

# reason

FREE MINDS AND FREE MARKETS

## Thoughts on Today's Supreme Court Oral Argument in *Knick v. Township of Scott* - A Crucial Property Rights Case

Ilya Somin

October 3, 2018

Earlier today, the Supreme Court heard oral arguments in *Knick v. Township of Scott*, an important Takings Clause property rights case. The outcome in the case is far from clear. Predicting the justices' votes based on oral argument is far from an exact science. But property rights advocates have grounds for cautious optimism.

The main point at issue in *Knick* is whether the Court should overrule or limit *Williamson County Regional Planning Commission v. Hamilton Bank*, a 1985 decision that makes it virtually impossible to bring many types of takings cases in federal court. Under *Williamson County*, a property owner who contends that the government has taken his property and therefore owes "just compensation" under the Fifth Amendment, cannot file a case in federal court until he or she has first secured a "final decision" from the relevant state regulatory agency and has "exhausted" all possible remedies in state court. At that point, it is *still* often impossible to bring a federal claim, because various procedural rules preclude federal courts from reviewing state court decisions in cases where the case was initially brought in state court. I discussed the issues at stake in the case in a [recent 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.

After reading [the oral argument transcript](#), it seems to me there is a decent chance of a 5-3 decision in favor of the property owner, one that will overrule or significantly limit *Williamson County*. The three conservative justices who asked questions - Chief Justice John Roberts, Samuel Alito, and Neil Gorsuch, all seemed clearly sympathetic to the property owner's argument. For example, the Chief Justice was highly skeptical of the main justification for *Williamson County*: that no real violation of the Takings Clause has occurred until state courts rule against providing compensation. As Roberts noted in a question to the lawyer for the township, "the compensation that is due runs from the moment of the taking... In other words, if it takes you six months to adjudicate the -- the claim and you say, well, this is how much you owe, you owe interest going all the way back to the point at which the property was taken..." Gorsuch similarly

indicated that "maybe it makes sense to wait when the state has acknowledged a duty to pay, and we can say the state's probably good for it," but emphasized that things are different when the state denies that a taking has occurred, and simply refuses to pay. Roberts, Alito, and Gorsuch also all emphasized that there is no good justification for categorically denying takings claimants access to federal court, which is the practical effect of *Williamson County* in numerous cases. As Gorsuch put it, "why should we single out... this particular right, the takings clause, for such disfavored treatment to wait to exhaust state remedies that wind up... yield[ing] a moot federal claim?"

On this key point, Justice Elena Kagan appeared to agree with the conservatives, as she explained in an exchange counsel for the Township:

I think you have a pretty good argument that there's no Fifth Amendment violation until both the taking has been accomplished and there's been a denial of just compensation. And until both of those things happen, there's no claim. But I think the problem is, and the Chief Justice referred to this, the way that rule combines with the preclusion principles in such a way that it prevents somebody from getting into federal court at all....

And -- and that seems to me an issue, and one that I'm trying to find my way around. And I'm wondering whether there is one.

The truth is that there isn't any way to get around this issue without overruling or significantly modifying *Williamson County*. Either takings plaintiffs should be allowed to raise their claims in federal court in the first place (my preferred solution), or the Supreme Court must eliminate procedural rules barring them from going to federal court after a state court has ruled against them.

The fourth conservative justice, Clarence Thomas did not speak at oral argument. But I think he's a safe vote for the property owner, given his previous statement that "*Williamson County* has downgraded the protection afforded by the Takings Clause to second- class status."

By contrast, the three remaining liberal justices - Stephen Breyer, Ruth Bader Ginsburg, and Sonia Sotomayor, seemed generally supportive of the government's position in the case. Breyer argued that *Williamson County* is a "sleeping dog" that should be allowed to lie, and maintained on stare decisis grounds. I thought that J. David Breemer, counsel for Knick, had a great riposte to that comment: "*Williamson County* is not a sleeping dog. It has run wild through the state and federal courts for 30 years swallowing just compensation rights of ordinary people like Ms. Knick." But I doubt Breyer will be convinced.

Sotomayor feared that a decision in favor of Knick would lead to a great increase in takings litigation in federal court. But exactly the same argument can be raised against giving other kinds of constitutional claims access to federal courts. That too results in greater federal court litigation over local and state policies, including ones on which local and state officials have greater expertise than federal ones.

One point on which all or nearly all the justices seemed to be in agreement is that the Court should at least make clear that defendants in state-court takings cases should not be allowed to exercise their right to "remove" the case to federal court, and then get the case dismissed because the property owner did not manage to first "exhaust" state court remedies (a failure caused by the

defendants' own decision to get the case removed). Whatever else happens, this particularly ridiculous extension of *Williamson County* seems unlikely to survive *Knick*.

Things are much less clear on the main issue at stake in the case. But if I interpret Justice Kagan's concerns correctly, I think she may well join with the four conservative justices to pare back *Williamson County* at least enough to ensure that takings claims have some significant access to federal court.

Like all the cases heard this week, this one is being considered by a court with only eight justices, due to the fact that Brett Kavanaugh's nomination to replace Justice Anthony Kennedy remains in limbo, while the FBI investigates sexual assault claims against him. If the case ends up in a 4-4 split, it is possible the Court will have it reargued when and if a new justice is confirmed, so that he or she can break the tie.

In the meantime, the retirement of Justice Kennedy was a bad break for *Knick*, because Kennedy was one of four justices who joined a 2005 concurring opinion urging the Court to consider overruling *Williamson County*.

*Ilya Somin is Professor of Law at George Mason University and the author of Democracy and Political Ignorance: Why Smaller Government Is Smarter and The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain.*