



Takings Claims in *DeVillier v. Texas* Awash in Procedural Matters

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In April 2024, the United States Supreme Court issued its opinion in a *DeVillier v. Texas*, a case brought by landowners who sought compensation for property damage caused by the state. Several years ago, Texas constructed a three-foot wall along a highway to serve as a barrier that could protect the road during heavy rains. The barrier effectively kept the water off the highway, but that water instead periodically inundated properties on the other side of the barrier. Owners of the flooded lands claimed Texas violated both state and federal law by taking their land without paying fair compensation for property damage. Texas tried to dismiss the federal claim on the basis that federal law did not provide a cause of action to enforce a takings claim against the state.

The Supreme Court found that Texas state law authorized the plaintiff to bring suit against the state alleging a violation of the U.S. Constitution, so the Court found it unnecessary to reach the [constitutional question](#) that it initially had been asked to resolve: whether authorizing legislation is needed for a party to bring suit against a state under the [Takings Clause](#) of the Fifth Amendment (as [applied](#) to the states by way of the Fourteenth Amendment). As a result, this constitutional question, which has divided federal and state courts, remains unresolved.

The Takings Clause of the Fifth Amendment

The Takings Clause of the [Fifth Amendment](#) of the United States Constitution provides that private property shall not be taken for public use by the federal government without just compensation. Claims for compensation under [this clause](#) are commonly referred to as *takings claims*. The Fourteenth Amendment incorporates many of the protections against federal government action contained in the Bill of Rights against individual states, including the [right to compensation](#) for private property taken for public use under state authority.

While the [Tucker Act](#) provides that takings claims against the federal government must generally be tried at the [Court of Federal Claims](#), both federal and state courts may consider takings claims brought against states. Notably, the Supreme Court's 2019 ruling in *Knick v. Township of Scott* allows plaintiffs to file a claim against a state agency for violation of the Fifth Amendment in federal court without having to first bring the claim to state court.

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Is There a Federal Remedy for a State Taking?

DeVillier v. Texas involves takings claims under both state and federal law. Under *Knick*, such a case could be brought against a state government in [either](#) state or federal court. A number of states have laws expressly providing for the process under which just compensation claims may be brought in state court. For example, Texas law [authorizes takings claims](#) based on violations of the United States and Texas Constitutions.

Richard DeVillier, a property owner, originally filed his case in state court. Texas successfully removed *DeVillier* and related cases to federal court. After *DeVillier* and other cases had been consolidated into a single docket in federal court, Texas moved to dismiss them on multiple grounds. Among other arguments, Texas claimed sovereign immunity from liability for a Fifth Amendment takings claim, arguing that Texas was [not a “person” subject to liability](#) for a violation of constitutional rights under [42 U.S.C. § 1983](#) and that there was no other cause of action under which a federal court could provide a remedy to plaintiffs.

While the right to compensation is guaranteed, the means by which that compensation is awarded is not specified in the Constitution. As the Supreme Court has [explained](#), “Constitutional rights do not typically come with a built-in cause of action to allow for private enforcement in courts.” The question thus arises whether the right to compensation guaranteed by the Takings Clause directly confers the ability to bring a claim in court, or whether such a claim must be explicitly authorized through legislative action. If no legislation is required, the claim is considered *self-executing*.

While some courts have found that the Takings Clause is self-executing, the U.S. Courts of Appeals for [Ninth](#) and [Fifth](#) Circuits disagree. In considering DeVillier’s case, the Fifth Circuit [held that](#) the Takings Clause “does not provide a right of action” for takings claims against a state. However, the Supreme Court of Texas does [recognize](#) a such a right of action as a matter of state law. When the Fifth Circuit denied rehearing, one judge wrote separately and [explained](#) that the appropriate venue for plaintiffs was in state and not federal court.

As Supreme Court took up *DeVillier*, the [question presented](#) was whether the constitutional guarantee of just compensation under Fifth Amendment necessarily includes a right to a remedy (i.e., is self-executing). More broadly, the case afforded the court an opportunity to clarify a plaintiff’s path to sue a state for alleged unconstitutional takings, potentially avoiding the many procedural steps of DeVillier’s own claim.

The [Last Resort Rule](#) of the [Constitutional Avoidance Doctrine](#) counsels that a federal court should not decide a constitutional question if there is some other basis for reaching a decision in the case. Consistent with that rule, the Supreme Court declined to decide whether the Takings Clause is self-executing. Instead, the Court remanded the case back to the lower courts to hear the case on the merits—potentially in state court, noting that Texas has indicated it would not oppose such a measure. Because “Texas state law provides a cause of action by which property owners may seek just compensation against the State,” the Court declined to decide the broader question of whether the Fifth Amendment’s Takings Clause would require a remedy if the state legislature had not proactively enabled one. The Court indicated, however, that it might need to decide the question of a *federal* remedy in a case “in which a property owner has no cause of action to seek just compensation.”

Considerations for Congress

DeVillier is an example of a growing set of class action [flood-related takings claims](#) for damages sustained due to government actions that inundate property. *DeVillier* is one of several takings claims related to government responses to the [flooding from Hurricane Harvey](#). In 2012 the Supreme Court [authorized](#) takings claims for damages associated with periodic temporary flooding, leading to concerns

that such a measure had opened the proverbial floodgates of litigation. Now, courts hearing those cases are grappling with procedural considerations such as those presented in *DeVillier*. The Supreme Court's 2019 ruling in *Knick* allows plaintiffs to file in federal court against a state agency without having to first bring the claim to state court. Federal courts may increasingly confront questions such as what causes of action are available for such claims and which courts should consider them. Congress could consider whether to expressly authorize a federal forum to hear a Fifth Amendment takings claim when the defendant is a state or local government, similar to how Congress authorized the Court of Federal Claims to hear takings claims under the [Tucker Act](#) when the federal government is a defendant.

Given the increasing volume of flood-related takings cases, Congress could also consider whether to provide a non-judicial pathway by which to compensate property owners affected by flooding caused by a government entity. It could do so through measures such as authorizing a federal agency to issue payments after a particular flood has occurred for the purpose of fairly compensating a property owner for a government-caused loss. Congress could also consider alternate or parallel means of providing some assistance to a property owner even if not expressly intended to fully compensate a loss, such as by providing disaster assistance or subsidized insurance for damages associated with a government-covered project. Another option could be to require enhanced risk disclosures when government actions are likely to cause flooding to enable more informed decisions about property risks—and to share that information with governmental agencies, Congress, property owners, and the public more broadly. Alternatively, Congress could leave it to the states and courts to sort out claims on a case-by-case basis unless the Supreme Court decides to address the matter more directly.

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