nuisance law at the date of acquisition).

129 *See Lucas*, 505 U.S. at 1032 n.18; Blumm & Ritchie, *supra* note 126, at 334 (discussing *Lucas*); *id.* at 334–35 (indicating that some courts rely on Justice Kennedy's concurrence which allows greater flexibility).

130 *Cf.* McKesson v. Doe, 141 S. Ct. 48, 50–51 (2020) (per curiam) (holding that the issue of tort liability for a demonstration organizer should be certified to the state court: "To impose a duty under Louisiana law, courts must consider 'various moral, social, and economic factors,' among them 'the fairness of imposing liability,' 'the historical development of precedent,' and 'the direction in which society and its institutions are evolving.'" (quoting Posecai v. Wal-Mart Stores, Inc., 752 So. 2d 762, 766 (La. 1999))).

existed at the time of acquisition.[131] And a federal court should be at least as capable as a state court in making such a determination.

Similarly, scholars who wish to minimize federal court involvement argue that background principles militate against an increased federal role with respect to the denominator problem.[132] The denominator problem arises when a restriction on land use affects part of a property interest and addresses how one determines the parcel from which to measure the diminution of value. In *Murr v. Wisconsin*, the Court addressed whether two lots acquired by the same owners merged so as to prohibit separate sale and development. The Supreme Court prescribed a multifactored test for determining the proper parcel.[133] While state law was one factor,[134] the Court also directed attention to the physical characteristics of the property and the "value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings."[135]

The minimalists would leave state courts latitude in determining state law as to how to determine the proper parcel. But as is true for background principles more generally, state law that goes into the determination should largely preexist the decision in the case. Federal courts should be capable of evaluating state law by existing caselaw and other legal sources.[136]

It should be noted, moreover, that the undecided state law issues that the minimalists argue should be decided in state courts differ from

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131 *See* Huffman, *supra* note 128, at 19, 25 (arguing that background principles and public trust doctrines should only allow for evolutionary common law changes).

132 *See* Beaton & Zinn, *supra* note 10, at 631–32 (indicating that state law was important in defining what parcel to look at for takings); Blumm & Wolfard, *supra* note 125, at 1182 (arguing that the issue of the parcel may involve a background principle); Sterk & Pollack, *supra* note 9, at 438–39 (arguing that state law is important to the denominator issue). *But cf.* Hodges, *supra* note 4, at 17–18 (criticizing some scholars' approach to the denominator problem). The denominator problem can be important to determining whether there is a *Lucas*-type taking. *See* Carole Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of* Lucas: *Making or Breaking the Takings Claim*, 102 IOWA L. REV. 1847, 1850 (2017) (indicating that *Lucas* meant it was important to reduce the denominator).

133 Murr v. Wisconsin, 137 S. Ct. 1933 (2017); *see* Maureen E. Brady, Penn Central *Squared: What the Many Factors of* Murr v. Wisconsin *Mean for Property Federalism*, 166 U. PA. L. REV. ONLINE 53, 54 (2017).

134 137 S. Ct. at 1947; *see* Nicole Stelle Garnett, *From a Muddle to a Mudslide:* Murr v. Wisconsin, 2016–2017 CATO SUP. CT. REV. 131, 148 (2017) (criticizing *Murr* for paying insufficient attention to state law in defining the relevant parcel).

135 137 S. Ct. at 1945–46.

136 The same presumably should be true as to background principles with respect to wildlife preservation. *See, e.g.*, Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1183 (Fed. Cir. 1994); Blumm & Wolfard, *supra* note 125, at 1170–71 (discussing the Federal Circuit's allowing takings claims as to water rights affected by the Endangered Species Act); Blumm & Ritchie, *supra* note 126, at 353–54 (discussing wildlife protection as fitting into a nuisance theory and other background principles generally).

the undecided state law issue in *Pullman*. In *Pullman*, the uncertain state law issue was whether the Texas Railroad Commission had been delegated authority under state law to issue the order allocating work to white conductors rather than African American porters. If the state court determined that the commission lacked that authority, the porters would win without the federal equal protection issue's having to be decided. If the state court determined that the Commission did have the authority, the federal issue would remain open to determination in the federal courts.[137] By contrast in the takings cases, the minimalists suggest that the state courts should be able to decide an indeterminate state law issue in a way that will defeat the federal takings claim.[138]

Takings claims, moreover, are not unique in featuring antecedent questions of state law entitlements that may defeat a federal constitutional claim, and such antecedent issues have not generally occasioned a retiring role for the federal courts. Contract Clause claims often have a similar structure to takings claims. If no contract existed under state law to begin with, it would often follow that no impairment of the obligation of contract occurred. In addition, remedies that existed at the time of the contracting could constitute part of the contract that could not be impaired. The Supreme Court by way of direct review and by its expansive views of lower federal court jurisdiction[139] allowed federal courts to make their own determinations of whether a contract existed under state law[140] and also what remedies existed at the time of contracting and were part of the contract.[141]

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137 Blaesser, *supra* note 2, at 86 (noting that lower federal courts who used *Pullman* abstention in land use cases often failed to identify the state law issue); *id.* at 124–25 (stating courts should not equate unresolved applications with unsettled general principles); Radford & Thompson, *supra* note 5, at 599 (noting failure to specify undecided state issues when federal courts used *Pullman* for land use cases); *cf.* McKesson v. Doe, 141 S. Ct. 48, 50–51 (2020) (holding that the federal appeals court, rather than deciding that under Louisiana law a person who unlawfully led the protest onto a highway may be held liable for an unknown demonstrator's throwing an object at a policeman, should have certified the question to the state Supreme Court); *id.* at 50 (claiming the state court's determination that there was no liability would obviate the need for the federal court to decide whether such liability would violate the First Amendment).

138 Beaton & Zinn, *supra* note 10, at 636 ("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."); *cf.* Ryckman, *supra* note 1, at 400–01 (noting that the state and federal constitutional issues may both be whether a taking without just compensation has occurred, but that *Pullman* abstention may still be appropriate).

139 White v. Greenhow, 114 U.S. 307, 308 (1885) (reinstating the trespass action).

140 *See, e.g.*, Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95 (1938).

141 *See* Poindexter v. Greenhow, 114 U.S. 270 (1885); *cf.* Phillips v. Wash. Legal Found., 524 U.S. 156, 172 (1998) (holding that interest on client trust accounts was private property).

Thus *Pullman* abstention generally is a poor fit in takings cases. If one assumes that background principles of state law are to be based largely on preexisting law rather than a freewheeling policy choice, then federal courts are as well-situated to make those determinations as state courts. That the determinations of state law background principles could defeat the federal right also militates against abstention.[142]

### *B.* Burford *Abstention?*

*Burford* on the other hand might reinforce an abstention argument. *Burford* abstention is said to apply when the federal court involvement would interfere with a complex state administrative scheme thought to require uniform administration.[143] But apart from this description, *Burford* reflected the Court's substantive dilution of the nonconfiscation norm in the common pool oil drilling context, and a concomitant federal court withdrawal from deciding both federal and state claims.

*Williamson County* could be seen as effecting a somewhat similar result by directing state and federal confiscation claims to the state courts, which effectively provided greater leeway for state and local land use regulation. Thus it might be possible to see *Knick*, as do some commentators, as signaling the abandonment of the New Deal's treatment of most economic regulation as subject to only deferential judicial review.[144]

The problem is that the federal courts never effected such a drastic substantive withdrawal from federal takings claims as they did for common pool drilling. In the context of drilling, the Court prescribed deferential scrutiny, and greater room for redistributive policymaking by state agencies and courts. But the Court never demoted land use claims to the same extent, given the Fifth Amendment's express provisions and the traditional current value formulation for just compensation. Rather, real estate is a more definite entitlement, and the Court treats major state-law-based qualifications on productive use of land as largely needing to be baked in at the time of acquisition of title. Certainly one can discern a desire

142 Certification as well as *Pullman* would be appropriate if the state law issue has a greater resemblance to that in *Pullman*. *Cf.* Dana, *supra* note 3, at 617–18 (recommending certification); Beaton & Zinn, *supra* note 10, at 637–38 (recommending certification in some cases). The Supreme Court has expressed a preference for certification over *Pullman* abstention. Arizonans for Off. Eng. v. Arizona, 520 U.S. 43, 75–80 (1997).

143 *See, e.g.*, FALLON ET AL., *supra* note 80, at 1120.

144 *See* Dana, *supra* note 3, at 600; *cf.* Pollack, *supra* note 10, at 238 (arguing that *Knick* and other cases undermine environmental goals, and are often presented on oversimplified facts).

to limit lower federal court exposure to takings cases in *Williamson County*,[145] but one cannot safely say that the Court meant to change substantive doctrine as dramatically as it had in the oil drilling context.

### *C. A More Customized Land Use Abstention Doctrine?*

Even assuming that neither *Pullman* nor *Burford* provides an appropriate basis for abstention, the federal courts may be inclined to find some ways to thin out federal takings claims. The state courts have always entertained most land use cases, and there is certainly some sense to the minimalists' point that federal courts will not want to become boards of zoning appeals.[146] Perhaps the Supreme Court could leave the lower federal courts to apply existing abstention doctrines as they have in the past.[147] Ad hoc abstention, however, invites inconsistency[148] and an undesirable expenditure of time on such jurisdictional issues. Another possibility is to recognize a form of abstention particular to takings claims that uses more or less categorical exclusions.

Claims for injunctive relief alone may often be appropriate federal court actions. As Professor McConnell pointed out in discussing the federal courts' hearing a takings challenge to an agricultural marketing order: "There are many statutory schemes under which the government has not agreed to pay compensation—indeed, where the payment of compensation would be inconsistent with the purposes of the statutory program."[149] And cases such as *Knick* where the landowner was seeking to enjoin threatened enforcement of a generally applicable law seem appropriate for a federal forum.[150]

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145 The preclusion effects of *Williamson* may have been obscure at that point. Certainly, one can discern a desire for limitations or filters before takings cases were brought in lower federal courts.

146 *See* Ryckman, *supra* note 1, at 380 ("[T]he essentially local character of these disputes and their potential for resolution on nonconstitutional grounds should make federal courts wary of assuming the role of a zoning appeals court through the exercise of primary and pendent jurisdiction.").

147 This is not to suggest that the lower courts would use *Burford*'s near across-the-board abstention; the Court's overturning *Williamson* indicates that is not what the Court has in mind.

148 *See* Blaesser, *supra* note 2, at 117 (finding significant variations among the circuits in their use of abstention in land use cases); *id.* at 118–19 (arguing that greater familiarity with local conditions is not a good reason to abstain under *Burford* or *Pullman)*; McConnell, *supra* note 2, at 10751 (arguing that local knowledge generally does not trump the right to go to federal court).

149 McConnell, *supra* note 2, at 10750.

150 *Knick*, 139 S. Ct. at 2168. Of course, refusal to grant a permit ultimately involves a threat of enforcement.

So-called facial takings claims, generally for injunctions, were allowed into lower federal courts even before *Knick*. These were sometimes defined as claims not tied to the individual economic effects on the landowner.[151] But the Court in *Lingle v. Chevron U.S.A. Inc.*,[152] held that claims that a statute failed to advance a substantial government interest are properly characterized as substantive due process claims, not takings claims. The due process categorization for claims that do not fall into narrower takings categories generally means that such claims have little chance of success on federal grounds.[153] While the likely lack of merit may suggest that these cases should be treated like other economic rights cases that the federal courts have retreated from, these cases may be relatively easily disposed of on the merits if filed in federal courts. If one is looking for a sorting device, then perhaps these injunction-only claims should remain in federal courts.

Allegations of loss of all economically viable use under the standards of *Lucas* present a category that also may be appropriate for lower federal courts. *Lucas* or "wipeout" cases are to a degree separable from less drastic regulatory takings cases that are more likely to be determined under the *Penn Central* multifactor approach and, in addition, *Lucas* claims are more likely to be viable.[154] In such cases, the government may raise a background principles defense, but as noted above, the federal courts may be able to add to the fairness of these determinations by evaluating prior state court precedent. In addition, to the extent such cases may present issues of the proper parcel or denominator, federal courts should be able to make such determinations under the moderate *Murr* standard.[155]

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151 *See* San Remo Hotel v. City & County of San Francisco, 545 U.S. 323, 345–46 & n.25 (2005).

152 544 U.S. 528 (2005) (involving an unsuccessful challenge to a statute limiting rents that oil companies could charge gas station lessees).

153 The courts can decline supplemental jurisdiction. For injunction actions against state-level officials, *Pennhurst* already disallows state claims. *See generally* Daniel R. Mandelker, *Litigating Land Use Cases in Federal Court: A Substantive Due Process Primer*, 55 REAL PROP., TR. & EST. L.J. 69 (2020) (arguing that substantive due process should be used for addressing very arbitrary land use decisions, and that a shock the conscience standard is too strict).

154 Merriam, *supra* note 9, at 650 (noting there are few good *Penn Central* claims); Huffman, *supra* note 128, at 2–3 (indicating *Penn Central* claims had rarely been successful); Brady, *supra* note 19, at 1471 ("[R]ecent empirical studies show that *Penn Central* claims have an abysmal success rate approximating zero." (footnote omitted)); *cf.* Callies & Ashford, *supra* note 10, at 146–47 (arguing that federal courts could have contributed to a fairer result in a *Lucas*-type case decided by Hawaii courts).

155 137 S. Ct. 1933, 1945–46 (2017), *discussed in* text accompanying notes 132–36. The temporal severance issue may present largely a federal question. The problems with this question may have been exacerbated by *Knick's* statements as to when compensation is due.

As noted above, cases involving non-wipeout restrictions decided under *Penn Central* balancing are perhaps more appropriate for state courts. In addition, a large category in land use practice involves questions of impact fees and dedications associated with development, and their routine nature suggests that federal court involvement should be limited.[156] In *Dolan v. City of Tigard*, the Court prescribed a test of "rough proportionality"[157] of the exaction to the impact of the proposed development.[158] While there may be some benefit in federal court applications of the intermediate standard, the routine nature of these claims again may suggest a larger state court role.

Any attempt to draw categorical lines will be problematic. Federal courts may be able to contribute to the fairness of application of the *Penn Central* factors, and the intermediate standards for impact fees and exactions. Thus it is reasonable to argue that no such presumptive exclusions should occur. But if federal courts, as seems likely, will want to limit takings claims, some categorical inclusions and exclusions seem not only desirable but unavoidable. *Lucas* and *Murr* cases seem to be areas where the federal courts could most usefully contribute to a fair assessment of entitlements as they existed at the time title was acquired.

Some might question fashioning a new abstention doctrine specifically for takings claims. Abstention has been the subject of debate between those arguing that federal courts are obliged to exercise the jurisdiction provided in congressional statutes,[159] and those arguing that the federal courts can exercise "principled

*See* Dana, *supra* note 3, at 597–98, 619–20; Pakdel v. City of San Francisco, 141 S. Ct. 2226, 2230, 2231 (2021) (per curiam) (indicating that finality would be met when there was no question as to how the regulation would apply to the particular land or when government had reached a conclusive position); Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 321 (2002) (holding that temporary development moratoria should be analyzed under *Penn Central* rather than under a per se rule); *see also* Sterk & Pollack, *supra* note 9, at 441 (noting that *Knick* meant that federal courts would often have to determine when a taking became final). *See generally* Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1 (1995) (discussing various timing issues involved in takings litigation).

156 Beaton & Zinn, *supra* note 10, at 626 ("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.").

157 512 U.S. 374, 391 (1994).

158 *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987). Some state courts at the time used a comparable test, while others used more and less stringent tests. *Dolan*, 512 U.S. at 391.

159 *See, e.g.*, Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 72, 74 (1984).

discretion" to decline to exercise jurisdiction.[160] There is also debate as to whether abstention should be reserved for equitable actions.[161] But due to concerns for federalism as well as judicial administration, the federal courts since the mid-twentieth century have directed a good many land use cases involving both legal and equitable relief to state courts under abstention and related doctrines. In addition, the federal courts' declining to hear some land use cases is supported by their refusal to hear—based on federalism and comity concerns—most claims for monetary relief arising from state taxation.[162]

### *D. Limiting Use of § 1983*

An additional or alternative possibility—although one the Court may be unlikely to adopt—is simply to exclude takings claims from the ambit of § 1983. As discussed above, takings claims were late to the table as § 1983 actions.[163] They were not clearly within the intended scope of the 1871 Civil Rights Act. And the Court at first did not treat most economic rights claims as "rights secured by the Constitution," because property rights preexisted the Constitution. Subsequently

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160 *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 578, 588 (1985); *id.* at 579 (suggesting that criteria for the federal courts' declining jurisdiction may be grouped as "equitable discretion, federalism and comity, separation of powers, and judicial administration"); Richard H. Fallon, Jr., *Why Abstention is Not Illegitimate: An Essay on the Distinction Between "Legitimate" and "Illegitimate" Statutory Interpretation and Judicial Lawmaking*, 107 NW. U. L. REV. 847, 880 (2013) (concluding that "Professor Redish was wrong to conclude that the best reading of the Constitution and relevant statutes precludes federal judicial abstention under all circumstances"). *See generally* FALLON ET AL., *supra* note 80, at 1105–06 & n.4 (discussing the debate and citing authority).

161 *See, e.g.*, Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 731 (1996) ("Under our precedents, federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary."); Fallon, *supra* note 160, at 869–70 (noting that *Quackenbush* nevertheless allowed staying federal court non-equity proceedings, which operates similarly to abstention); *Quakenbush*, 517 U.S. at 719–21 (distinguishing stays from abstention and citing the stay allowed in *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959)); FALLON ET AL., *supra* note 80, at 1107–08 (discussing whether abstention could be appropriate in both law and equity, and apparently suggesting that it was); Shapiro, *supra* note 160, at 551 (stating that the abstention cases "have not been confined to actions in equity, and it is hard to see why they should be").

162 *See, e.g.*, Fair Assessment in Real Est. Ass'n, Inc. v. McNary, 454 U.S. 100 (1981); *cf.* Shapiro, *supra* note 160, at 567–68, 587 (indicating that the Court's exclusion from § 1331 of a range of cases involving land disputes where title traced back to the United States was defensible on grounds of judicial administration).

163 *See supra* notes 73–75, 106–13, and accompanying text. *But cf.* Blaesser, *supra* note 2, at 135 (arguing that excluding takings claims from federal courts was never intended by the Congress when it enacted the Civil Rights Act of 1871); Radford & Thompson, *supra* note 5, at 612–13 (arguing that federal courts' failure to entertain takings cases was contrary to the congressional command to hear § 1983 cases).

Justice Stone indicated that § 1983 encompassed liberty but not property claims. Even after the Court abandoned the liberty/property distinction, § 1983 was not much used for land use claims until after *Monell* and *Owen* opened up prospects for municipal liability that it would be difficult to attribute to the framers of the 1871 Civil Rights Act. But even that potential increase in claims was checked until recently by *Williamson*.

Takings claims thus could be returned to their historical home as diversity actions or as constitutionally-based actions brought under § 1331. While the Court lately has been disinclined to imply a damages remedy directly under the Constitution,[164] it has stated that the obligation to provide compensation for a taking is self-executing and does not depend on a particular legislative grant.[165] Thus a constitutionally-based takings claim brought under § 1331 might be somewhat more acceptable to the current Court than other implied constitutional claims involving monetary relief.

Standing in the way of removing takings claims from § 1983 is the Court's current plain meaning approach to determine which constitutional claims are covered by § 1983.[166] *Monell*, however, only questionably relied on § 1983's plain meaning, as opposed to its debatable legislative history, in holding cities liable as persons under § 1983.[167] In some areas, moreover, the Court has retreated from the plain meaning approach. For example, the Court in *Maine v. Thiboutot*[168] used a plain meaning approach for employing § 1983 to address statutory violations, which it later abandoned.[169] In addition, claims of statutory preemption generally proceed as statute-based

164 *See, e.g.*, Hernández v. Mesa, 140 S. Ct. 735, 742 (2020) (refusing to imply an action for a cross-border killing due to alleged use of excessive force).

165 Jacobs v. United States, 290 U.S. 13 (1933); First Eng. Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987) ("We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation. . . .'" (quoting United States v. Clarke, 445 U.S. 253, 257 (1980))).

166 Professor Collins has argued against such a plain meaning approach, based on legislative intent surrounding § 1983, the judicial practice of using the general federal question jurisdictional provision for bringing economic rights claims, and the diminished need for § 1983's remedial scheme as to economic rights. *See* Collins, *supra* note 11, at 1542.

167 Monell v. Dep't of Soc. Servis., 436 U.S. 658, 688–89 (1978) ("Municipal corporations in 1871 were included within the phrase 'bodies politic and corporate' and, accordingly, the 'plain meaning' of § 1 is that local government bodies were to be included within the ambit of the persons who could be sued under § 1 of the Civil Rights Act.") (quoting Civil Rights Act of 1871, ch. 71, § 2, 16 Stat. 431, 431 (1871)). *But cf. supra* notes 54–59, sources cited therein, and accompanying text.

168 448 U.S. 1 (1980).

169 *See* Gonzaga Univ. v. Doe, 536 U.S. 273 (2002).

injunctive actions under § 1331 rather than § 1983 claims. Based on concerns about state tax administration,[170] the Court also has read out of § 1983 actions seeking monetary relief for taxes.[171] Excluding tax refund claims from § 1983 even when based on constitutional infirmities means that attorneys' fees are unavailable under § 1988—an incentive to suit that the Court may see as unnecessary given the parties who raise such claims.

Allowing land use claims to be framed as § 1983 takings claims brings along attorneys' fees in both state and federal courts. And because the federal courts may be more likely to decide the cases based on § 1983 rather than state law grounds, the availability of attorneys' fees increases incentives to file in federal courts.[172] The added incentive of attorneys' fees may be unnecessary to assure vindication of these claims.[173]

## CONCLUSION

For most of the nation's history, federal courts have taken a moderately active role in adjudicating property rights claims against state and local governments. This role was substantially reduced by the Supreme Court's 1985 decision in *Williamson County*, which limited access to federal courts for takings litigants by treating their claims as unripe.

In *Knick v. Township of Scott*, the Court put an end to *Williamson County*'s ripeness doctrine, but the question of how federal courts will handle the potential influx of takings cases remains unanswered. In this Article, we have detailed how federal courts can take steps toward crafting an abstention doctrine particular to takings cases that

170 Nat'l Private Truck Council v. Okla. Tax Comm'n, 515 U.S. 589 (1985) (indicating there was no § 1983 injunction or declaratory action, even if pursued in state court); *id.* at 584, 587 (relying on federalism and comity); Fair Assessment in Real Est. Ass'n, Inc. v. McNary, 454 U.S. 100 (1981) (stating no § 1983 damages action existed for monetary relief in a tax case).

171 The Tax Injunction Act excluded most injunctions from federal courts so long as a plain, speedy, and efficient remedy existed at state law. The taxpayer generally must use state law actions rather than federal causes of action. 28 U.S.C. § 1341.

172 *Cf.* Sterk, *supra* note 1, at 266, 268–69 (noting that some state courts rely on state law to avoid financial consequences to municipalities). Attorneys' fees are available for some state law claims. *See* Brady, *supra* note 19, at 1472.

173 Merriam, *supra* note 9, at 653–54 ("Actions applying *Knick* include the greater use and the threat of successful plaintiffs recovering their attorney's fees under Section 1988."); *cf.* City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 123–24 (2005) (holding that § 1983 did not provide a vehicle for enforcement of the Telecommunications Act of 1996's, 47 U.S.C. § 332(c)(7), provisions as to location of wireless communication facilities, reasoning inter alia, that § 1988's attorneys' fee provisions would have a "particularly severe impact" on local governments).

comports with the federal courts' traditional role and that will help to ensure prudent deployment of judicial resources. We have also drawn on history and federalism to explain the benefits of allowing takings claims to be brought as diversity actions or constitutionally grounded actions under § 1331, rather than relying on § 1983.