Takings and Implied Causes of Action

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Introduction

In *DeVillier v. Texas*,[1] a group of property owners asked the Supreme Court to imply a private right of action against the State of Texas to remedy alleged violations of the Fifth Amendment's Takings Clause.[2] Without having compensated the plaintiffs, the state built a highway barrier that led to flooding of the plaintiffs' property.[3] *DeVillier* had the makings of a major property rights decision, because the question of whether the Takings Clause is "self-executing" in the sense of implying a private right of action has long remained unresolved. In the end, however, a unanimous Court determined that there was no need to grapple with this thorny constitutional issue because it had become clear in the course of litigation that "Texas state law provides a cause of action by which property owners may seek just compensation against the state."[4]

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[1] 601 U.S. 285 (2024).

[2] The Takings Clause provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Takings Clause has been incorporated against the states under the Due Process Clause of the Fourteenth Amendment. Chicago B. & Q. R.R. Co. v. Chicago, 166 U.S. 226 (1897).

[3] 601 U.S. at 288.

[4] *Id.* at 293.

The Court in *DeVillier* thereby declined the opportunity to overhaul constitutional doctrine, opting instead to take a "wait and see" approach toward modifying the existing and highly complicated system of just compensation remedies.[5] The Court's hesitation to recognize a federal Fifth Amendment implied right of action is understandable; an implied action would presumably have allowed inverse condemnation plaintiffs to file compensation claims directly against states in federal court as federal question cases.[6] Such a result would be in tension with traditional state sovereign immunity from monetary relief in the federal courts and would raise other federalism and separation of powers concerns.

I. Procedural Tangles

To understand the stakes in *DeVillier*, it is important to know the extent of existing takings remedies—quite apart from any Fifth Amendment claim that the plaintiffs had asked the Court to create. It is also helpful to understand the procedural posture of *DeVillier* itself.

A. Current Takings Remedies

The Fifth Amendment requires that "private property [shall not] be taken for public use, without just compensation."[7] When governments wish to acquire ownership of private property, they generally meet their just compensation obligations to the property owners by initiating formal eminent domain actions, in which actions the fair market value of the property is awarded against the government.[8] Governments, however, do not always initiate eminent domain proceedings when they invade private ownership. Sovereign immunity, moreover, generally forbids private parties from directly suing a state for monetary relief without its consent.[9]

[5] *See* Ann Woolhandler & Julia D. Mahoney, *Federal Courts and Takings Litigation*, 97 Notre Dame L. Rev. 679 (2022).

[6] 28 U.S.C. § 1331.

[7] U.S. Const. amend. V.

[8] *See* Thomas W. Merrill, *The Compensation Constraint and the Scope of the Takings Clause*, 96 Notre Dame L. Rev. 1421, 1422 (2021); *see also* Julia D. Mahoney, Kelo*'s Legacy: Eminent Domain and the Future of Property Rights*, 2005 S. Ct. Rev. 103.

[9] *See* Julia Grant, *A Clash of Constitutional Covenants: Reconciling State Sovereign Immunity and Just Compensation*, 109 Va. L. Rev. 1143 (2023).

That contrasts with municipalities, which do not generally enjoy similar sovereign immunity.[10]

Traditionally, property owners could pursue certain actions for monetary and injunctive relief addressing takings against individual governmental officers, including state as well as municipal officers.[11] Owner-initiated claims are generally denominated "inverse condemnation" actions.[12] States, over time, have made inverse condemnation actions for monetary and other relief available against states themselves (as well as against municipalities), at least in the state's own courts.

In addition to the various state-law-based remedies now available, remedies addressing takings can also be pursued under 42 U.S.C. § 1983, a federal civil rights statute which allows actions against every "person" who deprives another of constitutional rights.[13] Individual officers, state as well as local, can be sued for injunctive relief and damages under § 1983. Monetary relief, however, may be difficult to obtain against individual officers with respect to takings because, among other things, individuals can claim "good faith" or qualified immunity from damages.[14]

But this difficulty in obtaining monetary relief against individual officers under § 1983 is not a problem as to local government takings. The Court has held that municipalities are "persons" who are subject

[10] In referring to municipalities, we also include counties, which are treated the same as cities with respect to immunities.

[11] Potential nonimmune defendants included state and municipal officers, municipalities, and government contractors.

[12] *See* Knick v. Township of Scott, 588 U.S. 180, 186 (2019) ("Inverse condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant.") (internal quotation marks omitted).

[13] 42 U.S.C. § 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, 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. . . ."

[14] Under the current judge-made law of good faith or qualified immunity, mostly developed since the 1970s, an individual is not liable unless he "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known." *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800 (1982) (enunciating this standard in an implied action against a federal official); Davis v. Scherer, 468 U.S. 183 (1984) (applying this standard in a § 1983 action).

to direct suits under § 1983.[15] Municipalities do not enjoy sovereign immunity, nor can they claim the good faith immunity from damages that is available to individual officers.[16] States, however, are doubly protected. They are not suable "persons" under § 1983, and they have sovereign immunity in the federal courts unless properly abrogated by Congress.

B. Procedures in DeVillier

At stake in *DeVillier* was the ability of property owners to pursue inverse condemnation actions for monetary relief against the state of Texas itself in the lower federal courts. But the issue was clouded by the convoluted procedural posture of *DeVillier*. States generally have made inverse condemnation actions available directly against themselves in *state* courts, but property owners cannot initiate inverse condemnation actions directly against states in *federal* courts because of the sovereign immunity and statutory limitations noted earlier. In *DeVillier*, however, Texas had opted to remove the plaintiffs' claims from state courts to a federal court.[17] Texas's removal likely waived sovereign immunity as to state-law claims, since the state did not enjoy such immunity with respect to state-law claims in state courts.[18]

[15] Monell v. Dep't. of Soc. Servs., 436 U.S. 658, 690 (1978).

[16] Owen v. City of Independence, 445 U.S. 622, 650 (1980). Municipalities are only liable for their laws, customs, and policies, which will generally be implicated in takings claims.

[17] In oral argument before the Court, the Texas Solicitor General explained that Texas did so because the *DeVillier* litigation comprised "four separate cases, all putative class actions" and there was "no way to put all of them in a single Texas court." Transcript of Oral Argument at 44, DeVillier v. Texas, 601 U.S. 285 (2024) (No. 22-913). In addition, the Texas Solicitor General said Texas's decision was motivated by concerns that, while its own state courts "don't have a lot of experience with implied rights of action," such issues are the "bread and butter" of the federal courts." *Id.* at 44–45.

[18] *See* Lapides v. Bd. of Regents, 535 U.S. 613, 617, 624 (2002) (holding that removal of state-law claims as to which the state had waived sovereign immunity for state-court proceedings waived the state's immunity in federal court); *cf.* Alden v. Maine, 527 U.S. 706, 748 (1999) (holding that as to federal claims, the states can assert in state courts the same sovereign immunity that they would have in federal courts). The plaintiffs sought to sideline the sovereign immunity issue due to Texas's removal. Petition for Writ of Certiorari at 19, *DeVillier*, 601 U.S. 285 (No. 22-913); Brief for Petitioners at 16 n.4, *DeVillier*, 601 U.S. 285 (No. 22-913) ("Petitioners do not concede that a State could ever invoke sovereign immunity in the face of a superior constitutional obligation to pay just compensation, but in all events Texas has waived its immunity here . . .").

In *DeVillier*, the Supreme Court granted certiorari on the following issue:

> May a person whose property is taken without compensation seek redress under the self-executing Takings Clause even if the legislature has not affirmatively provided them with a cause of action?[19]

The reader may be forgiven for concluding from this phrasing of the Question Presented that Texas law did not allow for just compensation claims against itself in state court. Indeed, the Supreme Court seems to have initially so assumed.[20] In the initial complaints and the consolidated complaint filed after removal to federal court, the plaintiffs pleaded an implied action directly under the Fifth Amendment, as well as a claim under the Texas Constitution.[21] Texas sought to dismiss the Fifth Amendment claim, arguing that—as a matter of federal law—such a cause of action did not exist. The district court declined to dismiss the case,[22] certifying to the Fifth Circuit the question of whether there could be an implied Fifth Amendment claim.[23]

The Fifth Circuit panel agreed with Texas that there was no such implied federal takings claim, directing that the plaintiffs' claims be remanded to the state courts.[24] The panel assumed that the plaintiffs could raise both Texas and Fifth Amendment constitutional claims in

[19] *See DeVillier*, 601 U.S. at 287–88; Petition for Writ of Certiorari at i, *DeVillier*, 601 U.S. 285 (No. 22-913).

[20] *See DeVillier*, 601 U.S. at 292 ("The question presented asks what would happen if a property owner had no cause of action to vindicate his rights under the Takings Clause.").

[21] Joint Appendix at 24, 36, *DeVillier*, 601 U.S. 285 (No. 22-913); Brief for the United States as Amicus Curiae Supporting Respondent at 2, *DeVillier*, 601 U.S. 285 (No. 22-913).

[22] DeVillier v. Texas, No. 3:20-CV-00223, 2021 U.S. Dist. LEXIS 165951, at *6 (S.D. Tex 2021) (Magistrate's recommendation), *adopted*, 2021 U.S. Dist. LEXIS 164573 (W.D. Tex. 2021).

[23] *See* 28 U.S.C. § 1292(b); Peter W. Low, John C. Jeffries, Jr. & Curtis A. Bradley, Federal Courts and the Law of Federal-State Relations 207 (9th ed. 2018) ("The Supreme Court has not approved a new *Bivens* claim since 1980."); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) (implying an action under the Fourth Amendment against individual federal officers).

[24] DeVillier v. Texas, 53 F.4th 904, 904 (5th Cir. 2022).

the state courts.[25] That meant the Fifth Amendment issues could be raised under a state-law cause of action that might include federal-law elements, rather than in the form of a more thoroughly federal cause of action rooted directly in the Fifth Amendment itself.[26]

Fifth Circuit Judge Andrew Oldham, dissenting from the denial of rehearing en banc, nevertheless treated the panel decision as rendering "federal takings claims non-cognizable in state or federal court."[27] The plaintiffs featured this language in a supplemental brief in support of their certiorari petition,[28] and their merits brief made a similar argument.[29]

The Supreme Court, however, determined that a state court inverse condemnation action "provides a vehicle for takings claims based on both the Texas Constitution and the Takings Clause."[30] It therefore declined to decide what the result would be if state-law actions to vindicate plaintiffs' takings rights had been unavailable.[31]

[25] "The Supreme Court of Texas recognizes takings claims under the federal and state constitutions, with differing remedies and constraints turning on the character and nature of the taking." *Id*. Two of the panel judges, Judges Patrick Higginbotham and Stephen Higginson, wrote more extensive opinions accompanying the denial of the petition for rehearing en banc. *See* DeVillier v. Texas, 63 F.4th 416, 417, 420 (5th Cir. 2023); *id*. at 417 (Higginbotham, J., concurring in denial of rehearing en banc) ("The pathway for enforcement in takings by the state is rather through the state courts to the [U.S.] Supreme Court); *id.* at 426 (Higginson, J., concurring in denial of rehearing en banc) ("In short, we have long outgrown the '*ancien regime* that freely implied rights of action.'") (citation omitted).

[26] The panel also opined that the state-law claim could not stay in federal court as a state-law claim with a federal ingredient because the federal issue must be "necessary to the resolution of the state-law claim." 53 F.4th at 905 n.5 (citing Mitchell v. Advanced HCS, 28 F.4th 580, 588 (5th Cir. 2022)). *See also* Lamar Co. v. Miss. Trans. Comm'n, 976 F.3d 524, 529 (5th Cir. 2022).

[27] DeVillier v. Texas, 63 F.4th 416, 426 (5th Cir. 2023) (Oldham, J., dissenting from the denial of rehearing en banc).

[28] Supplemental Brief in Support of Certiorari at 2, DeVillier v. Texas, 601 U.S. 285 (2024) (No. 22-913); *id.* (also quoting language that the "the Takings Clause [is] a dead letter" with respect to the states in the Fifth Circuit).

[29] Brief for Petitioners at 10, *DeVillier*, 601 U.S. 285 (No. 22-913) ("[T]he consequence of ruling for Texas is not that claims for compensation under the Fifth Amendment will proceed in state court. It is that they will not proceed.").

[30] *DeVillier*, 601 U.S. at 293.

[31] *Id*.

II. Traditions of Takings Remedies

By many criteria, takings claims present a strong argument for implied constitutional remedies, including monetary relief. While the Court in recent years has been reluctant to imply damages actions directly from the Constitution,[32] the Takings Clause arguably provides an explicit textual basis for such claims.[33] What is more, claims to remedy takings are well supported by the traditions of common law actions and other remedies.[34]

A. Actions in State Courts

As noted earlier, governments have long initiated proceedings to acquire property in eminent domain actions, in which property owners could obtain determinations of how much just compensation they were due as defendants to the government-initiated action.[35] Even though property owners in such proceedings were litigating against the state, sovereign immunity was no bar to compensation, because the government entity seeking condemnation had made itself amenable to the award by initiating the action as a plaintiff.

Even when the government had not initiated such an action, the property owner was not without remedies.[36] Historically, causes of action addressing governmental takings were the same as those available against private parties for invasions of property interests—actions in trespass,[37] in ejectment,[38] and for

[32] *See, e.g.*, Egbert v. Boule, 596 U.S. 482 (2022).

[33] *See also* U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

[34] *See* Woolhandler & Mahoney, *supra* note 5, at 684–86.

[35] *See* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 69–70 (1999) (indicating that sometimes legislatures provided actions only the condemnor could initiate). The account of various types of state-law claims in this section draws heavily on Brauneis's article.

[36] *See id.* at 69–72 (describing some such actions).

[37] *Id.* at 65 (describing common law actions). Trespass refers to actions for invasions of persons and property.

[38] Ejectment is a common law action to recover property from a defendant in possession.

injunctive relief.[39] These claims typically ran against individual officers, including state officers involved in the taking,[40] rather than directly against the state.[41] Officers were sued as individuals, and officers would defend by claiming that their actions were justified by law. But the defense would fail if their actions were not indeed authorized by law, or if the law was unconstitutional. In either instance, officers could not claim sovereign immunity nor good faith immunity from damages and injunctive remedies.[42] Suits against individual officers thereby accommodated the rule of law to sovereign immunity.[43]

Over time, the state courts supplemented these common law actions with additional remedies,[44] aided by various state statutory and state constitutional provisions.[45] While state sovereign immunity doctrines continued to provide some hurdles to actions directly against the states,[46] the early 20th century saw state courts increasingly willing to allow actions in state courts directly against the states, including for monetary relief.[47] Virtually all states now allow

[39] *See* Brauneis, *supra* note 35, at 98 (discussing the use of injunctions and ejectment).

[40] Government contractors and municipalities also could be subject to suits. *See id.* at 75 (indicating private corporations generally could be held liable); *id.* at 72 (discussing some immunities that municipalities could claim).

[41] *See id.* at 72 (noting states' general acceptance that states could not be sued without consent).

[42] *See id.* at 72, 79, 82–83, 109.

[43] Private bills in the legislature were also a means for receiving compensation. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 783 (1995).

[44] Brauneis, *supra* note 35, at 133 (indicating that increasingly courts were allowing permanent damages, although this might make the courts more reluctant to grant injunctions).

[45] *Id.* at 69 (noting statutory actions); *id.* at 119–20 (discussing "taking or damage" provisions in state constitutions); *cf.* Brief for Professors James W. Ely, Jr., and Julia D. Mahoney and the Buckeye Institute as Amici Curiae in Support of Petitioners at 2, DeVillier v. Texas, 601 U.S. 285 (2024) (No. 22-913) ("State courts took the lead in fashioning takings jurisprudence and affirmed the just compensation principle.").

[46] Brauneis, *supra* note 35, at 135–37.

[47] *See id.* at 138–39 ("But beginning in the 1920s and 1930s, many state courts began to hold that state just compensation provisions did abrogate state sovereign immunity. . . .").

compensatory remedies against the states in state courts to address takings.[48]

B. Actions in Federal Courts

Federal courts have long entertained actions for takings against state (and local) officials under theories of individual officer liability,[49] including actions at law in trespass and ejectment and suits in equity for injunctions. But the federal courts did not entertain actions brought against the states themselves, even when states had allowed inverse condemnation actions against themselves in state courts.[50]

It should be noted that the federal government, like the states, enjoys sovereign immunity from monetary claims to which it has not consented. But the federal courts have sustained common law actions in takings claims implicating the United States when those actions were brought against federal officers as individuals—for example, by ejectment.[51] In addition to suits against individual officers, eminent domain proceedings and private bills in Congress addressed federal government takings.[52] And in 1946, the Supreme

[48] *See* Knick v. Township of Scott, 588 U.S. 180, 186 & n.1 (2019). Ohio is sometimes listed as an exception, but a property owner can bring a mandamus action to compel the government to initiate an eminent domain case. *See id.* Louisiana is sometimes listed as an exception, but inverse condemnation suits against governments are allowed. *Cf.* Watson Mem'l Spiritual Temple of Christ v. Korban, 387 So.3d 499 (La. 2024) (holding that mandamus would lie to compel a local governmental entity to satisfy an inverse condemnation award); *id*. (remanding to the district court to tailor a plan for the satisfaction of the judgment within a reasonable time); *cf*. Libr. of Cong. v. Shaw, 478 U.S. 310, 316 n.3 (1986) ("Prior to the creation of the Court of Claims, a citizen's only means of obtaining recompense from the Government was by requesting individually tailored waivers of sovereign immunity, through private Acts of Congress.").

[49] Woolhandler & Mahoney, *supra* note 5, at 684–86. Federal courts also entertained some eminent domain actions at the instance of landowners seeking review of certain commission determinations against local governments and government contractors. *See id.* at 686.

[50] *Cf.* Smith v. Reeves, 178 U.S. 436, 445 (1900) (holding that the state could limit its consent to be sued for tax refunds to its own courts, subject to Supreme Court review).

[51] *See, e.g.*, United States v. Lee, 106 U.S. 196 (1882).

[52] *See* Brief for the United States as Amicus Curiae Supporting Respondent at 5, 15, DeVillier v. Texas, 601 U.S. 285 (2024) (No. 22-913) (discussing private bills and tort actions).

Court interpreted a federal statute called the Tucker Act to provide for taking claims directly against the United States.[53]

All of the above state and federal remedies indirectly support the view that governments must provide adequate remedies for takings claims. But the examples also support at least two qualifications to arguments supporting an implied Fifth Amendment takings action. First, federal courts did not provide remedies directly against the sovereign states. And second, the tradition of remedies suggests that an implied action is not necessary.[54]

III. Federal Courts' Nonprovision of Remedies Directly against Sovereigns

When sovereign entities—the state or federal government—were involuntary parties, the federal courts did not allow monetary remedies against them.[55] To the extent that the Supreme Court has implied the availability of monetary remedies, it has been against individual officers or nonsovereign entities.[56] Even where states allowed such claims in *state* courts through their judge-made law, statutes, and constitutions, the state was not treated as having consented to suit in the *federal* courts.[57] And federal-court actions directly against the federal government for monetary liability required statutory authorization to abrogate sovereign immunity.[58]

[53] *Id.* at 18–20 (citing United States v. Causby, 328 U.S. 256 (1946)); 28 U.S.C. § 1491(a)(1). The Court had previously interpreted the Tucker Act to require some form of express or implied contract. Brief for the United States as Amicus Curiae Supporting Respondent at 18–19, *DeVillier*, 601 U.S. 285 (No. 22-913).

[54] In addition, the traditional view is that Article III does not require that lower federal courts be created. *See* Richard H. Fallon et al., Hart and Wechsler's The Federal Courts and the Federal System 307 (7th ed. 2015) [hereinafter Hart and Wechsler].

[55] There are certain exceptions, such as when the federal government properly sues a state, or a state properly sues another state. *See id.* at 921.

[56] *See* FDIC v. Meyer, 510 U.S. 471 (1994) (holding that an implied action under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), was not available against a federal agency).

[57] *See* Brauneis, *supra* note 35, at 139; *cf.* Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 Wash. L. Rev. 1067, 1102–13 (2001) (arguing that due process should be seen as requiring state courts, if the states' other remedies are inadequate, to supply compensation remedies directly against the states in state courts).

[58] To be sure, the Court has at times employed a somewhat liberal interpretation of the Tucker Act to allow for inverse takings remedies. *See, e.g.*, United States v. Causby, 328 U.S. 256, 267 (1946).

There are two possible avenues for suing the states as defendants in federal court: state consent and congressional abrogation. As noted, the states can consent to being sued in their own courts. But consent to being sued in *state* court has not been treated as consent to being sued in the lower *federal* courts.[59] The notion of consent, however, does allow for Supreme Court review of state-court decisions in which the state has waived sovereign immunity. On direct review of state-court decisions, the Supreme Court generally takes the state courts and their causes of action as it finds them, correcting errors of federal law within the state-recognized cause of action. Where the state has substituted suits against itself for remedies that the Court might have found to be constitutionally required against an individual officer,[60] the Court has filled in remedies against the state that the Court could have compelled against the individual officer.[61]

Another possible avenue for making states involuntarily suable at the initiative of individuals is congressional abrogation. The Court has held that, within certain limitations, Congress can abrogate state sovereign immunity when acting under Section 5 of the Fourteenth Amendment, which provides that "Congress shall have power to enforce, by legislation" the provisions of the Fourteenth Amendment.[62] In some instances, the Court has required that Congress produce evidence of systemic failures of state remedies for alleged constitutional violations in order to legislatively abrogate state sovereign immunity.[63]

[59] *See* HART AND WECHSLER, *supra* note 54, at 919. The state can, by removal, waive its immunity with respect to claims as to which it could not assert immunity in state court. *See* cases cited *supra* note 18.

[60] *See* Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1770 (1997) (discussing a right to damages from individuals as to certain mandatory federal obligations).

[61] *See id.* at 1771–73 (indicating that remedies that can run against the state are based on the state's designating itself rather than the officer as the proper party defendant); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 152–54 (1997) (providing a similar interpretation).

[62] *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 452–56 (1976).

[63] For example, in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), the Court held Congress could not make the states liable for patent violations without a showing of a pattern of unremedied patent violations by the state. But it is not clear that systemic failures are required if the legislation merely forbids what the Court has recognized as a violation of the Fourteenth Amendment and provides remedies that are congruent and proportional to the violation. *See* HART AND WECHSLER, *supra* note 54, at 959.

In any event, Congress has not abrogated state sovereign immunity for takings claims. And relatedly, Congress has not provided that states should be considered suable "persons" directly subject to compensatory or other remedies under § 1983.[64] Thus, implying an action, and an action that abrogated sovereign immunity, would run counter to Congress's prerogative to provide remedies for constitutional violations and to abrogate sovereign immunity.

IV. The Nonnecessity of an Implied Takings Remedy

Thus, despite the long tradition of takings remedies, there is no tradition of federal-court abrogation of state sovereign immunity in takings claims. In addition, the long tradition of takings remedies in both state and federal courts undermines an argument for the necessity of implying a Fifth Amendment action against states for takings. In the Supreme Court's recent implied remedies cases involving federal officials, the Court has suggested that alternative remedies obviate the need for implied actions.[65] And indeed, it was the existence of such alternative remedies that led the Court in *DeVillier* to decline to address the Fifth Amendment implied right-of-action claim.

One might argue that an implied action would bring desirable uniformity to takings compensation as against state entities. There are, however, alternative avenues for uniformity respecting Fifth Amendment requirements that do not require courts to develop an implied right of action. The absence of a thoroughly federalized implied action does not mean that the states do not consider Fifth Amendment issues, and the Supreme Court has used direct review of state-court decisions to outline major requirements for remedies. In addition, § 1983 claims against municipalities and individuals,

[64] Will v. Mich. Dep't. of State Police, 491 U.S. 58, 71 (1989).

[65] *See, e.g.*, Egbert v. Boule, 596 U.S. 482, 497 (2022) (reasoning that the existence of alternative remedies for alleged misconduct of border patrol agents counted against the Court's extending an implied remedy). In addition, the federalism concerns involved in implying an action directly against the state in federal court counsel hesitation. *Cf. id.* at 492 (indicating that the Court looks to whether special factors counsel hesitation in implying a remedy). Also counselling hesitation is that when Congress created a fairly comprehensive remedy for constitutional violations in 42 U.S.C. § 1983, it elected not to include states as defendants for takings claims or other constitutional violations. *See* Bush v. Lucas, 462 U.S. 367, 378, 385–86 (1983) (indicating that Congress's providing a comprehensive remedial civil service scheme weighed against implying an action under the First Amendment against individual officers).

and Tucker Act claims against the federal government, provide avenues for lower federal courts to develop takings doctrine.

What is more, the course of state takings remedies demonstrates certain benefits of disuniformity. States over time have expanded the types of compensable damages recoverable, and they have provided remedies against the states themselves.[66]

A closely analogous area illustrating the values of disuniformity and federalism involves remedies for overpayment of taxes. Similar to takings claims, a person who has been subject to an illegal tax has a strong claim to a monetary remedy. The government, after all, may be intentionally internalizing a specific amount of money that belongs to another.[67]

Similar to actions against officers as individuals for takings of land, common law actions against tax collectors as individuals were traditionally available in the state and federal courts. As against state officers sued as individuals, the federal courts allowed injunctions[68] and various forms of monetary relief such as in assumpsit and trespass.[69] But the federal courts did not provide monetary remedies against the state itself,[70] given sovereign immunity.

Over time, the states made actions for overpayments available against themselves in state courts. But even these actions directly against the state were not available in the federal courts.[71]

What is more, the Supreme Court has more generally channeled refund remedies against state and local governments to state-law causes of action even when the taxpayer alleges that the taxes violated the federal Constitution. The Tax Injunction Act of 1937 disallowed most federal-court injunctions against the enforcement of

[66] *See supra* notes 44–48; Brief of Minnesota et al., as *Amici Curiae* in Support of Respondent at 14–17, DeVillier v. Texas, 601 U.S. 285 (2024) (No. 22-913).

[67] *See* Ann Woolhandler & Michael G. Collins, *State Jurisdictional Independence and Federal Supremacy*, 72 Fla. L. Rev. 73, 107 (2020).

[68] *See* Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 844–46 (1824) (allowing an injunction action against the state collector).

[69] *See, e.g.*, Atchison, T. & S.F. Ry. Co. v. O'Connor, 223 U.S. 280, 285 (1912) (allowing a common law assumpsit action against a state collector).

[70] *Cf.* Ford Motor Co. v. Dep't. of Treasury of Ind., 323 U.S. 459, 463–65, 470 (1945) (holding that authorization of a refund action against the state waived immunity only with respect to the state courts, not the lower federal courts, but did not foreclose Supreme Court review of the state-court decisionmaking).

[71] *See, e.g.*, Burrill v. Locomobile Co., 258 U.S. 34, 37–38 (1922).

taxes so long as a "plain, speedy, and efficient remedy" exists in state courts.[72] And the Court declined to read § 1983 as allowing monetary relief against suable parties (such as municipalities and individual collectors) where state refund remedies are available, even though such monetary remedies are not explicitly barred by the Tax Injunction Act.[73]

In many ways, the state remedies exceed likely constitutional minima. Remedies could be sought directly against the states, payment under protest generally is not required, and taxpayer mistake rather than government illegality is commonly a ground for relief. As for these remedies that must be pursued in the state courts, direct review by the Supreme Court has been available to correct constitutional errors.[74] As with takings, there is no compelling need to federalize tax remedies with respect to state taxes even when the tax is alleged to be unconstitutional.

One similarly sees useful variation in the area of habeas corpus. The federal courts supply remedies for certain constitutional violations, but federal statutes and federal courts impose numerous hurdles to obtaining relief.[75] States provide a somewhat different set of postconviction remedies. Some such remedies exceed those that the federal courts supply, including claims for innocence based on new evidence.[76] All states provide for postconviction DNA testing by statute, and the states may provide more leniency as to procedural defaults and statutes of limitation than the federal courts.[77]

To the extent that an implied takings action would have to be entertained in both state and federal courts against the states, such actions might tend to undermine state experimentation with their

[72] The Tax Injunction Act of 1937, 50 Stat. 738, 28 U.S.C. § 1341. The Johnson Act of 1934, 48 Stat. 775, 28 U.S.C. § 1343, similarly foreclosed many federal-court injunctive suits challenging state and local utility rates.

[73] *See, e.g.*, Fair Assessment in Real Est. Ass'n v. McNary, 454 U.S. 100, 115–16 (1981) (holding that comity barred a § 1983 suit for damages against the county and individual officers).

[74] *See, e.g.*, McKesson Corp. v. Div. of ABT, 496 U.S. 18, 51–52 (1990).

[75] *See* 28 U.S.C. § 2254.

[76] *See* Brandon L. Garrett & Lee Kovarsky, Federal Habeas Corpus 163 (2013); 1 Donald E. Wilkes, Jr., State Postconviction Remedies and Relief Handbook 2017–2018 § 1:4, at 7–8 (2017) (finding 37 states provide such relief under their main postconviction mechanisms).

[77] Woolhandler & Collins, *supra* note 67, at 120–21 (citing authority).

own remedies. States would not be precluded from having differing claims, but the states might tend to restrain their own efforts if compelled to follow the details of a thoroughly federalized claim.[78] As Professor Paul Bator asked, "Do we not derive enormous benefits from having a variety of institutional 'sets' within which issues of federal constitutional law are addressed?"[79]

V. Congressional Power to Control Lower-Federal-Court Jurisdiction

As discussed above, the tradition of takings remedies does not support an implied action against the sovereign state in the federal courts. And the tradition of remedies also suggests that there is no pressing need to imply such an action. What is more, an implied action against the state could undermine the presumptive congressional allocation of jurisdiction between the federal and state courts.

For the most part, federal courts, under their "federal question" jurisdiction (28 U.S.C. § 1331), entertain claims in which federal law provides a cause of action.[80] Generally, such federal actions are statutory, such as lawsuits under the antitrust or employment discrimination laws. But a federal judge-made implied Fifth Amendment action would also command an original federal forum under § 1331.

The *DeVillier* Court did not decide whether to imply such a Fifth Amendment claim, reasoning that state-law claims sufficiently addressed Fifth Amendment issues. But a state-law claim that incorporates a significant and contested issue of federal law[81] could possibly obtain lower-federal-court jurisdiction under § 1331.[82] The Court has sometimes indicated that a plaintiff's state-law claim must "necessarily raise" a federal issue,[83] and the Fifth Circuit has read this as

[78] *Id.* at 121–22.

[79] *See* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 Wm. & Mary L. Rev. 605, 634 (1981).

[80] *See, e.g.*, Am. Well Works Co. v. Layne & Bowler, 241 U.S. 257, 260 (1916).

[81] *See* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 313 (2005); Hart and Wechsler, *supra* note 54, at 817 ("[J]urisdiction under § 1331 has been upheld in some cases not involving a federal cause of action, on the basis that a state law cause of action incorporates a question of federal law in a fashion that merits the exercise of federal question jurisdiction. . . .").

[82] *See, e.g.*, Smith v. Kan. City Title & Tr. Co., 255 U.S. 180, 199 (1921).

[83] *See, e.g.*, *Grable*, 545 U.S. at 314.

meaning that the federal issue will necessarily have to be decided in the case. Presumably because takings claims often can be resolved on state-law grounds, the Fifth Circuit indicated that *DeVillier* should not receive an original federal forum under § 1331 and therefore should be remanded to state court.[84]

Another requirement for such state-law causes of action with federal ingredients to obtain an original federal forum is that the type of action should not upset Congress's presumptive allocation of jurisdiction to the federal courts.[85] For example, tort claims alleging negligence per se based on violation of a federal law are generally jurisdictionally disallowed,[86] because, inter alia, they might bring in a raft of state-law tort claims as to which Congress did not provide a federal cause of action.

The Supreme Court's remand in *DeVillier* left unclear whether the state-law claim with a federal takings ingredient could proceed in federal court.[87] But sovereign immunity would normally prevent the plaintiff from filing such an action against the state in a federal court. If the state removed an action that could have proceeded against the state in the state court, the state would have waived its immunity in the federal court with respect to that action. Although that sort of removal occurred in *DeVillier*, it is not likely to happen often.

A different matter would be presented, however, if the Court did imply a federal cause of action directly under the Fifth Amendment. If one assumes that the primary reason for implying such an action is to provide a monetary remedy directly against the state without a sovereign immunity bar, then plaintiffs could routinely file inverse condemnation claims for monetary relief in the lower federal courts

[84] DeVillier v. Texas, 53 F.4th 904 at n.5 (5th Cir. 2022). The Fifth Circuit's "necessarily decided" requirement may be unduly narrow, given the vagaries of what may be decided in the course of litigation.

[85] *See Grable*, 545 U.S. at 313.

[86] *See, e.g.*, Merrell Dow Pharms. v. Thompson, 478 U.S. 804, 812 (1986).

[87] The Fifth Circuit had reversed the district court's refusal to dismiss the implied Fifth Amendment claim and remanded with directions that the action should proceed in state court. *See* 54 F.4th 904, 904 (5th Cir. 2022). The Supreme Court order states, "The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion." *DeVillier*, 601 U.S. at 293.

against states as an action arising under federal law.[88] As an action deriving directly from the Fifth Amendment, the claim would not need to satisfy the standard of not altering Congress's presumptive allocation of jurisdiction between state and federal courts. Nevertheless, such an implied action would significantly alter lower-federal-court jurisdiction by allowing takings actions directly against the state in federal court in the teeth of sovereign immunity—a result that Congress has not explicitly authorized.

VI. What If States Abrogate Remedies?

The Supreme Court and many amici assumed that *DeVillier* presented the question of whether the Court should imply a takings remedy directly under the Fifth Amendment when the state did not provide adequate state-law remedies. In fact, Texas did provide such remedies, as do the states more generally. Failure of the state courts in meeting Fifth Amendment standards can largely be addressed on direct review by the Supreme Court of state-court decisions. As noted above, the Supreme Court has often corrected state errors on review within the setting of causes of action that the state has provided against itself. But if the state purports to abrogate effective remedies against itself and further attempts to cut off remedies against individual officers, the Supreme Court on direct review could still require states courts to provide tort and injunctive remedies against individual officers.[89]

Not only can the Supreme Court correct errors on direct review, but the federal courts may provide significant remedies under § 1983 even within the strictures of sovereign immunity. Injunction actions that technically run against individual state officers are available. So too are damages actions. Under current doctrine, monetary remedies

[88] The Court, to an extent, has allowed such claims against municipalities under § 1983, although two of this article's authors have suggested that the federal courts might want to limit such actions through an abstention doctrine designed for land-use cases. Woolhandler & Mahoney, *supra* note 5, at 708–11.

[89] *See, e.g.*, Poindexter v. Greenhow, 114 U.S. 270, 302–03 (1884) (holding on direct review that the trespass action against the collector could not be repealed); Chaffin v. Taylor, 114 U.S. 309, 310 (1884) (reinstating a tort action against the collector that the state court had dismissed); *cf.* Ward v. Bd. of Cnty. Comm'rs, 253 U.S. 17 (1920) (requiring the state court to entertain an assumpsit action) (discussed in Woolhandler, *supra* note 61, at 120–21, 137).

against individuals face barriers of qualified immunity. But historically such immunity was unavailable, and the current federal courts could dispense with those immunities to provide just compensation.[90] While individual officers may lack the resources to pay the judgments, the government likely would pay such awards.[91]

Holding individuals liable may strike some as a byzantine way to provide just compensation, but such individual liability long provided constitutionally sufficient remedies for takings. And such remedies leave to the state itself discretion to substitute other constitutionally adequate remedies. For example, in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*,[92] the Court on direct review indicated that the state must provide the tax refund remedy that it promised.[93] But it also indicated that going forward, the state might substitute prepayment remedies.[94] And for a discriminatory tax, it could remedy the inequality by imposing higher taxes on others for the relevant tax period.[95]

Conclusion

History and precedent tell us that the just compensation requirement has been implemented by a complex network of remedies providing multiple avenues for redress. To say that the Takings Clause requires adequate remedies is not the same as saying that the Clause requires an implied action directly against the states that can be brought in federal courts. If one operates with a preference for taking constitutional doctrine down to the studs, a cause of action directly against the states under the Fifth Amendment might seem like a clean result. But one must be wary of displacing a network that works reasonably well, and with greater respect for the states and Congress, than would an implied Fifth Amendment action.

[90] *See* Woolhandler, *supra* note 61, at 153.

[91] *Cf.* Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885 (2014).

[92] 496 U.S. 18, 36–38 (1990).

[93] *Id.* at 31.

[94] *Id.* at 36–37.

[95] *See id.* at 35–36, 40. Similarly, in *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990), the Court held that the district court should not order a specific tax to pay for a desegregation remedy but should rather leave discretion to the School Board to determine how to raise money. *See also id.* (remedies should show "proper respect for the integrity and functions of local government institutions").