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Not Just a Procedural Case: The Substantive Implications of Knick for State Property Law and Federal Takings Doctrine

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**NOT JUST A PROCEDURAL CASE: THE
SUBSTANTIVE IMPLICATIONS OF *KNICK* FOR
STATE PROPERTY LAW AND FEDERAL
TAKINGS DOCTRINE**

*David A. Dana**

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INTRODUCTION

The United States Supreme Court's decision in *Knick v. Township of Scott*¹ ostensibly addresses only a procedural issue: Whether an aggrieved property owner must first seek compensation in state court via a state inverse condemnation action before seeking access to the federal courts or whether, instead, she can immediately bring a federal takings claim in federal court.

Viewed solely as a procedural decision, *Knick* itself might seem to be, basically, no big deal. After all, nothing in the *Knick* majority opinion purports to alter what rights in property or rights to compensation for interferences with property anyone enjoys in the United States. All the *Knick* decision does, on its face, is open the federal courthouse doors more quickly than is currently the case to those claiming to have had their property taken without just compensation in violation of the Fifth Amendment of the U.S. Constitution.² Although *Knick* may shift the initial decisionmaker in many federal takings cases — from a state judge to a federal judge — it does not purport to challenge the constitutional status of state property law as the underpinning of federal takings law. Nor does it purport to challenge the test and principles that are to be applied in determining whether an interference with a property right under state law requires the payment of just compensation as a matter of federal constitutional law.³

Nevertheless, *Knick* may have real consequences for substantive law, both state and federal. The purpose of this Article is to explore those implications for substantive law, suggest that they are highly problematic from a normative perspective, and consider how the possible adverse effects of *Knick* might be mitigated.

In our constitutional order, property law (with very limited exceptions, like federal patent rights) is the domain of state law, not federal law. Property rights in land in every state are largely created by, interpreted by, and enforced under state law.⁴ Land-use regulation,

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

2. See *infra* text accompanying notes 29–33 (describing what I term a narrow reading of *Knick*).

3. Only Justice Kagan's dissent addresses the substance of federal takings law doctrine, and then only to make the point that federal takings law builds on state property law. *Knick*, 139 S. Ct. at 2186 (Kagan, J., dissenting).

4. See Maureen Brady, *Property's Ceiling: State Courts and the Expansion of Takings Clause Property*, 102 VA. L. REV. 1167, 1168 (2016) (“[I]t is generally agreed that state property law — and typically, the judge-made common law of the state — define the range of interests that qualify for [federal] constitutional protection.”);

in particular, is overwhelmingly a matter of local enforcement of state and local, not federal law.⁵ As the physical realities, economies, histories, legal traditions, and political cultures of states differ substantially, so too does substantive state property law.⁶ That diversity in state substantive property law is a strength of our legal system; it allows property law to adapt to local conditions.⁷ Notably, as climate change causes rises in sea level, flooding, drought, wildfires, and mudslides, among other phenomena, affecting different parts of the country very differently, the argument for a localized substantive property law that is sensitive to and adapts to local conditions becomes even more compelling.⁸

The *Knick* opinion is troubling in that it may result in the effective usurpation (albeit only a partial usurpation) by the federal courts of the state courts and legislatures' role as the authors of substantive property law. For a variety of reasons, explicated below, federal judges may not consistently interpret state property law — and especially “fuzzy” background principles of law that limit rights of titleholders, such as nuisance and public trust — in the same way as state courts would.⁹ It seems quite plausible that, as a result of *Knick*, state substantive law will be interpreted by federal courts to sometimes afford state officials and regulators less flexibility to deal with the land use challenges posed by climate change than they otherwise would have at their disposal. *Knick* thus can be understood as an impediment to the productive adaptation of state property law to the real-world demands of climate change adaptation. In theory, certification of state property law issues to state supreme courts can prevent federal

Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 222 (2004) (describing the primacy of state property law).

5. See, e.g., *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) (describing land use regulation as “perhaps the quintessential state activity”); see also Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 MINN. L. REV. 231, 236 (2008) (“[T]he prevailing descriptive and normative view of land use involves, first and foremost, local control.”).

6. See, e.g., Daniel L. Siegel, *Why We Will Probably Never See a Judicial Takings Doctrine*, 35 VT. L. REV. 459, 461 (2012) (“State courts in particular have a special ability to develop rules of property grounded in the individual State’s unique history and physical landscape.”).

7. See WINSTON HARRINGTON, RESOURCES FOR THE FUTURE, PROMOTING INNOVATIVE CLIMATE CHANGE ADAPTATION THROUGH FEDERALISM (2010), <https://media.rff.org/documents/RFF-IB-10-17.pdf> [<https://perma.cc/Y9ZH-QRG6>] (emphasizing advantages of localized experimentation).

8. For a thoughtful discussion of how state property law will need to be developed to meet the needs of climate change adaptation, see Holly Doremus, *Climate Change and the Evolution of Property Rights*, 1 U.C. IRVINE L. REV. 1091 (2011).

9. See *infra* text accompanying notes 63–72.

usurpation of the state courts' role in interpreting state property law. But certification is never mandatory, and there are currently a number of impediments to it. Some of these impediments, however, could be lessened by the federal courts, state courts, and state legislatures, if they are willing.¹⁰

The second substantive doctrinal problem posed by *Knick* is that it may destabilize the test for when a compensable "temporary taking" has occurred, in such a way as to expand the scope of what constitutes a compensable "temporary taking." That expansion could chill innovative state and (especially) local land use and other regulation, and effectively overrule the Supreme Court's well-reasoned decision in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.¹¹ By potentially expanding compensation requirements for temporary government actions, *Knick* could deprive state and local regulators of the flexibility that they require for effective adaptation to climate change.¹² Whether *Knick* has these effects on the substance of federal takings law depends ultimately on how courts understand and employ *Knick* as a precedent.

Part I of this Article provides a brief background to and summary of the *Knick* decision and offers a narrow and broad reading of the majority opinion. Part II explores how *Knick* may result in interference with state courts' role in interpreting state property law. Part II uses a review of denied certiorari petitions involving federal takings claims to highlight some of the difficult issues in state substantive property law that the lower federal courts will be called upon to decide in the post-*Knick* era. Part II also considers how much the usurpation of state law by the federal courts can be mitigated through prudential federal abstention, state judicial and legislative corrections of federal interpretations, and certifications to state supreme courts. Lastly, Part III considers how *Knick* may result in a de facto overruling of the Supreme Court's decision in *Tahoe*.

In sum, *Knick* may upend our constitutional regime that has long allocated states the power to interpret their own property law and may shift federal takings doctrine toward a more restrictive posture

10. See *infra* text accompanying notes 104–08 (discussing possible reforms to the law governing federal certification of state issues to state supreme courts).

11. 535 U.S. 302 (2002).

12. Indeed, since the *Tahoe* decision, the need for creative approaches to protecting sensitive resources like Lake Tahoe from the stresses of climate change has only become clearer. See, e.g., *Climate Science*, U.C. DAVIS, <https://tahoe.ucdavis.edu/climate-change> [https://perma.cc/D7H9-9M6J] (last visited Jan. 26, 2020).

regarding state and local efforts to fashion solutions to a range of problems. *Knick* is not just a procedural decision.

I. TWO READINGS OF THE *KNICK* OPINION

State courts are courts of plenary jurisdiction, and thus can hear both federal and state constitutional claims. Because states have constitutional guarantees of compensation for deprivations of property that mirror the Fifth Amendment Takings Clause,¹³ property owners typically will want to bring both a federal and a state constitutional claim for just compensation for the same underlying government conduct or restriction.¹⁴ In all states, property owners may bring an action for inverse condemnation — that is, for the interference with property rights (as protected under the state and/or federal constitution) to such an extent that the government has, in effect, condemned the property, but without paying the compensation that would have been paid in a formal eminent domain proceeding.¹⁵

By contrast, federal courts are courts of limited jurisdiction. Section 1983 of the United States Code affords “any citizen of the United States or other person within the jurisdiction thereof” to sue “at law [and] in equity” seeking remedies for “deprivation[s] of any rights, privileges, or immunities secured by the Constitution”¹⁶ Thus, at least on the face of Section 1983, a party can bring a suit in federal court alleging a deprivation of Fifth Amendment rights based on an alleged taking of property without just compensation.

In 1985, in *Williamson County Regional Planning Commission v. Hamilton Bank*, the Supreme Court articulated a ripeness rule that was consistent with precedent but not previously articulated by the Court: a federal takings claim is not ripe until a property owner first seeks compensation through a state inverse condemnation action, so long as such an action provides a “reasonable, certain and adequate provision for obtaining compensation” if compensation, in fact, is constitutionally due.¹⁷ The *Williamson County* Court’s holding follows from a straightforward reading of the Fifth Amendment’s Takings

13. See Brady, *supra* note 4, at 1168 n.1 (noting that only North Carolina lacked a state constitutional guarantee of compensation for takings).

14. See Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251, 275 (2006) (noting that most litigants opt to bring parallel federal and state takings claims).

15. For a general review of state inverse condemnation law, see 11A MCQUILLIN MUN. CORP. § 32:164 (3d ed. 2019).

16. 42 U.S.C. § 1983 (1996).

17. 473 U.S. 172, 194 (1985) (citations omitted).

Clause. The Clause does not prohibit or render unconstitutional government takings of property in and of themselves; it requires just compensation to be paid in due course, but there is no constitutional violation simply because the taking was not accompanied by contemporaneous compensation.¹⁸

The *Williamson County* ripeness holding regarding state inverse condemnation action became subject to considerable criticism after the Court's 2005 decision in *San Remo Hotel, L.P. v. City & County of San Francisco*, which created what Chief Justice Roberts in *Knick* dubbed a "preclusion trap" for aggrieved property owners.¹⁹ In *San Remo*, the federal court exercised *Pullman* abstention with respect to the plaintiff's federal takings claim, but after the plaintiff failed to prevail in state court, the federal court held that the plaintiff was precluded from re-litigating issues that had been litigated in the state court.²⁰ The Supreme Court based its preclusion decision on the federal full faith and credit statute:

At base, petitioners' claim amounts to little more than the concern that it is unfair to give preclusive effect to state-court proceedings that are not chosen, but are instead *required* in order to ripen federal takings claims. Whatever the merits of that concern may be, we are not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum. The Court of Appeals was correct to decline petitioners' invitation to ignore the requirements of 28 U.S.C. § 1738.²¹

In *Knick*, the plaintiff landowner pressed the Court to overrule *Williamson County* and hold that her federal takings suit in federal court was ripe, although she had brought no inverse condemnation action in state court.²² At oral argument, both Justice Breyer and Justice Kagan suggested that if the Court could devise some way to undo or limit the preclusion trap created by *San Remo*, there would be no reason to overrule the 25-year-old *Williamson County* precedent.²³ However, rather than doing so, the majority not only expressly

18. *Id.* ("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" (citations omitted)).

19. *Knick v. Township of Scott*, 139 S. Ct. 2163, 2174 (2019).

20. *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 338 (2005).

21. *Id.* at 347–48.

22. *Knick*, 139 S. Ct. at 2169.

23. Transcript of Oral Argument at 44–47, *Knick*, 139 S. Ct. 2163 (No. 17-647).

overruled *Williamson County*, but did so in as emphatic a way as possible.²⁴

Like many takings cases, *Knick* involved a landowner who claimed that a recently-enacted local ordinance took away one of the rights that inhered in her land title — in this case, the right to exclude. In 2008, Florence Knick acquired from her sister “approximately 90 acres” of farmland in the Township of Scott, Pennsylvania, which includes her “primary residence, as well as farmland and grazing areas for horses, cattle and other farm animals.”²⁵ It also contains a cemetery, located in an open field a substantial distance from her residence, in which her neighbors’ ancestors allegedly are buried.²⁶ In 2012, the Township enacted an ordinance requiring landowners to adequately “maintain and upkeep” cemeteries and not “unreasonably restrict [public] access” to them “during daylight hours.”²⁷ The Township subsequently concluded Knick was denying access to the cemetery as required by the ordinance.²⁸

The federal district court dismissed the Fifth Amendment Takings Clause Section 1983 claim that the ordinance, either on its face or as applied, infringed Knick’s constitutional right to compensation for a taking of property, on the grounds that she “‘ha[d] not pursued’ the state’s ‘constitutionally adequate’ procedure ‘for obtaining just compensation.’”²⁹ The Third Circuit affirmed the dismissal, explaining that “the government does not violate the Fifth Amendment simply because one of its actions ‘constitutes a taking.’”³⁰ Since Pennsylvania provided inverse-condemnation proceedings, which constitute “a reasonable, certain and adequate provision for obtaining compensation,” and Knick had not invoked the requisite state procedure, she could not claim to have been deprived of her constitutional right to compensation for a taking.³¹ The Supreme

24. See *infra* Part III (explicating how the rhetoric of *Knick* implicates substantive takings doctrine, apart from issues of procedure and jurisdiction).

25. See Brief for Respondents at 13, *Knick* 139 S. Ct. 2162 (No. 17-647) (summarizing the facts alleged by Knick).

26. *Id.*

27. *Id.* at 14 (quoting Scott Township, Pa., Ordinance 12-12-20-001 §§ 5–6 (Dec. 20, 2012)).

28. *Id.*

29. *Id.* at 16 (citation omitted) (quoting *Knick v. Township of Scott*, No. 3:14-CV-02223, 2016 WL 4701549, at *6 (M.D. Pa. Sept. 8, 2016)).

30. *Knick v. Township of Scott*, 862 F.3d 310, 324 (3d Cir. 2017).

31. *Id.* at 326 (citations omitted).

Court granted certiorari to address the question of whether *Williamson County*'s state litigation ripeness requirement should be overruled.³²

The narrow reading of *Knick* is that it simply holds that an aggrieved property owner need not seek redress in state court first but may instead proceed in federal court under Section 1983, seeking just compensation for a taking. The majority held that *Williamson County* not only lacked cogent reasoning, but misread the precedent available at the time it was decided. For the majority, because the error of *Williamson County* was so clear, it had to be reversed, notwithstanding principles of stare decisis.³³

But the *Knick* majority also articulated broader ideas — ones that have possible implications beyond the elimination of a state litigation requirement. The broad holding of *Knick* is that the federal constitutional compensation must happen at the same time or immediately after a taking has occurred. In deciding whether a taking occurred, courts must be as relentlessly protective of property rights as they are of, say, freedom of religion or speech. *Knick* thus articulates a reconceptualization of when a Fifth Amendment violation occurs (at the time of the taking, not the denial of just compensation) and at least hints at a shift as to when courts should find such a Fifth Amendment violation has occurred (namely, more often than they have in the past). Articulation of these broader ideas was not necessary for the majority to reach the result of overruling *Williamson County*.³⁴

The *Knick* majority was adamant that the denial of compensation — let alone just compensation — is not required for there to be a constitutional violation: “[T]he violation is complete at the time of taking”³⁵ The majority claimed that *First English Evangelical Lutheran Church v. Los Angeles County* already had held that “a property owner acquires an irrevocable right to just compensation

32. See *Knick v. Township of Scott*, 138 S. Ct. 1262 (2018) (granting certiorari solely on the question of whether to overrule *Williamson County*).

33. *Knick v. Township of Scott*, 139 S. Ct. 2162, 2178–79 (2019).

34. See, e.g., Brief for the United States as Amicus Curiae in Support of Vacatur and Remand at 8, *Knick*, 139 S. Ct. 2162 (No. 17-647) (arguing that vacating the dismissal of *Knick*'s complaint did not require the Court to hold that a taking occurs as soon as a property right is infringed without contemporaneous provision of compensation).

35. *Knick*, 139 S. Ct. at 2177. The majority stated this idea in a variety of ways, such as: “The Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner[.]” *id.* at 2170; “the property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation . . . [.]” *id.* at 2168; and “a taking without compensation violates the self-executing Fifth Amendment at the time of the taking” *Id.* at 2172.

immediately upon a taking.”³⁶ But actually, *First English* merely held that the Takings Clause was self-executing and judicial invalidation of an ordinance, without a damages remedy, was not an adequate remedy for a taking.³⁷ *First English* was consistent with the proposition that an aggrieved party may bring an inverse condemnation action in state court but may not bring one in federal court until the state courts first deny compensation.³⁸

The idea that compensation is immediately due, if taken at face value, calls into question not just the *Williamson County* state litigation requirement, but also any local, state, or federal procedure, process, or deliberation that might result in a delay between the acts allegedly constituting the taking and the actual grant of just compensation. While *Knick* itself does not explicitly say so, it implicitly strengthens the argument that any delay between the physical or regulatory deprivation of a property right and the payment of compensation is constitutionally problematic.

Consider this passage, in which the majority analogizes a government taking to a bank robbery:

A later payment of compensation may remedy the constitutional violation that occurred at the time of the taking, but that does not mean the violation never took place. The violation is the only reason compensation was owed in the first place. A bank robber might give the loot back, but he still robbed the bank. The availability of a subsequent compensation remedy for a taking without compensation no more means that there was not a constitutional violation in the first

36. *Id.* at 2172 (citing *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 315, 318 (1987)).

37. *See First English*, 482 U.S. at 321–22 (“We merely hold that where the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective Here we must assume that the Los Angeles County ordinance has denied appellant all use of its property for a considerable period of years, and we hold that invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy. The judgment of the California Court of Appeals is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.”); *see also Knick*, 139 S. Ct. at 2172 n.4, 2185–86 (Kagan, J., dissenting) (criticizing the majority’s interpretation of *First English*).

38. Indeed, no court after *First English* until the *Knick* decision had interpreted the *First English* decision in 1987 as implicitly overruling or even being in tension with the *Williamson County* decision in 1985. As Justice Kagan explained, *First English* itself expressly affirms the continued validity of *Williamson County*. *Knick*, 139 S. Ct. at 2185 n.4 (2019) (Kagan, J., dissenting).

place than the availability of a damages remedy renders negligent conduct compliant with the duty of care.³⁹

If a taking itself is a “bank robbery,” then that would seem to suggest that the remedy for a taking should not just be available in a reasonable amount of time, but rather should be immediately available, no matter the administrative difficulties the government may face. Indeed, the only way to make a bank robbery seem like “no big deal” — for it to seem lawful — is if a bank robber takes the money from the bank vault with one hand and at the very same time places the money back into the vault with her other hand.

The *Knick* majority also forcefully embraced the view that Fifth Amendment property rights stand at the same level — and thus deserve the same respect — as the other individual rights secured by the Bill of Rights.⁴⁰ The Court announced itself as rejecting the view that the Takings Clause has “‘the status of a poor relation’ among the provisions of the Bill of Rights.”⁴¹ The Court viewed its opinion as “restoring takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights” by insisting that “[t]akings claims against local governments should be handled in the same way as other claims under the Bill of Rights.”⁴² This rhetoric hints at a rejection of the post-*Lochner* idea that in a modern economy, economic regulation of the sort that implicates the use of and economic value in property must be more deferentially reviewed by the courts than regulation of individual liberties, such as speech and the free exercise of religion.⁴³ This rhetoric, if taken to heart, would call into question the flexible, pragmatic, ad hoc approach to federal takings issues that is articulated in such cases as *Penn Central*.⁴⁴ As explained below, the broad reading of *Knick* could potentially support a re-orientation of substantive takings doctrine to make it more favorable to property owners by shifting the understanding of when a temporary taking has occurred from *Tahoe*’s relatively pro-government conception to the more pro-

39. *Id.* at 2172.

40. *Id.* at 2170.

41. *Id.* at 2169.

42. *Id.*

43. See David E. Bernstein & Ilya Somin, *The Mainstreaming of Libertarian Constitutionalism*, 77 LAW & CONTEMP. PROBS. 43, 65–70 (2015) (arguing that the Supreme Court’s jurisprudence may be moving toward restoring property rights to their pre-New Deal status and suggesting that that would be normatively desirable).

44. See generally *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

property owner conception that was arguably suggested by *First English*.

II. HOW *KNICK* COULD DISTORT SUBSTANTIVE PROPERTY LAW AND WHAT CAN BE DONE ABOUT THAT

Although federal courts sometimes heard federal takings cases involving state property law before *Knick*, the pre-*Knick* regime largely left it to the state courts to say what rights state property law did and did not afford. For takings cases that ultimately are appealed through the state court system, there is always the theoretical possibility of the U.S. Supreme Court granting certiorari. But the Supreme Court grants certiorari on only a tiny fraction of certiorari petitions, and correction of state law by state courts does not meet the Court's own stated criteria for granting certiorari.⁴⁵ As described below, federal takings claims rely directly and unavoidably on the content of state property law because it is only when a state property right exists and then is infringed that a federal takings claim can be recognized. There are good reasons to believe that litigants will strategically select a federal forum when they believe that federal judges will diverge from the state courts on the substance of state property law. A review of denied certiorari petitions suggests such strategic forum shopping will include cases involving areas of state property law that are at the heart of climate change and climate change adaptation, such as riparian and littoral rights, public trust, and water rights. The last Section of this Part considers three ways in which the federal usurpation of state substantive property law as a result of *Knick* might be mitigated.

A. The State Property Law Content of Federal Takings Cases

As Justice Kagan highlighted in her *Knick* dissent, takings cases are different from other sorts of constitutional cases because state law — specifically property law — is so central to the substance of the claims:

And a claim that a land-use regulation violates the Takings Clause usually turns on state-law issues. In this respect, takings claims have little in common with other constitutional challenges. The question in takings cases is not merely whether a given state action meets

45. See SUP. CT. R. 10 (listing criteria for granting certiorari); *Supreme Court Procedures*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> [<https://perma.cc/4X3A-YWCH>] (last visited Jan. 31, 2020) (explaining that the Supreme Court accepts only 100 to 150 cases out of 7000 petitions for review per year).

federal constitutional standards. Before these standards can come into play, a court must typically decide whether, under state law, the plaintiff has a property interest in the thing regulated Often those questions — how does pre-existing [state] law define a property right?; what interests does the law grant?; and conversely what interests does it deny? — are nuanced and complicated.⁴⁶

The centrality of state substantive property law to takings law is underscored by what is still arguably the leading federal takings case — *Penn Coal Co. v. Mahon*.⁴⁷ In *Penn Coal*, the Court based its holding that a taking had occurred in part on the grounds that the mining restriction took a property interest specifically recognized by Pennsylvania law — the support estate.⁴⁸ As Stewart Sterk argues, the Takings Clause thus does not protect any particular set of rights in property, but rather protects against uncompensated changes in the particular set of property rights recognized under state law.⁴⁹

This is as true with respect to alleged physical takings as it is for alleged regulatory takings. In the physical invasion cases like *Loretto v. Teleprompter Manhattan CATV Corp.*,⁵⁰ or the easement exaction cases like *Dolan v. City of Tigard*,⁵¹ there could be no constitutional violation if the party claiming compensation did not own, under state law, the physical space at issue and, in particular, the right to exclude from that physical space. In the regulatory takings cases like *Penn Central*,⁵² there could not even conceivably be a taking unless the

46. *Knick*, 139 S. Ct. at 2187 (Kagan, J., dissenting) (citations omitted).

47. 260 U.S. 393 (1922).

48. *Id.* at 414.

49. See Sterk, *supra* note 4, at 222 (“[I]f state law did not create property in the first instance, then subsequent state action cannot take property.”). Thomas Merrill rightly argues that the U.S. Constitution limits the categories of property a state can recognize — a state cannot, for example, establish property rights in obscenity or human persons. See generally Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000). But these limits are largely irrelevant in practice, as states do not generally seek to establish property outside of what Merrill describes as the federally permissible property categories.

50. 458 U.S. 419 (1982).

51. 512 U.S. 374 (1994).

52. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). A study of takings decisions by state courts by James Krier and Stewart Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35 (2016), does not undercut the view state court takings decisions can turn more on the definition of state property rights than the application of the formal doctrinal tests for whether a taking occurred. Krier and Sterk conclude that the state regulatory takings decisions largely ignore or give lip service to the U.S. Supreme Court case law, with the overall effect that the state courts consign property rights disputes to the political branches. *Id.* at 92–95. At the same time, Krier and Sterk acknowledge that the United States Supreme Court decisions themselves clearly leave room for state courts to determine what the doctrinal tests

challenged state action — the building prohibition — infringed on a property interest protected under state law. If Penn Central had no rights to the airspace above the Grand Central Terminal under New York zoning law before the landmark designation, the case could have been decided with one sentence; there would be no need for the application of a fact-based, ad-hoc test to determine whether there was a regulatory taking. The Supreme Court’s recent decision in *Murr v. Wisconsin* underscored the centrality of substantive property law in takings cases,⁵³ and can be understood as an affirmation of federal judicial deference to state substantive property law.⁵⁴

Moreover, it is not just relatively discrete positive law like title statutes and zoning regulations that are central to takings inquiries, but also amorphous, and thus readily-subject-to-varied interpretation, aspects of state substantive property law. In *Lucas v. South Carolina Coastal Council*, the majority expressly recognized that background principles of state property law could limit the scope of rights included in property ownership, even if those limits were not expressed in a statute or regulation or other specific positive law source at the time

mean in practice; indeed Krier and Sterk suggest that the Supreme Court’s takings jurisprudence has a substantially rhetorical or performative purpose. *Id.* at 40, 83–84. Krier and Sterk do not include a category in their database for decisions where the state court found that there was no protected property interest under state law at issue and hence there could be no taking whatever formal tests for a taking applied. Instead, in at least some cases, they appear to categorize such cases as ones where the state court simply disregarded an applicable Supreme Court rule, such as the rule that permanent physical occupations are per se compensable under *Loretto v. Teleprompter*. 458 U.S. 419 (1982). For example, in *S. W. Sand & Gravel, Inc. v. Cent. Ariz. Water Conservation Dist.*, 212 P.3d 1 (Ariz. Ct. App. 2008), which Krier and Sterk categorize as a case disregarding the *Loretto* per se rule, the Arizona court addressed property rights under Arizona water law, which like the water law of many arid Western states, is anything but straightforward. The Water District, as part of a water conservation and aquifer recharge project, diverted water to a river that abutted a gravel company’s land, with the result that the water levels below the land rose and the gravel business was disrupted. The Arizona court explained that, under Arizona water statutes as construed by the state courts, the State reserves the right to use natural channels to move and restore water because “[Plaintiff] South West took its property subject to Arizona’s reservation of natural channels to move and store water” and [t]he [Water] District was using that channel for the intended statutory purpose, . . . [n]o taking can arise from such activity.” *Id.* at 5.

53. See *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (2017) (instructing that in determining the denominator for purposes of estimating the diminution in value borne by the claimant, courts should give “substantial weight” to the treatment of the land “under state and local law.”).

54. *Id.* at 1948 (“[T]he treatment of the property under state and local law indicates petitioners’ property should be treated as one when considering the effects of the [building] restrictions. As the Wisconsin courts held, the state and local regulations merged Lots E and F.”).

title was acquired.⁵⁵ *Lucas*, in particular, was referring to state common law of nuisance, but the background principle category could be and has been interpreted to include public trust, custom, and nuisance or harm principles based not just on common law but also on state constitutional and statutory sources.⁵⁶ All of these background principles are subject to different understandings. In most cases, there is no single clear answer regarding these background principles.⁵⁷

55. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992).

56. On background principles and the diverse ways in which they have been interpreted by state courts, see Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321 (2005); James L. Huffman, *Background Principles and the Rule of Law: Fifteen Years after "Lucas"*, 35 ECOLOGY L.Q. 1 (2008); Christine A. Klein, *The New Nuisance: An Antidote to Wetland Loss, Sprawl, and Global Warming*, 48 B.C. L. REV. 1155 (2007).

57. The *Knick* case is an apt example. At the time the Scott Township ordinance was enacted, Pennsylvania case law suggested a background common law principle in Pennsylvania law (as in the law of most states) that cemeteries on private land have a distinct status imposing special obligations on the landowner. The relevant Pennsylvania cases, though, are old and not exactly on point. Other states by common law and/or statute require access for either family members or sometimes the general public to cemeteries on private land. See Brief of Cemetery Law Scholars as Amici Curiae in Support of Respondents at 6–25, *Knick v. Township of Scott*, 138 S. Ct. 2162 (2019) (No. 17-647) (detailing the law regarding cemetery access). The Scott Township ordinance allowed “not unreasonable” access to a cemetery by the public during daylight hours. A Pennsylvania statute enacted a few years after the ordinance required that any “individual” have “reasonable access” to a cemetery. See Brief for Respondents, *supra* note 25, at 10–19 (describing both the ordinance and the Pennsylvania statute). It is not clear whether the Pennsylvania statute allows access to a narrower or broader range of people or under less onerous or more onerous (to a landowner) conditions than does the ordinance, as the statute (like the ordinance) contains open-ended terms and has not been judicially construed. A court might, as Scott Township urged, conclude that the ordinance only codified common law and thus took nothing away from *Knick*. A court alternatively could conclude that the access required by the ordinance exceeded that required by common law, but in that case, the court would have to determine by how much the required access exceeded the common law requirement. Moreover, because the Pennsylvania statute could be taken as evidence of what the common law required, as the legislature was apparently seeking to codify the common law, a court might need to determine if the access required by the ordinance in fact exceeded the access required by the Pennsylvania statute. The court thus might find itself, explicitly or implicitly, ruling on whether the Pennsylvania statute provides access in excess of what the common law required at the time of enactment. In short, a single case involving a local ordinance would require an analysis of Pennsylvania common law that could have implications for Pennsylvania common law and statutes well beyond the confines of that single case.

B. Why Strategic Litigants Will Choose Federal Courts When They Believe Federal Courts Will Deviate from What Would Have Been the Property Law Interpretations of the State Courts

One question to be asked about the now-successful effort on the part of property-rights groups like the Pacific Legal Foundation⁵⁸ to overrule *Williamson County* is: Why would parties seeking compensation for a taking prefer a federal judicial forum to a state one? The answer is not obvious. Most property owners in takings cases (like *Knick*) are local — that is, state residents. Hence the idea that federal courts are more impartial to outsiders or strangers (which is the basis for diversity jurisdiction) is inapplicable.⁵⁹ Almost all state judges, like federal ones, come from what might be called the propertied classes and can identify with what it might mean to be subject to government regulation or intrusion.⁶⁰ Nor, as a general matter, is it any cheaper or quicker to litigate in federal court rather than state court. Indeed, Pennsylvania's inverse condemnation process — the process *Knick* sought to avoid — includes a number of safeguards to ensure timely resolution of claims.⁶¹

While there is no reason to think state courts are systematically hostile to property rights, parties claiming a taking have every reason to prefer a federal forum in one subset of inverse condemnation disputes: those where state property law is arguably unclear, but the parties and their lawyers' best estimate is that the state courts would hold that there was no property right at issue and hence no taking of a property right. In such cases, parties and their lawyers might think it plausible that they would receive a more favorable interpretation of state substantive law from the federal courts than the state courts. As discussed below, there are several reasons why a federal court might interpret state law more favorably to takings claimants than would state courts.⁶² These reasons all hold even if we (plausibly) assume that federal judges in good faith try to assess what state law is to the best of their ability, just as state judges do. That is, these reasons all have to

58. See James Burling, *Winning the Battle against Williamson County*, PAC. LEGAL FOUND. (June 25, 2019), <https://pacificlegal.org/winning-the-battle-against-williamson-county/> [https://perma.cc/4JL3-83DY] (“True enemies are most often the stuff of epic tales and movies. But in real life, our enemies are subtler; many times, they’re unknown to most. For decades, one of PLF’s enemies has been a legal precedent called *Williamson County*.”).

59. Sterk, *supra* note 4, at 235.

60. *Id.* at 235–36.

61. See Brief for Respondents, *supra* note 25, at 11 (describing Pennsylvania compensation procedures).

62. See *infra* text accompanying notes 63–72.

do with the implicit biases and motivated reasoning that the judges themselves might not realize they are subject to, but that skilled lawyers may be able to sense and strategically capitalize upon given the forum shopping now allowed by *Knick*.

The first implicit bias is based on political ideology. Property law, which inherently balances individual autonomy with social obligations and needs, inherently is viewed (in part) through a political prism.⁶³ State judicial appointments generally reflect state political culture; increasingly, federal judicial appointments reflect only the ideology of the President and the party controlling the Senate. In recent decades, this has translated into a great deal of influence on the part of the Republican Party and the Federalist Society in screening judicial appointees to ensure that they strongly identify as “conservatives.”⁶⁴ Thus, in a given state or region, it would be possible to have the federal courts dominated by conservative legal ideology even though there are few or no state court judges who self-identify as conservative. Conservative legal ideology strongly favors individual property rights and is skeptical of the efficiency, fairness, and integrity of government regulation.⁶⁵ A hero of the conservative legal movement, Justice Scalia, “was a very reliable supporter of private property rights

63. See generally Gregory S. Alexander, *Property's Ends: The Publicness of Private Law Values*, 99 IOWA L. REV. 1277 (2014) (exploring the private-public tension in property law).

64. See MICHAEL AVERY & DANIELLE McLAUGHLIN, *THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS* (2013) (tracing conservatives' dominance of the federal judiciary); Henry Gass, *The Supreme Court and Beyond, How Partisan Are America's Judges?*, CHRISTIAN SCI. MONITOR (Oct. 1, 2018), <https://www.csmonitor.com/USA/Justice/2018/1001/The-Supreme-Court-and-beyond-how-partisan-are-America-s-judges> [https://perma.cc/B9KC-NFK2] (“Federal judges have become more partisan, in part because they are all confirmed through the highly polarized US Senate confirmation process”); Brandon Lowrey, *How the Federalist Society Conquered the Mainstream*, LAW360 (Sept. 11, 2019), <https://www.law360.com/articles/1198067/how-the-federalist-society-conquered-the-mainstream> [https://perma.cc/BVJ7-PZJP] (“In sum, the Federalist Society has been able to fill a huge number of seats with stunning efficiency.”).

65. See Christopher Serkin, *The New Politics of New Property and the Takings Clause*, 42 VT. L. REV. 1, 4 (2017) (“Conservatives favor an expansive reading of the Takings Clause and would require the government to compensate for most, if not all, regulatory burdens. For conservatives, this is important as a matter of restorative justice — ensuring that property owners are made whole — and as a constraint on government.”); Roger Brooks, *The Constitution from a Conservative Perspective*, HERITAGE FOUND. (May 15, 1988), <https://www.heritage.org/political-process/report/the-constitution-conservative-perspective> [https://perma.cc/8V8M-RFJQ] (“A third canon [of conservative constitutionalism] . . . is the conviction that property and freedom are inseparably connected. Indeed, the Constitution not only makes free enterprise possible, but promotes as well the sanctity of property rights through such provisions as the Contract and Takings Clauses.”).

advocates” who consistently sided with Court majorities supporting takings claimants.⁶⁶

Conservative federal judges, precisely because of their ideological commitments to individual property rights and skepticism of regulation, may be motivated to interpret unclear areas of state property law as favoring individual property rights over the government’s arguments about the rights and needs of the community, public, or environment.⁶⁷ Imagine, for example, a case in California about the extent of public trust requirements of public access over the dry sand in beachfront property. Imagine, too, there is no California case precedent squarely on point, and that the Ninth Circuit in a second Trump presidency has a super-majority of Trump appointees, whereas the California state courts reflect California’s very different political culture. In such circumstances, it seems quite plausible the federal courts would interpret unclear California law as embedding a more robust right to exclude than would the state courts. In other words, given that it is the legitimate role of state courts to interpret state law, the forum shopping enabled by *Knick* will result in an incorrect and yet legally binding interpretation of California law.⁶⁸

Another difference between lower court federal and lower court state judges is that the latter, but not the former, have a very strong incentive in interpreting substantive property law to avoid an interpretation that will result in a reversal by the state supreme court. It is fair to assume that judges in a judicial hierarchy do not like to be reversed.⁶⁹ When a federal court of appeals tries to estimate what the

66. John D. Echeverria, *Antonin Scalia’s Flawed Takings Legacy*, 41 VT. L. REV. 689, 693 (2017).

67. As Daniel Kahan explains:

[M]otivated cognition refers to the unconscious tendency of individuals to fit their processing of information to conclusions that suit some end or goal

The end or goal *motivates* the cognition in the sense that it directs mental operations — . . . sensory perceptions; . . . assessments of the weight and credibility of empirical evidence, or performance of mathematical or logical computation — that we expect to function independently of that goal or end.

Chris Mooney, *What Is Motivated Reasoning? How Does It Work?* Dan Kahan Answers, DISCOVER (May 5, 2011), <http://blogs.discovermagazine.com/intersection/2011/05/05/what-is-motivated-reasoning-how-does-it-work-dan-kahan-answers/> [https://perma.cc/SH3G-J6BK].

68. In theory, takings cases could arise in a state with a very conservative state court judiciary but with federal judges thought to be liberal. But in such cases, parties bringing inverse condemnation claims would have more incentive to choose the state forum than the federal forum, so there would be no distortion in state substantive property law.

69. See JEFFREY BRAND-BALLARD, LIMITS OF LEGALITY: THE ETHICS OF LAWLESS JUDGING 70–71 (2010) (discussing judges’ dislike of reversal); LEE EPSTEIN ET AL., THE

state supreme court would rule in an area where the state case law is unclear, the judges do not really have to worry that their interpretation will be reversed by the U.S. Supreme Court, as it almost certainly will never grant certiorari and review their interpretation. By contrast, lower state court judges face a realistic scenario in which a superior state court will reverse their interpretation of substantive state law. This possibility of reversal creates a motivation for state judges to strive to adhere to the views and principles of the state supreme court that federal judges do not have.

Further, when an interpretation of state precedent would have a disruptive effect on state government — perhaps throwing existing programs into turmoil and threatening the meeting of felt public needs — state judges may be more capable of understanding those possible consequences than federal judges.⁷⁰ Those programs address public needs in places and communities in which or at least near where state judges live, and it is they, not federal judges, who will hear the bulk of any ensuing litigation.

Finally, state judges simply have a better understanding of state law and state institutions because they live state law and interact with state institutions on a daily basis.⁷¹ Of course, federal judges can learn about state property law and its nuances, but because they begin with much less knowledge, it is also possible that well-financed clients with excellent lawyers can convince a federal judge of an interpretation of state law that state court judges would not find persuasive. Moreover, especially when the defendant governments are small local governments, the plaintiffs in takings cases may have greater resources for legal representation than the defendants.⁷²

BEHAVIOR OF FEDERAL JUDGES 83–85 (2013) (discussing evidence of reversal aversion among federal judges).

70. Steven Eagle dubs what he calls “the proclivity of judges to perceive acutely the state’s needs” as a potential state court bias in takings litigation. Steven J. Eagle, *Judicial Takings and State Takings*, 21 WIDENER L.J. 811, 825 (2012). But one could as readily dub federal courts’ greater remove and lesser understanding of state regulatory needs as a federal court bias.

71. Justice Kagan made this point powerfully in her *Knick* dissent. See *Knick v. Township of Scott*, 139 S. Ct. 2162, 2187–89 (2019) (Kagan, J., dissenting). A number of leading academics have emphasized the federal courts’ lack of understanding of state and local law as a rationale for judicial federalism. See, e.g., Roderick Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 GEO. WASH. L. REV. 888 (2006).

72. For a discussion of takings law that addresses the limited financial capacities of small localities, see Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624 (2006).

None of these differences between federal and state judges matter where state substantive property law is clear. But in the many cases of unclear substantive state property law, for the reasons listed above, federal judges may be more likely than state ones to find that there is no background principle that would negate a property rights claim. Or they may be more willing than state judges to stretch a precedent's or statute's language to support a property rights claim. Since it is ultimately the state courts in our constitutional order who are supposed to have the final say on the content of substantive state law, another way of stating the point is just this: strategic takings litigants will prefer federal courts when they think federal courts will get the substance of state law wrong. And sometimes, litigants will correctly predict that federal courts will get it wrong.

i. Understanding Knick's Possible Effects Through an Examination of Denials of Certiorari Petitions

One way to get some sense of the possible substantive state property law implications of *Knick* is to consider the cases in which the purported victim of an uncompensated taking was willing to litigate through the state courts all the way to filing a petition for certiorari in the U.S. Supreme Court. These cases involve highly motivated, well-resourced parties — parties who, it is reasonable to suppose, would have pursued litigation in the federal courts from the outset if they had believed they would receive a more favorable reception there than in the state courts.⁷³ I reviewed denied certiorari petitions involving takings claims in which the government had prevailed in the state courts for the years 2010–2017 using a variety of Westlaw searches. Overall, I identified 34 denied certiorari petitions filed during this period that involved a takings claim in which the government prevailed in state court.⁷⁴ Seven of the 34 petitions involve efforts by the petitioners to convince the U.S. Supreme Court to set aside a state court's interpretation of state property law; none of these petitions argues a judicial taking theory, but rather simply that the state court got state law wrong. The Supreme Court refused to grant certiorari and reread state law in all these seven cases, but after *Williamson*

73. Litigating a case all the way to the highest court in a state and then seeking certiorari from the U.S. Supreme Court necessitates both motivation and financial resources, either on the part of the nominal litigant or aligned groups willing to provide financing or pro bono legal services.

74. A full list of these petitions is available from the author. Only the ones relevant to the question of the content of state property law are discussed in the text.

County, the lower federal courts might well have no choice but to hear and decide many cases similar to these.

As explored in the discussion below, these denied petitions underscore that the reversal of *Williamson County* will compel federal courts to decide complicated state law issues of riparian and littoral rights, water law, and public trust that, in our constitutional order, should be decided by the state courts. These are also areas of law that are critical for climate change adaptation, which requires sensitivity to local physical conditions and local culture and which, therefore, should be (at least primarily) the domain of state institutions and state law.⁷⁵

*Maunalua Bay Beach Ohana 28 v. Hawaii*⁷⁶ involves the law of accretions and avulsions, an area of law that is receiving attention of late because of climate change-induced beach erosion and public efforts to address it.⁷⁷ In 2003, the Hawaii legislature enacted a law that provided that the state owned all future accretions, except for accretions that replaced land previously lost to erosion, in which case the landowner bordering the accretion owned the accretion.⁷⁸ The Hawaii Intermediate Court of Appeals held that possible future accretions under Hawaii law were not “vested” property, so that the Hawaii legislature did not deprive littoral landowners of a property interest they owned under state law. The court relied on two strands in Hawaii law: cases regarding future rights to a natural resource that

75. Another area where the *Knick* decision may force the federal courts into murky state law is the area of fair market valuation for purposes of eminent domain, which the federal courts have long left to the states and which is anything but uncomplicated. Some of the denied petitions I reviewed in effect asked the Court to rule unlawful a valuation method used by a state that was less favorable to them than methods used in some other states. *See, e.g.*, Petition for Writ of Certiorari, City of Milwaukee Post No. 2874 Veterans of Foreign Wars v. Redevelopment Auth. of Milwaukee, 130 S. Ct. 3493 (2010) (No. 09-1204) (challenging the Wisconsin courts’ use of the undivided fee rule in eminent domain, whereby the fair market value of a condemned building is assessed based on valuing the total building rather than by separately valuing components and the total valuation is then allocated among component owners).

76. Petition for Writ of Certiorari, *Maunalua Bay Beach Ohana v. Hawaii*, 131 S. Ct. 529 (2010) (No. 10-331).

77. “Accreted land is dry land added to an upland parcel caused by the slow attachment of sediment, ‘by small and imperceptible degrees.’” Josh Eagle, *Taking the Oceanfront Lot*, 91 IND. L.J. 851, 874 n.132 (2016) (quoting *Jones v. Johnston*, 59 U.S. (18 How.) 150, 156 (1855)). As Josh Eagle explains:

In many, but not all states, the law distinguishes between these slow forms of change and rapid forms of change: where change occurs slowly, the legal coastline moves with the water line; where it occurs rapidly, the legal coastline remains where it was prior to the event All rapid change is generally known as “avulsion.”

Id.

78. HAW. REV. STAT. ANN. § 501-33 (2019).

were not yet being exercised and cases regarding the Hawaii public trust doctrine as applied to submerged shoreline areas.⁷⁹ According to the Hawaii appellate court, Hawaii case law made the right to future accretions an inherently contingent right subject to legislative actions motivated by public trust-like concerns related to the ocean and shoreline. The petitioners argued that the Hawaii courts were mistaken in finding that there was no vested right in future accretions and, in effect, asked the Supreme Court to reject Hawaii's interpretation of its own background principles of state law. In the post-*Knick* legal regime, a federal district court and a federal appellate court might well have been tasked to sort out the arcane complexities of Hawaii property law as they bore on the challenged state statute, and those federal courts could have come to different conclusions than did the Hawaii state court.

In a number of petitions, the petitioners, in effect, asked the Supreme Court to re-conceive the state water law system in a way that could throw water institutions and planning into turmoil. For example, in *Kobobel v. Colorado*, the State of Colorado issued cease and desist orders prohibiting well owners from pumping water from their irrigation wells until the water court entered a plan for water-supply augmentation.⁸⁰ The well owners complied with the cease and desist orders but contended that the state's action rendered their farming operations essentially worthless, thus entitling them to compensation for the unconstitutional taking of their vested property rights.⁸¹ The Colorado water court and the Colorado Supreme Court held that the well owners' takings argument misconceived the scope of their water rights, explaining that under Colorado's prior appropriation doctrine, the well owners' vested priority date has always been subject to the rights of senior water rights holders and the amount of water available in the tributary system.⁸² The petitioner argued that the Supreme Court should correct the Colorado courts' misunderstanding of the water property rights regime in Colorado and recognize that the State had taken their property in water withdrawal rights. If the Supreme Court had so held, that would have destabilized the complex, nuanced prior appropriation and augmentation system that allows the Colorado

79. *Maunalua Bay Beach Ohana 28 v. State of Hawaii*, 222 P.3d 441, 460–61 (Haw. Ct. App. 2009).

80. *Petition for Writ of Certiorari at 3, Kobobel v. Colorado*, 132 S. Ct. 252 (2011) (No.11-111).

81. *See id.*

82. *Kobobel v. State Dep't of Nat. Res.*, 249 P.3d 1127, 1137 (Colo. 2011).

economy and burgeoning population to function under conditions of continuing water scarcity.⁸³

In *Nies v. Town of Emerald Isle*, the petition challenged a North Carolina statute that purported to codify a public trust and customary right of public and governmental access over privately held dry beaches.⁸⁴ The North Carolina courts held that the specific public access of which the petitioners complained — the local government driving over dry sand for emergency and other public needs — was not a taking but rather an activity that was permitted without compensation because of longtime limitation in private title rooted in state public trust doctrine.⁸⁵ The petitioners essentially asked the Supreme Court to mandate a version of the public trust in North Carolina that differed from what the North Carolina courts understood the public trust doctrine of that state to be. Public trust is an area of law where great variation among the states has long dominated, reflecting different histories, legal traditions, and physical conditions in the states.⁸⁶ If *Knick* opens the federal courts to interpret public trust in the different states, public trust might become more homogeneous and less suited to local conditions.

One might reply to my criticisms of the way in which *Knick* invites federal usurpation of state property law with the point that *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*⁸⁷ already had done so and that *Knick* thus is in line with

83. For other examples of certiorari petitions asking the Supreme Court to correct state courts' alleged mistakes regarding state water law and water institutions, see Petition for Writ of Certiorari, *Del Mar v. Imperial Irrigation Dist.*, 133 S. Ct. 312 (2012) (No. 12-53) (arguing that the allocation of water to urban areas by the Imperial Irrigation Water district effected a taking of the water rights of rural landowners); Petition for Writ of Certiorari, *E-L Enterprises, Inc. v. Milwaukee Metro. Sewage Dist.*, 131 S. Ct. 798 (2010) (No. 10-448) (arguing that the Wisconsin Supreme Court erred in holding that the local government had no liability for groundwater withdrawals under Wisconsin law).

84. Petition for Writ of Certiorari at 3, *Nies v. Town of Emerald Isle*, 138 S. Ct. 75 (2017) (No. 16-1305).

85. See *Nies v. Emerald Isle*, 780 S.E.2d 187, 197–99 (N.C. App. 2015).

86. Brief in Opposition at 36, *Nies*, 138 S. Ct. 75 (No. 16-1305) (arguing that “[i]n this unique area, different States have developed, over centuries, different laws to address different local circumstances, history, and customs. Such differences in State policy and custom that shape unique beach property laws are the birthright of our federalist system.”). See generally Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 *ECOLOGY L.Q.* 53 (2010).

87. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702, 713–14 (2010) (suggesting that a state court can take property under the Fifth Amendment by eliminating established property rights but concluding that the Florida courts had not done so in this case).

current law. To an extent, that is true: to determine whether a judicial taking had occurred, a federal court would need to characterize both the state law before the alleged judicial taking and after and in some cases that would entail rejecting the state courts' characterization of their own property law as essentially constant. However, it is important to recall that in *Stop the Beach*, only a plurality of justices endorses the judicial takings category,⁸⁸ and under the pre-*Williamson County* regime, any judicial takings cases would be heard by only one court — the U.S. Supreme Court — and then only on certiorari.⁸⁹ And indeed, the Supreme Court has not accepted certiorari on any case styled as a judicial taking case since *Stop the Beach*.

C. Mitigating *Knick's* Intrusion into Substantive State Property Law

If the preceding analysis is correct, the question arises: Is there any way to mitigate the distortions to state property law that *Knick's* opening of the federal courts to takings claims otherwise would result in?

This Section considers three possible paths of mitigation: abstention, state legislative and state court corrections, and federal court certification. Under prudential abstention as established by *Railroad Commission of Texas v. Pullman Co.*⁹⁰ and *Burford v. Sun Oil Co.*,⁹¹ federal courts can abstain from hearing cases that turn on unclear issues of state law, but the federal courts are unlikely to consistently rely on these abstention doctrines to avoid deciding takings cases in the wake of *Knick*. Some of the “mistakes” in state substantive law created by the federal courts could be corrected by state courts and legislatures, but the opportunities for such corrections may be very limited in reality. Perhaps the most promising means of mitigating *Knick's* effects on state substantive property law would be for federal courts to routinely certify state property law issues to the relevant state supreme court. While certification, too, has its limits, it should be encouraged by the Supreme Court and federal courts of appeals in inverse condemnation suits, and the state courts and legislatures should adopt rules that allow for certification in the widest possible set of circumstances.

88. Only Justices Scalia, Roberts, Thomas, and Alito joined the plurality opinion, and only the plurality opinion acknowledged that there could be a valid judicial takings claim. *Id.* at 706.

89. See *supra* text accompanying notes 17–21 (describing the jurisdictional limits imposed by *Williamson County*).

90. 312 U.S. 496 (1941).

91. 319 U.S. 315 (1943).

i. Abstention and Justice Sotomayor's Question

At one of the oral arguments in *Knick*, Justice Sotomayor suggested that overturning *Williamson County* would not necessarily guarantee property owners a federal forum for takings claims because federal district courts could abstain from hearing these cases under one of the prudential abstention doctrines that the Supreme Court has recognized.⁹² Indeed, some federal circuits before *Williamson County* did employ abstention doctrines in takings cases to either stay federal proceedings pending the outcome of a state lawsuit (as in *Pullman* abstention) or to dismiss the federal proceeding altogether (as in *Burford* abstention).⁹³ *Williamson County* effectively removed the occasion for courts to consider *Pullman* or *Burford* abstention in takings cases: because *Williamson County* generally required federal courts to dismiss federal takings claims on ripeness grounds, federal courts no longer needed to engage the question of whether dismissal was proper and prudent under an abstention doctrine.⁹⁴ Now, with *Knick's* overruling of *Williamson County*, one might suppose federal district courts might revert to pre-*Williamson County* abstention practices in takings cases, and appeals courts might allow them to do so.

There are several reasons, however, to doubt that, post-*Knick*, federal courts will feel free to abstain in inverse condemnation suits brought pursuant to Section 1983. For one, at least in theory, both *Burford* and *Pullman* abstention are supposed to be extraordinary, exceptional acts of prudential judicial discretion, and thus not to be readily exercised.⁹⁵ Even before *Williamson County*, the Supreme Court in *Hawaii Housing Authority v. Midkiff*⁹⁶ and the Ninth Circuit in *Pearl Investment Co. v. San Francisco*⁹⁷ expressed doubts about the appropriateness of abstention in inverse condemnation suits. Given

92. Transcript of Oral Argument at 5–9, *Knick v. Township of Scott*, 138 S. Ct. 1262 (2018) (No. 17-647).

93. 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, 596–603 (2016).

94. *Id.* at 571.

95. See STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS § 6:20 (2018) (“Moreover, the Court has subsequently made clear that federal courts have a ‘virtually unflagging obligation’ to exercise jurisdiction, and abstention, including *Burford* abstention, is only appropriate in extraordinary or unusual circumstances.” (citations omitted)).

96. 467 U.S. 229, 237 n.4 (1984).

97. 774 F.2d 1460, 1465 n.3 (9th Cir. 1985).

that (under *San Remo*) issue preclusion in effect may eliminate any advantage a litigant would have in bringing a federal suit after the state court had resolved issues essential to the federal takings claim, many federal courts might feel that abstention is unfair to the party claiming a taking. Issue preclusion at a minimum would provide a litigant who had chosen the federal forum with a powerful argument as to why the federal court should not abstain.⁹⁸ Indeed, the rhetoric of the *Knick* opinion, with its denunciation of the “preclusion trap” and its emphasis on the importance and high stature of property rights,⁹⁹ suggests lower federal courts almost always should decline to abstain in inverse condemnation takings cases.

Moreover, even if the courts of appeals and Supreme Court do not read *Knick* as precluding abstention and instead leave it to the district courts to decide whether to abstain in inverse condemnation suits, it seems plausible to believe that those judges who are comparatively more concerned with fidelity to state law and the operation of state regulatory institutions will abstain, while those who are comparatively more concerned with safeguarding property rights will choose not to abstain, all else being equal.¹⁰⁰ The question of whether state law is so unclear and the state law issues so complex that abstention is appropriate may often be one upon which federal judges, in good faith, can disagree. Albeit unconsciously, the ideological commitments of judges may influence their views on whether the abstention is appropriate. In other words, because of the broad discretion that a federal judge has over whether to abstain, the most conservative judges within the federal judiciary after *Knick* may hear an outsized proportion of the takings cases involving unclear state law.

If that is true, abstention doctrine operating in conjunction with *Knick*’s removal of the state litigation requirement may result in a body of federal interpretations of substantive state property law that diverges *more* from what the state courts would have decided than

98. See STEINGLASS, *supra* note 95, § 6:19 (“The Supreme Court’s decision in *San Remo Hotel v. City and County of San Francisco* effectively precludes property owners from filing § 1983 taking claims in federal court and relying on *Pullman* abstention as a strategy for retaining access to federal court while giving state courts an opportunity to apply state compensation remedies.”).

99. See *Knick v. Township of Scott*, 139 S. Ct. 2162, 2169–72 (2019) (employing strong rhetoric criticizing *Williamson County* and exalting property rights protections).

100. A district court’s decision whether or not to abstain is subject only to review for abuse of discretion. See, e.g., *Garamendi v. Allstate*, 47 F.3d 350, 354 (9th Cir. 1995) (“[T]he district court’s decision whether or not to abstain is reviewed for an abuse of discretion.” (citations omitted)).

would have been the case in the absence of judges having any discretion to decide whether to abstain.

ii. Legislative and State Court Corrections

Another possible means of mitigating the distortions *Knick* may create in terms of substantive state property law would be for the state courts and/or legislatures to correct any errors regarding state law in federal courts' opinions in inverse condemnation cases. For instance, a state supreme court could simply rule that what the United States District Court for the District of Colorado said about prior appropriation and riparian rights under Colorado law was a misstatement of state law. Or the state legislature could pass a law clarifying exactly what those rights are. Any such action on the part of the state courts or state legislature could not undo final federal decisions, but it could prevent future reliance on misstatements of state law by the federal courts.

Such corrections, however, are not readily achieved. State courts cannot *sua sponte* correct federal court misinterpretations of state law: there needs to be a case brought to the state courts involving the same issue of state law, and there may never be such a case, or at least there may not be one for many years. The longer a federal court remains on the books with its misinterpretation of state law, the more people — including, notably, state and local government officials — will be forced to rely on that interpretation, to the point that it may become a *de facto* reality that a state court will hesitate to overturn.

Legislatures, of course, are not limited to expressing views in cases brought by litigants. However, legislatures generally operate under conditions of limited resources for legislating. It takes a great deal to get a bill written, introduced, vetted, and actually enacted. A legislature thus may seek to act, if at all, only on issues with the most powerful interest group backing or the most salience for media coverage and the general public;¹⁰¹ otherwise, legislative inertia may carry the day.¹⁰² Thus, state legislatures may not seek to correct

101. This, at any rate, is how state legislators are understood in the highly influential “public choice” school of political economy. See, e.g., Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355, 1357 (1993) (describing a model of state legislation as “the products of self-seeking, poorly monitored state legislators who act within a zone of discretion and opportunistically accommodate interest groups”).

102. On legislative inertia, see, for example, Richard Neely, *Obsolete Statutes, Due Process, and the Power of Courts to Demand a Second Legislative Look*, 131 U. PA. L. REV. 271, 274 (“[A] legislature is not a neutral, majoritarian body that impartially

misinterpretations of state law by federal courts except in cases where there is great disruption and outrage caused by the federal decision.¹⁰³

iii. Certification: The Limits of Certification, and Reforms

The ideal solution to *Knick's* de facto requirement that federal courts decide even uncertain substantive property law issues is for the federal courts to certify the legal issues to the relevant state supreme court. However, there are already substantial delays regarding certification requests in some states (notably California¹⁰⁴), and an increase in certification requests because of *Knick* could increase delays to the point where litigants and federal courts would forego considering certification. As it is, certification is always based on the judge's assessment of whether the state law is uncertain enough to warrant certification, and, as such, may be avoided by the very federal judges who are relatively inattentive to the complexities of state law in the first place. Thus, certification poses some of the same problems as abstention as a means of mitigating *Knick's* intrusion into state substantive law.

In addition, some federal courts of appeal have expressed a somewhat restrictive, hesitant attitude toward certification as a general matter, which may mean that they will not readily certify state property issues to state supreme courts and that the district courts within these circuits may likewise understand that they should eschew certification.¹⁰⁵ Finally, while certification to the state supreme court

studies all intelligent suggestions for law changes; rather, it is a machine deliberately, intelligently, and efficiently designed to say 'no' unless some Herculean force kicks it in its institutional tail."); Molly J. Walker Wilson & Megan P. Fuchs, *Publicity, Pressure, and Environmental Legislation: The Untold Story of Availability Campaigns*, 30 CARDOZO L. REV. 2147, 2179 n.107 (2009) ("[L]egislative stagnation is not unique to environmental law but is also pervasive in other legal fields and in the U.S. legal system as a whole.").

103. Even in a hypothetical case where the federal courts arrive at a different interpretation of state property law than the state courts would have, and the majority in the state legislature affirmatively supports the federal interpretation, one can say that state property law has been distorted unless that legislative majority would have invested the time and political capital to successfully override the state court interpretation.

104. See Frank Chang, *You Have Not Because You Ask Not: Why Federal Courts Do Not Certify Questions of State Law to State Courts*, 85 GEO. WASH. L. REV. 251, 269 (2017) (discussing delays). For a thoughtful discussion of the jurisprudential issues posed by certification, see Jonathan Nash, *Examining the Power of Federal Court to Certify Questions of State Law*, 88 CORNELL L. REV. 1672 (2003).

105. See, e.g., *Copier v. Smith & Wesson Corp.*, 138 F.3d 833, 838 (10th Cir. 1998) ("[J]ust because a new state law question is raised, '[c]ertification is not to be routinely

is now available in 49 states plus the District of Columbia,¹⁰⁶ the applicable state statutes and rules in a minority of jurisdictions allow for certification only from a federal court of appeals.¹⁰⁷ For a range of reasons, either property owners or governments may choose not to appeal a federal district court decision that contains a misinterpretation of substantive state property law. In some instances, an appeal by the government simply will not be possible, as (for example) where a court disagreed with the government's interpretation of state property law but nonetheless agreed there was no taking or no loss in market value and hence no compensation due.

A number of steps or reforms could facilitate more certification after *Knick*. The U.S. Supreme Court could explicitly encourage such certification. Justice Kagan's dissent in *Knick* addresses certification, but the majority is notably silent about it.¹⁰⁸ The federal courts of appeals, as distinct legal institutions, could also explicitly endorse and encourage certification in such cases. The state legislatures could increase the budgets of state supreme courts so that they could process certification requests more expeditiously. Moreover, and perhaps most obviously, states could modify their statutes and court rules to allow for certification to the state supreme court from any federal court, rather than only from a federal court of appeals.

III. HOW *KNICK* COULD BLUR CURRENT FEDERAL TAKINGS LAW DOCTRINE

Knick may not only change substantive state property law but may also move the courts toward a more property rights-protective, pro-

invoked whenever a federal court is presented with an unsettled question of state law.” (citations omitted)); *see also* Chang, *supra* note 104, at 269.

106. Chang, *supra* note 104, at 268.

107. *Id.* For example, Pennsylvania only allows for certification from a federal court of appeals or the United States Supreme Court. *See* PA. R. APP. P. 3341. Other states, such as Washington, allow certification from any federal court. *See* WASH. REV. CODE § 2.60.020 (1965) (“When . . . it is necessary to ascertain the local law of this state in order to dispose of such proceeding and the local law has not been clearly determined, such federal court may certify to the supreme court for answer the question of local law involved and the supreme court shall render its opinion in answer thereto.”); *see also* Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 167–68 (2013) (“The largest states, California, Illinois, and New York, and eight other states, including New Jersey, Pennsylvania, and Texas, chose the narrowest scope for certification. These narrow jurisdictions typically deny not only all state courts, but federal district courts the power to certify, limiting the scope of the certification provision to a single federal court of appeals or all federal courts of appeal . . .”).

108. *See Knick v. Township of Scott*, 139 S. Ct. 2162, 2188–89 (2019).

compensation version of substantive federal takings doctrine. In particular, *Knick* seems to call into question the ruling in *Tahoe* that temporary regulatory deprivations of all value are not per se compensable.¹⁰⁹ *Knick* arguably suggests that temporary regulatory deprivation of all beneficial use or economic value, at least if the temporary deprivation lasts a substantial time, is subject to the per se compensation rule set forth in *Lucas*.¹¹⁰

At least prior to *Knick*, the Supreme Court's takings doctrine was reasonably clear regarding the government's temporary physical invasions of property and temporary prohibitions on all development. In the case of both alleged temporary physical and regulatory interferences with property rights, the Court disavowed any per se rule; instead, whether the landowner was due compensation depended on a multi-factor balancing test of one sort or the other in which the duration of the government's invasion or regulatory prohibition was one factor.¹¹¹

Knick suggests, however, that a possible reading of *First English* before *First English* was clarified by *Tahoe* — that *First English* establishes that temporary takings of all beneficial use or economic value are per se compensable, with just minor exception for routine administrative delays — was correct and is the current law. *First English* is a confusing and opaque opinion, but it does contain language that supports the view (explicitly disavowed in *Tahoe*) that temporary regulatory losses of all use or value are per se compensable — the Court in *First English* did say that “‘temporary’ takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.”¹¹²

The language of the *Knick* opinion seems to embrace this reading of *First English*'s holding, as if it had not been clarified at all by the

109. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 342 (2002).

110. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015–19 (1992).

111. *See Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 38 (2012) (“When regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence *vel non* of a compensable taking.”); *Tahoe*, 535 U.S. at 342 (duration of regulatory restriction is a factor for court to consider within the context of the *Penn Central* balancing test); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982) (holding temporary physical invasions should be assessed by case-specific factual inquiry).

112. *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 318 (1987).

majority in *Tahoe*. Thus, in addition to generally holding that Fifth Amendment property rights need to be accorded the same stature as other individual rights, the *Knick* Court addresses *First English* as if it decided the question of temporary takings once and for all and *Tahoe* had never been decided:

[In *Williamson County*,] [t]he Court granted certiorari to decide whether the Fifth Amendment entitles a property owner to just compensation when a regulation temporarily deprives him of the use of his property. (*First English* later held that the answer was yes.)¹¹³

But it is not just the language of *Knick* about *First English* that suggests an implicit overruling of *Tahoe* and an affirmation of something like a per se compensation rule for temporary deprivations of use. Rather, the reasoning of the *Knick* opinion also implicitly supports this conclusion. On a certain level, the basic idea of *Knick* is that property owners deserve respect, and thus it is too disrespectful to be constitutional to make property owners wait for compensation. Therefore, property owners should not have to wait to get a hearing in the same federal forum as is available to all other victims of unconstitutional action. They should not have to wait as they litigate their takings claim way through the state courts.¹¹⁴ This idea in *Knick* is logically different from — but not so far removed from — the idea that property owners deserve respect and, therefore, it is too disrespectful to allow the government to physically occupy their property or prohibit the use of the property for months or years and get away without paying on the grounds that the government action is just temporary. Just as property owners should not have to wait through state inverse condemnation litigation to get to a federal forum that offers compensation, property owners should not have to wait to see if the government invasion of their property or regulatory prohibition is going to go on long enough that it is no longer “temporary” but rather de facto permanent and hence per se compensable. Instead, property owners burdened with “temporary” deprivations of their property should be able to access the federal courts and receive compensation as a matter of categorical right, consistent with the “full-fledged constitutional status” of the Takings Clause.¹¹⁵

113. *Knick*, 139 S. Ct. at 2174.

114. See *supra* text accompanying notes 34–44 (explicating what I term a broad reading of *Knick*).

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

If I am correct, and *Knick* in effect overrules *Tahoe*, then state and local governments may lose the regulatory flexibility that they need to arrive at pragmatic solutions to problems such as (in *Tahoe*) water pollution and loss of water quality from increasing residential development or any of a number of difficult problems associated with climate change — like flooding and land loss due to sea-level rise.¹¹⁶ As the *Tahoe* majority explained:

The interest in facilitating informed decision-making by regulatory agencies counsels against adopting a *per se* rule that would impose such severe costs on their deliberations. Otherwise, the financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether.¹¹⁷

Ultimately, *Knick's* implications for takings doctrine depend on how state courts, lower federal courts, and the U.S. Supreme Court construe and build on *Knick* in subsequent cases. That, in turn, will depend on the composition of those courts, especially the U.S. Supreme Court.¹¹⁸ With the loss of Justice Kennedy, who was a swing vote in takings cases, the Court may now have as part of its agenda an elevation of property rights concerns and a de-emphasis of environmental and other societal concerns.

116. See J. Peter Byrne, *Rising Seas and Common Law Baselines: A Comment on Regulatory Takings Discourse Concerning Climate Change*, 11 VT. J. ENVTL. L. 625, 626 (2011) (discussing litigation challenges to laws and regulations addressing sea-level rise).

117. *Tahoe*, 535 U.S. at 339.

118. Relatedly, *Knick's* holding that a constitutional right to compensation obtains as soon as the government “takes” property calls into question the constitutionally permissible range of flexibility states and localities enjoy in eminent domain procedures, and in particular in the use of “quick take” eminent domain. The federal courts have largely allowed states to fashion their own laws as to precisely when compensation will be provided when a state or local government formally condemns property. In some states, under some circumstances, the government lawfully can quick-take a property — physically seize it — while depositing the government’s estimate of just compensation in a special account. See generally 27 AM. JUR. 2D *Eminent Domain* § 630 (2019); 29 C.J.S. *Eminent Domain* § 263 (1929). If the property owner disagrees with the valuation, he or she is, in effect, dispossessed without compensation until a settlement or court award of compensation is made. Quick-take laws have been challenged in state courts, and the courts have largely upheld such laws where they are used on the grounds that exigencies required the government to possess the property immediately. *Knick* calls into question quick take laws, or at least suggests that some applications of them may be unconstitutional, because it stresses the immediacy of the right to compensation once a taking has occurred.

CONCLUSION

Knick does not read like a big opinion; it has not received a great deal of general press attention, and the media attention it did receive related mostly to the Court's discussion of stare decisis and what that discussion suggests about the Court's willingness generally to overturn its own precedents.¹¹⁹ But *Knick*, in addition to having obvious procedural implications, has the potential to federalize state property law to a degree and to move federal takings doctrine toward a more rigid, per se rule approach. Certification to state courts may mitigate *Knick's* effects. However, it seems unavoidable now, especially as state property law collides with the realities of climate change, that strategic litigants will head to federal court precisely when they think the federal judiciary will interpret state property law differently from how the state courts would have interpreted it. *Knick* thus almost certainly will compromise the state courts' unquestionably legitimate role as the final interpreters of the content of state property law.

119. See, e.g., Adam Liptak, *In Property Rights Case, Justices Sharply Debate Power of Precedent*, N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/us/politics/supreme-court-precedent.html> [<https://perma.cc/FR54-3BQN>] (focusing on the stare decisis aspect of the *Knick* decision).