ARTICLE: UNWINDING THE "PRECLUSION TRAP"—KNICK V. TOWNSHIP OF SCOTT UPENDS THIRTY YEARS OF FEDERAL TAKINGS PRECEDENT.

By Travis Brooks[*]

I. Introduction

In June, the United States Supreme Court dismantled what many considered to be an untenable "preclusion trap" in Fifth Amendment takings law when it decided *Knick v. Township of Scott, Pennsylvania*.[1] The key issue in *Knick* was whether the Court should overturn its often criticized 1985 decision *Williamson County Regional Planning Commission v. Hamilton Bank*.[2] *Williamson County* held that before a property owner could bring a takings action in federal court for "just compensation," that property owner must first (1) obtain a "final decision" from the relevant local or state agency implementing the action effectuating the taking, and then (2) exhaust all available state court remedies to obtain compensation for the alleged taking.[3] Unfortunately for takings plaintiffs, the second *Williamson County* requirement meant that, after pursuing takings claims to an adverse resolution in state court, they were then precluded from challenging the state decision in federal court under the full faith and credit doctrine.[4]

As discussed below, *Knick* put an end to the second *Williamson County* requirement and left the first requirement intact. The result is that after receiving a final decision from a local or state agency allowing a taking to occur, aggrieved property owners are no longer required to sue for compensation in state court. Instead, they may proceed immediately with an action for compensation in federal court.

This article will first discuss pre-existing law and Supreme Court decisions that gave rise to the "preclusion trap" in effect for years leading up to the *Knick* decision. It will then discuss the *Knick* decision and the competing analysis presented in its concurring and dissenting opinions. Last, this article will discuss the key practical impacts of the *Knick* decision.

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II. Pre-*Knick* Jurisprudence

A. The Takings Clause of the Fifth Amendment

All federal takings jurisprudence derives from the Takings Clause of the Fifth Amendment, which provides "nor shall private property be taken for public use, without just compensation."[5] The Takings Clause comes into play not only when the government undertakes its power of eminent domain through established procedures, but also when land use regulations, permit decisions, and other government actions deprive land of significant value or use.[6] In this second strain of takings cases, a state court action to recover for such deprivation of property comes in the form of an "inverse condemnation" action for compensation.

Knick and the cases it overturned dealt with takings in this "inverse condemnation" context.

B. The Preclusion trap sprung by *Williamson County* & *San Remo*

The 1985 *Williamson County* case, and a 2005 follow-on case *San Remo Hotel v. City and County of San Francisco*,[7] set the table for the Court's recent decision in *Knick*.

Williamson County involved a claim by a Tennessee land developer who alleged that an amendment to a local subdivision regulation, which reduced the maximum development intensity of his land, effectuated a Fifth Amendment taking of his property.[8] Crucially, the developer failed to obtain a final decision by the local planning commission about whether the regulation would apply to his property (here, by pursuing an available procedure to seek a variance), prior to filing federal suit.[9] The developer also chose not to pursue an inverse condemnation action in state court for the loss in value allegedly caused by the new regulation.[10]

Ultimately, the Supreme Court held that the developer's claim was not ripe for federal review because: (1) the plaintiff had not obtained a final decision from the local agency as to whether the regulation would be applied to his property;[11] and (2) even if a taking had occurred, federal takings claims were not ripe because the plaintiff had not sought compensation under available state law procedures for inverse condemnation.[12]

Twenty years later, in *San Remo Hotel v. City and County of San Francisco*,

Williamson County's harmful impacts on takings plaintiffs in federal court became clear.[13] The plaintiffs in *San Remo* owned a building in the City of San Francisco. The City enacted an affordable housing ordinance requiring plaintiffs to pay several hundred thousand dollars in fees before selling units in the building. Plaintiffs filed a state court action that included state law takings claims with the same elements as Fifth Amendment takings claims. Ultimately the case was appealed to the state Supreme Court, which rejected the takings claims.[14]

Plaintiffs then pursued a Fifth Amendment takings claim in federal court. The Supreme Court determined that even though plaintiffs had complied with the two *Williamson County* requirements, under the full faith and credit statute, the state courts' denial of plaintiffs' takings claims precluded any contrary ruling in federal court.

The court went on to address plaintiffs' grievance, that the Court was effectively creating a preclusion trap that prevented them from pursuing their Fifth Amendment claims in federal court:

> . . . plaintiffs' claim amounts to little more than the concern that it is unfair to give preclusive effect to state-court proceedings that are not chosen, but are instead required in order to ripen into federal takings claims. Whatever the merits of that concern may be, we are not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum.[15]

This preclusion trap was widely criticized by legal scholars and judges.[16] In fact, in a concurring opinion to *San Remo* joined by Justices O'Conner, Kennedy, and Thomas, Justice Rehnquist noted that the *Williamson County* decision had major flaws, was inconsistent with the Supreme Court's treatment of other constitutional rights, and warranted the Court's future revisiting of the issue.[17]

III. The *Knick* Decision

A. Factual and Procedural Background

Notwithstanding these criticisms, the preclusion trap remained in effect for more than a decade after *San Remo* until an ordinance passed by the Township of Scott, Pennsylvania teed up the Court's re-consideration of *Williamson County*.

Rose Mary Knick owned 90 acres in the Township where she lived and grazed farm animals. There was a small graveyard on the property, similar to other

small graveyards that were common in the area.[18] In December of 2012, the Township passed an ordinance requiring that "[a]ll cemeteries . . . be kept open and accessible to the general public during daylight hours."[19]

Ms. Knick did not abide by the ordinance. Soon after the City enacted the ordinance, a Township officer entered Knick's property and notified her that she was violating the ordinance by failing to provide for public access to the gravesite on her property.[20]

In response, Knick filed an action in state court seeking declaratory and injunctive relief on the basis that the 2012 ordinance imposed a taking on her property. In a procedural maneuver, the Township then withdrew its notice of violation and agreed to stay enforcement of the ordinance during ongoing court proceedings. The state court responded by declining to rule on Knick's request for injunctive relief because Knick could no longer show the imminent and irreparable harm necessary to establish that claim.[21]

Knick then filed an action in federal court under 42 U.S.C.A. § 1983 alleging that the 2012 ordinance violated the Takings Clause of the Fifth Amendment. [22]

B. Unwinding the 'preclusion trap'—Justice Roberts' majority opinion

Knick's case ultimately reached a Supreme Court majority eager to overturn *Williamson's* preclusion trap.

Early in his decision, Roberts focused on a point at the heart of many critiques of *Williamson County*—that the state litigation requirement effectively "relegated [the Takings Clause] to the status of poor relations" among the Bill of Rights. Roberts pointed out that plaintiffs seeking to enforce other constitutional rights in federal court are guaranteed a forum to do so by § 1983. Unlike those rights, *Williamson County* and *San Remo* effectively "hand[ed] authority over federal takings claims to state courts," barring federal courthouse doors. In Roberts' view, restoring the Takings Clause to its rightful status among the other constitutional rights required overruling *Williamson County* and authorizing federal takings claims to be brought in federal court as soon as a taking occurs.[23]

In support of this conclusion, Roberts looked to a line of Supreme Court cases interpreting the Tucker Act, which lays out the procedures for pursuing

takings claims against the federal government. Roberts highlighted language from multiple Tucker Act cases stating that the act constituting the federal government's taking is the event that gives rise to a takings claim against the federal government in federal court. For example, the 1933 Supreme Court case *Jacobs v. United States* held that under the Tucker Act, a Fifth Amendment taking is "self-executing," giving rise to an immediate takings claim in federal court. To Roberts, *Jacobs* and related cases stood for the proposition that 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."[24]

Roberts then argued that *Williamson County* effectively created an exhaustion requirement for § 1983 takings claims, which conflicts with well-settled law that exhaustion of state court remedies is *not* a prerequisite to § 1983 actions. The majority reasoned that this was the result of *Williamson County's* mistaken interpretation of earlier Supreme Court precedent, and the peculiar circumstances of that case. In Roberts' opinion, these circumstances meant that the Court may not have "adequately tested the logic of the state-court litigation requirement or considered its implications, most notably the preclusion trap . . ."[25]

The majority opinion also took aim at what Roberts considered to be *Williamson County*'s misinterpretation of other decisions that refused to enjoin threatened takings because adequate procedures existed to compensate plaintiffs afterwards. In Roberts' view, these cases merely highlighted the fact that injunctive relief is typically not available when a compensation remedy is available at law.[26] These cases did not, as *Williamson County* concluded, indicate that an actionable taking only occurred after compensation had been denied.

In summary, *Knick* overruled *Williamson County* by holding that the government violates the Fifth Amendment's Takings Clause *at the time that it takes private property without compensation*. Accordingly, a property owner whose property is taken may proceed in federal court under 42 U.S.C.A. § 1983 as soon as a government reaches a decision that has the effect of taking private property.

C. Justice Thomas would go further, requiring compensation before or contemporaneous with a taking

In a very brief concurring opinion, Justice Thomas noted that the majority correctly determined that a violation of the Takings Clause occurs "as soon as

the government takes property without paying for it." However, instead of allowing a taking to move forward with the promise of an adequate post takings compensation procedure, Thomas would require governments to compensate private property owners as a "prerequisite" to the government's authority to take property for public use.

Thomas acknowledged that this position could effectively render some regulatory programs unworkable. However, Thomas downplayed this risk, stating that if his position makes some regulatory programs unworkable, the Court's role is to "enforce the takings clause as written."[27]

Ultimately, Thomas' concurrence represents an expansive view of private property rights that even the property rights friendly Roberts Court is not yet willing to adopt.

D. Kagan's Dissenting Opinion—It is not the taking of private property that violates the constitution but the failure to adequately compensate the property owner after such taking occurs

Justice Kagan wrote the dissenting opinion joined by four justices. The dissent is built on a fundamentally different interpretation of case law and operation of the Takings Clause. Under this interpretation, a Takings Clause violation *only* occurs after private property is taken for public use *and* the private property owner is also denied a fair procedure to obtain compensation for that taking.

In Kagan's view, *Williamson County* correctly determined that Fifth Amendment takings claims are functionally different from other constitutional violations. Unlike other constitutional violations, the Fifth Amendment does not prohibit the taking of public property for public use. Instead, the Takings Clause only prohibits the taking of public property if just compensation is not also provided.[28]

Kagan also disagreed with the majority's interpretation of pre-*Williamson* case law. To Kagan, these cases held that so long as a government has set up an adequate compensatory mechanism, a taking is within that government's constitutional power. The Tucker Act cases cited by the majority merely required the federal government to compensate claimants under the compensation mechanism established to pursue takings claims against the federal government.[29] This mechanism ensured that an actionable taking did not occur, it did not remedy a *prior* constitutional violation.

Perhaps most important, Kagan predicted that the majority opinion would result in two harmful consequences. First, Kagan fears it will turn local zoning and land use authorities into regular "constitutional malefactors," who will commonly be subject to federal lawsuits for enacting local land use and zoning regulations. Second, and more critical from a practical standpoint, Kagan fears the decision will channel a potentially massive set of cases involving complex state-law issues into federal courts. By placing interpretation of local land use regulations and property law into the hands of the federal judiciary, she said, the decision will flood federal courts with complex state law issues and make federal courts a "principal player" in local and state land use disputes.[30]

IV. Practical Takeaways

With the *Knick* decision in mind, this article will now discuss the decision's key practical impacts.

A. An actionable federal taking occurs as soon as a final decision allowing for a taking is reached by first relevant state or local decision maker.

As noted above, the first of two holdings in *Williamson County* was that the plaintiff could not pursue a Fifth Amendment takings claim because that plaintiff had failed to seek a variance from the local planning commission that could have avoided the taking at issue. *Knick* expressly left this first holding intact.[31]

In this still intact portion of *Williamson County*, the *Williamson* court noted that that the relevant "finality requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." Once this actual, concrete injury is inflicted, and absent the state court exhaustion requirement, a plaintiff may now bring an action for a Fifth Amendment Taking under 42 U.S.C.A. § 1983.[32]

The "final decision" requirement necessary to establish ripeness for a Fifth Amendment takings claim is distinguishable from the exhaustion of state "administrative or judicial remedies" requirement not applicable to § 1983 actions. As the court in *Williamson County* noted, the final decision requirement "is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual injury."[33] By contrast, the exhaustion of administrative remedies requirement "refers to administrative and judicial procedures by which an injured party may seek review of an adverse de-

cision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate."[34]

The takeaway after *Knick* is that a property owner is free to bring a Takings Clause action under § 1983 as soon as a local or state agency reaches a final decision that results in a taking of private property. In the land use context, local legislative bodies such as city councils or county boards of supervisors, typically will issue the final reviewable decision necessary to bring a § 1983 Takings Clause action. Where lower level administrative decisions are advisory and subject to affirmation by the local legislative body, a final decision by the local legislative body would certainly be required before a § 1983 action can be brought. However, the question still will exist as to whether a lower level administrative decision that is final unless appealed under local ordinance, may be brought as a § 1983 case without further appeal to the local legislative body, as well as whether additional administrative remedies (such as a variance or exception) must be sought even after the local legislative body has acted, in order to satisfy the "ripeness" test of *Williamson County*. Despite the broad language in *Knick* that once a "taking" has occurred, exhaustion of state judicial or administrative remedies is not required as a prerequisite to a Takings Clause claim under § 1983, the failure of a landowner to pursue usual and ordinary *administrative* remedies in the land use context, as distinguished from state court *judicial* remedies, will potentially preclude assertion of a takings claim under the still-intact first prong of the *Williamson County* analysis.

B. Will *Knick* result in an overwhelming flood of federal takings cases?

An open question raised by Justice Kagan in her dissent, is the practical impact that *Knick* will have on state and federal judiciaries. As noted above, Kagan worried that *Knick* would result in a "potentially massive" stream of regulatory takings cases, involving complex state property law issues, being brought in federal court. By diverting such cases to federal court, Kagan worried that *Knick* would result in federal courts becoming a "principal player" in local and state land use disputes.

Regarding the predicted flood of takings cases into federal court, this risk is potentially significant in California where the state Supreme Court is perceived by many as hostile to regulatory takings claims. The result is that many, if not most takings plaintiffs in California will prefer to litigate Takings Clause claims in federal court, potentially shifting a significant number of cases to that forum.

On the other hand, many would argue this shift is the result of state courts' inadequate protection of Fifth Amendment rights more than any flaw in the *Knick* decision.

It is too early to say, in the fall of 2019, what impact *Knick* will have on federal and state judiciaries. Ultimately, Kagan's dissent does raise an important practical question as whether *Knick* will open the floodgates of federal court litigation. On the other hand, many hope that the decision will encourage local governments to exercise their regulatory powers more cautiously than they have in the past. The practical impacts of the *Knick* decision, if any, will become clearer in the coming years.

C. Stare Decisis will continue to be a touchy subject.

Although ancillary to the property rights issues addressed in *Knick*, another key area of dispute between majority and dissenting opinions was the impact that "stare decisis" should have had on the outcome.[35]

In Justice Roberts' opinion, the *Williamson County* case was one of the rare decisions that was so "exceptionally wrong" and "ill founded" on an inaccurate reading of prior precedent that it warranted reversal.[36] In Kagan's view, the majority's criticism of *Williamson County* was not sufficient to overturn the precedent, which she believed accurately followed multiple prior Supreme Court decisions. To the extent that the preclusion trap needed addressing, Kagan argued that the proper avenue to do so was through congressional action amending the full faith and credit statute, 28 U.S.C.A. § 1738, which dictated the result in *San Remo*.[37]

On a wide range of potentially contentious social and political issues likely to reach the Supreme Court in coming terms, the Court's conversation regarding stare decisis is likely to heat up significantly.

V. Conclusion

Although the scale of *Knick's* real-world practical impacts remains to be seen, it is without question one of the more significant property rights cases decided by the Supreme Court in decades.

ENDNOTES:

[1]*Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162, 204 L. Ed. 2d

558 (2019).

[2]*Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985) (overruled by, *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019)).

[3]*Id.* at 186.

[4]28 U.S.C.A. § 1738; *San Remo Hotel, L.P. v. City and County of San Francisco, Cal.*, 545 U.S. 323, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005).

[5]U.S. Const. Amend V.

[6]See *U.S. v. Clarke*, 445 U.S. 253, 255, 100 S. Ct. 1127, 63 L. Ed. 2d 373 (1980); see also *Customer Co. v. City of Sacramento*, 10 Cal. 4th 368, 377, 41 Cal. Rptr. 2d 658, 895 P.2d 900 (1995).

[7]*San Remo Hotel, L.P. v. City and County of San Francisco, Cal.*, 545 U.S. 323, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005); *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985) (overruled by, *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019)).

[8]*Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. at 186-94.

[9]*Id.* at 187-94.

[10]*Id.* at 194-97.

[11]*Id.* at 186-94.

[12]*Id.* at 194-95.

[13]*San Remo Hotel*, *L.P. v. City and County of San Francisco*, 545 U.S. at 323.

[14]*Id.* at 329.

[15]*San Remo Hotel*, *L.P. v. City and County of San Francisco*, 545 U.S. at 347-48; see also 28 U.S.C. § 1738.

[16]*Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. at 2178.

[17]*San Remo Hotel*, *L.P. v. City and County of San Francisco*, 545 U.S. at 351 (Rehnquist, C.J., concurring).

[18]*Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. at 2168.

[19]*Id.* at 2168.

[20]*Id.*

[21]*Id.*

[22]*Id.* at 2169.

[23]*Id.*; see also *San Remo Hotel*, *L.P. v. City and County of San Francisco*, 545 U.S. at 350 (Rehnquist, C.J., concurring.)

[24]*Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. at 2170-71, citing

Jacobs v. U.S., 290 U.S. 13, 16, 54 S. Ct. 26, 78 L. Ed. 142 (1933).

[25]*Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. at 2173-75.

[26]*Id.* at 2176-77. As discussed below, this portion of the majority opinion varies from Justice Thomas' concurrence. While Roberts noted that injunctive relief would still not be available to enjoin a taking when adequate post-takings compensation procedures exist, Thomas would require compensation to be provided either before or contemporaneous with a taking.

[27]*Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. at 2180.

[28]*Id.* at 2183-84.

[29]*Id.* at 2185.

[30]*Id.* at 2188-89.

[31]*Id.* at 2169.

[32]*Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. at 193.

[33]*Id.*

[34]*Id.* at 192-93; *see also Patsy v. Board of Regents of State of Fla.*, 457 U.S. 496, 511, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982) (holding that there is no requirement for a plaintiff to exhaust administrative remedies under state law before bringing a § 1983 action.)

[35]*See Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. at 2178 & 2189-2190 (Kagan, A.J., dissenting.)

[36]*Id.* at 2178.

[37]*Id.* at 2189-90 (Kagan, A.J., dissenting).

