

Fordham Urban Law Journal

Volume 47
Number 3 *Taking Account: Procedure,
Substance, and Stare Decisis in the Post-Knick
Era*

Article 5

2020

Rose Mary Knick and the Story of Chicken Little

Dwight Merriam

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>

Recommended Citation

Dwight Merriam, *Rose Mary Knick and the Story of Chicken Little*, 47 Fordham Urb. L.J. 639 (2020).
Available at: <https://ir.lawnet.fordham.edu/ulj/vol47/iss3/5>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

ROSE MARY KNICK AND THE STORY OF CHICKEN LITTLE

*Dwight Merriam**

Introduction.....	639
I. Learning from a Fable	640
II. We Have Been Here Before	641
III. First Reactions to <i>Knick</i>	643
IV. The Likely Impacts of <i>Knick</i> on Local Governments	647
Conclusion	656

INTRODUCTION

The case of *Knick v. Township of Scott*¹ risks becoming a fairy tale of the frightening kind if we fail to put it into perspective. With *Knick*, the U.S. Supreme Court cast aside the second prong of the ripeness test, overruling a 34-year-old precedent that a takings claimant had to first seek compensation in the state courts under state law before going to federal court. One perspective on the decision was that “*Knick* may result in the crowding of federal courts, through which myriad takings claims stemming from local regulations of zoning and land use may now pass unencumbered.”² Whether that will hold true is yet to be seen. In establishing a foundation on which to analyze *Knick*’s likely impacts on local governments (including inundation of the federal

* Dwight Merriam is a lawyer and planner in Connecticut. www.dwightmerriam.com. He is past President of the American Institute of Certified Planners, a Fellow of AICP, a Fellow of the American College of Real Estate Lawyers, a Counselor of Real Estate, and the Connecticut Member of Owners’ Counsel of America. He has published 13 books, including co-editing *Rathkopf’s Law of Zoning and Planning*. B.A., (cum laude), University of Massachusetts; M.R.P., University of North Carolina; J.D., Yale Law School.

1. 139 S. Ct. 2162 (2019).
2. *Fifth Amendment – Takings Clause – State Litigation Requirement – Knick v. Township of Scott*, 133 HARV. L. REV. 322, 330 (2019).

courts) — my self-assigned task — it is necessary to establish a certain gravitas. I start with the story of Chicken Little.

I. LEARNING FROM A FABLE

If you want to get technical about it, believe it or not, there is a formal typology of fables³ in which the story of Chicken Little is categorized: the Aarne-Thompson-Uther type 20C (including former type 2033).⁴ It is one of a class of folktales where the lesson is that we should not overreact or be led into hysteria over the littlest thing. It is the hapless Chicken Little, as you will fondly recall, who is hit on the head with an acorn and, believing the sky is falling, becomes hysterical and decides that he must tell the King.⁵ Along the way, Chicken Little runs into a string of characters, all with delightfully rhyming names, such as Henny Penny, Ducky Lucky, Drakey Lakey, Turkey Lurkey, Goosey Loosey a.k.a. Loosey Goosey,⁶ and Foxey Loxey, among others. Chicken Little recruits them all, one after another, and they join him in the quest to tell the King, allowing the storyteller an opportunity to repeat all of the names each time a character joins them, as they troop along. The cumulative or chain tale⁷ dates back to long before it was first written down, probably by the Brothers Grimm in 1812.⁸

3. See Cara Giaimo, *The ATU Fable Index: Like the Dewey Decimal System, But with More Ogres*, CHILD. LITERATURE WK. (June 14, 2017), <https://www.atlasobscura.com/articles/aarne-thompson-uther-tale-type-index-fables-fairy-tales> [https://perma.cc/H9AQ-7DDP].

4. D.L. Ashliman, *The End of the World*, UNIV. PITT.: FOLKLORE & MYTHOLOGY: ELECTRONIC TEXTS, <http://www.pitt.edu/~dash/type2033.html> [https://perma.cc/UU3U-ZX64].

5. An average acorn weighs 4.0–9.5 grams. See Jerry Tecklin & Douglas McCreary, *Acorn Size as a Factor in Early Seedling Growth of Blue Oaks*, in U.S. DEP'T OF AGRIC., PROCEEDINGS OF THE SYMPOSIUM ON OAK WOODLANDS AND HARDWOOD RANGELAND MANAGEMENT 48 (1991), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.584.8359&rep=rep1&type=pdf> [https://perma.cc/786U-B6BA].

6. “Loosey Goosey” is defined in Merriam-Webster as an adjective, “notably loose or relaxed; not tense.” MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/loosey-goosey> [https://perma.cc/3FZL-JND5] (last visited Feb. 9, 2020).

7. *Old MacDonald Had a Farm* is another example of the chain or cumulative tale that repeats itself and is iterative. *Old MacDonald Had a Farm*, SECONDHANDSONGS, <https://secondhandsongs.com/work/171732> [https://perma.cc/EKH9-D2J2] (last visited Feb. 20, 2020).

8. See JACOB GRIMM & WILHELM GRIMM, CHILDREN'S AND HOUSEHOLD TALES (1812). A second volume was published in 1815. See Mari Ness, *The Sky Is Falling! Maybe! “Henny Penny” or “Chicken Little”*, TOR.COM (May 5, 2016, 2:00 P.M.),

You see, the law can be fun; you are smiling already, and we have not yet arrived at the serious business at hand. Most interesting is how the tale ends. In one version, the fox eats them all. In another, one character survives long enough to warn and save Chicken Little. And in yet a third version, they are all saved.

With *Knick*, the end of the story is likely to be happy enough: the sky will not fall, and all can be saved. Why? Because, as we shall see, in all of the other landmark direct and indirect condemnation cases, the consequences have proved mostly unremarkable. Even so, it is essential to know the path forward in light of the new precedent in *Knick*.

II. WE HAVE BEEN HERE BEFORE

After each successive Supreme Court decision on property rights, we have imagined a parade of horrors that ultimately never appeared. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, the Court held that property owners must be compensated with money damages for their lost property from the time of the taking, even when the taking is temporary.⁹

The report of the decision, the day after it was handed down, was mostly doom and gloom: “The decision will chill the zeal of local, state, and Federal regulators of land use around the nation and encourage property owners to seek damages when they feel they have been unduly burdened by regulations”¹⁰ A *New York Times* article less than two weeks after the decision reported on the concern of local and state planners and suggested trouble ahead:

Under the Court’s ruling, governmental agencies could be made to pay potentially huge amounts rather than simply amending a regulation after it is struck down by a court. The action not only raises sharply the financial stakes involved in zoning and other land-use decisions, but has also caused many experts to agree that it could lead to a new era of caution in the imposition of controls on private property.¹¹

<https://www.tor.com/2016/05/05/the-sky-is-falling-maybe-henny-penny-or-chicken-little/> [<https://perma.cc/KB5M-GDDG>].

9. 482 U.S. 304, 320 (1987).

10. Stuart Taylor Jr., *High Court Backs Rights of Owners in Land-Use Suits*, N.Y. TIMES (June 10, 1987), <https://www.nytimes.com/1987/06/10/us/high-court-backs-rights-of-owners-in-land-use-suits.html> [<https://perma.cc/SBZ9-LYLV>].

11. Robert A. Hamilton, *U.S. Land-Use Ruling Causing Concern*, N.Y. TIMES (June 21, 1987), <https://www.nytimes.com/1987/06/21/nyregion/us-land-use-ruling-causing-concern.html> [<https://perma.cc/SY73-QS9T>].

Looking back at *First English* over 30 years later, it is impossible to see any measurable, adverse impact on governmental decision-making, planning, and land-use regulation arising from the decision. Most certainly, there have been more cases brought for compensation for temporary takings,¹² more money damages paid in California that otherwise would not have been paid,¹³ and more favorable settlements for property owners,¹⁴ but nowhere is there any report or evidence of any dramatic change. Indeed, decisions applying *First English* impose serious limitations on its application in those instances where permits are not quickly forthcoming, requiring that claimants allege and prove that their temporary takings are “extraordinary” and not merely the result of normal delays.¹⁵

The Supreme Court’s decision in *Lucas v. South Carolina Coastal Council*,¹⁶ five years after *First English*, was subject to the same initial overreaction. Norman Williams, Jr., one of the great land-use law scholars in my lifetime, authored a two-part analysis of the decision, calling it the “culmination of a trend” that would end the presumption of validity established in the state courts.¹⁷ That did not happen. A recent study of the 1700 post-*Lucas* decisions citing *Lucas* revealed that in only a minuscule 1.6% of the cases (just 27 of them) was the plaintiff property owner victorious.¹⁸ The *Lucas* decision never even made a tremendous makeweight argument.

12. See, e.g., *Caquelin v. United States*, 140 Fed. Cl. 564 (2018) (temporary taking for interim trail use).

13. See, e.g., *Roscco Holdings Inc. v. California*, 260 Cal. Rptr. 736 (Ct. App. 1989).

14. See Michelle Casady, *Long Road Remains Ahead After Hurricane Taking Ruling*, LAW360 (Dec. 18, 2019), <https://www.law360.com/articles/1229587/long-road-remains-ahead-after-hurricane-takings-ruling> [<https://perma.cc/S9Q8-SVJE>] (more favorable settlements likely following favorable court ruling). The temporary taking caused by a moratorium led to a year-long negotiation in an attempt to settle the claim, but it ultimately failed. See Tedra Fox, *Lake Tahoe’s Temporary Development Moratorium: Why a Stitch in Time Should Not Define the Property Interest in a Takings Claim*, 28 *ECOLOGY L.Q.* 399 (2011).

15. See, e.g., *Landgate v. Cal. Coastal Comm’n*, 953 P.2d 1188 (Cal. 1998) (two-year delay not a taking); *LXR RS V, LLC v. Municipality of Norristown*, No. 2:19-cv-01397-JDW, 2019 WL 4930157 at *3 (E.D. Pa. Oct. 7, 2019) (“The Supreme Court, however, has ruled that decreases in the value of property during governmental deliberations, absent an extraordinary delay, are mere incidents of ownership and do not constitute a regulatory taking.” (citing *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980))).

16. 505 U.S. 1003 (1992).

17. See Dwight Merriam, *No, Norman, The Sky Is Not Falling*, *Zoning & Plan. L. Rep.*, Jul.–Aug. 1993.

18. See Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 *IOWA L. REV.* 103, 116 (2016).

And then there is the notorious *Kelo v. City of New London*¹⁹ eminent domain decision from 2005, legally doing nothing more than restating settled law, but causing such enormous angst. The decision galvanized the masses into action when they saw how draconian eminent domain could be. The result was that 44 states changed their constitutions or statutes to address issues of what was a public use or purpose, what properties might be protected from being taken, and what compensation was fair.²⁰ Call it “losing the battle and winning the war.”²¹ If anything, *Kelo* is exemplary of how politics can be profoundly affected by a decision, even though the law has not changed.²²

III. FIRST REACTIONS TO *KNICK*

As to *Knick v. Township of Scott*, it appears we have more of the same: overreaction, hyperbole, prognostications without foundation, and idle speculation. For instance, shortly after the decision, U.S. Senator Sheldon Whitehouse saw *Knick* as part of a 73-case campaign by the “Roberts Five,” as he labels them, supported by “dark money” intent on “seeking control of our courts.”²³ As Rhode Island Attorney General in 2001, Senator Whitehouse had lost a seemingly-consequential Supreme Court takings case, *Palazzolo v. Rhode Island*.²⁴ *Palazzolo* was yet another case where the decision eliminating

19. 545 U.S. 469 (2005). See generally DWIGHT MERRIAM & MARY MASSARON, EMINENT DOMAIN USE AND ABUSE: *KELO* IN CONTEXT (2006).

20. *50 State Report Card: Tracking Eminent Domain Reform Legislation since Kelo*, CASTLE COALITION, <http://castlecoalition.org/50-state-report-card> [https://perma.cc/W8K3-NZX6] (last visited Mar. 4, 2020).

21. Adam Liptak, *Case Won on Appeal (to Public)*, N.Y. TIMES (July 30, 2006), <https://www.nytimes.com/2006/07/30/weekinreview/the-nation-case-won-on-appeal-to-public.html> [https://perma.cc/GZ4L-YVV8].

22. It has been argued that some state courts have ignored *Kelo* and continued a trend toward greater protection of private property owners. See Ilya Somin, *The Judicial Reaction to Kelo*, 4 ALB. GOV'T L. REV. 1, 3 (2011) (introduction to the Symposium on Eminent Domain in the United States); see also Patricia E. Salkin, *The Kelo-Effect in New York, New Jersey and Pennsylvania: Assessing the Impact of Kelo in the Tri-State Region* (Albany Law Sch., Working Paper No. 09-06, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1028893 [https://perma.cc/W3DY-CSZU].

23. Sheldon Whitehouse, *'Knick'-Picking: Why a Recent SCOTUS Ruling Signals a New Day*, NAT'L L.J. (July 1, 2019), <https://www.law.com/nationallawjournal/2019/07/01/knick-picking-why-a-recent-scotus-ruling-signals-a-new-day/> [https://perma.cc/7TJM-ZGQB].

24. 533 U.S. 606 (2001).

the notice defense in takings seemed momentous at the time,²⁵ yet proved to have no real effect. The doctrine of investment-backed expectations slid in, for the most part, to take its place.²⁶ It appears Senator Whitehouse cannot put the loss behind him: “Front groups funded by anonymous money manufacture legal controversies, like the Pacific Legal Foundation, which handpicked the plaintiff in *Knick* and shepherded the litigation to the high court. I happen to know a thing or two about them. They led the litigation in *Palazzolo*.”²⁷ The involvement of the Pacific Legal Foundation in both *Knick* and *Palazzolo* is probably indicative of nothing more than it being a large nonprofit legal organization that defends private property rights, with 73 lawyers and staff and 170 active cases in 2018.²⁸ As I noted in my response to Senator Whitehouse’s commentary, some pro-regulation, government planning, and land-use control advocates, such as Professor Daniel R. Mandelker of Washington University School of Law, had strongly advocated overruling the second prong of ripeness in *Williamson County*.²⁹

In his commentary, Senator Whitehouse also disparaged the Chief Justice and the rest of the “Roberts Five”: “The chief justice likes to

25. *See id.* The Court ruled five to four that the owner of 20 acres of Rhode Island waterfront property had the right to go to court to challenge development restrictions even though the restrictions were in place when he acquired the property. Advocates of property rights hailed the decision as a substantial victory. *See also* Linda Greenhouse, *Justices Rein in Local Regulation of Tobacco Ads*, N.Y. TIMES (June 29, 2001) <https://www.nytimes.com/2001/06/29/us/supreme-court-supreme-court-roundup-justices-rein-local-regulation-tobacco-ads.html> [https://perma.cc/GT5T-GEDY].

26. *See, e.g.*, *Wilkie v. City of Boiling Spring Lakes*, 821 S.E.2d 901 (N.C. Ct. App. 2018) (reasonable investment-backed expectations).

27. *See* Whitehouse, *supra* note 23. *See* my reply at Dwight Merriam, *Viewpoint: Senator Is Wrong About ‘Knick’ Ruling*, CONN. L. TRIB. (July 2, 2019), <https://www.law.com/ctlawtribune/2019/07/02/viewpoint-senator-is-wrong-about-knick-ruling/> [https://perma.cc/R2D5-UFFH]; *see also* James Burling, *Sen. Whitehouse Is Wrong About Public Interest Law*, NAT’L L.J. (Oct. 4, 2019), <https://www.law.com/nationallawjournal/2019/10/04/sen-whitehouse-is-wrong-about-public-interest-law/?slreturn=20190929134733> [https://perma.cc/JQY9-J2NU]. Anthony Palazzolo became my friend. I came to know him in interviewing him for my writings. He was a junk and scrap dealer who studied the law. He knew more about the leading takings cases and the line-up of the justices and their views than I will ever know. He was a wonderful man.

28. PAC. LEGAL FOUND., <https://pacificlegal.org> [https://perma.cc/NY7R-CVEH] (last visited Mar. 4, 2020).

29. *See* Merriam, *supra* note 27; *see also* *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). *Williamson County* established the two-prong test for determining the ripeness of a federal takings claim, requiring (1) a final decision by the entity enacting the regulation (the finality prong); and (2) that the plaintiff sought compensation first from the state (the compensation prong). *Id.*

say his court isn't partisan; that's because people believing that helps him be partisan. But it's actually worse. The Roberts Five have become virtual delivery boys for big Republican donor interests, almost daring us to point out the obvious pattern."³⁰ As with his attack on the Pacific Legal Foundation and indirectly on Professor Mandelker, Senator Whitehouse's claim that Republican donors have turned the "Roberts Five" into "virtual delivery boys" is unsubstantiated and misses the mark.

Cogent, yet probably exaggerated, speculation on the impacts of *Knick* was made the day of the decision by the dissenters, in an opinion written by Justice Kagan and joined by Justices Ginsburg, Breyer, and Sotomayor. They identify three adverse impacts of the decision. First, they believe that "it will inevitably turn even well-meaning government officials into lawbreakers" who "will almost inescapably become constitutional malefactors."³¹ What they mean is that because takings are now deemed to occur at the moment the property is unconstitutionally encumbered and before a court may render a decision on whether it is a taking or not, the public official is put in an untenable position. However, is this not essentially the same situation a police officer is in when making a stop or a zoning enforcement officer when issuing a cease and desist order to remove a sign? The civil rights violation occurs at the moment of action.

Second, the dissenters argue, correctly, that it is "more important" that the federal courts may be overwhelmed with run-of-the-mill local land-use controversies. They write that "the majority's ruling channels to federal courts a (potentially massive) set of cases that more properly belongs, at least in the first instance, in state courts — where *Williamson County* put them."³² Furthermore, the dissenters state: "Today's decision sends a flood of complex state-law issues to federal courts. It makes federal courts a principal player in local and state land-use disputes. It betrays judicial federalism."³³ This may well prove to be true, to some limited extent.

Finally, the dissenters express concerns about the apparent disregard for the doctrine of stare decisis in overturning precedent

30. See Whitehouse, *supra* note 23. In my response, I addressed some of the issues I saw in Whitehouse's commentary, pointing out that pro-government types like Professor Daniel R. Mandelker have supported overturning *Williamson County* for decades. See Merriam, *supra* note 27.

31. *Knick v. Township of Scott*, 139 S. Ct. 2162, 2187 (2019) (Kagan, J., dissenting).

32. *Id.*

33. *Id.* at 2189.

dating back 34 years.³⁴ One could argue that it is not an issue of stare decisis to overturn a wrongly-decided case. Regardless, the question of whether setting aside *Williamson County*'s second prong of ripeness violates the principle of stare decisis and portends decisions to overturn other precedent is not central to the decision's impact on local governments.³⁵ The reality is that *Williamson County* had already been weakened and was identified by some as wrongly-decided, or at least proven to be ill-considered and impractical in its application.

The Court first weakened the precedent in 1997 in *Suitum v. Tahoe Regional Planning Agency*, where it characterized the compensation prong in *Williamson County* as merely prudential, not a jurisdictional rule.³⁶ Then, in 2005 in *San Remo Hotel, L. P. v. City and County of San Francisco*, then-Chief Justice Rehnquist questioned *Williamson County*'s compensation prong in a concurring opinion joined by Justices O'Connor, Kennedy, and Thomas:

It is not clear to me that *Williamson County* was correct in demanding that, once a government entity has reached a final decision with respect to a claimant's property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court I joined the opinion of the Court in *Williamson County*. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic. Here, no court below has addressed the correctness of *Williamson County*, neither party has asked us to reconsider it, and resolving the issue could not benefit petitioners. In an appropriate case, I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts.³⁷

Some see the recent *Knick* decision as part of a larger and longer process of moving the Court to the right.³⁸ Some people say that the recent overturning of precedent is a lead up to overturning *Roe v.*

34. See *id.* at 2181–90.

35. See *id.* at 2190.

36. 520 U.S. 725, 733–34 (1997); see also J. David Breemer, *The Rebirth of Federal Takings Review: The Courts' "Prudential" Answer to Williamson County's Flawed State Litigation Ripeness Requirement*, 30 *TOURO L. REV.* 319, 320 (2014); Thomas Roberts, *Fifth Amendment Takings Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 *URB. LAW.* 479, 482–83 (1992).

37. 545 U.S. 323, 349, 352 (2005).

38. See Jimmy Hoover, *Inside the Supreme Court's Playbook on Precedent*, *LAW360* (Oct. 6, 2019), <https://www.law360.com/articles/1206353/inside-the-supreme-court-s-playbook-on-precedent> [<https://perma.cc/8URV-68ZM>].

Wade.³⁹ However, how could one possibly know that, or even imagine some sort of silent conspiracy among a group of justices?

IV. THE LIKELY IMPACTS OF *KNICK* ON LOCAL GOVERNMENTS

Thinking through the implications of *Knick*, with only a little case law so far applying it, and with a measure of caution about the risk of over-reaching, below are the likely impacts on local government. None are greatly adverse, and some are helpful for the government. Is it possible that the *Knick* decision in some respects will be a win-win for all the stakeholders?

More Takings Cases Will Be Brought to Federal Court

It is easy to predict that more takings cases will be brought to federal court. The question is, how many? Since everyone can now go to federal court,⁴⁰ some claimants who otherwise would have felt compelled to start in state court will start in federal court. Some people who see *Knick* as generally a “pro-property rights” case will be encouraged to commence an action.

Some practitioners have said they will still likely go to state court with their constitutionality issues under 42 U.S.C. § 1983 simply because they believe in some cases the state forum will be more favorable.⁴¹ As Professor John Echeverria of Vermont Law School sees it:

In terms of practical implications for future takings litigation, the *Knick* decision unquestionably gives property owners significant new tactical advantages. In particular, the option to select either a federal or state forum will allow claimants to forum shop based on which one offers the most favorable precedent or is more likely to provide a probable plaintiff-friendly judge.⁴²

39. See *Precedent and the Roberts Court in 4 Charts*, LAW360 (Oct. 7, 2019), <https://www.law360.com/articles/1207062/precedent-and-the-roberts-court-in-4-charts> [<https://perma.cc/E8VY-THLJ>].

40. See *Knick*, 139 S. Ct. at 2177, 2179.

41. This is the collective view of the many lawyers with whom I have discussed the impacts, particularly those fellow members of Owners’ Counsel of America. See OWNERS’ COUNS. AM., www.ownerscounsel.com [<https://perma.cc/HW44-8NVH>] (last visited Mar. 4, 2020). It is believed that, in some instances, federal courts will be less interested in what may be characterized as issues of local land use, and state courts may be more sympathetic to property owners. The decision on whether to bring the action in state or federal court will vary from state to state depending upon the culture and common law.

42. John Echeverria, *Knick v. Township of Scott: A Procedural Boost for Takings Claimants*, 2020 A.B.A. SEC. ENV’T, ENERGY & RESOURCES 51.

I doubt there will be a “flood” of cases to federal court. Nothing in the case reports suggests this, at least thus far, five months after the *Knick* decision. Professor Ilya Somin of George Mason University Scalia Law School has speculated on whether there will be a “flood” of new cases. He concludes that the idea there will be a “flood” of new cases is overstated and that if there are many new cases in federal court it “would indicate that state courts (at least in some parts of the country) have been severely underprotecting property owners’ constitutional rights, taking advantage of the *Williamson County* regime to deny takings claims that federal courts would have upheld.”⁴³

At this early time after the *Knick* decision, the extent to which there may be a “flood” or even a “spurt” of new cases is speculative.

A Wider Range of Takings Claims May Be Seen

Beyond an increase in the number of takings claims brought, the range of governmental activities claimed to effect a taking may widen, particularly with facial claims that do not require a federal court to apply decision-making criteria on site-specific challenges.⁴⁴

The Pleading Process Will Become More Complicated: Can You Say “*Twiqbal*”?

If “*Twiqbal*”⁴⁵ is a foreign term to you and you cannot pronounce it, you are not alone (I confess to both until I was forced into it by *Knick*⁴⁶). The holdings in *Bell Atlantic Corp. v. Twombly*⁴⁷ and *Ashcroft v. Iqbal* have been colloquially referred to as “*Twiqbal*.”⁴⁸ Through these cases, the U.S. Supreme Court created a “plausibility standard” for courts to use in evaluating factual allegations at the pleading stage.⁴⁹ It is plain that claimants are now going to have to be more specific, and government lawyers need to be prepared to know what they can demand in pleading. For over four decades I have said

43. See Ilya Somin, *Knick v. Township of Scott: Ending a “Catch 22” that Barred Takings Cases from Federal Court*, 2018–2019 CATO SUP. CT. REV. 153, 153, 183–84 (2019).

44. Before the decision in *Knick*, courts were split on whether facial claims were exempt under the state-litigation requirements of *Williamson County*, but now both as-applied and facial claims are clearly exempt. See *Petworth Holdings, LLC v. Bowser*, No. CV 18-3 (JEB), 2019 WL 4889274, at *2 (D.D.C. Oct. 3, 2019).

45. Christine P. Bartholomew, *Twiqbal in Context*, 65 J. LEGAL EDUC. 744 (2016).

46. My license plate “number” is “ZONING” (really), not “COMPLEXFEDERALCIVILPROCEDURE.”

47. 550 U.S. 544 (2007).

48. 556 U.S. 662 (2009).

49. See generally Bartholomew, *supra* note 45.

to my clients, “We must never fear the facts. They are what they are.” If someone does not have a good takings claim, they should not bring it. If the government cannot defend its actions, it should settle. The pleading process can help both sides know where they are vulnerable and hopefully lead to resolutions short of trial. “*Twiqbal*” pleading may be able to help us get there.

More Problems with Pendent Jurisdiction Are Inevitable

As federal courts increasingly hear local land-use cases with state law issues, more argument will be had on whether the court will take pendent jurisdiction of the state claims.⁵⁰ A federal district court recently described ancillary and pendent jurisdiction principles in an inverse condemnation case:

Federal courts follow the principles of ancillary and pendent jurisdiction, under which a court’s original jurisdiction over a federal claim “carries with it jurisdiction over state law claims that ‘derive from a common nucleus of operative fact,’ such that the relationship between the federal claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional ‘case.’” These principles have been codified under a single “supplemental jurisdiction” statute at 28 U.S.C. § 1367. Under that statute, “in any civil action of which the district courts have original jurisdiction,” district courts 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 Constitution.

Supplemental jurisdiction is discretionary, however, and § 1367 reflects this discretion. Accordingly, a federal court may decline to exercise supplemental jurisdiction over a claim if 1) “the claim raises a novel or complex issue of State law,” 2) “the claim substantially predominates over the claim or claims” subject to the district court’s original jurisdiction, 3) “the district court has dismissed all claims over

50. See, e.g., *E&B Nat. Res. Mgmt. Corp. v. Cty. of Alameda*, No. 18-CV-05857-YGR, 2019 WL 5697912 (N.D. Cal. Nov. 4, 2019); *Little v. Mayor & City Council of Ocean City*, No. CV ELH-18-360, 2019 WL 4689238 (D. Md. Sept. 26, 2019) (declining to exercise pendent jurisdiction where all federal claims were dismissed). See generally *Marianist Province of United States v. City of Kirkwood*, 944 F.3d 996 (8th Cir. 2019) (declining to exercise pendent jurisdiction where all federal claims were resolved before trial considering judicial economy, convenience, fairness, and comity).

which it has original jurisdiction,” or 4) “in exceptional circumstances, there are other compelling reasons for declining jurisdiction.”⁵¹

A post-*Knick* case in federal court with a takings claim concluded with the court ruling against the taking claim and finding itself left with only state claims, over which it then chose to decline to exercise its supplemental jurisdiction.⁵² There will be more like this and plaintiffs will find themselves headed ultimately to state court, wiping out any efficiency that may have been gained in going first to federal court.

***Knick* May Only Mean that Takings Plaintiffs Will Be Able to Lose Their Cases More Quickly**

This is glib, but glib can be true. There are few good takings cases because the *Penn Central*⁵³ three-part test is so difficult, and most takings claims are added to routine zoning appeals to make the action appear more serious.⁵⁴ As Robert Thomas, author of *Sublimating Municipal Home Rule and Separation of Powers in Knick v. Township of Scott*⁵⁵ in this Issue has said in conversations with me and others: “Now we get to go to federal court and lose because *Penn Central* is still the standard.”

Abstention Will Be an Issue More Often

This is the other side of pendent jurisdiction. The dissent in *Knick* cited the Court’s promotion of “practices of certification and abstention to put difficult state-law issues in state judges’ hands” and then said that “[w]e may as well not have bothered” because the “decision sends a flood of complex state-law issues to federal courts.”⁵⁶

51. *Clark v. City of Williamsburg*, No. 17-2002, slip op. at 5–6 (D. Kan. Feb. 14, 2018) (granting jurisdiction over pendent inverse condemnation claim upon amendment of the complaint) (internal citations omitted).

52. *See Funderburk v. S.C. Elec. & Gas Co.*, No. 3: 15-cv-04660-JMC, 2019 WL 3504232, at *7 (D.S.C. Aug. 1, 2019).

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

54. This is the point made to me and others by Michael M. Berger, who has argued four takings cases in the U.S. Supreme Court. He laments that local zoning lawyers often toss in a takings claim in their routine appeals. One might guess it is done to impress clients or maybe intimidate the government. In the end, it usually does neither. Most are not good claims, they do not go anywhere, and they are often abandoned along the way.

55. Robert Thomas, *Sublimating Municipal Home Rule and Separation of Powers in Knick v. Township of Scott*, 47 FORDHAM URB. L.J. 509 (2020).

56. *See Knick v. Township of Scott*, 139 S. Ct. 2162, 2188–89 (2019); *see also Nimer v. Litchfield Twp. Bd. of Tr.*, 707 F.3d 699, 701 (6th Cir. 2013) (“A district court may abstain under the *Younger* doctrine if three conditions exist: there are state proceedings that are (1) currently pending; (2) involve an important state interest; and

This remains to be seen. Certification and abstention are powerful tools of federalism, and we should hope that *Knick* will usher in a new era of cooperative federal and state court efforts to divvy up those interesting property rights issues that straddle federal and state law.

There Is No Change in the Tests for a Taking

Because the tests for a taking are unchanged, there should be no noticeable change in the proportion of wins and losses, except to the extent that the types of cases brought are different. As suggested above, perhaps more takings cases that are less likely to be winners will be brought and, ultimately, lost.⁵⁷

The Length of Time to Get to a Final Judgment May Not Be Shorter

It may take takings claimants just as long as it did before, or longer, to get a final judgment.⁵⁸ For example, take the recent case of *First State Bank v. City of Elkins*⁵⁹ in the federal district court in the Western District of Arkansas and decided shortly before *Knick*. There was an alleged Fifth Amendment taking wrapped up with other state and federal claims. It became a procedural quagmire, with an obviously frustrated judge trying to straighten it out:

Thus began a now two-year procedural saga during which the parties have completely reversed their original positions on litigating these issues in federal court. Along the way, all concerned — certainly including this Court — have endeavored to pursue a prudent and judicially efficient path forward. Unfortunately, and with much regret

(3) will provide the federal plaintiff with an adequate opportunity to raise his or her constitutional claims.”); *Pae v. City of Lawton*, No. CIV-16-1198-M, 2017 WL 168910, at *1 (W.D. Okla. Jan. 17, 2017) (*Pullman* abstention rejected in Section 1983 inverse condemnation case: “plaintiff has not shown that there is an uncertain issue of state law underlying his § 1983 claim, that the state issues are amenable to interpretation and such interpretation obviates the need for or substantially narrows the scope of his § 1983 claim, or that an incorrect decision of state law would hinder important state law policies. The Court further finds that the unresolved state law issue cited by plaintiff — whether defendant’s actions are governed by the Oklahoma Governmental Tort Claims Act — is an issue routinely addressed by the courts in the Tenth Circuit exercising supplemental jurisdiction over state tort claims.”). *See generally* R.J. Potvin, III *Inv. Tr. v. Auburn Water Dist.*, No. 2:18-CV-00046-NT, 2018 WL 2425926 (D. Me. May 25, 2018) (*Burford* abstention not appropriate in a takings case because relief is not discretionary). *England* reservations will become more important as abstentions increase. *See* *Lumbard v. City of Ann Arbor*, 913 F.3d 585 (6th Cir. 2019).

57. *See supra* note 55 and accompanying text.

58. How about those self-checkout lines at the grocery? Is it faster for you? Not always.

59. No. 5:17-CV-5084, 2019 WL 2150388 (W.D. Ark. May 16, 2019).

in hindsight, the Court now concludes that it is without jurisdiction, and therefore the journey in this forum must end.⁶⁰

Availability of Compensation Will Preclude an Injunction to Invalidate a Regulation

The *Knick* court said that “[g]overnments need not fear that our holding will lead federal courts to invalidate their regulations as unconstitutional.”⁶¹ “As long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin government’s action effecting a taking.”⁶²

Professor Echeverria describes this as the “most interesting and consequential question going forward”:

The most interesting and consequential question going forward is what *Knick* portends for the ability of property owners to sue to enjoin alleged takings that, in the Court’s new terminology, “violate” the U.S. Constitution. The Court’s opinion contains absolute statements that takings claimants will be limited to compensatory relief, and other statements that are more nebulous. For example, the Court said, “As long as just compensation remedies are available . . . injunctive relief will be foreclosed,” but the Court also said, “Given the availability of post-taking compensation, barring the government from acting will *ordinarily* not be appropriate.” To add to the uncertainty, Justice Thomas filed a concurring opinion arguing that injunctive relief should sometimes be available in takings litigation; he read the opinion of the Court, which he joined, as not foreclosing the application of “ordinary remedial principles.”⁶³

This will be a considerable benefit to local governments in most circumstances. For example, local governments can choose to regulate at the cutting edge, requiring developers to use only green energy and prohibiting use of any fossil fuels in the interest of slowing global climate change. If the developer sued claiming a taking and a court found a taking by over-regulation, the government unilaterally would have the choice of abandoning the energy requirement or paying just compensation to overcome the taking. The court would not have the power to enjoin the government from its program.

60. *Id.* at *1.

61. *Knick*, 139 S. Ct. at 2179.

62. *Id.* However, Justice Thomas in his concurrence rejected the argument that regulators should be free of the threat of injunctive relief. *Id.* at 2180 (Thomas, J., concurring).

63. Echeverria, *supra* note 42 (quoting *Knick*, 139 S. Ct. at 2180 (Thomas, J., concurring)).

We are likely to see statements from the decision, such as “[s]o long as the property owner has some way to obtain compensation after the fact, governments need not fear that courts will enjoin their activities,”⁶⁴ quoted along with citation to the Court’s discussion of *Ruckelshaus v. Monsanto Co.*⁶⁵ for the proposition that courts cannot invalidate a government action or program so long as the government pays for the property rights. It seems likely that once it is determined that a taking is for public use or purpose, injunctive relief will be foreclosed. However, again, as we have seen with other precedents, there is much yet to be learned as to how the courts will decide claims for injunctive relief.

More Section 1983 Actions Will Be Brought

Federal constitutional and statutory claims are typically brought as Section 1983 claims, but with the Court’s reference to the statute in *Knick* as the way to bring these claims, litigants will likely make more use of it. In 1871, Congress enacted Section 1983 to provide an additional means of redress of Fourteenth Amendment violations. Section 1983 provides that an action may be brought in federal court against any “person,” which includes local governments, “who, under color of” state law:

[S]ubjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.⁶⁶

Claims for Attorney’s Fees Under Section 1988 Will Be Front and Center

Actions applying *Knick* include the greater use and the threat of successful plaintiffs recovering their attorney’s fees under Section 1988.⁶⁷ This threat will have a chilling effect on local government initiatives, particularly those novel programs where the defensibility of public regulation has been untested. The potential for having to pay attorney’s fees has had a profound effect on local government decision making in matters where there have been threatened and actual claims

64. *Knick*, 139 S. Ct. at 2168.

65. 467 U.S. 986 (1984).

66. 42 U.S.C. § 1983 (1996).

67. 42 U.S.C. § 1988 (2000).

under the Religious Land Use and Institutionalized Persons Act (RLUIPA).⁶⁸

Local Adjudicatory Review Could Protect Local Governments

A local adjudicatory process above and beyond the usual variance and enforcement appeals available with existing boards of appeal would enable the government to grant relief in the form of program changes or permit modifications and to award partial compensation as an alternative to abandoning what the government wants to achieve. It could save everyone from ending up in court. Also, the finality prong of *Williamson County* is unaffected and must be met. A takings claimant would have to exhaust the local adjudicatory process to reach finality, and that process with the potential for a negotiated settlement could result in an accommodation for both the property owner and the government.

Ombudsmen and Special Land Use Courts May Be Considered

Another alternative is to create federal and state takings courts to streamline adjudication. Such courts have proven useful in resolving takings claims short of trial because they bring to the conflict resolution a level of expertise in land-use matters not found in courts of general jurisdiction. The decision in *Knick*, if it does result in increased litigation or is even perceived that it will do so, may encourage claimants and governments to find ways to resolve claims early on. By way of illustration, Utah has a Property Rights Ombudsman authorized to mediate takings claims.⁶⁹ Connecticut is an example of a state that has specialized land-use courts.⁷⁰

68. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc (2000); see also Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 URB. L. 195, 255 (2008) (“RLUIPA has had a chilling effect on local government’s ability to exercise the police power through zoning to ensure that community character is preserved and that the public health, safety, and welfare is protected.”).

69. UTAH CODE ANN. § 13-43-204 (1953).

70. John Martinez, *A Proposal for Establishing Specialized Federal and State “Takings Courts”*, 61 ME. L. REV. 467, 489 n.159 (2009).

Mediation May Be More Favored

Most lawyers and planners involved in local land-use disputes will agree that mediation is underutilized.⁷¹ The threat of attorney's fees with the Section 1983 claims and the direct path to federal court may incentivize consideration of mediation.

Governments May Give More Consideration to Buying Their Way Out of the Problem

The *Knick* case could have been avoided if the township negotiated the voluntary sale and purchase of an easement with definitive metes and bounds, restrictions on the terms of access, and the government holding the property owner harmless. Knick had a reasonable concern that visitors could be injured walking across the property and that she would be liable.⁷²

Eminent domain, even as unpopular as it is after *Kelo*, could be used if Knick refused to sell. The cost of the easement, either in a voluntary sale or under eminent domain, would have been far less than the cost of the litigation. In the 1994 Supreme Court case of *Dolan v. City of Tigard*, where dedication of a bicycle path along an undevelopable floodway was imposed as a condition on the approval of the expansion of a hardware and plumbing supply store, the easement was valued at \$8000, a tiny fraction of what the litigation cost and about 1% of what the case ultimately settled for.⁷³

71. SARA BRONIN & DWIGHT MERRIAM, RATHKOPF'S LAW OF ZONING & PLANNING § 31.8 (4th ed. 2019).

In addition to necessary program modifications to encourage greater participation, a change in mindset by all stakeholders involved must develop. Despite the increased use of dispute resolution in land use matters, in some localities, there is still hesitation on the part of all parties: the public, the developers, the planners, the lawyers, the local boards and the courts, to participate in a program that is a change from the traditional system. In the traditional system, commissioners feel pressure to make decisions quickly, and a collaborative approach is viewed as time consuming. Because all parties may lack an understanding of how the program works, they are hesitant to embrace mediation as an option.

Id.

72. Jessica Gresko, *Cemetery Case Puts Property Rights Issue Before the High Court*, ASSOCIATED PRESS (Oct. 4, 2018), <https://apnews.com/86ec9d89d4d34579b528845f5f8c1642/Cemetery-case-puts-property-rights-issue-before-high-court> [<https://perma.cc/5G42-XGBK>] (“Knick, 69, says her town’s ordinance wouldn’t protect her if people injure themselves on her land and sue.”).

73. *Dolan v. City of Tigard*, 512 U.S. 374 (1994); E-mail from Jill Gelineau, Shareholder, Schwabe, Williamson & Wyatt PC, to Dwight Merriam (Mar. 8, 2020, 17:13 EST) (on file with author).

Incentives Will Likely Be Considered

Governments can incentivize the voluntary dedication, in this case, of an access easement, by providing some type of relief from development restrictions — such as a density bonus or by providing tax relief.

Jury Trials Will Be Had in Section 1983 Cases

The Court in *Monterey v. Del Monte Dunes at Monterey, Ltd.*, made clear that there is a right to a jury trial in federal court in these Section 1983 cases if there is a claim in excess of \$20 or more in compensation, but not if only equitable relief is sought.⁷⁴ The U.S. Supreme Court in *Knick* made clear that in eliminating the state compensation prong of the ripeness test it expected claimants to proceed under Section 1983.⁷⁵

CONCLUSION

It will be interesting in so many respects to watch how takings negotiations and litigation evolve post-*Knick*. We must recognize that a decision like *Knick* cannot foretell with any great certainty how it will be more fully developed. That, indeed, is the lesson we have learned from other takings decisions, where there has also been an overreaction, on all sides.

Former Secretary of Defense Donald Rumsfeld made an observation that may be apt here as we enter the post-*Knick* phase of “known unknowns” and “unknown unknowns”:

The message is that there are no “knowns.” There are things we know that we know. There are known unknowns. That is to say there are thing [sic] that we now know we don’t know. But there are also unknown unknowns. There are things we don’t know we don’t know. So when we do the best we can and we pull all this information together, and we then say well that’s basically what we see as the situation, that is really only the known knowns and the known unknowns. And each year, we discover a few more of those unknown unknowns.⁷⁶

74. See 526 U.S. 687 (1999); see also MARTIN SCHWARTZ, SECTION 1983 LITIGATION 5 (3d ed. 2014).

75. *Knick v. Township of Scott*, 139 S. Ct. 2168 (2019).

76. Donald Rumsfeld, U.S. Secretary of Defense, Press Conference at NATO Headquarters, Brussels, Belgium (June 6, 2002) (official transcript from U.S. Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs)), <https://www.nato.int/docu/speech/2002/s020606g.htm> [<https://perma.cc/4K2C-U5B4>].

This may be a turning point, not great in its impacts, but still a time to reconsider how all of the stakeholders conduct themselves. Would it not be good if property owners, developers, neighbors, advocacy groups, planners, and government officials took this opportunity to find new ways to avoid conflict and to embrace alternative dispute resolution?