DECIDING WHERE TO TAKE YOUR TAKINGS CASE POST-*KNICK*

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I. INTRODUCTION

On June 21, 2019, in *Knick v. Township of Scott*,[1] the United States Supreme Court reversed one of the few bright-line rules in regulatory takings cases: the state-litigation requirement. The state-litigation requirement was originally established in 1985 in the Supreme Court case of *Williamson County*.[2] This decision required property owners who claimed that their property had been inversely condemned by local government and sought just compensation under the Fifth Amendment Takings Clause of the United States Constitution to first attempt to recover just compensation through state court proceedings before they could file suit in federal court.[3] The theory behind this requirement was

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1. 139 S. Ct. 2162 (2019).

2. Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194–97 (1985).

3. *Id.* at 195. The *Williamson County* Court described the state-litigation requirement as a question of "ripeness" imposed by the text of the Fifth Amendment Takings Clause itself. *Id.* at 194–95. The Court held that the Fifth Amendment prohibits the taking of property only when it is done without payment of just compensation. *Id.* at 194. Thus, a claim was not ripe until a property owner could show that there was no avenue pursuant to which the property owner could seek and obtain just compensation. *Id.* at 194–95. The Supreme Court later clarified that the requirement was actually prudential and should not in all instances bar claims that have not met the state-litigation requirement from state court. Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 733–34 (1997). A prudential requirement stems from the principles of justiciability—"where 'wise policy militates against judicial review,' generally because certain cases 'are more appropriately resolved in another forum.'" Katherine Mims Crocker, *Justifying a Prudential Solution to the* Williamson County *Ripeness*

that if the state court proceedings either invalidated the taking or provided adequate compensation pursuant to state law, then no actual violation of federal law occurred.[4] The *Knick* decision extinguished this requirement.[5] Now, property owners can file suit directly in federal court without first exhausting their state-court remedies.[6]

Post-*Knick*, both plaintiffs and defendants have an option available to them that was previously unavailable. This Article will discuss the options that litigants on either side now have in federal takings cases and evaluate which options are desirable depending on the objectives of a particular litigant. Part II will discuss the history of the state-litigation requirement and the theoretical underpinnings of the *Williamson County* decision in which the state-litigation requirement was imposed. Part III will discuss *Knick* and the Supreme Court's reasoning for reversing its own precedent in *Williamson County*. Part IV will discuss the new options now available to property owners and government defendants in regulatory takings cases due to the elimination of the state-litigation requirement. Part V will discuss the critical differences between federal and state courts that litigants should consider when choosing their forum. Part VI will apply the considerations set forth in Part V to a hypothetical regulatory takings case to show how these considerations should be applied. Given the reversal of thirty-four years of precedent, this Article seeks to elucidate the new options that litigants have and what they should consider in choosing their forum.

II. HISTORY OF THE STATE-LITIGATION REQUIREMENT

The state-litigation requirement was first imposed in 1985 as a result of the Supreme Court's decision in *Williamson County*.[7] The Supreme Court held that a takings claim against a local government under the Fifth Amendment was not ripe in federal court until a plaintiff first sought compensation through state court proceedings.[8] To fully understand what changed after this requirement was eliminated by *Knick*, it is important to understand why the state-litigation requirement

Puzzle, 49 GA. L. REV. 163, 174 (2014). Where a court determines that prudential concerns militate against judicial review, the court can abstain from deciding the matter. *Id.* at 192.

4. *See Williamson Cty. Reg'l Planning Comm'n*, 473 U.S. at 195 (explaining that the State's action is not complete until the State fails to provide adequate compensation for the taking).

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

6. *See id.* at 2172 ("In sum, because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time.").

7. *Williamson Cty. Reg'l Planning Comm'n*, 473 U.S. at 194–95.

8. *Id.* at 186.

was first imposed. This Part will discuss the facts in *Williamson County*, the Supreme Court's stated reasons for the decision, and the possible historical reasons for the decision.

A. Facts of *Williamson County*

The plaintiff in *Williamson County*, Hamilton Bank, purchased a property in 1980.[9] A portion of the property had been approved for development in 1973 through a preliminary plat approval process.[10] In 1981, Hamilton Bank attempted to obtain final approval to construct the portions of its property that were subject to the 1973 preliminary plat (with slight adjustments) and the portions of its property that had not been approved through the preliminary plat process.[11] The proposed development had 688 units.[12] The County rejected the proposed plat and provided several comments on why the plat was not approved.[13]

According to Hamilton Bank's trial expert, if addressed, the comments would have reduced the plat to sixty-seven units.[14] Hamilton Bank claimed that the reduced density would result in a loss of one million dollars.[15] Hamilton Bank filed suit in federal district court alleging that the conditions imposed by the County effected a taking of its property without just compensation, and that the County was estopped from denying approval of the project.[16] A jury found that Hamilton Bank's property had been taken, the County was required to approve the project, and Hamilton Bank was entitled to recover $350,000 in compensation for the temporary taking of its property (for the time that elapsed between the County rejecting the proposed development and the jury rendering a verdict).[17]

The district court entered an injunction requiring that the County approve the plat.[18] However, it also found that Hamilton Bank could not recover compensation for a temporary taking of its property under

9. *Id.* at 181.
10. *Id.* The property's permitting history was long and drawn out. A description of the entire permitting history that will better explain the bank's claim of entitlement to the development approval is set forth in the opinion, *id.* at 176–81, but will not be discussed in this Article. While interesting, the facts do not have a bearing on the Supreme Court's decision to impose the state-litigation requirement.
11. *Id.* at 181.
12. *Id.*
13. *Id.*
14. *Id.* at 182.
15. *Id.*
16. *Id.*
17. *Id.* at 182–83.
18. *Id.*

federal law and entered a judgment notwithstanding the jury verdict awarding no compensation to Hamilton Bank.[19] The Sixth Circuit reversed, finding that a temporary taking occurred, and Hamilton Bank could recover compensation for the temporary taking.[20] The Supreme Court granted certiorari and determined that a taking could not be found because the case was not ripe.[21]

The Supreme Court first held that the takings claim was not ripe because Hamilton Bank failed to obtain a final decision from the County.[22] The Court specifically stated that Hamilton Bank was required to apply for a variance before it would be deemed to have obtained a final decision from the County.[23] Although the Supreme Court could have concluded its decision there,[24] it went on to hold that the taking was not ripe because Hamilton Bank was required to first seek compensation by filing a claim for inverse condemnation in state court.[25] This was how the state-litigation requirement was born.

B. The Supreme Court's Stated Reasons for Imposing the State-Litigation Requirement

Williamson County lacked an explanation that is well-grounded in precedent or policy for imposing the state-litigation requirement.[26] The *Williamson County* holding was based in part on the Court's textual interpretation of the Fifth Amendment Takings Clause and in part on

19. *Id.* at 183.

20. *Id.* at 183–84.

21. *Id.* at 185. The Supreme Court did not recognize a property owner's ability to recover compensation as redress for a temporary regulatory taking until 1987 when the issue was properly before the Court. First English Evangelical Lutheran Church of Glendale v. L.A. Cty., 482 U.S. 304, 317–19 (1987).

22. *Williamson Cty. Reg'l Planning Comm'n*, 473 U.S. at 190–91. The Court also concluded that Hamilton Bank's due process claim was not ripe because Hamilton Bank failed to obtain a final decision from the County (the first ripeness requirement). *Id.* at 197–200.

23. *Id.* at 187–90.

24. The *Knick* Court argues in part that the state-litigation issue should not have been decided in *Williamson County* because there was no need to reach that issue, stating that "the case could have been resolved solely on the narrower and settled ground that no taking had occurred because the zoning board had not yet come to a final decision regarding the developer's proposal." *Knick*, 139 S. Ct. at 2174. Therefore, the *Knick* Court does not affect this final decision requirement of settled takings law. *Id.* at 2169. It merely overturns the second ripeness requirement—the state-litigation requirement. *Id.* at 2179.

25. *Williamson Cty. Reg'l Planning Comm'n*, 473 U.S. at 196–97.

26. *See Knick*, 139 S. Ct. at 2173–75 (explaining *Williamson County*'s poor reasoning to support its state-litigation requirement).

what *Knick* decided was a misapplication and misinterpretation of precedent that concerned the Tucker Act.[27]

In formulating the state-litigation requirement, the Supreme Court first reasoned that the Fifth Amendment does not prohibit the taking of property per se; it prohibits the taking of property *without just compensation*.[28] This holding was well-established at this point by Supreme Court precedent (and remains well-established law).[29] The Court further held that a taking without just compensation does not occur just because property is taken before compensation is made, stating: "[n]or does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking."[30] This also was (and still is) a well-established principle.[31] Thus, the Court concluded, a violation of the Fifth Amendment Takings Clause does not exist until just compensation is denied.[32] But the Court did not stop there. The Court further concluded that a lawsuit against a local government to determine whether a taking has occurred, and the compensation that must be paid if a taking occurred, must be filed in state court before it can be brought in federal court.[33] Even if the Court's first two holdings about the Fifth Amendment Takings Clause were unequivocally correct, *Knick* held that the *Williamson County* Court's final holding (that takings cases against local governments must first be brought in state court) does not follow.[34]

Nevertheless, the *Williamson County* Court went on to find that before a Fifth Amendment takings claim against a local government

27. *Id.* at 2173–75. The Tucker Act is the federal act that requires all claims for compensation above a certain dollar amount *against the Federal government* pursuant to the Fifth Amendment Takings Clause to be filed in the Federal Claims Court. 28 U.S.C. § 1491(a)(1) (2018). Federal district courts have concurrent jurisdiction over claims "not exceeding $10,000 in amount . . . ." 28 U.S.C. §1346(a)(2) (2013). As the Court in *Knick* noted in reversing *Williamson County*, "[a] claim for just compensation brought under the Tucker Act is not a prerequisite to a Fifth Amendment takings claim—it *is* a Fifth Amendment takings claim." *Knick*, 139 S. Ct. at 2174 (emphasis in original). The Tucker Act is just Congress' allocation of jurisdiction to hear such claims in the Federal Claims Court. *See id.* at 2170 (explaining that the Tucker Act provides the standard procedure for bringing Fifth Amendment takings claims and "gives the Court of Federal Claims jurisdiction").

28. *Williamson Cty. Reg'l Planning Comm'n*, 473 U.S. at 194.

29. *Id.* (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc., 452 U.S. 264 (1981)).

30. *Id.*

31. *Id.* (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984); Regional Rail Reorganization Act Cases, 419 U.S. 102, 124–25 (1974); Yearsley v. W.A. Ross Construction Co., 309 U.S. 18, 21 (1940); Hurley v. Kincaid, 285 U.S. 95, 104 (1932)).

32. *Id.* at 194 n.13.

33. *Id.* at 194.

34. Knick v. Township of Scott, 139 S. Ct. 2162, 2169–70 (2019).

could be heard in federal court, a property owner must first attempt to seek "just compensation" using state court remedies and must be denied just compensation.[35] The Court cited five Supreme Court cases attempting to support its holding,[36] but none of the cases do.

The cited cases can be sorted into two categories. The first category consists of four cases in which the Supreme Court found that a property owner cannot obtain an injunction to prevent the federal government from taking its property simply because there was not a contemporaneous payment of just compensation at the time of the taking.[37] The Supreme Court's reasoning behind these decisions is that the property owner could ultimately seek compensation by filing suit in the Federal Claims Court under the Tucker Act.[38] Because there is an adequate method of obtaining just compensation through the Tucker Act, the property owner cannot enjoin the taking.[39] The second category consists of one case in which the Supreme Court found that it did not have to reach the question of whether a taking had occurred *without just compensation* because the plaintiff had not filed suit under the Tucker

35. *Williamson Cty. Reg'l Planning Comm'n*, 473 U.S. at 195.

36. *Id.*

37. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1020 (1984); Blanchette v. Connecticut Gen. Ins. Corp., 419 U.S. 102, 119–20 (1974); Hurley v. Kincaid, 285 U.S. 95, 103–04 (1932); Cherokee Nation v. Southern Kansas Ry. Co., 135 U.S. 641, 659 (1890). By way of example, in *Monsanto*, the property owner, Monsanto, claimed that a federal law effected a taking of its private property without just compensation because it required Monsanto to seek compensation for any alleged taking through mandatory arbitration proceedings. 467 U.S. at 999–1000. Monsanto also claimed that the federal law prohibited Monsanto from seeking compensation under the Tucker Act. *Id.* The federal district court agreed and enjoined implementation and enforcement of the portions of the law that required arbitration. *Id.* at 1000. The Supreme Court reversed, finding that the law did not prohibit plaintiff from filing suit for just compensation under the Tucker Act once it exhausted the arbitration remedy, and "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." *Id.* at 1016–19. The Court in *Monsanto*, in a footnote, stated in reference to the arbitration requirement under the law that "[e]xhaustion of the statutory remedy is necessary to determine the extent of the taking that has occurred. To the extent that the operation of the statute provides compensation, no taking has occurred, and the original submitter of data has no claim against the Government." *Id.* at 1018 n.21.

The *Williamson County* Court refers to this footnote in support of its decision to impose a state-litigation requirement by concluding that if compensation is paid, the owner does not have a claim against the government for a taking. 473 U.S. at 194–95. First, it was likely that the *Monsanto* Court meant that a taking had occurred but it was not a taking "without just compensation" at that point in time because the pre-suit arbitration proceedings and the Tucker Act provide mechanisms by which a property owner could obtain just compensation. *Id.* It likely did not mean to say that no taking occurred at all. *See* Knick v. Township of Scott, 139 S. Ct. 2162, 2173 (2019) ("Certainly it is correct that a fully compensated plaintiff has no further claim, but that is because the taking has been *remedied* by compensation, not because there was *no taking* in the first place."). Second, the *Williamson County* Court took a legislatively mandated *pre-suit* arbitration procedure and extrapolated that a *court* could mandate a new procedure whereby a lawsuit had to be filed in a venue other than federal court. 473 U.S. at 195.

38. *See Williamson Cty. Reg'l Planning Comm'n*, 473 U.S. at 194–95.

39. *Id.*

Act to obtain just compensation.[40] Neither of these categories of cases directly supports a finding that suit must be filed in state court to test the adequacy of state constitutional remedies before claiming a violation of the Fifth Amendment Takings Clause against a local government.

The cases cited by the *Williamson County* Court merely acknowledge that Congress enacted the Tucker Act requiring that all inverse condemnation cases against the federal government be filed in the Federal Claims Court, unless Congress provided an alternate procedure. Congress has not passed legislation requiring property owners seeking compensation for a taking from a local government to first file suit in state court.

To the contrary, under 42 U.S.C. § 1983, Congress permits property owners to file suit in federal district court for any deprivation of rights by any government arising under the United States Constitution, including the Fifth Amendment Takings Clause. Thus, there was no clear reason why the Tucker Act cases were read to divest district courts of the jurisdiction provided under § 1983 to hear Fifth Amendment Takings cases, and the *Knick* Court found no support for this conclusion in the cited cases.[41]

C. Possible Historical Reasons for the State-Litigation Requirement

There are a few reasons that could explain the Supreme Court's sudden and unprecedented decision in *Williamson County*. First, the Supreme Court has long viewed the regulation of land use as a "quintessential state activity."[42] Thus, federal courts are always deferential when reviewing land use decisions in particular because

40. Yearsley v. W.A. Ross Const. Co., 309 U.S. 18, 22–23 (1940). In *Yearsley*, the plaintiff claimed that a federal contractor's dredging of a river for a federal project eroded plaintiff's property and damaged it. *Id.* at 19. Plaintiff brought suit in federal court. *Id.* at 19. The Supreme Court found that the district court should not have reached the question of whether the project resulted in a taking without just compensation because every taking results in an implied promise by the government to pay compensation for the taking via the procedures in place under the Tucker Act, and plaintiff could file suit under the Tucker Act. *Id.* at 21. The Court stated the general proposition that "'[t]he Fifth Amendment does not entitle . . . the owner . . . to be paid in advance of the taking.'" *Id.* (quoting *Hurley*, 285 U.S. at 104).

41. *Knick*, 139 S. Ct. at 2173. The *Knick* Court specifically stated that *Monsanto* "offers no support" to the conclusion in *Williamson County* and that the cases concerning whether injunctive relief was available to prevent a taking simply because compensation is not made contemporaneously "were . . . read too broadly." *Id.* at 2166, 2173.

42. FERC v. Mississippi, 456 U.S. 742, 768–69 n.30 (1982); *accord*, Warth v. Seldin, 422 U.S. 490, 508, n.18 (1975). *See also* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981) ("The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities.").

there are concerns of interfering in this "quintessential state activity." The decision in *Williamson County* may reflect this deference.

Second, for decades, state courts heard and decided inverse condemnation cases against local governments without federal court intervention.[43] Thus, federal courts historically did not have as much experience in deciding land use cases as state courts.[44] This, in part, is because property owners did not have an avenue for bringing inverse condemnation cases against the state or local governments in federal courts. The Fifth Amendment to the United States Constitution was ratified in 1791, but it did not apply to the states until 1868, when the Fourteenth Amendment was enacted.[45] The only alternative to federal question jurisdiction would be diversity jurisdiction. Considering the local nature of land use cases, however, diversity jurisdiction would not have been common.

Until the passage of the Fourteenth Amendment in 1868, takings cases in a land use context were predominantly being decided in state courts.[46] By the time regulatory takings questions were presented in federal court, states had developed several state supreme court decisions on the topic, which were influential in guiding federal courts on defining the protections provided by the Fifth Amendment.[47]

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43. Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1263–65 (noting that the Supreme Court had "little occasion" to consider takings cases before the Civil War because "[u]ntil that point, state supreme courts provided virtually all of the noteworthy juridical analysis on the subject, without reference to the U.S. Constitution").

44. *Id.* at 1265.

45. Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 238–39 (1897).

46. Kobach, *supra* note 43, at 1265. The article notes "the importance of antebellum state supreme court decisions in guiding the federal courts. The preceding decades of rumination and explication at the state level shaped subsequent federal decisions defining the Takings Clause of the Fifth Amendment and the nascent federal common law of property and takings." *Id.* The article explains that the first state court regulatory taking case in which a state court recognized a regulatory taking as compensable was People v. Platt, 17 Johns. 195 (N.Y. Sup. Ct. 1819), where the legislature enacted a law that "required riparian property owners who erected dams on rivers flowing into Lakes Ontario, Erie, or Champlain to alter their dams . . . to facilitate salmon passage over the dams." *Id.* at 1236. The court found that the regulation amounted to a taking because it left the property owner with two options: take down the dam or reconstruct it at great expense. *Platt*, 17 Johns. at 215–16. The court further held that if the legislature wanted to regulate dams on privately owned bodies of water, they have to pay the property owner for any taking that resulted from the regulation. *Id.*

47. Kobach, *supra* note 43, at 1265. The fact that regulatory takings in the land use context first developed in state courts is important because it helps to understand why some believe that state court is the appropriate venue for regulatory takings litigation. As the dissent in *Knick* pointed out, takings law is largely dependent on what a particular state defines as property and "usually turns on state-law issues." Knick v. Township of Scott, 139 S. Ct. 2162, 2187 (2019) (Kagan, J., with Ginsberg, Breyer and Sotomayor, JJ., dissenting). Aside from the inherently local nature of land use regulations (a power that is exclusively reserved to states, counties, and municipalities), it is possible that this deference to state law also stems from the early development of regulatory takings case law.

Third, the protection of property in the Fifth Amendment Takings Clause only extends to recognized property interests, and state law is one of the main sources for defining property interests.[48] The Fifth Amendment does not create property interests; it protects existing property interests.[49] "[T]he existence of . . . property interest[s] is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'"[50] Thus, Fifth Amendment takings jurisprudence is largely dependent on what the individual states define as a property right,[51] and the analysis of whether property has been taken necessarily entails a deep-dive into state property law.[52]

Fourth, even when the Supreme Court finally heard and decided its first regulatory takings case, its decisions were hesitant and inconsistent at best. Despite a few early U.S. Supreme Court opinions initially recognizing regulatory takings,[53] in 1877, the Supreme Court

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

49. Phillips v. Wash. Legal Found., 524 U.S. 156, 163–64 (1998); *see also* Sterk, *supra* note 48, at 288.

50. *Phillips*, 524 U.S. at 164 (quoting Board of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)).

51. *Id.*

52. *Knick*, 139 S. Ct. at 2187 (Kagan, J., with Ginsberg, Breyer and Sotomayor, JJ., dissenting). As the dissent in *Knick* noted, to determine if property has been taken, a court must often analyze "how . . . pre-existing state law define[s] the property right?; what interests does that law grant?; and conversely what interests does it deny?" *Id.* Justice Kagan, writing for the dissent, characterized these questions as "nuanced," "complicated," and unfamiliar to federal courts. *Id.* The dissent's concern was not unfounded.

By way of example, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1006–07 (1992) involved a regulation enacted by the South Carolina Coastal Council that limited all development on beach-front properties that were within a certain boundary. Lucas, the property owner, filed suit against the Council alleging that the regulation deprived him of all economically beneficial use of his property and that the Council must pay full compensation for the loss. *Id.* at 1009. The Council argued, in part, that the regulation was intended to prevent a nuisance; therefore, the Council did not have to pay compensation under the Takings Clause. *See id.* at 1009–10. The trial court found that compensation must be paid. *Id.* at 1009. The State Supreme Court reversed, finding "that when a regulation respecting the use of property is designed 'to prevent serious public harm,' . . . no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value." *Id.* at 1010 (quoting Lucas v. S.C. Coastal Council, 304 S.C. 376, 383 (1991)). On appeal, the United States Supreme Court held that before it can be determined that no compensation is owed to an owner who has lost all economically beneficial use of his property, the court must conduct an inquiry into the "restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029. The policy behind this rule is that owners cannot lose something that they never had. *Id.* at 1027. Thus, if the proposed use of the property was traditionally prohibited under state property or nuisance laws (whether common or statutory), then the property owner never had that property right. *Id.* at 1028–29. This analysis necessitates a review of basic principles of state property law and is a state-specific inquiry that is most likely better handled in the individual state's courts.

53. Kobach, *supra* note 43 at 1266–67.

unequivocally renounced the theory[54] until 1922.[55] Even after the Supreme Court's 1922 recognition that regulatory takings are compensable, the next major Supreme Court regulatory takings case in the land use context did not come until 1978 with the *Penn Central* decision.[56] Thus, regulatory takings jurisprudence in the land use context was relatively new in federal courts when *Williamson County* was decided.

Finally, Justice Rehnquist, who was on the Court when it rendered the *Williamson County* opinion, was viewed as wanting to "reorient [F]ourteenth [A]mendment jurisprudence" with the goal of "keep[ing] the lower federal courts out of the business of monitoring the routine day-to-day administration of state government in areas that only marginally implicate constitutional values."[57] Thus, it is not surprising that the Court found a way to remove from federal courts the question of regulatory takings, which was traditionally viewed as a state issue and traditionally heard in state courts. Ultimately, it is clear that underlying *Williamson County* was a concern that the federal government was getting involved in issues that traditionally were viewed and tried as local issues.

While *Knick* has opened the federal courthouse doors to takings litigants, considering the history of land use decisions, all parties should

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54. *Id.* at 1276–77 (noting that in Richmond, F. & P.R. Co. v. City of Richmond, 96 U.S. 521, 529 (1877), the Court held that "'[a]ll property within the city is subject to the legitimate control of the government. . . . Appropriate regulation of the use of property is not "taking" property, within the meaning of the constitutional prohibition.'").

55. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). In *Mahon*, Pennsylvania Coal owned the right to mine coal on a residential property that was improved with a residence. *Id.* at 412. The state enacted legislation prohibiting mining that could undermine the surface on which a residence is constructed. *Id.* at 412–13. The Supreme Court found that the law effected a taking, stating "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

56. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 107 (1978).

57. Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979, 979–80 (1986). Federal courts' disdain for deciding intrinsically local land use matters also appeared in the context of substantive due process cases involving zoning disputes. In the oft-cited case of Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988), Judge Posner, writing for the court, proclaimed that "garden-variety zoning dispute[s]" should not be heard in federal court just because they are "dressed up in the trappings of constitutional law." Coniston Corp., the property owner, brought suit seeking to invalidate the local government's denial of its site plan application by claiming that the decision denied it substantive and procedural due process. *Id.* at 463. In discussing the substantive due process claim, the court explained the high bar that had been set for such claims: "'[I]n order to prevail on a substantive due process claim, plaintiffs must allege and prove that the denial of their proposal is arbitrary and unreasonable bearing no substantial relationship to the public health, safety or welfare.'" *Id.* at 467 (quoting Creative Env'ts, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1982)). The court concluded that "[n]o one thinks substantive due process should be interpreted so broadly as to protect landowners against erroneous zoning decisions." *Id.* at 466. The court clearly viewed zoning disputes as an innately local issue that should be decided in state courts. *Id.* at 467.

be cautious of bringing these traditionally state law questions to a federal judge, who is likely unfamiliar with the nuances of a particular state's law.[58]

III. THE KNICK *CASE*

The Supreme Court's decision to reverse *Williamson County*, a thirty-four-year precedent, was not made lightly, and it is important to understand why it was made and why it was made now. This Part will discuss the facts and holding in *Knick* and explore why the decision to overturn *Williamson County* came to fruition.

A. Facts and Holding in *Knick*

Rose Mary Knick owned a ninety-acre rural property in the Township of Scott, Pennsylvania.[59] There was a small graveyard on Knick's property in which Knick's neighbors' ancestors are allegedly buried.[60] In December 2012, the Township passed an ordinance that required all cemeteries "to be kept open and accessible to the general public during daylight hours."[61] The definition of cemetery included private property utilized as a burial place, and thus included the burial ground on Knick's property.[62] The ordinance also allowed "'code enforcement' officers to 'enter upon any property' to determine the existence and location of a cemetery."[63]

In 2013, a code enforcement officer entered Knick's property and found several grave markers.[64] The Township issued a notice of violation to Knick for "failing to open the cemetery to the public during the day."[65] Knick filed suit for declaratory and injunctive relief in state court

58. *But see* 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, 616–17 (2015) (arguing that federal courts can competently hear takings claims as shown by federal courts' competence in hearing state law issues when they exercise supplemental jurisdiction over state law claims); Scott A. Keller, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the* Williamson County *State Litigation Requirement for Regulatory Takings Claims*, 85 TEX. L. REV. 199, 234 (2006) (noting that federal courts often have to interpret local land use regulations in First Amendment and Equal Protection cases).

59. Knick v. Township of Scott, 139 S. Ct. 2162, 2168 (2019).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

claiming that the ordinance effected a taking of her property.[66] Knick did not seek compensation for the alleged taking.[67] The Township withdrew the notice of violation and stayed enforcement of the ordinance during the pendency of the state proceedings.[68] Because the Township was not seeking to enforce the ordinance, the court dismissed Knick's action.[69]

Completely disregarding the previously discussed state-litigation requirement, Knick then filed a 42 U.S.C. § 1983 action in federal district court alleging, among other things, that the ordinance violates the Fifth Amendment Takings Clause.[70] The district court dismissed the takings claim because Knick failed to state a claim for a facial challenge to the ordinance and because any as-applied challenge was not adequately pled and would not be ripe for adjudication pursuant to the state-litigation requirement.[71] The Third Circuit affirmed the district court's decision, and the Supreme Court granted Knick's writ of certiorari.[72]

In its opinion, the Supreme Court unequivocally overruled its previous decision in *Williamson County*, stating:

> Contrary to *Williamson County*, a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it. . . . If a local government takes private property without paying for it, that government has violated the Fifth Amendment—just as the Takings Clause says—without regard to subsequent state court proceedings. And the property owner may sue the government at that time in federal court for the "deprivation" of a right "secured by the Constitution."[73]

B. Why Now?

The Supreme Court's decision to grant certiorari was not surprising. The state-litigation requirement had long been criticized by scholars[74] for the unintended consequences it created. Two unintended

66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* Knick filed suit on several grounds, including violations of her substantive and procedural due process rights and violations of her Fourth Amendment rights. Knick v. Scott Township, No. 3:14-CV-2223, 2015 WL 6560647, at *3 (M.D. Pa. Oct. 29, 2015). Knick sought both compensation and injunctive relief. *Id.* at *5.
71. *Id.* at *13–14.
72. *Knick*, 139 S. Ct. at 2169.
73. *Id.* at 2170 (quoting 42 U.S.C. § 1983 (2010)).
74. Radford & Thompson, *supra* note 58, at 570 ("Virtually from its inception, the rule created by *Williamson County*—that a regulatory takings claim brought in federal court under the United

consequences will be specifically discussed in this Part. First, the state-litigation requirement created a Catch-22. Property owners were forced to bring suit for their takings claims in state court because their federal claims were not ripe for decision until they did. Once they brought their state court proceedings, however, they were often barred from filing suit in federal court by issue or claim preclusion, or both.[75]

Second, property owners were forced to litigate their takings claims in state court but could proceed with their other factually related federal claims in federal court. This created inefficiencies and confusion in the lower federal courts. These consequences were not anticipated by the *Williamson County* Court but became obvious in the years following that decision. The *Knick* case provided an opportunity for the Supreme Court to reconsider the long criticized state-litigation requirement.

1. The Claim and Issue Preclusion Traps Caused by the State-Litigation Requirement

Fourteen years before *Knick*, in *San Remo*,[76] the Supreme Court was faced with the claim preclusion and issue preclusion trap caused by the state-litigation requirement, and certain justices emphatically expressed the need for a change in the requirement if and when the right case came along.[77] The *Knick* Court's summary of the *San Remo* holding best describes the problems with the state-litigation requirement:

> The unanticipated consequences of this ruling were not clear until [twenty] years later, when this Court decided *San Remo*. In that case, the takings plaintiffs complied with *Williamson County* and brought a claim for compensation in state court. The complaint made clear that

States Constitution is not ripe for adjudication until compensation has been sought in state court—has been widely criticized as having no coherent doctrinal basis.").

75. Property owners were not *always* barred from filing suit in federal court due to issue and claim preclusion. They were only sometimes barred from doing so because the federal circuit courts were split on this issue:

> Despite recognizing that barring federal takings claims from federal court directly conflicted with the "ripeness" terminology of *Williamson County*, most federal judges continued to repeat Justice Blackmun's tautology that the Constitution proscribes only takings without just compensation, while simultaneously invoking state preclusion rules to prevent litigants from proving that such takings had occurred. A few courts, however, struck by both the logical contradictions and unjust results that followed from trying to reconcile a literal interpretation of *Williamson County* with preclusion doctrine, attempted to find work-arounds.

Id. at 585–86 (citation omitted).

76. San Remo Hotel, L.P. v. City & Cty. of San Francisco, 545 U.S. 323 (2005).

77. *Id.* at 351 (Rehnquist, J., concurring).

> the plaintiffs sought relief only under the takings clause of the State Constitution, intending to reserve their Fifth Amendment claim for a later federal suit if the state suit proved unsuccessful. When that happened, however, and the plaintiffs proceeded to federal court, they found that their federal claim was barred. This Court held that the full faith and credit statute, 28 U.S.C. § 1738, required the federal court to give preclusive effect to the state court's decision, blocking any subsequent consideration of whether the plaintiff had suffered a taking within the meaning of the Fifth Amendment. The adverse state court decision that, according to *Williamson County*, gave rise to a ripe federal takings claim simultaneously barred that claim, preventing the federal court from ever considering it.[78]

In other words, the Full Faith and Credit Statute requires that federal courts acknowledge and enforce state court judgments.[79] In *San Remo*, the adjudication of the owners' takings claims under the state constitution involved facts and law that were similar to those that would be decided in a takings claim under the U.S. Constitution.[80] Since federal courts must give effect to state court judgments, the federal district court was not free to render a decision on the same issues that had already been decided in the state court judgment.[81]

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78. *Knick*, 139 S. Ct. at 2169 (internal citations omitted).

79. *See* 28 U.S.C. § 1738 (2018).

80. *San Remo*, 545 U.S. at 335–36 & n.14.

81. It should be noted that not every case will result in issue and claim preclusion. In those cases in which the state law and federal law claims rest on different standards, issue and claim preclusion should not bar a subsequent federal suit if the state lawsuit is limited to state claims and the property owner makes a proper record-reservation of their right to bring suit in federal court for a Fifth Amendment takings claim.

By way of example, in Dodd v. Hood River County, 136 F.3d 1219, 1223 (9th Cir. 1998), the property owners pursued their state administrative and judicial remedies to attempt to recover compensation for a regulatory taking of their property. The State Supreme Court affirmed the lower court decision that there was no taking under the Oregon Constitution because the property owners had not been deprived of all economically viable uses of their property. *Id.* at 1224. The property owners "expressly reserved their takings claims under the Fifth Amendment, [and] the federal issue was not presented in the [state] proceedings." *Id.* The property owners filed suit in federal court, and the district court granted summary judgment in favor of the County finding that "there was no fundamental distinction between the takings analysis under the [state and federal constitutions] and, therefore, . . . the Dodds were precluded from obtaining federal court relief." *Id.*

A taking under the Fifth Amendment, however, could occur under two alternative theories: (1) that the regulation deprived the owners of substantially all economically beneficial use of their property; or (2) that the regulation resulted in a taking under the *Penn Central* test. *Id.* at 1225, 1228. *See infra* note 151 for an explanation of the *Penn Central* takings test. The Ninth Circuit found that the federal takings test of whether a property has been deprived of all economically viable use comports with the state takings test to a degree that results in issue preclusion. *Dodd*, 136 F.3d at 1225. The court, however, also found that the question of whether a taking had occurred under the *Penn Central* test was not addressed in the state proceedings. *Id.* at 1229. Thus, the latter issue could be heard and decided in federal court. *Id.* Although in many pre-*Knick* cases federal and state law were sufficiently similar to result in issue or claim preclusion (or both), there were exceptions to the general rule.

The *San Remo* Court further found that it was not free to ignore the requirements of the Full Faith and Credit Statute just because it could deprive a property owner of the right to bring suit in federal court for a Fifth Amendment taking.[82] Thus, even though *Williamson County* was based on the determination that federal claims under the Fifth Amendment Takings Clause were unripe until "just compensation" has been denied, the effect of the holding was to bar most Fifth Amendment takings claims from federal court forever.[83]

Chief Justice Rehnquist recognized this anomaly in his concurrence in the *San Remo* case and recommended that the Supreme Court revisit the issue:

> [O]ur holding today ensures that litigants who go to state court to seek compensation will likely be unable later to assert their federal takings claims in federal court. And, even if preclusion law would not block a litigant's claim, the *Rooker-Feldman* doctrine might, insofar as *Williamson County* can be read to characterize the state courts' denial of compensation as a required element of the Fifth Amendment takings claim.[84]

The *Knick* Court took Justice Rehnquist's suggestion and remedied this unintended result by eliminating the state-litigation requirement.

2. Different Forums for Related Claims

Another unintended consequence of *Williamson County* was the inefficiency of requiring property owners to file their takings claims in state court while also pursuing their ripe and factually related federal claims in federal court. Often, a Fifth Amendment takings claim is accompanied by due process claims (challenging the substance of the regulation and the procedure underlying the regulation) and equal protection claims. These claims are factually related to the owners' takings claims and are pled in the alternative to claims for compensation

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

83. State law controls the question of the preclusive effect of a state court judgment in a federal proceeding. Wright v. Georgia R.R. & Banking Co., 216 U.S. 420, 429 (1910). In Florida, claim preclusion not only prohibits any claims that were specifically decided in a cause of action between the same parties or their privies, but it is also conclusive on any other matter that could have been litigated and determined in the same action. Kimbrell v. Paige, 448 So. 2d 1009, 1012 (Fla. 1984). Issue preclusion is narrower, and prohibits the re-litigation of an "identical issue [from] a prior proceeding" that was a "critical and necessary part of the prior determination" and in which the same exact parties had "a full and fair opportunity to litigate" and "actually litigated" the issue. Holt v. Brown's Repair Service, Inc., 780 So. 2d 180, 182 (Fla. 2d Dist. Ct. App. 2001).

84. *San Remo*, 545 U.S. at 351 (Rehnquist, J., concurring) (internal citations omitted).

under the Fifth Amendment Taking Clause because the relief under a due process or equal protection claim is to invalidate the law or prohibit the law's application. Yet under *Williamson County*, the claims cannot be heard concurrently with the takings claim because the takings claim is not immediately ripe for adjudication in federal court.

Litigants and federal courts alike were confounded as to how other factually related federal claims should be treated. The federal district courts could not overcome the state-litigation requirement by taking supplemental jurisdiction[85] of the Fifth Amendment claims because this would defeat, in almost every instance, the Supreme Court's clear mandate in *Williamson County*.[86] Thus, federal district courts were left in the unique situation where they could hear certain pending federal claims but were required to relinquish jurisdiction of other factually related federal claims to state court. This created significant judicial inefficiencies because two courts were hearing and ruling on the same fact pattern without providing parties the usual option of having the claims heard in the same forum.[87] Under the new *Knick* holding, these judicial inefficiencies are no longer a concern.

IV. NEWLY AVAILABLE OPTIONS

In the *Williamson County* era, absent diversity jurisdiction, all takings claims based on the Fifth Amendment, whether regulatory or involving a physical occupation of real property, in which a property owner seeks compensation were arguably subject to the state-litigation

85. 28 U.S.C. § 1367(a) (2014).

86. 13B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 3532.1.1 (Edward H. Cooper ed., 3d ed. 2019) (stating that the state-litigation requirement cannot be met "by filing a federal action and asking the federal court to provide the state-court remedy by exercising supplemental jurisdiction").

87. By way of example, in Villas of Lake Jackson, Ltd. v. Leon County, 121 F.3d 610, 612 (11th Cir. 1997), the landowners filed suit in the district court of the Northern District of Florida when Leon County rezoned their property taking away the right to build a high-density apartment complex. The landowners claimed that the rezoning (1) effected a taking under the Fifth Amendment Takings Clause; (2) resulted in the taking of their property under state law; (3) effected a taking of their property under the Due Process Clause (notably this is not a recognized cause of action under the law as all takings claims arise from the Fifth Amendment Takings Clause after McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994)); (4) violated their substantive due process rights (after *McKinney*, such claims only remain valid for purposes of facial challenges, not as-applied challenges because the former is a legislative action and the latter is an executive action); and (5) violated their right to equal protection. *Id.* at 611–15. The district court dismissed the first two claims because they were not ripe under the state-litigation requirement. *Id.* at 611. The district court, however, retained jurisdiction over the remaining three claims and decided them on summary judgment. *Id.*

requirement.[88] Post *Knick*, all such takings are now free from the state-litigation requirement. Property owners and government defendants now have several options that were not available before.

First, if a property owner believes that state court will result in a more beneficial outcome (which, depending on the facts and posture of a case, may be true), the property owner can still file all of its claims in state court. *Knick* does not prevent property owners from filing in state court. It merely provides federal court as a possible venue. Thus, the option of filing in state court is still available and should be considered.

Second, if a property owner believes a federal venue might be more beneficial, they can file both their federal and state law claims in federal court,[89] as long as the state claims are "derive[d] from a common nucleus of operative facts" so that if the federal and state nature of the claims were disregarded, "[one] would ordinarily be expected to try them all in

88. Although the Supreme Court has never ruled that the state-litigation requirement applies in all inverse cases (not just regulatory takings cases), it stands to reason that the state-litigation requirement would apply to takings based on a physical occupation of private property. The Eleventh Circuit has so held under *Williamson County*. Hadar v. Broward County, 692 Fed. App'x 618, 621 (11th Cir. 2017) (finding that a property owner claiming a physical invasion of his property must first bring suit in state court for inverse condemnation before pursuing a remedy in federal court). The reasoning behind the state-litigation requirement is the Supreme Court's conclusion that if just compensation is provided, the Fifth Amendment has not been violated:

> The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a "reasonable, certain and adequate provision for obtaining compensation" exist at the time of the taking. If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking. . . . [I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194–95 (1985) (citations omitted). Thus, there is no conceivable reason why an inverse claim for compensation involving the physical occupation of private property would not be subject to the state-litigation requirement. Other circuits have almost unanimously held that if an owner concedes the propriety of the taking and only seeks compensation, state remedies must first be exhausted before suit is filed in federal court. Stephen E. Abraham, Williamson County *Fifteen Years Later: When Is a Taking Claim (Ever) Ripe?*, 36 REAL PROP. PROB. & TR. J. 101, 110 (2001).

89. 28 U.S.C. §1367(a). Federal courts can exercise supplemental jurisdiction over state claims that are sufficiently related to a federal claim over which a federal court has original jurisdiction "that they form part of the same case or controversy under Article III of the United States Constitution." *Id.* The test for whether a state claim forms part of the same case or controversy as a federal claim is found in United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966), and is stated in the body of this Article. 13D CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 3567.1 (Richard D. Freer ed., 3d ed. 2019) (stating that 28 U.S.C. § 1367 codified the result in *Gibbs*).

one judicial proceeding."[90] Thus, with the *Williamson County* barrier removed, all related claims can be adjudicated in federal court.

Third, government defendants can remove to federal court any federal claims and related state claims that a property owner originally files in state court.[91] Now, if a property owner decides to file both its federal and state law claims in state court, the claims are subject to removal as long as they are sufficiently related.[92] Both the government defendants and property owners are subject to the same standard of relatedness.

The only way for property owners who want their takings claims to be decided in state court to partially circumvent removal is to file their state claims in state court and file their federal claims in federal court.[93]

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90. *Gibbs*, 383 U.S. at 725.

91. Pre-*Knick* circuit courts were divided on this question. Some courts believed the state-litigation requirement was jurisdictional and did not permit governments to remove takings cases from state court. Snaza v. City of Saint Paul, 548 F.3d 1178, 1182 (8th Cir. 2008). Other courts permitted removal, viewing the state-litigation requirement as prudential and within the court's discretion and determining that the government waives the state-litigation requirement upon removing the case to federal court. Sansotta v. Town of Nags Head, 724 F.3d 533, 549 (4th Cir. 2013). The Eleventh Circuit has not ruled on this issue, so the outcome of removal was questionable at best in this Circuit. Some have argued that the Supreme Court case of City of Chicago v. Int'l College of Surgeons, 522 U.S. 156 (1997), in which the Supreme Court held that federal takings claims could be removed to federal court pursuant to 28 U.S.C. § 1441, permits removal despite the state-litigation requirement. Michael B. Kent, Jr., *Weakening the "Ripeness Trap" for Federal Takings Claims:* Sansotta v. Town of Nags Head *and* Town of Nags Head v. Toloczko, 65 S.C. L. REV. 935, 936 (2014). *College of Surgeons*, however, makes no mention of the state-litigation requirement, thus that point was not argued to or decided by the Supreme Court in that case. Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 URB. LAW. 671, 677 (2004) (noting that the *College of Surgeons* decision overlooked the state-litigation requirement, but "[i]n fairness to the Court, it appears that the briefs in [the case] did not call *Williamson County* to the Court's attention").

92. A government defendant can remove related state law claims if the federal court is authorized to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a). Thus, the test used in determining whether state law claims can be removed with their federal law counterparts to federal courts is the same test that is used in determining whether a property owner can file both its federal claims and its related state-court claims in federal court.

93. 28 U.S.C. § 1367(a) permits federal courts to exercise supplemental jurisdiction as follows (emphasis added):

> *[I]n any civil action of which the district courts have original jurisdiction*, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

Federal courts have confirmed that this provision limits supplemental jurisdiction to circumstances where a federal claim and a state claim are part of the same lawsuit. *In re* Estate of Tabas, 879 F. Supp. 464, 467 (E.D. Pa. 1995). *See also* Winiarski v. Brown & Brown, Inc., No. 5:07-CV-409-OC-10GRJ, 2008 WL 11334919, at *2 (M.D. Fla. Apr. 30, 2008), *R. & R. adopted,* 5:07-CV-409-OC-10GRJ, 2008 WL 11334988 (M.D. Fla. May 23, 2008). A state suit that is filed in state court cannot be removed to federal court simply because there is a related cause of action pending in federal court.

This strategy presents some additional complications and potential unintended consequences. For example, the federal court may decide to stay proceedings pending a decision from the state court based on an abstention doctrine.[94] This may essentially deprive the property owner of its right to pursue its federal claims.[95] Additionally, even if the federal court does not abstain, the property owner must be mindful of which court first renders a decision. Any decision rendered in either court will likely have some preclusive effect in the other pending case because state law defines "property" in Fifth Amendment takings claims.

Finally, in both state and federal courts, if a proper public purpose does not exist, a property owner is entitled to an injunction.[96] *Knick* changed very little with respect to the substantive or procedural rights in this arena because the state-litigation requirement in *Williamson County* only applied in circumstances where a property owner was attempting to recover compensation, not where an owner was seeking injunctive relief.[97] Thus, before and after *Knick*, property owners could likely bring suit in federal court to enjoin the taking based on a challenge to public purpose.[98] The only difference post-*Knick* is that property owners who choose to bring suit in federal court can now seek

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Tabas, 879 F. Supp. at 467. Removal is only partially circumvented in these circumstances because the federal claims will be heard in federal court.

94. A full discussion of abstention doctrines is set forth in Part VI. B and note 154, *infra*. The referenced abstention doctrine is known as "*Cone* abstention," and only applies in "extraordinary circumstances." *See infra* note 154. Given the decision in *Knick* that federal forums are available to plaintiffs in regulatory takings cases against local governments, it is unlikely that a federal case will be stayed under *Cone* abstention, but this issue has not been decided.

95. When federal courts abstain under *Cone* abstention from exercising concurrent jurisdiction with state courts, the intent is that the matter will be fully adjudicated in state court so that any attempts by a plaintiff to later pursue their federal claims will be barred by principles of res judicata. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 10 (1983) (finding that an order staying federal proceedings in order to permit a state court having concurrent jurisdiction to render a decision "meant that there would be no further litigation in the federal forum; the state court's judgment on the issue would be res judicata"). Given that the lower court ruling in *Knick* was predominantly overturned because of the claim preclusion caused by state court proceedings, it is likely that any abstention by a federal court on an inverse claim to permit a state court to render a decision will have the effect of completely barring further adjudication by the federal court.

96. Thompson v. Consol. Gas Utilities Corp., 300 U.S. 55, 58–59, 76–78 (1937); Isleworth Grove Co. v. Orange County, 84 So. 83, 84 (Fla. 1920).

97. *See supra* text accompanying note 88. Although the state-litigation requirement was imposed to require litigants to seek just compensation in state court, which presupposes a public purpose underlying the taking, some federal circuit courts have still imposed the state-litigation requirement where the property owner was seeking injunctive relief because the property was taken for a private use. Forseth v. Village of Sussex, 199 F.3d 363, 369 (7th Cir. 2000) ("Despite the troubling facts and allegations of the instant case, particularly the significant private pecuniary gain achieved by President Tews . . . , we are forced to conclude that Plaintiffs' [sic] are bound by *Covington Court* and *Williamson*.").

98. *See infra* text accompanying note 99 (regarding whether a regulatory taking can be challenged because there is no underlying public purpose).

alternative relief in the form of just compensation without being relegated to state court.

V. WHERE TO TAKE YOUR TAKINGS CLAIM?

Now that we know the options available in this new *Knick* era, the question is where should you take (or remove) your takings claim? There are a number of differences between federal and state court that may impact the outcome of a case, and they thus should be considered when choosing a forum. These differences include: (1) who makes the substantive decisions in a case; (2) how quickly the case is likely to be adjudicated; (3) the difference between judges and juries in each forum; and (4) a litigant's exposure to fees and costs.

A. Who Makes the Substantive Decisions in the Case?

In regulatory takings cases, it is important to understand whether a judge or a jury will be rendering the decision on the substantive issues in the case because there are various differences between the two decision makers in federal and state court that may affect the outcome of the case, as further explained in Part V.C, *infra*. The substantive issues include three areas: (1) the existence of proper public purpose; (2) whether the regulation results in a taking; and (3) the value of the property taken.

1. Who Decides Whether There Is a Proper Public Purpose?

The judge presiding over an inverse case decides whether a proper public purpose exists both in state and federal court.[99] Thus, there are

99. If a property owner is questioning public purpose, then the resolution would be to enjoin the taking. In federal court, the Seventh Amendment right to a jury trial is only available where the plaintiff seeks to recover compensation. *See infra* note 105. In Florida state court, there are no cases that speak directly to this point. However, a judge would decide this issue because (1) a judge decides the issue in eminent domain cases, FLA. STAT. § 73.071(1)–(3) (stating that a jury is empaneled only to determine valuation issues); *see also* FLA. STAT. §74.051 (2019) (in quick-take proceedings, a judge decides "whether the petitioner is properly exercising its delegated authority"); and (2) litigants are not entitled to a jury trial when they are seeking equitable relief, Pompano Horse Club v. State, 111 So. 801, 806 (Fla. 1927).

Some have suggested that a property owner claiming a Fifth Amendment Taking cannot challenge public purpose under the Fifth Amendment. Norman Williams, Jr. & John M. Taylor, *Due Process or Taking?*—Lingle *Case*, 1 AMERICAN LAND PLANNING LAW § 6:17.50 (Rev. Ed.) ("Takings analysis is accordingly not pertinent to those situations where the government has exceeded its police power authority, but is rather confined to those where there has been a diminution in value resulting from a valid regulation."). Instead, a property owner's remedy for challenging the

no options with respect to this factor. Nevertheless, as discussed in Part V.C.3 *infra*, the outcome may be different in state and federal court due to the manner in which judges in each forum get to the bench and stay there.

2. Who Decides That a Taking Occurred?

Another important threshold question in all inverse condemnation cases is whether the regulation results in a taking. This is a particularly complicated question in regulatory takings cases because of the various scenarios in which a taking can be found to exist. Takings can exist where a property is deprived of all economically beneficial or productive uses,[100] under the *Penn Central* balancing-of-interests test,[101] in the exactions context,[102] or where a regulation requires the physical occupation of a land owner's private property.[103]

In Florida courts, a judge decides this threshold question.[104] Any decision rendered in either court will likely have some preclusive effect in the other pending case because state law defines "property" in Fifth Amendment takings claims. Federal law does not govern the right to a jury trial in state court, even when a federal claim is being decided in

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regulation is under the Due Process Clause as a substantive due process claim. *Id.* The authority cited for this proposition is Lingle v. Chevron USA, Inc., 544 U.S. 528, 540 (2005). *Lingle* did not, however, go so far as to hold that one could never challenge public purpose under the Takings Clause. *Lingle* held that the question of whether a taking occurred (requiring payment of just compensation) cannot be decided by questioning whether the regulation substantially advances a legitimate government interest because that does not speak to the "*magnitude or character of the burden* a particular regulation imposes." *Id.* at 529. Thus, the "substantially advances" test announced in Agins v. City of Tiburon, 447 U.S. 255, 260 (1980), was not a valid test for determining whether a regulation effects a taking. *Id.* The Supreme Court noted that the "substantially advances test" is more akin to a substantive due process challenge to a law. *Id.* The Court does not specifically (or impliedly) hold that a regulation cannot be challenged because the taking effected by the regulation is not for a "public use." In fact, the possibility of a "public use" challenge is specifically left open. *Id.* at 543. The Court notes:

> The Clause expressly requires *compensation* where government takes private property "*for public use*." It does not bar government from interfering with property rights, but rather requires compensation 'in the event of *otherwise proper interference* amounting to a taking.' *Conversely, if a government action is found to be impermissible for instance because it fails to meet the 'public use' requirement* or is so arbitrary as to violate due process—that is the end of the inquiry. *No amount of compensation can authorize such action.*

Id. (citation omitted) (emphasis added).

100. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).

101. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 137–38 (1978).

102. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994); Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2018)

103. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

104. *See* Ocean Palm Golf Club P'ship v. City of Flagler Beach, 139 So. 3d 463, 470 (Fla. 5th Dist. Ct. App. 2014).

state court,[105] so this arena is particularly impacted by the *Knick* decision.

In federal court, when a property owner seeks compensation for a taking, parties are entitled to a jury trial on all questions of fact, including those related to whether a regulation results in a taking.[106] For example, if an owner's taking claim is based on a regulation depriving the owner of all economically beneficial and productive uses, this would be considered a question of fact that is wholly decided by the jury.[107] As further discussed in Part V.C *infra*, depending on the facts of one's case, one decision-maker may be preferable to the other.

3. Who Decides the Value of the Property?

Finally, in both state and federal court a jury decides the value of the property taken. Thus, this consideration will not affect a litigant's choice of forum.[108]

B. How Quickly Do You Want a Decision to Be Made?

This question might seem a bit strange. Most parties should have the objective of concluding the lawsuit as expeditiously as possible because of the expense of litigation and political drama involved. Nevertheless, for those rare clients for whom money is no object, there may be strategic reasons for choosing a forum in which the litigation will

105. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 719 (1999) (stating that "[i]t is settled law that the Seventh Amendment does not apply" in the context of suits decided in state court).

106. *Id.* at 710. *Monterey* involved a regulatory taking. The Supreme Court recognized a right to a jury trial in Fifth Amendment takings cases filed under §1983 in which a property owner seeks to recover compensation. *Id.* at 720–21. The Supreme Court further found that the question of whether a regulation has deprived an owner of all economically viable uses of the property is a factual question that should be decided by a jury. *Id.* at 721. Finally, the Supreme Court reaffirmed two established concepts concerning the Seventh Amendment right to a jury trial. First, in cases involving mixed questions of fact and law, the jury should decide all questions of fact, and the judge should decide questions of law based on the jury's findings of fact. *Id.* at 721. Second, in instances where a party is seeking both equitable and legal relief, a timely asserted right to jury trial is still preserved for all legal relief sought by the parties. *Id.* at 730. The Seventh Amendment does not recognize a right to a jury trial in actions for equitable relief. *See id.* Nevertheless, the Supreme Court has long held that if both legal and equitable relief is sought (which is often the case), courts should, under most circumstances, preserve the right to a jury trial. Dairy Queen v. Wood, 369 U.S. 469, 473 (1962) (citing Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959)). In Fifth Amendment takings claims, where an owner seeks just compensation, that is a legal remedy and a right to jury trial necessarily follows. *City of Monterey*, 526 U.S. at 710.

107. *City of Monterey*, 526 U.S. at 710.

108. Ballew v. Georgia, 435 U.S. 223, 242 (1978) (citing a study on juries); *see also* Evan Moore & Tali Panken, *Jury Size: Less Is Not More*, CORNELL UNIVERSITY LAW SCHOOL, https://courses2.cit.cornell.edu/sociallaw/student_projects/JurySize_lessisnotmore.html (last visited April 29, 2020).

be drawn out. For example, a property owner who is a major developer litigating against a small municipality may be able to obtain a favorable settlement early on, just because the municipality cannot afford the expense of the litigation.

On the other hand, if an issue is particularly politically charged or if the real estate market is booming (such that it would benefit the developer to obtain its development approvals as soon as possible in order to construct the project in a favorable market), that same developer may prefer a quick resolution to the litigation to avoid excessive delay and public attention on the matter. This consideration will vary from case to case, but understanding the aspects of state and federal court that can impact the timing on obtaining a decision in one's case is strategically important. There are two major aspects that impact timing: (1) judicial case load, and (2) discovery.

1. Judicial Case Load

Judicial case load is one of the factors that can drastically impact how quickly a court can render a decision in a case. The case load of federal judges is significantly less than that of state court judges. In 2018,[109] there were 370,085 federal case filings nationwide.[110] Of those filings, 21,680 were civil cases filed in Florida district courts,[111] and 4,482 were criminal cases filed in Florida district courts (total 26,162).[112] There are 67 Florida federal district court judges and 45 magistrate judges (112 total). In all Florida federal district courts, certain matters are automatically assigned to magistrate judges,[113] and, by local rule, district courts can assign additional responsibilities to magistrate judges.[114] Thus, a significant portion of the federal district

109. The reporting period on which this Article relies is from September 2017 through September 2018, so it partially includes 2017 statistics.

110. United States Courts, *Judicial Business 2018*, https://www.uscourts.gov/statistics-reports/judicial-business-2018 (last visited Apr. 24, 2020) (showing civil cases commenced, terminated, and pending during the 12-month period ending September 30, 2018).

111. *Id.*

112. *Id.*

113. Some cases in federal court are assigned automatically to magistrate judges. 28 U.S.C. § 1636. This is in stark contrast with the state court magistrate system, which only permits assignments to magistrates if all parties agree. FLA. R. CIV. P. 1.490(c) (2019).

114. 28 U.S.C. § 636(b) (2019). All Florida District Courts have expanded their magistrates' duties by local rule. S.D. Fla., MAGISTRATE JUDGE RULES, R. 1; M.D. FLA. R. 6.01; N.D. FLA. R. 72.1-72.2. By way of example, the Middle District permits judges to assign the responsibility to magistrates of (1) issuing search warrants upon a determination that probable cause exists; (2) processing complaints and issuing summonses or arrest warrants for criminal defendants; (3) presiding over initial appearances for criminal defendants; and (4) appointing counsel to indigent criminal defendants, among other matters. M.D. FLA. R. 6.01(c).

court case load is handled by magistrate judges. Assuming, for the sake of comparison, that the cases are evenly distributed among the judges, each judge (including magistrates) would have 233 cases. If you do not account for the cases heard by magistrate judges, each judge can be assumed to have approximately 390 cases assigned to them.

In stark contrast, during a similar reporting period, 196,773 cases were filed in Florida civil circuit courts, 116,654 cases were reopened, and 1,742 cases were appealed from county court.[115] Not even including pending cases,[116] Florida civil circuit courts had 239,281 cases during the same reporting period as federal courts, which amount to over three-fourths of the *nationwide* federal filings. There are 236 civil circuit court judges in Florida.[117] Assuming for the sake of comparison that an even

115. The cited statistics were gathered from the Florida Courts trial court statistics search engine that can be found at https://www.flcourts.org/Publications-Statistics/Statistics (last visited Apr. 3, 2020). The parameters entered into the search engine were all civil circuit courts, state totals, during June 2017 through June 2018 reporting period. The search results are on file with the Authors.

116. Although federal courts provide statistics on pending cases, Florida state courts do not. Therefore, it was not possible to compare the pending case loads, but the filed cases likely provide an adequate indication of the respective caseloads for each set of courts.

117. The number of judges is an estimate compiled based on the websites and administrative orders in the twenty judicial circuits in Florida. Re: Santa Rosa County Circuit Div. Assignments Effective January 8, 2019, Administrative Directive SRCAD 2018-03 (setting for the assignments of Circuit Court Judges in Santa Rosa County in the Florida's First Judicial Circuit); First Judicial Circuit of Florida, *Escambia County*, https://www.firstjudicialcircuit.org/judges/escambia-county (last visited Apr. 3, 2020); First Judicial Circuit of Florida, *Okaloosa County*, https://www.firstjudicialcircuit.org/judges/okaloosa-county (last visited Apr. 3, 2020); First Judicial Circuit of Florida, *Walton County*, https://www.firstjudicialcircuit.org/judges/walton-county (last visited Apr. 3, 2020); Second Judicial Circuit of Florida, In Re: Circuit and County Judges Assignments, Admin. Order 2018-04; Third Judicial Circuit of Florida, *Directory*, https://thirdcircuitfl.org/directory/ (last visited Apr. 3, 2020); Fourth Judicial Circuit of Florida, *Circuit and County Judges of the Fourth Judicial Circuit*, https://www.jud4.org/Circuit-and-County-Judges-of-the-Fourth-Judicial.aspx (last visited Apr. 3, 2020); Fifth Judicial Circuit of Florida, In Re: Duty Judge Rotation and Judicial Assignments for Calendar Year 2019, Admin. Order No. C-2018-30-D (addressing assignment of Citrus County Judges only); Fifth Judicial Circuit of Florida, In Re: Amended Judicial Assignments for Calendar Year 2019 and for December of 2018, Admin. Order No. S-2018-31-C (addressing assignment of Sumter County Judges only); Fifth Judicial Circuit of Florida, Admin. Order Establishing Caseload Assignment for the Calendar Year 2020 and 2021: Replacing H-2018-46-A, Admin. Order No. H-2019-45 (addressing assignment of Hernando County Judges only); Fifth Judicial Circuit of Florida, 2nd Am. Admin. Order of Circuit court Assignments from Nov. 1, 2019 through Dec. 31, 2020, Admin. Order No. L-2018-56-C (addressing assignment of Lake County Judges only); Fifth Judicial Circuit of Florida, In Re: Amended Marion County Circuit Judges Judicial Assignments for the Remainder of the Year 2019 and for the Year of 2020, Admin. Order No. M-2019-18-B (addressing assignment of Marion County Judges only); Fifth Judicial Circuit of Florida, In Re: Amended Judicial Assignments for Calendar Year 2019 and for December of 2018, Admin. Order No. S-2018-31-C (addressing assignment of Sumter County Judges only); Sixth Judicial Circuit of Florida, *Judges' Phone Numbers*, http://www.jud6.org/ContactInformation/JudgesPhoneNumbers.html (last visited Feb. 2, 2020); Seventh Judicial Circuit of Florida, *Circuit Judges*, http://www.circuit7.org/About%20the%20Court/circuitjudges.html (listing all circuit judges) (last visited Apr. 3, 2020) (no administrative order or

number of cases are distributed among the judges (which is certainly not the case since case assignments are by circuit), that results in just over 1,000 cases per judge. Although Florida circuit court judges can use magistrate judges to assist on cases, an assignment to a magistrate judge is only permissible if both parties agree.[118]

Given the much more demanding case load of state circuit court judges, a party that wants a quick disposition of its case should consider its options to have the case heard in federal court.

2. Discovery

Discovery in federal court could also lead to a quicker resolution of a case. One of the biggest differences between litigating in federal court

webpage listing the judicial assignments, so it was assumed that all judges in this circuit hear civil cases); Eighth Judicial Circuit of Florida, *Circuit Judges*, https://circuit8.org/circuit-judges (last visited Apr. 3, 2020) (requires navigation into each judge's page to determine the division to which the judge is assigned); Ninth Judicial Circuit of Florida, *Circuit Judges*, https://www.ninthcircuit.org/about/judges/circuit (last visited Feb. 2, 2020); Tenth Judicial Circuit of Florida, *Circuit Judges*, http://www.jud10.flcourts.org/?q=gallery (last visited Apr. 3, 2020); Eleventh Judicial Circuit of Florida, *Judicial Directory*, https://www.jud11.flcourts.org/About-the-Court/Judges/Judicial-Directory (last visited Apr. 3, 2020); Twelfth Judicial Circuit of Florida, *Judges/Magistrates*, https://www.jud12.flcourts.org/About/Judges (last visited Apr. 3, 2020) (requires navigation into each judge's page to determine the division to which the judge is assigned); Thirteenth Judicial Circuit of Florida, *Judicial Directory*, http://www.fljud13.org/JudicialDirectory.aspx#General_Civil (last visited Apr. 3, 2020); Fourteenth Judicial Circuit of Florida, *Judges*, https://www.jud14.flcourts.org/judges (last visited Apr. 3, 2020) (requires navigation into each judge's page to determine the division to which the judge is assigned); Fifteenth Judicial Circuit of Florida, *The Fifteenth Circuit Judiciary*, https://15thcircuit.com/judges?field_judge_first_name_value=&field_court_type_target_id=235 (last visited Apr. 3, 2020); Sixteenth Judicial Circuit of Florida, *Circuit Court Judges*, http://keyscourts.net/circuit-judges.html (last visited Apr. 3, 2020) (requires navigation into each judge's page to determine the division to which the judge is assigned); Seventeenth Judicial Circuit of Florida, *Judiciary*, http://www.17th.flcourts.org/judiciary-list-and-category/ (last visited Apr. 3, 2020); Eighteenth Judicial Circuit of Florida, *Judicial Directory*, https://flcourts18.org/judges-directory/#circuit (last visited Apr. 3, 2020); Nineteenth Judicial Circuit of Florida, Fourth Am. Admin. Order 2018-06, Re: Judicial Assignments for 2019; Twentieth Judicial Circuit of Florida, Order Re Assignments of Circuit Court Judges, Entered on May 16, 2019, https://www.ca.cjis20.org/pdf/LeeCircuitCourtDivAssign_070119.pdf (last visited Apr. 3, 2020).

Administrative judges were not counted because they generally do not handle a significant case load. Additionally, in certain instances, some circuits permit County Court Judges to assist with Circuit Court cases, some Circuits permit Circuit Court judges to assist with County Court cases, and some circuits permit both. *See generally* Order on County Court Judges Performing Circuit Court Duties within the First Judicial Circuit, Admin. Order No. 2018-42; In Re: Judicial Assignments, Order on Circuit Court Judges Performing County Court Duties within the First Judicial Circuit, Admin. Order No. 2018-41; Order on County Court Judges Performing Circuit Court Duties within the First Judicial Circuit, Admin. Order No. 2018-42; In Re Judicial Assignments, Order on County Court Judges Performing Circuit court Duties within the First Judicial Circuit, Admin. Order No. 2018-42. This was not considered. Only Circuit Court Judges in the civil division were counted. Finally, certain circuits, such as the Seventh Judicial Circuit, do not have an administrative order or web page showing the divisions to which each judge is assigned. In such instances, it was assumed that all judges hear civil cases.

118. FLA. R. CIV. P. 1.490(c) (2019).

and litigating in Florida state court is the initial disclosures required under Federal Rule of Civil Procedure 26. Rule 26 requires that, as soon as practical, all parties disclose: (1) the name, address, and telephone number of each individual having discoverable information that the disclosing party may use to support its claims or defenses in the case and the topic on which the individual has information;[119] (2) copies of all documents that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses;[120] (3) a computation of each category of damages claimed by the disclosing party, and the documents or other evidentiary materials on which the computation is based;[121] and (4) any insurance agreement for any insurance that might be liable for the claims in the action.[122] Because the rule is broad and permissive, initial discovery is a much easier process in federal court.

In state court, on the other hand, no initial disclosures are required, parties generally make broad objections to discovery requests, and getting a court to rule upon the objections is a long, drawn out process.[123] The initial disclosures required under the Federal Rules also weed out frivolous claims early on because a party is not excused from making initial disclosures because she has not fully investigated the case.[124] A property owner who files in federal court must know the basis for its claim and must be ready to share that information with the government defendant.

Additionally, these initial disclosures can bring a case to conclusion much sooner. In an inverse case, where the most hotly contested initial question will be whether there was a taking at all, such initial disclosures can assist in quickly resolving the very critical question early on through a motion for summary judgment. By contrast, if parties have to engage in long, drawn out litigation just on the discovery portion of the proceedings (as is usually the case in state court), it will take longer to get to a point where a court can decide the takings issue. For governments, this is a particularly important consideration in determining whether the property owner has a viable claim.

119. FED. R. CIV. P. 26(a)(1)(A)(i) (2019).

120. FED. R. CIV. P. 26(a)(1)(A)(ii). The rule includes disclosure of electronically stored information and other tangible things. *Id.*

121. FED. R. CIV. P. 26(a)(1)(A)(iii).

122. FED. R. CIV. P. 26(a)(1)(A)(iv).

123. Due in part to the judicial case load, it is difficult to obtain special set hearings. Thus, it could be months before you actually get full responses to the discovery. Some circuit courts are busier than others, so the extent of the issue may vary by venue.

124. FED. R. CIV. P. 26(a)(1)(E).

C. What Are the Differences Between Juries and Judges in Each Forum?

Land use issues are particularly local and particularly sensitive. Thus, the sensitivities of the decision-makers in one's case (the judge and the jury) must be considered when choosing a forum. Important questions to ask are (1) how many jurors will be hearing my case, (2) where will those jurors come from, and (3) what are the motivations of the presiding judge?

1. Number of Jurors

Under Florida law, the valuation portion of an inverse case is tried by a twelve-person jury.[125] Federal law only requires a six-person jury.[126] In both instances, the verdict must be unanimous. Studies indicate that juries of twelve "produce longer deliberations, more communication, far better community representation, and, possibly, greater verdict reliability (consistency)."[127] In instances where an issue is particularly politically charged, a twelve-person jury may provide more of an opportunity for careful consideration of the claim and potentially different viewpoints. This must be considered in determining the most advantageous forum for a client's claim, depending on the specific facts of one's case.

2. Jury Pool

The number of jurors must be balanced with the potential jury pool. In both state and federal court, jury pools are drawn from the counties over which the courts have jurisdiction.[128] In Florida state court, however, each county has a courthouse.[129] Therefore, potential jurors

125. Jeffrey L. Hinds, *The Inverse Condemnation Avoidance and Defense Notebook*, http://faca.fl-counties.com/sites/default/files/2018-11/Inverse%20Condemnation%20Avoidance%20and%20Defense%28Hinds%29.Written%20Materials.pdf (last visited Apr. 24, 2020).

126. FED. R. CIV. P. 48; *see also* Colgrove v. Battin, 413 U.S. 149, 159–60 (1973).

127. Ballew v. Georgia, 435 U.S. 223, 242 (1978).

128. FLA. STAT. § 40.011(2), (5) (2019); 28 U.S.C. § 1861 (2018). There are three federal districts in Florida: the Northern District, the Middle District, and the Southern District. 28 U.S.C. § 89(c) (2018). Each district is comprised of several counties, but the courts are only established in certain cities. *Id.* The Southern District, for example, encompasses Broward, Miami-Dade, Highlands, Indian River, Martin, Monroe, Okeechobee, Palm Beach, and St. Lucie counties. *Id.* There are only four courthouses for the Southern District, however. *Id.* Thus, some courthouses encompass more than one county. In such instances, the jury is selected from all the counties encompassed by a particular courthouse. *See generally* Eleventh Judicial Circuit Reviewing Panel, *Jury Plan*, https://www.flsd.uscourts.gov/sites/flsd/files/JuryPlan.pdf (last visited Apr. 24, 2020).

129. Florida Courts, *Court Locations*, https://www.flcourts.org/Florida-Courts/Court-Locations (last visited Apr. 24, 2020).

only serve in their respective counties.[130] In federal court, on the other hand, there is the possibility of having a jury made up of residents of multiple counties.[131] If a case concerns a particularly local issue and there is the option to obtain a jury made up of residents of other counties, a litigant must evaluate which option is preferable.

3. Judge's Motivations

With politically charged issues, a litigant must also consider the differences between state and federal judges and their potential biases based on politics. In Florida, circuit court judges are elected and are subject to reelection. In federal court, judges are appointed and enjoy life tenure.[132] The manner in which a judge reaches the bench (and stays there) could affect the outcome of a particular case. The Brennan Center for Justice, having monitored judicial elections in states for nearly two decades, concludes that there are "numerous threats to the fairness and integrity of state courts that are closely tied to how states choose their judges."[133] Among the acknowledged threats is the possibility that preferential treatment will be given to potential campaign donors,[134] the possibility that the judge's stance on an issue will be viewed as a politically charged decision,[135] and the possibility that nearing elections could impact the outcome of the case.[136] With land use decisions, which are particularly local, if you are the party whose position is not generally favored in the community, having the case heard in federal court might be preferable. Federal judges enjoy tenure.[137] Thus, it is less likely that the decision in the case will be driven by other factors that are unrelated to the facts and the law of the case.

D. Exposure to Attorneys' Fees and Expert Fees

It is well known that the ability to recover attorneys' fees in a proceeding can greatly affect how cases are litigated. From a property

130. FLA. STAT. § 40.011(2) (2019).
131. *See* Florida Courts, *supra* note 129.
132. U.S. CONST. art. III § 1.
133. Alicia Bannon, *Rethinking Judicial Selection in State Court*, BRENNAN CTR. FOR JUSTICE 1, https://www.brennancenter.org/sites/default/files/2019-08/Report_Rethinking_Judicial_Selection_State_Courts.pdf (last visited Apr. 24, 2020).
134. Bannon reported that, in a survey of state court judges, "nearly half said they thought campaign contributions affected judges' decision-making." *Id.* at 1.
135. *Id.*
136. *Id.*
137. U.S. CONST. art. III § 1.

owner's perspective, it may affect her ability to even file suit. If a property owner is unable to afford an attorney, then her only option, absent a guarantee that attorneys' fees are recoverable under the law, is to enter into a contingency fee agreement. Depending on the percentage that the attorney is requesting, the plaintiff may decide that the recovery is not worth it. Additionally, considering the complexities and uncertainties involved in pleading and proving most regulatory takings cases, attorneys are likely to be wary of accepting cases on a contingency. Finally, if there is the possibility that the government could recover fees if the property owner is unsuccessful, then the property owner will likely consider this exposure in deciding whether to file suit and in any settlement negotiations.

From a government's perspective, attorneys' fees affect settlement determinations. If it is not possible to recover prevailing party attorneys' fees, then the government might deem it more cost-effective to settle early on than to pay an attorney to litigate the case through completion.[138] In this scenario, a government might decide to pay even questionable claims based on cost-avoidance considerations alone. Similarly, if the government has exposure to paying the property owner's attorneys' fees, it might consider that a factor in determining whether an early settlement is more cost-effective than litigating the case.

Another significant expense that can impact the property owner's ability to file suit and the government's willingness to settle is the expert fees. Depending on the particular issues involved, one may need to hire a land use planner, an engineer, or an appraiser to do extensive work in proving or defending a case. Expert fees, therefore, impact owners and governments alike when making decisions in takings cases (particularly small governments that do not have enough in-house staff to provide the expert opinions that are needed).

In Florida, the state constitution's guarantee of "full compensation . . . includes the right to a reasonable attorney's fee"[139] and expert fees.[140] The United States Constitution's guarantee of "just compensation" does not mandate the payment of the property owner's

138. Of course, there is also the consideration that if the government always settles claims to avoid paying attorneys to defend it, then property owners will bring frivolous claims knowing they can obtain a settlement (however small the settlement might be).

139. Joseph B. Doerr Tr. v. Cent. Florida Expressway Auth., 177 So. 3d 1209, 1215 (Fla. 2015).

140. Dep't of Transp. v. Jack's Quick Cash, Inc., 748 So. 2d 1049, 1054 (Fla. 5th Dist. Ct. App. 1999) ("Recovery of attorney's fees, expert witness fees, or any other cost by the losing party, is an anomaly of Florida's broad constitutional right to full compensation.").

attorneys' fees.[141] All claims against local governments under the Fifth Amendment Takings Clause, however, must be filed as a 42 U.S.C. § 1983 action.[142] Thus, property owners can seek to recover attorneys' fees pursuant to 42 U.S.C § 1988, which provides for the recovery of fees in actions filed pursuant to § 1983. Expert fees can also be recovered pursuant to § 1988.[143]

This potential avenue for recovering fees in a federal court takings case, however, has its pitfalls. First, under § 1988, whoever prevails can recover fees. This means that both the property owner and the government have the ability to recover fees.[144] By comparison, under the Florida Constitution, only the property owner can recover fees. Thus, in Florida state courts, the property owner does not have exposure to paying the government's fees.[145]

Second, unlike the Florida Constitution's guarantee that reasonable attorneys' fees shall be recovered, § 1988 leaves the award of attorneys' fees to the court's discretion.[146] Thus, it is not guaranteed that a property owner will be awarded attorneys' fees. Although the court's discretion to deny a fee award is limited to "special circumstances [that] would

141. United States v. Bodcaw Co., 440 U.S. 202, 204 (1979). Notably, Congress enacted legislation that permits property owners who bring an inverse claim under the Tucker Act against the federal government to recover attorneys' fees. 42 U.S.C. § 4654(c) (2018).

142. Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251, 255–56 (2006).

143. Dowdell v. City of Apopka, 698 F.2d 1181, 1189–92 (11th Cir. 1983).

144. The Supreme Court has limited the district courts' discretion in awarding prevailing defendants' attorneys' fees pursuant to § 1988(b). *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 421 (1978). The district court can only award fees to a prevailing defendant "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.* The Supreme Court warned that the circumstances in which fees will be awarded to a prevailing defendant should be limited:

> In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

Id. at 421–22. Although there are limited circumstances pursuant to which a government defendant can recover fees, a property owner is still exposed to fees in this context.

145. This, of course, assumes that the government has not served an offer of judgment in the case. Offers of Judgment pursuant to Section 768.28, Florida Statutes, are permissible in inverse condemnation cases and could expose the property owner to paying the government's attorneys' fees. Polk County v. Highlands-in-the-Woods, L.L.C., 227 So. 3d 161, 163 (Fla. 2d Dist. Ct. App. 2017).

146. 42 U.S.C. § 1988(b) (2018).

render such an award unjust,"[147] there is still a possibility that such circumstances might arise.

Finally, in a case where a property owner seeks alternative relief or brings multiple claims and only prevails on some grounds, the property owner may not be able to recover all of its fees in federal court. A good example of this is when a property owner seeks injunctive relief claiming that a particular law was not enacted for a public purpose and alternatively seeks just compensation. If the court finds that the property owner is not entitled to injunctive relief because a sufficient public purpose exists but also finds that the owner is entitled to just compensation because a taking has occurred, it is not entirely clear that the property owner will be entitled to recover prevailing party fees in federal court.[148] As previously noted, the Florida constitutional guarantee to attorneys' fees is unequivocal where a taking is found to have occurred, and its only limitation is that the fees must be reasonable.

VI. HYPOTHETICAL REGULATORY TAKINGS CASE

To assist in visualizing the various issues that should be considered in determining the preferred forum for a regulatory takings case, I will use a hypothetical that is particularly prevalent in Florida: golf courses. Within the last few years, a recurring issue in Florida in the land use field is the conversion of golf courses to other uses. The number of individuals playing golf has been on a steady decline since the 2000s.[149] The decrease in the sport's popularity, coupled with the Great Recession, caused many golf courses to close nationwide.[150] Golf courses are particularly well-suited for conversion into residential development because they consist of acres of land in otherwise increasingly built-out areas.

Our hypothetical golf course is owned by Tee Partners. The golf course consists of twenty acres and was developed in 1985. The course's future land use designation permits residential development, but its zoning only permits recreational uses. The golf course has been

147. Hensley v. Eckerhart, 461 U.S. 424, 429 (1983).

148. While the Eleventh Circuit's interpretation of § 1988 favors an award of attorneys' fees if a § 1983 plaintiff prevails on any of its claims, Solomon v. City of Gainesville, 796 F.2d 1464, 1466 (11th Cir. 1986), there is still exposure for the property owner when pleading in the alternative. *Compare* Farrar v. Hobby, 506 U.S. 103, 114 (1992) ("[T]he most critical factor" in determining the reasonableness of a fee award "is the degree of success obtained.").

149. Matt Morgan, *Development, Golf Courses Coming to a Crossroads in Palm Beach County*, THE PALM BEACH POST, (Nov. 18, 2016, 4:15 PM) https://www.palmbeachpost.com /news/local/ development-golf-courses-coming-crossroads-palm-beach- county/ oYhlUIib62wxUHQCyRMuQK/.

150. *Id.*

operating at a deficit for ten years. Without a zoning change, Tee Partners cannot redevelop the property for another use.

The golf course is surrounded by residential properties, and the owners of those properties are politically influential. They also purchased their properties at a premium so that they could be adjacent to a golf course and do not want the golf course to be redeveloped with a residential use. If it is, the property values are very likely to decline. Tee Partners submits a rezoning application to the City in which it is located, Between a Rock and a Hard Place City. The rezoning application requests a rezoning to a residential use. The City denies the application because of the public outcry of the surrounding residential property owners. Tee Partners, having no other remaining options, sues the City.

A. Where Should Tee Partners File Suit?

For the purposes of the hypothetical, we will assume that Tee Partners is seeking injunctive relief by claiming that there is no underlying public purpose to the denial, and is seeking compensation for a taking by claiming that the City's denial of the rezoning application deprived it of all economically beneficial or productive uses, or, in the alternative, that the regulations result in a taking under the *Penn Central* factors. Tee Partners is on the wrong side of public opinion within the municipality. Tee Partners is also strapped for cash because it has been operating at a deficit for ten years, so it will most likely want a quick resolution to its case and the least amount of exposure to attorneys' fees and costs as possible. Finally, Tee Partners has a potentially complex issue of fact that needs to be resolved to determine whether the City's refusal to rezone the property results in a taking because of its alternate argument that the regulation results in a taking under the *Penn Central* factors.[151]

Tee Partners should likely file in federal court. First, it is most likely to get a quick resolution of its case in federal court, due to both the discovery mechanisms and the judicial case load. Additionally, because of the politics involved, it is preferable to avoid state court because elected judges might be concerned about keeping their seat on the bench if they rule in favor of Tee Partners. On the other hand, if the case is heard

151. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). To show that a compensable taking has occurred under *Penn Central*, several factors must be considered, including (1) "the economic impact of the regulation on" the property owner; (2) whether the "regulation has interfered with distinct investment-backed expectations of the owner"; and (3) "the character of the governmental action" (whether it is a physical invasion or something less than that). *Id.*

in federal court, a jury will have partial responsibility for determining that the regulation results in a taking, which may not be desirable given the controversial position that Tee Partners is taking. Overall, given the fact that federal jury pools are often drawn from more than one county, a jury in federal court is likely preferable to an elected judge in state court.

Tee Partners must also consider the question of attorneys' fees and expert fees. If Tee Partners has a colorable argument that its property has been taken, it is unlikely to be ordered to pay the City's attorneys' fees and expert fees if it loses the case. Nevertheless, it should carefully consider the other claims it files concurrently with its takings claim in order to assure that it does not jeopardize any portion of its attorneys' fee recovery in the event that it partially prevails. For example, Tee Partners may want to consider not bringing its claim for injunctive relief given the difficulty of proving that there is no public purpose.[152]

Because federal court is the best forum for Tee Partners' case, Tee Partners should file both its state and federal claims in federal court. While Tee Partners has the option of filing its federal claims in federal court and its state claims in state court, it should not do so. If the state court were to enter a judgment before the federal court, some of Tee Partners' federal claims could be subject to issue or claim preclusion.

B. Where Will the City Want Tee Partners' Case Heard?

The City will likely want the case heard in state court, mostly based on the political considerations previously discussed. Also, state judges are more likely to be familiar with this type of case given that it is a particularly local issue. The case is likely not sufficiently frivolous to permit the City to recover attorneys' fees from Tee Partners in the event that the City prevails, so there is no benefit from that perspective in proceeding in federal court. Finally, it is likely the case will take longer in state court, and this helps with the local politics as well. Since Tee Partners is not going to file in state court, the City may be left with no option but to proceed in federal court.

152. In the landmark case of Kelo v. City of New London, 545 U.S. 469 (2005), the Supreme Court confirmed that governments cannot take property "for the purpose of conferring a private benefit on a particular private party" or "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Kelo*, 545 U.S. at 477–78. It went on, however, to conclude that courts should give "deference to legislative judgments in this field." *Id.* at 478. Some have viewed this last holding as "eviscerating the 'public use' limitation," due to the deference given to the government determination of public use. Kelo*: A Setback for Property Owners*, 23 No. 6 GPSolo 22, 22–23, Sept. 2006.

Federal court abstention is the one possible loophole for the City that would allow it to get to state court. Abstention doctrines, however, generally have limited application and are unlikely to result in complete abdication of federal jurisdiction, which would be the City's ultimate goal.

There are several abstention doctrines,[153] only one of which could potentially apply in our hypothetical.[154] The abstention doctrine that may apply is *Pullman*, which was established in the case of *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941). Under *Pullman*, federal courts should refrain from deciding cases based on a federal constitutional claim where there are pending questions of interpretation of state law, the outcome of which may obviate the need for a decision on a federal constitutional question.[155] It is important to note that *Pullman* abstention does not abdicate federal jurisdiction; it only postpones it.[156] Thus, once the state court question is decided, the federal court may still have occasion to hear the takings claim if the state court question does not moot the federal takings claim.[157]

While knowing that the aforementioned doctrine exists may be useful because there will be instances where state law questions should be decided in state court, the doctrines have limited applicability and will not necessarily relinquish the decision on the takings issue to state courts. Thus, abstention doctrines only have some utility to the City

153. 17A FED. PRAC. & PROC. JURIS. 3d *Abstention Generally* § 4241 contains a thorough discussion on the various abstention doctrines, which is beyond the scope of this Article.

154. The other abstention doctrine that is most likely to apply in regulatory takings cases is *Cone* abstention. *Cone* abstention was discussed in Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1 (1983). "Abstention" is a misnomer for this doctrine because relinquishment to state court is done with the understanding that the case will not return to federal court for adjudication. *See* 17A FED. PRAC. & PROC. JURIS. 3d *Avoiding Duplicative Litigation* § 4247 (Westlaw through Aug. 2019). Nevertheless, federal courts should exercise *Cone* abstention where suit is filed in federal court on substantially the same issues that are pending in a state court proceeding, and only under "exceptional circumstances." *Id.* at 16.

To determine whether "exceptional circumstances" that warrant *Cone* abstention exist, the court must balance a number of factors: (1) whether the suit is in rem and the state court has already exercised jurisdiction over the res, (2) whether the federal forum is less convenient for the parties than the state forum, (3) whether there is an interest in avoiding piecemeal litigation, (4) "the order in which jurisdiction was obtained by the concurrent forums," (5) whether federal law provides the rule of decision on the merits, and (6) the inadequacy of state proceedings to protect the parties' rights. *Id.* at 19–27. Although this doctrine can be explored in certain regulatory takings claims, in light of the *Knick* decision, it is not likely that the abstention described in *Cone*, which should only be exercised under exceptional circumstances, will apply in a run of the mill regulatory takings case.

155. *Id.* at 500–02.

156. Harrison v. Nat'l Ass'n for the Advancement of Colored People, 360 U.S. 167, 176 (1959).

157. *See id.* at 179.

whose ultimate goal in our hypothetical is to have the federal court completely relinquish jurisdiction to the state court.

VII. CONCLUSION

While leaving most substantive taking law undisturbed, *Knick* corrected the unanticipated consequences of the state-litigation requirement and provided additional options for litigants in takings cases. The new options, however, must be carefully examined to assure that the best forum is selected for the particular takings case, and to assure that the action stays in the selected forum.

The factors in the hypothetical happened to result in the property owner's desired forum being federal court, and the City's desired forum being state court. Litigants and attorneys, however, should not automatically assume that this is the correct result in all instances. Attorneys should consider all the options available in this post-*Knick* era, consider the differences between federal and state court that may impact the outcome in their particular case, and, to the extent possible, elect the forum to which the case is best suited.