REMEDIES — TAKINGS CLAUSE — ELEVENTH CIRCUIT USES A NOVEL SUBSTITUTE-REMEDY TEST TO FIND A DIRECT CAUSE OF ACTION UNDER THE FIFTH AMENDMENT'S TAKINGS CLAUSE. — *Fulton v. Fulton County Board of Commissioners*, 148 F.4th 1224 (11th Cir. 2025).

"[W]here there is a legal right, there is also a legal remedy . . . ."[1] Although Blackstone's maxim has led to efforts to redress constitutional violations,[2] courts are divided on the proper source of such redress. Takings law illustrates this division: Courts have grappled with whether the Fifth Amendment's just compensation remedy can be vindicated through the Constitution alone.[3] Recently, in *Fulton v. Fulton County Board of Commissioners*,[4] the Eleventh Circuit weighed in on this debate, holding that the Takings Clause creates a direct cause of action for government takings.[5] While laudable for its attempt to prevent the Takings Clause from being an empty promise, *Fulton* relied on a novel test for substitute remedies that rested on contestable readings of the Supreme Court's Suspension Clause and Takings Clause precedents. In all, *Fulton* impedes states' ability to create alternative schemes for constitutional remedies that fit their local customs.

On April 22, 2017, Fulton County Animal Services (FCAS) officers arrested Brandon Fulton for animal cruelty and seized seven of his horses.[6] Despite the dismissal of the felony charges against Fulton a year later, FCAS refused to return the horses to Fulton or compensate him for their loss.[7] On May 5, 2020, Fulton brought a § 1983[8] suit against the Fulton County Board of Commissioners to recover his property.[9] After the Board moved to dismiss, Fulton moved to amend his complaint to add a takings claim directly under the Fifth Amendment.[10]

The District Court for the Northern District of Georgia denied Fulton's motion to amend his complaint and granted the Board's motion to dismiss.[11] It first held that Fulton's § 1983 claim failed because he did not point to "an official policy or practice of [the] County that caused

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[1] 3 WILLIAM BLACKSTONE, COMMENTARIES *23.

[2] *See, e.g.*, John C. Jeffries, Jr., Essay, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 87 & n.1 (1999).

[3] *Compare* DeVillier v. Texas, 63 F.4th 416, 420 (5th Cir. 2023) (per curiam), *with id.* at 436 (Oldham, J., dissenting from the denial of rehearing en banc).

[4] 148 F.4th 1224 (11th Cir. 2025).

[5] *Id.* at 1233.

[6] Complaint at 3, Fulton v. Fulton Cnty. Bd. of Comm'rs, No. 20-cv-01936 (N.D. Ga. Feb. 24, 2021).

[7] *Id.* at 4.

[8] 42 U.S.C. § 1983. Section 1983 provides a cause of action against state or local officials for violations of federal constitutional rights. *Id.*

[9] *Fulton*, 2021 WL 8945248, at *1. Fulton also sued two others, Paul Howard and Rebecca Guinn, in their individual capacities. *Id.*

[10] *Id.*

[11] *Id.* at *4.

his constitutional deprivation."[12] Turning to Fulton's Fifth Amendment claim, the court held that plaintiffs suing a municipality must bring their takings claims under § 1983, not the Fifth Amendment.[13] And because § 1983 "provides an adequate remedy," the court concluded that it would "not imply a judicially created cause of action directly under the Constitution."[14] Fulton appealed the district court's decision to the Eleventh Circuit.[15]

The Eleventh Circuit reversed.[16] Writing for the panel, Judge Rosenbaum[17] held that Fulton's amendment was not futile because the Fifth Amendment's Takings Clause creates "a direct cause of action against local governments."[18] In the panel's view, the case required it to address this contention.[19] After all, the district court would have jurisdiction to hear Fulton's Fifth Amendment claim;[20] Fulton lacked an alternative remedy under Georgia law,[21] unlike the plaintiff in *DeVillier v. Texas*;[22] and his Fifth Amendment claim would not be time-barred under Georgia's four-year statute of limitations for the recovery of personal property,[23] which would transfer to the federal claim as the "most substantively similar [state law] action."[24]

Having established that it had to address the direct-cause-of-action issue, the panel held that "the text, history, and structure of the Constitution" authorized a direct cause of action under the Takings Clause.[25] Starting with text and structure, the court stated that the Founding-era meaning of "just compensation" was "fair payment" proportionate to the value of the property taken.[26] The court explained that this right to just compensation implies "a guaranteed cause of action to sue to recover that relief,"[27] lest it be "an empty promise."[28] The court pointed to Supreme Court precedent recognizing the Takings Clause as "self-executing."[29] It concluded that property owners are "automatically

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12 *Id.* at *3.

13 *Id.*

14 *Id.* (quoting GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1253 n.15 (11th Cir. 2012)).

15 *Fulton*, 148 F.4th at 1233.

16 *Id.* at 1265.

17 Judge Abudu joined Judge Rosenbaum's opinion.

18 *Fulton*, 148 F.4th at 1234.

19 *Id.*

20 *Id.* at 1234–35.

21 *Id.* at 1235–36.

22 144 S. Ct. 938 (2024). In *DeVillier*, the Court avoided answering the Fifth Amendment cause-of-action question because the plaintiff had an adequate state-law alternative. *Id.* at 944.

23 *Fulton*, 148 F.4th at 1236–38 (citing GA. CODE ANN. §§ 9-3-31 to 9-3-32 (2025)).

24 *Id.* at 1237.

25 *Id.* at 1238. The Takings Clause reads: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

26 *Fulton*, 148 F.4th at 1238 (citing, inter alia, 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan, 5th ed. 1773)).

27 *Id.* at 1239.

28 *Id.* at 1240.

29 *Id.* at 1239 (quoting Knick v. Township of Scott, 139 S. Ct. 2162, 2172 (2019)).

entitled to . . . relief as soon as they suffer a taking," whether or not Congress "recognize[s] their injury [or] their right to a remedy."[30] This "automatic right to . . . relief" entails "an automatic cause of action to get that relief."[31] The panel argued that these two features of the Takings Clause — its guarantee of legal relief and its self-executing nature — render it "a constitutional unicorn" guaranteeing a "legal damages-type remedy" in takings cases.[32]

The panel then asserted that the Supreme Court's treatment of the Suspension Clause's guarantee of habeas corpus[33] — the only other constitutionally recognized remedy[34] — indicates that the Takings Clause remedy is protected against "abrogation or dereliction."[35] Analyzing[36] the Court's upholding of federal statutes affecting habeas corpus in *United States v. Hayman*[37] and *Swain v. Pressley*,[38] the *Fulton* panel discerned that "Congress cannot narrow the scope of a constitutionally prescribed remedy" like just compensation.[39] The court then pointed to the history of the Takings Clause and the Fourteenth Amendment to show that the Framers intended the just compensation remedy to, among other things, apply against local governments in federal courts and not depend upon legislation.[40]

Finding that the Takings Clause creates a direct cause of action, the panel held that Fulton could assert it.[41] Drawing upon habeas jurisprudence,[42] the panel determined that a substitute remedy must match the constitutional remedy in virtually every respect, including scope.[43] But none of the alternative remedies available to Fulton "completely capture[d] the constitutional guarantee" of the Takings Clause.[44] In particular, the court asserted that Georgia's one-year notice requirement for claims against counties[45] was narrower than the Takings Clause, which

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[30] *Id.* (citing *Knick*, 139 S. Ct. at 2170).

[31] *Id.*

[32] *Id.* at 1240.

[33] 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] *Fulton*, 148 F.4th at 1240.

[35] *Id.* (quoting DeVillier v. Texas, 63 F.4th 416, 439 (5th Cir. 2023) (Oldham, J., dissenting from the denial of rehearing en banc)).

[36] *Id.* at 1241–42.

[37] 342 U.S. 205 (1952).

[38] 430 U.S. 372 (1977).

[39] *Fulton*, 148 F.4th at 1242.

[40] *Id.* at 1242–43.

[41] *Id.* at 1265.

[42] *See id.* at 1241–42.

[43] *See id.* at 1255 (requiring that an alternative remedy "at least duplicate[] the scope of the just-compensation remedy"); *id.* at 1259–60 (finding state law relief inadequate because there was the potential that state law remedies were narrower in scope than the constitutional remedy).

[44] *Id.* at 1255; *see also id.* at 1255–61 (explaining why alternative remedies were inadequate).

[45] GA. CODE ANN. § 36-11-1 (2025) ("All claims against counties must be presented within 12 months after they accrue or become payable or the same are barred . . . .").

has no time limitation.[46] It held that the lack of constitutionally adequate remedies for takings of property by local governments required the Takings Clause to directly provide for judicial relief.[47]

The panel then dismissed federalism concerns raised by the dissent. It argued that the doctrine of sovereign immunity could not bar the constitutionally guaranteed remedy of just compensation because of the "textually guaranteed"[48] nature of the remedy.[49] Due to the Takings Clause's remedial focus, the majority disclaimed the relevance of the Supreme Court's "disfavor[]" toward judicially created causes of action against federal officials.[50] Finally, the court noted "the limited practical effect of [its] decision," as litigants will likely continue to sue under § 1983 rather than the Takings Clause due to the former's provision of consequential damages and attorney's fees.[51]

Chief Judge William Pryor dissented, arguing that the majority "ha[d] no business creating a constitutional remedy for" Fulton because he had failed to pursue the "ample alternatives" available to him.[52] Chief Judge Pryor would have found no cause of action in the Takings Clause.[53] While he acknowledged that the Takings Clause recognizes a compensatory remedy, he distinguished the *recognition* of a remedy from the *supplying of a cause of action* to pursue that remedy — the latter being "a job for Congress, not the courts."[54] He next argued that the history of habeas jurisdiction demonstrated that Congress "did not understand the Constitution to create . . . new remed[ies]."[55] Chief Judge Pryor also pointed out that locating a cause of action in the Takings Clause would forcibly waive federal and state governments' sovereign immunity.[56] He then challenged the majority's historical analysis of the Takings Clause, arguing that history establishes that takings claims depend on external remedies, such as § 1983.[57]

Chief Judge Pryor next argued that § 1983 and state law provide adequate alternative remedies that "obviate the need to imply a right of action" in the first instance.[58] In response to the majority's argument that Georgia law's one-year notice requirement narrowed the scope of

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46 *Fulton*, 148 F.4th at 1260. The majority qualified this statement by asserting that the problem with Georgia's time limit is that it is "unilaterally imposed" by "a state," rather than by Congress or by states with "congressional blessing." *Id.* at 1260 n.25 (emphasis omitted).

47 *Id.* at 1261.

48 *Id.* at 1262.

49 *Id.* at 1261–62.

50 *Id.* at 1263 (quoting DeVillier v. Texas, 63 F.4th 416, 420 (5th Cir. 2023) (Higginson, J., concurring in denial of rehearing en banc)).

51 *Id.* at 1264.

52 *Id.* at 1265 (Pryor, C.J., dissenting).

53 *Id.* at 1267.

54 *Id.* at 1268 (quoting Egbert v. Boule, 142 S. Ct. 1793, 1800 (2022)).

55 *Id.* at 1271.

56 *Id.* at 1272–73.

57 *Id.* at 1275–78.

58 *Id.* at 1278.

just compensation, he stated that the majority "upset[] the role of procedural rules in our judicial system"[59]: Procedural rules do not "constitute 'limits' on the scope of the Takings Clause" because they merely "govern how claimants seek" redress.[60] Treating every procedural hurdle as "narrowing,"[61] in his eyes, would collapse the distinction between procedure and substance and "undermine [state] legislative authority to define and shape . . . remedies."[62] Ultimately, he viewed the majority's creation of an implied right of action as a "transgress[ion of] the separation of powers" and a "rejection of judicial humility."[63]

In its eagerness to find a cause of action in the Takings Clause, the majority committed two fundamental errors. First, it overread the Court's Suspension Clause precedent by brushing colorable ambiguities under the rug or ignoring them altogether. Second, it imposed a novel adequate-alternatives test for state procedural restraints unmoored from the Court's Takings Clause jurisprudence. In finding Georgia law inadequate under a test resting on shaky ground, the majority improperly displaced states' abilities to create remedial schemes for constitutional rights.

The Eleventh Circuit found clarity where habeas precedents offered none. Scholars have acknowledged that habeas jurisprudence provides no clear substitute-remedy test.[64] On the one hand, *Hayman* and *Swain* appear to suggest that an alternative legislative remedy is adequate where it matches the scope of constitutional habeas. *Hayman* approved of an alternative remedy for habeas that was identical in all respects to the constitutional remedy except for jurisdiction.[65] Likewise, *Swain* upheld a substitute remedy that gave habeas power to non–Article III judges because its "scope" was "commensurate with habeas corpus in all respects save one."[66] Yet more recent cases like *Jones v. Hendrix*[67] suggest that *Hayman* and *Swain* should be read as setting sufficient, but not necessary, bounds for what constitutes an adequate alternative remedy. In *Jones*, the Court upheld 28 U.S.C. § 2255 — under which a federal prisoner could challenge the legality of his criminal sentence[68] — as

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[59] *Id.* at 1280.

[60] *Id.* The majority's rationale seems to permit Native tribes to challenge centuries-old takings of tribal lands by states and the United States. Whether the majority intended to enable this type of challenge is unclear.

[61] *Id.* at 1281.

[62] *Id.* at 1280.

[63] *Id.* at 1281.

[64] *See* Stephen I. Vladeck, *Habeas Corpus, Alternative Remedies and the Myth of* Swain v. Pressley, 13 ROGER WILLIAMS U. L. REV. 411, 441 (2008); *see also* Boumediene v. Bush, 553 U.S. 723, 771–74 (2008) (acknowledging that *Swain* and *Hayman* "provide little guidance," *id.* at 774, as to whether "Congress has provided adequate substitute procedures for habeas corpus," *id.* at 771).

[65] *See* United States v. Hayman, 342 U.S. 205, 219 (1952).

[66] Swain v. Pressley, 430 U.S. 372, 381–82 (1977).

[67] 143 S. Ct. 1857 (2023).

[68] *Id.* at 1865 (quoting 28 U.S.C. § 2255(a), (e)).

an alternative remedy to habeas even though the statute barred certain types of successive claims.[69] The Court's treatment of § 2255's adequacy standard[70] as a low bar suggests that it permits substitutes that do not fully duplicate the scope of the original habeas remedy.[71] *Fulton*'s glaring omission of *Jones* thus led to an inaccurately narrow view of what can constitute an adequate habeas substitute.

Even if habeas jurisprudence offers a clear substitute-remedies test that can be extended to state procedural limits on *habeas*, it is uncertain whether that test applies to state *takings* claims. In *DeVillier*, the Court addressed whether the plaintiff had adequate alternatives to obtain just compensation.[72] Rather than asking if the alternative remedy matched the scope of the Takings Clause, the Court held that the mere existence of a remedy in state law was sufficient to make that remedy adequate.[73] The Court's holding was consciously narrow. While the litigants briefed the habeas law analogue,[74] the Court made no mention of it in its cursory treatment of adequate substitutes. In light of the minimal scrutiny applied in *DeVillier*, the *Fulton* test's departure from the Court's takings jurisprudence becomes all the more noteworthy.

Some heightened scrutiny of state remedial schemes is necessary to prevent states from hollowing out the Takings Clause. But *DeVillier* provides a workable floor: A state-law remedy is adequate unless the remedy is illusory or categorically unavailable.[75] *DeVillier*'s baseline prevents the most egregious examples of state underenforcement while still preserving flexibility for states to impose certain procedural limitations.

But *Fulton*'s heightened requirement threatens states' ability to create procedures for constitutional remedies. The panel held that Georgia's one-year statute of limitations impermissibly narrowed Fulton's right to just compensation.[76] The dissent rightly noted that the majority's assumption — that procedural limitations are substantive limitations — would bar commonplace rules like the statute of limitations from "ever apply[ing] to constitutional claims."[77] Although the majority

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[69] *See id.* at 1869.

[70] The adequacy standard in § 2255 bars a federal prisoner from petitioning for a writ of habeas corpus "unless . . . the remedy by motion is inadequate or ineffective to test the legality of his detention." *Id.* at 1865 (quoting 28 U.S.C. § 2255(e)).

[71] *Cf.* Tom Jordan, *What's Left of the Suspension Clause After* Jones v. Hendrix*?*, 102 WASH. U. L. REV. ONLINE 23, 32 (2024) (describing *Jones* as a "diminution of the Suspension Clause"); *The Supreme Court, 2022 Term — Leading Cases:* Jones v. Hendrix, 137 HARV. L. REV. 370, 370 (2023) (arguing that *Jones* "curtailed incarcerated people's ability to seek habeas corpus review of their convictions").

[72] DeVillier v. Texas, 144 S. Ct. 938, 944 (2024).

[73] *See id.* at 941.

[74] Brief for Respondent at 41–42, *DeVillier*, 144 S. Ct. 938 (No. 22-913).

[75] *See DeVillier*, 144 S. Ct. at 944.

[76] *Fulton*, 148 F.4th at 1260.

[77] *Id.* at 1280 (Pryor, C.J., dissenting).

responded that an adequacy issue arises only when a state institutes a procedural bar on a constitutional claim "without any congressional blessing,"[78] it provided no evidence that Georgia's limit contravened the wishes of Congress.[79] Instead, the majority's argument effectively assumed that congressional silence defaults to a categorical bar against a state imposing procedural limits on takings claims.[80] But another court could assume the opposite: State procedures may fill federal statutory gaps unless Congress has explicitly legislated to impose a limit.

Due to the state-based nature of property law, state remedial schemes play an outsized role in shaping takings law — a role that federal courts should respect. In crafting their remedial schemes, states make tradeoffs, including imposing procedural limits to achieve substantive benefits. For instance, Colorado imposes strict "procedures set out in the [state's] eminent domain statute" on inverse condemnation claims.[81] Yet while the law bars such claims from "be[ing] litigated in the same lawsuit with a common law claim,"[82] it gives property owners the novel right to recover expert witness fees.[83] Florida provides another example of a tradeoff: It reduced the notice period for filing takings claims from 150 to 90 days[84] while creating new causes of action for "conditions imposed by a governmental entity on a property owner's proposed use of real property that lacks a nexus to a legitimate public purpose."[85] These innovations in state remedial schemes have even been adopted by federal courts.[86] But such innovations may fail the majority's test, with its myopic focus on procedural limitations that ignores whether the forum state has expanded the substantive scope of the just compensation

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[78] *Id.* at 1260 n.25 (majority opinion).

[79] In fact, the Georgia Court of Appeals had previously upheld the constitutionality of the twelve-month notice requirement as to the waiver of immunity. Cobb v. Bd. of Comm'rs of Rds. & Revenue, 260 S.E.2d 496, 497 (Ga. Ct. App. 1979). Also, Congress has instituted a six-year statute of limitations on the Tucker Act, a statute that allows property owners to bring takings claims against the federal government, 28 U.S.C. §§ 1491(a)(1), 2501, weakening the notion that it would be opposed to Georgia's limitation.

[80] *See Fulton*, 148 F.4th at 1260 n.25.

[81] Harold A. Feder & Christi Wieland, *Inverse Condemnation — A Viable Alternative*, 51 DENV. L.J. 529, 536 (1974).

[82] Ossman v. Mountain States Tel. & Tel. Co., 520 P.2d 738, 742 (Colo. 1974).

[83] *See* Feder & Wieland, *supra* note 81, at 536; *see also* Jennifer Lake, *Inverse Condemnation Claims After* Knick*: The Promise and Peril of Litigating in Federal Court*, COLO. LAW. (May 2020), https://cl.cobar.org/features/inverse-condemnation-claims-after-knick [https://perma.cc/B7K2-23SS] (discussing the right to recover attorney's fees in inverse condemnation cases).

[84] Brandon C. Meadows, *Changes to the Bert Harris Act — When Government Action Devalues Your Property*, JIMERSON BIRR (Mar. 7, 2024), https://www.jimersonfirm.com/blog/2024/03/changes-to-the-bert-harris-act-when-government-action-devalues-your-property [https://perma.cc/CB7Y-LQQY].

[85] Amber L. Ketterer & Rafael E. Suarez-Rivas, *The Bert J. Harris, Jr., Private Property Rights Protection Act: An Overview, Recent Developments, and What the Future May Hold*, FLA. BAR J., Sep.–Oct. 2015, at 49, 52 (quoting FLA. STAT. § 70.45(c) (2015)).

[86] *See, e.g.*, Feder & Wieland, *supra* note 81, at 537 (explaining the "recent trend in federal legislation and court decisions . . . toward recognizing the right to recover expert witness fees" in inverse condemnation actions, a right that Colorado had first recognized).

remedy. Indeed, under the majority's test, a state remedial scheme limiting takings claims to twelve months but providing for expert witness and attorney's fees in addition to just compensation would likely be found inadequate. Following *Fulton*, state legislatures may be hesitant to impose any requirement not explicit in the Takings Clause or a federal statute for fear that it may appear to restrict the Fifth Amendment's remedial scope.[87] Disincentivizing such policy experimentation may result in ineffective laws that are ill-suited to local or current needs.[88]

Fulton's test reveals the underlying federalism concern behind states' creation of alternative remedial schemes for just compensation: Where Congress has left gaps in its legislative scheme, should federal courts step in to provide an unlimited direct cause of action under the Takings Clause, overriding the policy pronounced by state legislatures? *DeVillier* deferred to state legislatures, trusting states to honor their constitutional obligations to provide causes of action for takings claims responsive to local needs.[89] *Fulton*, however, adopted a contrary view: It repeatedly referenced state procedures as "whims"[90] that could transform the Constitution's "promise" of just compensation into a "taunt."[91] The *Fulton* court's skepticism of states' willingness to vindicate their citizens' constitutional rights led it to adopt a more demanding substitute-remedies test that, in consequence, recasts certain state procedural rules as substantive limitations on constitutional rights.[92]

Though it may be unsettled whether Congress or states should design takings remedies, courts should not intervene by imposing a stringent substitute-remedies test. Federal courts should be hesitant to intervene in state remedial schemes for takings claims because it upsets state legislatures' delicate balance of interests between procedural constraints and substantive benefits. Such an intervention also disregards the Supreme Court's admonition that federal courts "should not 'assume the States will refuse to honor the Constitution.'"[93] And an intervention like *Fulton*'s, which imports a shaky analogy into the takings context, should be viewed with even greater suspicion. But whether courts move toward a more lenient, precedent-based test will depend on their trust in state legislatures to fulfill their constitutional obligations.

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87 *See* Ann Woolhandler, Julia D. Mahoney & Michael G. Collins, *Takings and Implied Causes of Action*, 2023–2024 CATO SUP. CT. REV. 249, 262–63 (2024).

88 *See* Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 1007, 1013–14 (2007) (describing the benefits of states in enabling innovation, lowering the cost of trying new policies, and preserving the "distinctiveness" of local communities, *id.* at 1013).

89 *See* DeVillier v. Texas, 144 S. Ct. 938, 944 (2024).

90 *Fulton*, 148 F.4th at 1232, 1260 n.25, 1261.

91 *Id.* at 1265.

92 *See id.* at 1260.

93 *DeVillier*, 144 S. Ct. at 944 (quoting Alden v. Maine, 527 U.S. 706, 755 (1999)).