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Supreme Court Overrules Precedent that Created "Catch-22" for Property Owners Attempting to Bring Takings Cases in Federal Court

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In *Knick v. Township of Scott*, an important decision issued this morning, the Supreme Court overruled a precedent that creates a Catch-22 blocking property owners from bringing takings cases against state and local governments in federal court.

The main point at issue in *Knick* was whether the Court should overrule *Williamson County Regional Planning Commission v. Hamilton Bank* (1985). Under *Williamson County*, a property owner who contends that the government has taken his property and therefore owes "just compensation" under the Fifth Amendment, could not file a case in federal court until he or she first secured a "final decision" from the relevant state regulatory agency and "exhausted" all possible remedies in state court. Even then, it was *still* often impossible to bring a federal claim, because various procedural rules preclude federal courts from reviewing final decisions in cases that were initially brought in state court. I discussed the issues at stake in the case in a *Wall Street Journal* op ed, and more fully here, and in an amicus brief I coauthored on behalf of the Cato Institute, the National Federation of Independent Business, the Southeastern Legal Foundation, the Beacon Center of Tennessee, the Reason Foundation (which publishes *Reason* magazine and this website), and myself.

The majority opinion by Chief Justice John Roberts overrules *Williamson County* and eliminates the Catch-22 that we highlighted in our brief, and which has long been heavily criticized by legal scholars and others. Here is the key part of the opinion:

In *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172 (1985), we held that a property owner whose property has been taken by a local government has not suffered a violation of his Fifth Amendment rights—and thus cannot bring a federal takings claim in federal court—until a state court has denied his claim for just compensation under state law….

The *Williamson County* Court anticipated that if the property owner failed to secure just compensation understate law in state court, he would be able to bring a "ripe" federal takings claim in federal court. See *id.*, at 194. But as we later held in *San Remo Hotel, L. P.* v. *City and County of San Francisco*, 545 U. S. 323 (2005), a state court's resolution of a claim for just compensation under state law generally has preclusive effect in any subsequent federal suit. The takings plaintiff thus finds himself in a Catch-22: He cannot go to federal court without going to

state court first; but if he goes to state court and loses, his claim will be barred in federal court. The federal claim dies aborning.

The *San Remo* preclusion trap should tip us off that the state-litigation requirement rests on a mistaken view of the Fifth Amendment. The Civil Rights Act of 1871, after all, guarantees "a federal forum for claims of unconstitutional treatment at the hands of state officials," and the settled rule is that "exhaustion of state remedies 'is *not* a prerequisite to an action under [42 U. S. C.] §1983….'" But the guarantee of a federal forum rings hollow for takings plaintiffs, who are forced to litigate their claims in state court.

We now conclude that the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled. A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it. That does not mean that the government must provide compensation in advance of a taking or risk having its action invalidated: So long as the property owner has some way to obtain compensation after the fact, governments need not fear that courts will enjoin their activities. But it does mean that the property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under §1983 at that time.

Chief Justice Roberts also emphasized that *Williamson County* created a double standard under which Takings Clause claims are subjected to a perverse requirement that is not imposed on other constitutional claims against state and local governments:

The state-litigation requirement relegates the Takings Clause "to the status of a poor relation" among the provisions of the Bill of Rights. *Dolan v. City of Tigard*, 512 U. S. 374, 392 (1994). Plaintiffs asserting any other constitutional claim are guaranteed a federal forum under §1983, but the state-litigation requirement "hand[s] authority over federal takings claims to state courts." *San Remo*, 545 U. S., at 350 (Rehnquist, C. J., concurring in judgment). Fidelity to the Takings Clause and our cases construing it requires overruling *Williamson County* and restoring takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights.

As emphasized in our amicus brief, one of the main reasons why the framers of the Fourteenth Amendment chose to "incorporate" the Bill of Rights against the states in 1868 was to preclude abuses by state governments, and to ensure that these rights could be vindicated in federal court. State courts can be and sometimes are tilted in favor of their own state and local governments. Particularly in the many states where state judges are elected, they may be part of the same political coalition as the state and local government officials who adopted the policy that may have violated the Takings Clause. In many—perhaps even most—situations, it will make little difference whether a takings claim is heard in state court or federal court. But sometimes, a federal forum is essential to ensuring fair consideration of the property owner's claims.

The standard rationale for *Williamson County,* defended in Justice Elena Kagan's dissent today, is that the state has not really "taken" property without just compensation until a state court has reached a final decision upholding the government's actions. Chief Justice Roberts nicely dispenses with that theory:

Contrary to *Williamson County*, a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it. The Clause provides: "[N]or shall private property be taken for public use, without just compensation." It does not say: "Nor shall private property be taken for public use, without an available procedure that will result in compensation." If a local government takes private property without paying for it, that government has violated the Fifth Amendment—just as the Takings Clause says—without regard to subsequent state court proceedings….

The Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner. That principle was confirmed in *Jacobs v. United States*, 290 U. S. 13 (1933), where we held that a property owner found to have a valid takings claim is entitled to compensation as if it had been "paid contemporaneously with the taking"—that is, the compensation must generally consist of the total value of the property when taken, plus interest from that time.

I would add that the same reasoning could be used to deny a federal forum for numerous other constitutional rights claims. By the logic of *Williamson County*, a state government has not really censored speech until a state court upholds the censorship policy. It has not really engaged in unconstitutional racial discrimination in hiring until a state court issues a "final decision" holding that the challenged hiring rules are legal. And so on.

Chief Justice Roberts' opinion also effectively explains why *Williamson County* should be overruled based on the Supreme Court's far from precise criteria for reversing precedent. As he emphasizes, "*Williamson County* was not just wrong. Its reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence." He also notes that the ruling "has come in for repeated criticism over the years from Justices of this Court and many respected commentators," that it has "become unworkable in practice," and that "there are no reliance interests on the state-litigation requirement" because allowing takings cases to go to federal court would not lead to the invalidation of otherwise lawful state and local government policies.

Given the serious flaws of *Williamson County*, it is unfortunate that *Knick* turned out to be a close 5-4 decision, with the justices divided along ideological lines—the five conservatives in the majority and four liberals in dissent. Indeed, the case was reargued in order to include Justice Brett Kavanaugh, who had not yet been confirmed at the time of the initial oral argument. It now seems highly likely that the Court took this step because the justices were previously split 4-4. I would add, however, that Kavanaugh's participation ultimately led to the same outcome as what likely would have occurred had Justice Anthony Kennedy remained on the Court. Kennedy was a critic of *Williamson County*, and had joined a 2005 concurring opinion urging the Court to consider reversing it.

The dissent by Justice Elena Kagan fails to provide any good justification for keeping *Williamson County* in place. Much of it seems to assume that the majority requires immediate payment of compensation any time a state or local government adopts any policy that might potentially qualify as a taking:

[A] government actor usually cannot know in advance whether implementing a regulatory program will effect a taking, much less of whose property. Until today, such an official could do his work without fear of wrongdoing, in any jurisdiction that had set up a reliable means for property owners to obtain compensation. Even if some regulatory action turned out to take

someone's property, the official would not have violated the Constitution. But no longer. Now, when a government undertakes land-use regulation (and what government doesn't?), the responsible employees will almost inescapably become constitutional malefactors. That is not a fair position in which to place persons carrying out their governmental duties.

But in fact the majority in no way turns government officials into "constitutional malefactors" merely because they enact a "regulatory program." It just holds that aggrieved property owners can then bring a takings case in federal court. There is no constitutional violation, however, unless the court finds that the program in question effects a taking and the state didn't pay. Exactly the same thing happens when the regulatory program in question is challenged in state court, and the latter rules that it was a taking.

Justice Kagan also argues that the *Williamson County* rule is supported by a "mountain of precedent" going back to the nineteenth century. But, as the majority points out, those cases addressed situations where the plaintiff sued for injunctive relief blocking a taking, rather than for monetary compensation. Once mechanisms for providing monetary compensation were established after 1870, injunctive relief was not an appropriate remedy for a Takings Clause claim. Thus, "every one of the cases cited by the dissent would come out the same way—the plaintiffs would not be entitled to the relief they requested because they could instead pursue a suit for compensation."

I would add that there is a crucial distinction between a situation where the state does not deny that a taking has occurred, but establishes a compensation procedure that does not provide immediate payment, and one where the state argues that there was no taking in the first place. As Roberts notes, the former scenario does not amount to a violation of the Takings Clause, so long as the state ultimately pays full compensation—including accumulated interest for the period that elapses between the moment when the taking took place and the time when compensation was actually paid. The latter case, by contrast, is no different from any other situation where a citizen claims the state has violated the federal Constitution, and the government denies it. Such cases can and should be entitled to a forum in federal court.

Justice Kagan even defends the "Catch-22" created by *Williamson County*, arguing that it is actually a feature rather than a bug, because it allows state courts to address issues on which they have greater expertise than federal courts. For reasons I explained in this article, the same superior expertise rationale can be used to justify consigning a wide range of other federal constitutional claims to state court, in situations where state judges are likely to have greater expertise than federal ones.

Finally, I am happy to report that the federal government's strange "Klingon forehead" rationale for retaining large parts of *Williamson County* ended up playing no part in the Court's decision. Neither the majority justices nor the dissenters endorse it. Indeed, they barely even mention it (the majority dispenses with it in a footnote).

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