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The Justices Can Undo a Constitutional Catch-22

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Rose Mary Knick lives on a 90-acre plot of farmland in Pennsylvania that her family has owned since 1970. But according to the local government, the property isn't entirely hers. In 2012 it enacted an ordinance requiring owners of "cemeteries" to allow unrestricted public access to their land and submit to inspections. In April 2013, a township code-enforcement officer searched Ms. Knick's land without her consent, concluded that some stones there were actually grave markers and deemed part of the area a "cemetery" subject to the law. If Ms. Knick refuses access to inspectors or anyone else, she could be fined up to \$600 a day.

On Wednesday the Supreme Court hears oral arguments in *Knick v. Township of Scott*. The justices have an opportunity to ensure that people whose property rights have been violated by state and local governments can get their day in federal court the same as victims of violations of other constitutional rights.

In most situations, giving outsiders a blanket right to trespass on private land counts as a taking under the Fifth Amendment, and the government must pay the owner "just compensation." Yet a misguided Supreme Court decision prevents federal courts from even considering Ms. Knick's case. Although she is before the high court, no federal judge has considered her case on the merits.

Ms. Knick is not alone. The town of Ponce Inlet, Fla., encouraged homeowners Simone and Lyder Johnson to spend several million dollars preparing to develop 10 properties they owned in the area, only to forbid the development after the balance of power on the Town Council shifted in favor of the project's opponents.

The roadblock standing in Ms. Knick's, the Johnsons' and so many others' way is *Williamson County Regional Planning Commission v. Hamilton Bank* (1985). Under this precedent, a plaintiff who claims the government has taken his property by regulation cannot file a case in federal court until he has first obtained a "final decision" from state regulatory agencies and has "exhausted" all possible state-court remedies. Even then it is often impossible to bring a federal case, because procedural rules generally bar federal judges from reviewing cases decided in state court.

In a traditional eminent-domain case, government takes the property outright and there is no dispute: it owes compensation. "Inverse condemnation" cases of the sort governed by *Williamson County* arise when the government restricts property rights but denies any taking has occurred. The owner then has to prove it is entitled to compensation.

Williamson County is a Catch-22 for property owners victimized by state or local governments. They cannot file claims in federal court unless they go to state court first. But the very act of getting a decision from a state court bars them from getting into federal court afterward. No such rule has ever been applied to other constitutional rights. Plaintiffs who claim that state or local governments have violated their rights to freedom of speech, freedom of religion or equal protection are not required to “exhaust” byzantine state remedies before bringing a federal case.

The standard justification for *Williamson County* is that a state or local government has not really “taken” property until its actions have been finalized by a regulatory agency and upheld by state courts. By the same reasoning, one could argue that a state has not really “censored” speech or “suppressed” religion until bureaucrats and judges uphold the policy in question.

In many cases, there may be little difference between state and federal courts. But in some, particularly when the issues are difficult and unclear, state courts may be biased against property owners because judges have close connections to the government officials who are defending their actions. This is an especially pronounced risk in the many states where judges are elected.

The time has come for the court to overrule a badly flawed precedent and give takings claims the same access to federal court available for violations of other constitutional rights.

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