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Fordham Urban Law Journal Symposium on Knick v. Township of Scott

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The *Fordham Urban Law Journal* has published a symposium on *Knick v. Township of Scott*, an important Supreme Court decision issued last year, which overruled a longstanding precedent that prevented nearly all takings claims against state and local governments from being brought in federal court. The symposium includes contributions by Laura Beaton and Matthew Zinn (who filed an amicus brief supporting the government on behalf of several state and local governments), David Dana (Northwestern University), Dwight Merriam (prominent attorney and commentator on takings law), and Robert Thomas (well-known takings expert and author of the Inverse Condemnation blog). Thomas has a post on the symposium at his blog.

The symposium also includes an article that I coauthored with Prof. Shelley Ross Saxer (Pepperdine), which addresses the question of whether the *Knick* majority was justified in overturning the 1985 *Williamson County* decision from the standpoint of a variety of leading theories of *stare decisis*. Here is the abstract to our piece:

The Supreme Court's decision in *Knick v. Township of Scott* was an important milestone in takings jurisprudence. But for many observers, it was even more significant because of its potential implications for the doctrine of *stare decisis*. *Knick* overruled a key part of a 34-year-old decision, *Williamson County Regional Planning Commission v. Hamilton Bank*, that had barred most takings cases from getting a hearing in federal court.

Some fear that the *Knick* decision signals the start of a campaign by the conservative majority on the Court that will lead to the ill-advised overruling of other precedents. In this article, we explain why such fears are misguided, because *Knick's* overruling of *Williamson County* was amply justified under the Supreme Court's established rules for overruling precedent, and also under leading alternative theories of *stare decisis*, both originalist and living constitutionalist.

Part I of this Article briefly summarizes the reasons why *Williamson County* was wrongly decided, and why the *Knick* Court was justified in overruling it on the merits — at least aside from the doctrine of *stare decisis*. The purpose of this Article is *not* to defend *Knick's* rejection of *Williamson County* against those who believe the latter was correctly decided. For present

purposes, we assume that *Williamson County* was indeed wrong, and consider whether the *Knick* Court should have nonetheless refused to overrule it because of the doctrine of *stare decisis*. But the reasons why *Williamson County* was wrong are relevant to assessing the *Knick* Court's decision to reverse it rather than keeping it in place out of deference to precedent.

Part II shows that *Knick's* overruling of *Williamson County* was amply justified based on the Supreme Court's existing criteria for overruling constitutional decisions, which may be called its "precedent on overruling precedent." It also addresses Justice Elena Kagan's claim, in her *Knick* dissent, that the majority's conclusion requires reversing numerous cases that long predate *Knick*. Part III explains why the overruling of *Williamson County* was justified based on leading current originalist theories of precedent advanced by prominent legal scholars, and by Supreme Court Justice Clarence Thomas in his recent concurring opinion in *Gamble v. United States*. In Part IV, we assess the overruling of *Williamson County* from the standpoint of prominent modern "living constitutionalist" theories of precedent. Here too, it turns out that overruling was well-founded.

I previously published an article defending the result in *Knick* more generally, which is available here. I also discussed the issues at stake in the case in a *Wall Street Journal* op ed, 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.

Knick was a closely divided 5-4 decision, which split the Court along right-left ideological lines. For that reason, it is entirely appropriate that the Fordham Urban Law Journal symposium includes a wide range of perspectives on the case. David Dana's article and that by Beaton and Zinn are generally sympathetic to the dissenters in the case, while Thomas' article and the one I coauthored with Shelley Saxer are on the opposite side. Merriam is, perhaps, somewhere in between, though leaning more towards the majority.

The debate over *Knick* is likely to continue. One issue that remains in question is whether there will in fact be a flood of new takings cases filed in federal court, as critics of *Knick* allege. Dwight Merriam's contribution to the Fordham symposium is skeptical of this claim, as was I in my earlier article about the case (where I also pointed out that an increase in federal-court takings cases might well actually be a good thing, if it did happen). But it is still too early to know for sure.

However, one consequence of *Knick* is that takings claims by businesses and other enterprises challenging coronavirus shutdown orders can now potentially be filed in federal court. So far, however, the only significant case of this kind that I know was actually filed and decided (in favor of the government) by a Pennsylvania state court. In my view, the doctrine in this area is sufficiently clear that most plaintiffs are likely to lose regardless of the venue. But perhaps we will see some of these cases end up in federal court, nonetheless.

Finally, I am happy to second Robert Thomas' praise of the editors of the *Fordham Urban Law Journal*, who did an excellent job of putting together a balanced symposium, and seeing it through to publication, despite the onset of the coronavirus crisis.

Ilya Somin is a Professor of Law at George Mason University. He is 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*, and coauthor of *A Conspiracy Against Obamacare: The Volokh Conspiracy and the Health Care Case*. Somin is widely published in both the scholarly and popular press, including the *Yale Law Journal*, the *Stanford Law Review*, the *Northwestern University Law Review*, and also the *New York Times*, *Washington Post Wall Street Journal*, *LA Times*, and *USA Today*.