Knick, Federal Courts, and Regulatory Takings

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Julia Mahoney and Ann Woolhandler, *Federal Courts and Takings Litigation*, 97 **Notre Dame L. Rev.** __ (forthcoming, 2021), available at SSRN.

Federal regulatory takings doctrine has long been a hopeless muddle.[1] How and when the federal courts should review takings claims—including through §1983—is the subject of an important new article by Professors Julia Mahoney and Ann Woolhandler.

The federal taking muddle is a product of a particularly unclear set of precedents. Except for narrow classes of takings claims that qualify for one of the handful of "categorical" takings rules (and it is far from clear which ones do),[2] the question in a regulatory takings case essentially boils down to whether a regulation "goes too far."

The Supreme Court "has generally eschewed any set formula for determining how far is too far," requiring instead that lower courts "engage in essentially *ad hoc*, factual inquiries."[3] The three-part balancing test used to guide such inquiries, first articulated in *Penn Central Transportation Company v. New York City*,[4] is so enigmatic that, as Justice Clarence Thomas recently observed, "nobody—not States, not property owners, not courts, nor juries—has any idea how to apply this standardless standard."[5]

One (of many) reason for the confusion is that the federal courts have had very little role in litigating takings cases for the last three decades. This is because, in *Williamson County v. Hamilton Bank*, the Supreme Court adopted an unusual prudential exhaustion doctrine that required property owners to litigate most regulatory takings cases in state courts.[6]

The logic of adopting such a rule, the majority reasoned in *Williamson County*, was that federal courts could not determine whether a property owner has suffered an uncompensated taking until all state-law remedial procedures are exhausted. A result of adopting such a rule is that the development of takings law was primarily the purview of the state courts, with the Supreme Court usually stepping in only to resolve disagreements among them. (At times, the Supreme Court's interventions confounded the confusion.)[7]

Williamson County was controversial from the moment that it was decided, so it was not entirely surprising when the Supreme Court overruled it two years ago in *Knick v. Township of Scott*.[8] *Knick* opened the door—and skeptics worry the floodgates—to federal judicial review of claims seeking compensation for regulatory takings. (Under the *Williamson County* rule, only facial challenges could originate in federal court.)

Knick, however, left many questions unanswered, including importantly: First, whether, as some scholars have begun to argue, federal courts ought to use other federal doctrines to avoid litigating takings claims; and second, whether (as is commonly assumed) civil rights claims under §1983 represent the right vehicle for resolving them. Julia Mahoney and Anne Woolhandler tackle both of these questions, neither of which lends itself to a straightforward answer.

I was never a fan of the *Williamson County* ripeness regime. I count myself among those who object to the Takings Clause's compensation guarantee being treated as a "poor relation" vis-à-vis other constitutional rights.[9]

Admittedly, however, my view is in the minority among legal scholars, many of whom worry that federal court intervention will harm the public interest by hamstringing land use and environmental regulations. These "minimalists"

(as Mahoney and Woolhander call them) assert that *Knick* invites a return to Lochnerism and that federal courts should utilize the *Pullman* and *Burford* abstention doctrines to avoid litigating takings claims.

Mahoney and Woolhander's article ably sets forth the historical record to demonstrate that the "anti-confiscation" principle has deeper historical roots than is commonly understood. This alone is a major scholarly contribution.

They also make a strong case that the factors justifying *Pullman* and *Burford* abstention—specifically the need for state court resolution of state law issues—are not present in most regulatory taking cases since federal courts are able to interpret and apply state law to the extent necessary to determine whether a taking has occurred.

Mahoney and Woolhander then ask whether §1983 is the correct legal mechanism for litigating takings claims in federal court. They are skeptical that this is the case.

They argue that constitutional challenges to the confiscatory effects of regulations were not litigated as §1983 civil rights claims seeking damages until relatively recently, and, indeed, that it is far from apparent that they were intended to be covered by the law.

Rather, these challenges historically arrived in federal court either through diversity jurisdiction or implied constitutional rights of action seeking injunctive relief. For at least two reasons, these arguments are thought-provoking and deserving of additional consideration by readers of their work.

First, §1983 provides a mechanism for property owners to be compensated for regulatory takings. Even if other mechanisms for challenging regulations exist in an era of skepticism over implied rights of action, I am not convinced that that non-monetary/injunctive relief would adequately protect owners and deter overregulation.

Second, if Mahoney and Woolhander are correct, then the implications of their arguments extend well beyond takings. Indeed, they call into question the legitimacy of the Monell v. New York Department of Social Services, which held that municipalities were suable persons under §1983.[10]

Mahoney and Woolhandler's work provides a solid foundation for thinking about the paths to federal court review of takings claims and sets the stage for further conversation on each of these subjects. They are to be commended to beginning this important conversation.

1. Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 **S. Cal. L. Rev.** 561 (1984).
2. *See*, *e.g.*, *Cedar Point Nursery v. Hassid*, 594 U.S. __ (2021) (holding that a California labor regulation granting unions access to certain employer's place of business up to three hours a day, 120 days a year [was/was not] a categorical taking of an easement).
3. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U. S. 302, 326 (2002) (internal quotation marks omitted).
4. 438 U. S. 104, 124 (1978).
5. Bridge Aina Le'a, L.L.C. v. Hawaii Land Use Comm'n, 592 U. S. __ (2021) (Thomas, J., dissenting from the denial of *certiorari*).
6. 473 U.S. 172 (1985).
7. *See*, *e.g.*, Nicole Stelle Garnett, *From a Muddle to a Mudslide: Murr v. Wisconsin*, 2016-17 **Cato Sup. Ct. Rev.** 131 (2017).
8. 139 S. Ct. 2162 (2019).
9. Dolan v. City of Tigard, 512 U.S. 374, 393 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation…").

10. 436 U.S. 658 (1978).

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