

# *Knick v. Township of Scott*: Ending a Catch-22 that Barred Takings Cases from Federal Court

Ilya Somin\*

## Introduction

The Supreme Court's decision in *Knick v. Township of Scott* put a long-overdue end to a badly misguided precedent that had barred most takings cases from federal court.<sup>1</sup> The Court reversed a 1985 ruling that created a catch-22 blocking property owners from bringing takings claims against state and local governments in federal court. *Knick* was a closely divided 5-4 decision, with the justices split along left-right ideological lines. The case was initially argued before a court of only eight justices on October 3, 2018, during the period when Justice Brett Kavanaugh was still in the midst of a contentious confirmation process. It was then reargued in January, with Kavanaugh participating (likely because the Court had been evenly divided, 4-4, after the first oral argument).<sup>2</sup>

\* Professor of law, George Mason University. I would like to thank James Burling, Trevor Burrus, Marty Lederman, Michael Masinter, Robert Thomas, and Ernie Young for helpful suggestions and comments, and Taylor Alexander and Tierney Walls for valuable research assistance. Parts of this article adapt material from an amicus curiae brief I wrote in the *Knick* case on behalf of the Cato Institute, the National Federation of Independent Business, the Southeastern Legal Foundation, the Beacon Center of Tennessee, and the Reason Foundation. However, the views expressed in the article are solely my own, and do not necessarily reflect those of the organizations that joined the brief.

<sup>1</sup> *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019).

<sup>2</sup> For my analyses of the first and second oral arguments, see Ilya Somin, Thoughts on Today's Supreme Court Oral Argument in *Knick v. Township of Scott*—A Crucial Property Rights Case, Reason: Volokh Conspiracy, Oct. 3, 2018, <https://reason.com/2018/10/03/thoughts-on-todays-supreme-court-oral-ar>; Ilya Somin, Thoughts on the Second Oral Argument in *Knick v. Township of Scott*, Reason: Volokh Conspiracy, Jan. 16, 2019, <https://reason.com/2019/01/16/thoughts-on-the-second-oral-argument-in>.

The big issue at stake in *Knick* was whether the Court should overrule *Williamson County Regional Planning Commission v. Hamilton Bank*.<sup>3</sup> Under *Williamson County*, a property owner who contends that the government has taken his property and therefore owes “just compensation” under the Takings Clause of the Fifth Amendment<sup>4</sup> 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.<sup>5</sup> The validity of this second “exhaustion” requirement was at issue in *Knick*.

Even after both *Williamson County* requirements were met, it was *still* usually 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.<sup>6</sup> As Chief Justice John Roberts wrote in his majority opinion for the Court, “[t]he 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.”<sup>7</sup>

Part I of this article briefly describes the background of the *Knick* case and the *Williamson County* decision that the Court ended up reversing. In Part II, I explain why the Court was right to conclude that *Williamson County* created an indefensible double standard under which takings claims against state governments were effectively barred from federal court in situations where other types of constitutional claims would not be.

Part III explains why overruling *Williamson County* is justified under the Supreme Court’s admittedly imprecise doctrine on overruling precedent. Under the Court’s established doctrine, *Williamson County* closely fits the profile of a case ripe for overruling. Justice Elena Kagan’s dissenting opinion is wrong to argue that overruling *Williamson County* also entails overruling numerous earlier precedents.<sup>8</sup> In reality, it requires no more than modest modifications of them, if that.

<sup>3</sup> 473 U.S. 172 (1985).

<sup>4</sup> U.S. Const. amend. V.

<sup>5</sup> *Williamson Cty.*, 473 U.S. at 186–97.

<sup>6</sup> *Knick*, 139 S. Ct. at 2167.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 2180–87 (Kagan, J., dissenting).

Finally, Part IV assesses the potential real-world impact of the *Knick* decision. In many cases, it will make little difference whether a takings claim gets litigated in state court or federal court. In some situations, however, the right to bring a claim in federal court is a vital tool to avoid potential bias in state courts and procedural hoops that subject property owners to a prolonged ordeal before they have an opportunity to vindicate their rights. Claims that *Knick* will lead to a flood of new takings litigation are overblown. But to the extent that substantial new litigation does result, that is likely to be a feature, not a bug. It would indicate that *Williamson County* blocked numerous meritorious takings cases that might have prevailed in federal court but were doomed to likely defeat in state courts unwilling or unable to protect the constitutional rights of property owners.

### **I. *Williamson County* and the Origins of the *Knick* Case**

The *Knick* case arose from a seemingly minor dispute over alleged centuries-old gravesites. Rose Mary Knick owns a 90-acre farm in the Township of Scott, in rural eastern Pennsylvania.<sup>9</sup> Members of her family have owned the land since 1970.<sup>10</sup> Beginning in 2008, some other area residents claimed that there are old gravesites on the Knick property and sought access to them. In December 2012, the township enacted Ordinance 12-12-20-001, which requires “[a]ll cemeteries . . . be kept open and accessible to the general public during daylight hours.”<sup>11</sup>

In April 2013, the township’s code enforcement officer entered the property and concluded that several stones on the land are actually gravestones, and therefore the land qualified as a “cemetery” under the ordinance.<sup>12</sup> Under the ordinance, Knick would have to pay somewhere between \$300 and \$600 in daily fines for each day that the public and township enforcement officials do not have daylight access to the supposed cemetery.<sup>13</sup>

<sup>9</sup> The facts recounted here are drawn from Brief for Petitioner at 3–7, *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) (No. 17-647), <https://pacificlegal.org/wp-content/uploads/pdf/knick-v-scott-township-pennsylvania/Merits-Brief-Knick.pdf>.

<sup>10</sup> *Id.* at 4.

<sup>11</sup> Scott Township, Pa., Ordinance 12-12-20-001 § 5.

<sup>12</sup> Brief for Petitioner, *supra* note 9, at 6.

<sup>13</sup> *Id.* at 4–7.

Knick filed a state court case challenging the ordinance, arguing that it amounts to an uncompensated taking in violation of the Takings Clause of the Fifth Amendment. The state court dismissed the case on procedural grounds, concluding that it was not ready for adjudication until the Township proceeded with a separate civil enforcement action against Knick.<sup>14</sup>

Failing to secure a decision in state court, Knick filed a takings claim in federal court. Citing *Williamson County*, both the district court and the U.S. Court of Appeals for the Third Circuit dismissed the case because Knick had not succeeded in getting a final decision by a state court before filing a federal takings claim.<sup>15</sup> The Third Circuit noted that the ordinance was “extraordinary and constitutionally suspect,” but it could not address the merits of the case because *Williamson County* tied the judges’ hands.<sup>16</sup>

The lower courts were surely right that Knick’s suit was barred by *Williamson County*. That decision prevented a takings claim against a state or local government from being heard in federal court unless the property owner had first secured a “final decision” from the relevant state regulatory agency and “exhausted” all possible remedies in state court.<sup>17</sup> Such exhaustion can only occur if the state court had reached a final decision on the merits.

This made it virtually impossible to bring a takings case in federal court without first going to state court. But going to state court itself made it impossible to file a case in federal court afterwards. As the Supreme Court ruled in *San Remo Hotel v. City and County of San Francisco*, a final decision in a takings case from a state court precludes relitigation of the same issue in federal court.<sup>18</sup> Thus, *Williamson County* created a Kafkaesque system under which going to state court was both an essential prerequisite to getting into federal court, but also an absolute bar to doing so. As Chief Justice John Roberts wrote in his majority opinion in *Knick*, “[t]he takings plaintiff

<sup>14</sup> Knick, 139 S. Ct. at 2168.

<sup>15</sup> See *Knick v. Twp. of Scott*, 2016 WL 4701549 at \*5–\*6 (M.D. Pa., Sept. 7, 2016); *Knick v. Twp. of Scott*, 862 F.3d 310, 314 (3d Cir. 2017), rev’d, 139 S. Ct. 2162 (2019).

<sup>16</sup> Knick, 862 F.3d at 314.

<sup>17</sup> *Williamson Cty.*, 473 U.S. at 186–97.

<sup>18</sup> *San Remo Hotel v. City & Cty. of San Francisco*, 545 U.S. 323 (2005).

thus finds himself in a Catch-22.”<sup>19</sup> In a 2003 decision, the Second Circuit similarly noted that “the very procedure that [*Williamson County*] require[s] [plaintiffs] to follow before bringing a Fifth Amendment takings claim . . . also preclude[s] [them] from ever bringing a Fifth Amendment takings claim.”<sup>20</sup>

To make this system even more absurd, some state and local governments defending against takings claims even exercised their right to “remove” the case to federal court (on the grounds that it raised a federal question) and then successfully moved to get the case dismissed because the property owner did not manage to first “exhaust” state court remedies, as required by *Williamson County*—a failure caused by the defendants’ own decision to have the case removed.<sup>21</sup> In 1997, the Supreme Court ruled that it is permissible to “remove” a takings claim from state court to federal court, despite the fact that such a claim would not yet be “ripe” for federal court consideration under *Williamson County*.<sup>22</sup>

The standard rationale for *Williamson County* was that a takings claim cannot be ripe until the government has not only taken the property in question but failed to pay just compensation.<sup>23</sup> And we cannot know if it will truly refuse to pay compensation until a state court has reached a final decision holding that it is not required to do so. But, as we shall see, this theory is at odds with both the text of the Takings Clause and the way courts routinely address other constitutional rights.<sup>24</sup>

## II. An Indefensible Catch-22

The main impact of *Knick* is putting an end to a double standard under which takings cases against state and local governments were almost completely excluded from federal court in a way that was not true

<sup>19</sup> *Knick*, 139 S. Ct. at 2167.

<sup>20</sup> *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 130 (2d Cir. 2003).

<sup>21</sup> See, e.g., *Warner v. City of Marathon*, 718 F. App’x 834 (11th Cir. 2017) (removed takings claim dismissed under *Williamson County*); *Reahard v. Lee Cty.*, 30 F.3d 1412 (11th Cir. 1994) (same).

<sup>22</sup> *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156 (1997).

<sup>23</sup> See *Williamson Cty.*, 473 U.S. at 195 (“if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation”).

<sup>24</sup> See discussion in Part II, *infra*.

of any comparable constitutional rights claims. Chief Justice Roberts highlighted the double standard in his majority opinion for the Court:

The state-litigation requirement relegates the Takings Clause “to the status of a poor relation” among the provisions of the Bill of Rights. Plaintiffs asserting any other constitutional claim are guaranteed a federal forum under §1983 [of the Civil Rights Act of 1871], but the state-litigation requirement “hand[s] authority over federal takings claims to state courts.” 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.<sup>25</sup>

As one academic analysis puts it, this aspect of *Williamson County* “finds no parallel in ripeness cases from other areas of law.”<sup>26</sup> The double standard cannot be justified by any supposedly unique aspects of the Takings Clause. The history of the Fourteenth Amendment’s “incorporation” of the Bill of Rights against the states strongly suggests that the amendment was originally understood to protect property rights no less than other rights. Arguments based on ripeness and the supposedly superior local expertise of state courts could just as easily be used to justify keeping numerous other constitutional claims out of federal court. The same is true of Justice Kagan’s argument, in her dissent, that allowing takings cases to be brought in federal court would lead state and local officials to be unfairly treated as “constitutional malefactors.”<sup>27</sup> Finally, *Williamson County*’s denial of federal judicial review for a whole category of constitutional rights claims was even more sweeping than current restrictions on judicial review of criminal defendants’ claims in habeas corpus cases.

In a somewhat strange amicus brief on behalf of the federal government,<sup>28</sup> Solicitor General Noel Francisco argued that *Williamson County* should be interpreted in a way that avoids the

<sup>25</sup> Knick, 139 S. Ct. at 2169 (internal citations omitted; bracket in original).

<sup>26</sup> Gregory M. Stein, Regulatory Takings and Ripeness in the Federal Courts, 48 Vand. L. Rev. 1, 23 (1995).

<sup>27</sup> Knick, 139 S. Ct. at 2187 (Kagan, J., dissenting).

<sup>28</sup> Brief of the United States as Amicus Curiae in Support of Vacatur and Remand, *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) (17-647).

catch-22 by reasoning that the state exhaustion requirement only applies to cases brought under 42 U.S.C. § 1983 (the federal statute authorizing law suits for violations of constitutional rights), but not ones brought to federal court under 28 USC § 1331, the law giving federal courts jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States.”<sup>29</sup>

This argument makes little sense, because nothing in *Williamson County* distinguishes the two types of cases. Takings law expert Robert Thomas analogized the solicitor general’s argument to Star Trek producers’ lame attempts to “retcon” an in-universe explanation of why Klingons’ foreheads looked very different in later movies and TV series, beginning with *Star Trek: The Next Generation*, than in the original 1960s TV version (the real explanation was a bigger makeup and special-effects budget).<sup>30</sup>

In addition, Section 1331 only gives federal courts jurisdiction over “civil actions arising under the Constitution, laws, or treaties of the United States.” But the whole point of *Williamson County* is that there is no action “arising under” the Takings Clause of the Fifth Amendment until the government has refused to pay compensation, and there is no sufficiently definitive refusal until the property owner has “exhausted” all possible state court remedies.<sup>31</sup>

Ultimately, neither the majority nor the dissenting justices in *Knick* accepted the solicitor general’s “Klingon forehead” argument, and the majority opinion dispensed with what it called a “novel” theory in a brief footnote indicating that it need not even be considered.<sup>32</sup> I therefore proceed on the assumption that the catch-22 is indeed an element of *Williamson County* that cannot be dispensed with without overruling the state exhaustion requirement.<sup>33</sup>

<sup>29</sup> 28 U.S.C. § 1331.

<sup>30</sup> Robert H. Thomas, *Knick* and Klingon Foreheads, Inverse Condemnation Blog, Nov. 13, 2019, <https://www.inversecondemnation.com/inversecondemnation/2018/11/knick-and-klingon-foreheads-retconning-williamson-county-.html>.

<sup>31</sup> See discussion earlier in this Part.

<sup>32</sup> *Knick*, 139 S.Ct. at 2174 n.5.

<sup>33</sup> For more detailed analyses of the solicitor general’s argument, see Thomas, *supra* note 30, and Ilya Somin, Will Supreme Court Reargument of the *Knick* Takings Case Come Down to the Federal Government’s “Klingon Forehead” Argument?, Reason: Volokh Conspiracy, Nov. 19, 2018, <https://reason.com/2018/11/19/will-reargument-of-the-knick-takings-cas>.

### A. Text and Original Meaning

There is no good textual or originalist reason to treat Takings Clause cases against state governments any differently from other constitutional claims against states and localities brought under the Fourteenth Amendment. In relevant part, the text of the Fifth Amendment states, “nor shall private property be taken for public use, without just compensation.”<sup>34</sup> If the government takes private property and does not pay, that is a violation of the amendment. It does not say that an uncompensated taking only becomes a violation after state courts refuse to order compensation after the fact.

As Chief Justice Roberts put it in his majority opinion in *Knick*: “[the Clause] . . . does not say ‘[n]or 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.”<sup>35</sup>

In her dissent, Justice Kagan takes issue with this point, noting that “the text does not say: ‘[n]or shall private property be taken for public use, without advance or contemporaneous payment of just compensation, notwithstanding ordinary procedures,’” and thereby concludes that the Takings Clause does not mandate the payment of compensation at any given time.<sup>36</sup> But this ignores the fact that, as soon as the government takes property, we necessarily have a taking of property “without just compensation” until such time as just compensation has actually been paid.

Property rights exist in time, as well as space. It is a long-established principle of takings law that if the government takes private property for a limited period of time, it must pay just compensation during that period.<sup>37</sup> Under Justice Kagan’s approach, there would be no vi-

<sup>34</sup> U.S. Const. amend. V.

<sup>35</sup> *Knick*, 139 S. Ct. at 2170.

<sup>36</sup> *Id.* at 2184 (Kagan, J., dissenting).

<sup>37</sup> See, e.g., *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949) (applying that rule); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946) (same); *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945) (same). For an overview of the Court’s jurisprudence on temporary takings, see Daniel L. Siegel & Robert Meltz, *Temporary Takings: Settled Principles and Unresolved Questions*, 11 *Vt. J. Envtl. Law* 479 (2010).



olation of the Takings Clause until “the property owner comes away from the government’s compensatory procedure empty-handed.”<sup>38</sup> By that standard, the government could delay a decision on whether or not it intends to pay for years—perhaps even decades—without being in violation.

The original meaning supports the conjecture derived from the text. Indeed, historical evidence indicates that protecting constitutional property rights against abuses by state governments was one of the main reasons the Bill of Rights was “incorporated” against the states in the first place.

The framers of the Fourteenth Amendment sought to apply the Bill of Rights against the states because of a long history of abusive practices by state governments, including state courts.<sup>39</sup> Advocates feared that southern state governments threatened the property rights of African Americans and other political minorities, including whites who had supported the Union against the Confederacy during the Civil War.<sup>40</sup> The right to private property was a central component of the “civil rights” that the framers of the Fourteenth Amendment sought to protect.<sup>41</sup> As Rep. John Bingham, a leading framer of the Fourteenth Amendment, emphasized, the Takings Clause must be applied against the states to protect “citizens of the United States, whose property, by State legislation, has been wrested from them, under confiscation.”<sup>42</sup> Bingham was referring to both African Americans and white unionists whose property rights

<sup>38</sup> *Knick*, 139 S. Ct. at 2184 (Kagan, J., dissenting).

<sup>39</sup> See generally, Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998).

<sup>40</sup> *Id.* at 268–69; see also *The Civil Rights Implications of Eminent Domain Abuse*, Testimony before the U.S. Comm’n on Civil Rights, 5–11 (Aug. 12, 2011) (statement of Ilya Somin) (discussing the relevant history), [https://www.law.gmu.edu/assets/files/faculty/Somin\\_USCCR-aug2011.pdf](https://www.law.gmu.edu/assets/files/faculty/Somin_USCCR-aug2011.pdf).

<sup>41</sup> On the centrality of property rights to 19th-century conceptions of civil rights, see, e.g., Harold Hyman & William Wiecek, *Equal Justice under Law: Constitutional Development, 1835–75, 395–97* (1982) (describing the right to property as one of the main elements of civil rights as conceived in the 1860s); Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (1991) (describing how most 19th-century jurists viewed property as a fundamental right).

<sup>42</sup> Quoted in Amar, *The Bill of Rights*, *supra* note 39, at 268. On Bingham’s role as the leading framer of the Fourteenth Amendment, see Gerard N. Magliocca, *American Founding Son: John Bingham and the Invention of the Fourteenth Amendment* (2013).

were threatened by southern state governments that had come under the influence of ex-Confederate political forces in the aftermath of the Civil War.<sup>43</sup> But the concern applies more broadly than this specific case. The protection of federal constitutional rights against state governments cannot be entrusted to the exclusive control of those states' own courts.<sup>44</sup> Section 1983 of the Civil Rights Act of 1871, the statute the Reconstruction Congress enacted to enable people to vindicate their new constitutional rights against state governments in federal court, was intended to provide broad access to federal court for a variety of rights claims; property rights cases were in no way excepted.<sup>45</sup>

### B. Ripeness

The standard rationale for *Williamson County*, defended in Justice Kagan's dissent in *Knick*,<sup>46</sup> is that a takings case is not ripe until a state court has reached a final decision upholding the government's actions because the state has not really taken property without just compensation. Chief Justice Roberts nicely rebuts that theory:

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*, 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.<sup>47</sup>

The ripeness argument fails for much the same reason as Justice Kagan's textual argument, discussed earlier.<sup>48</sup> Chief Justice Roberts

<sup>43</sup> See Amar, *The Bill of Rights*, *supra* note 39, at 268–69.

<sup>44</sup> For additional discussion of this point, see Part III, *infra*.

<sup>45</sup> For a recent summary of the relevant literature and evidence, see Michael M. Berger, *What's Federalism Got to Do with Regulatory Takings?*, Brigham-Kanner Prop. Rts. Conf. J., at 7–12 (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3256989](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3256989).

<sup>46</sup> *Knick*, 139 S. Ct. at 2180–90 (Kagan, J., dissenting).

<sup>47</sup> *Id.* at 2170 (internal citations omitted).

<sup>48</sup> See Part II.A, *supra*.

is right to conclude that the theory that no violation of the Takings Clause occurs until the state has refused compensation is incompatible with the longstanding principle that compensation must be paid for the full period during which the government controls the property in question—beginning at the time of the taking, not at the time the government reaches a final decision on whether it is willing to pay compensation or not. If there were no violation of the Takings Clause during the period between the taking and the payment, there would be no need to provide “just compensation” for the government’s occupation of the property during that time.

Another way of putting the point is that ownership has a temporal, as well as a spatial dimension.<sup>49</sup> The government “takes” property without compensation when it delays payment almost as much as if it chooses to deny payment entirely. The old adage that “time is money” is relevant to takings cases: what matters is not just how much property the government has appropriated, but for how long.

The same ripeness reasoning that supposedly justifies *Williamson County* 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 through “prior restraints” until a state court upholds the censorship policy.<sup>50</sup> Until then, the possibility exists that the state government won’t actually suppress the speech in question but will allow it to proceed unimpeded.

Along similar lines, it could be said that a state government has not really engaged in unconstitutional racial discrimination in hiring or in university admissions until the plaintiff has exhausted all possible remedies in state court, and the highest available state court has upheld the hiring or admissions rules in question. Until then, the possibility always remains that a state court may strike down the relevant policy, in which case the job or university applicants in question would be evaluated under nondiscriminatory rules.<sup>51</sup>

<sup>49</sup> See Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 Wash. U. L.Q. 667 (1986).

<sup>50</sup> See, e.g., *Freedman v. Maryland*, 380 U.S. 51 (1965) (striking down law imposing prior restraints on screening of movies, even though plaintiffs did not file a case in state court).

<sup>51</sup> See, e.g., *Fisher v. University of Tex.*, 136 S. Ct. 2198 (2016) (recent case considering claim of unconstitutional racial discrimination in state university admissions, despite plaintiff’s failure to file a claim in state court first).

*C. The Supposedly Superior Expertise of State Courts on Property Rights Issues*

Another traditional justification for treating takings cases differently from other constitutional rights claims is the idea that state courts have superior expertise on property rights issues, and therefore are more likely to resolve them correctly than federal courts. Justice Kagan takes up this theory in her *Knick* dissent, where she laments that “the majority’s ruling channels to federal courts a (potentially massive) set of cases that more properly belongs, at least in the first instance, in state courts” because it involves “complex state-law issues” over which state courts have superior competence, such as whether the plaintiff has a state-law property interest in the land in question.<sup>52</sup>

But many other constitutional rights cases also routinely involve issues on which state judges might have superior expertise. State judges may sometimes know more than federal judges about “complex state-law issues” involved in some takings cases. But the same can be said of issues that arise in many cases involving other constitutional rights.<sup>53</sup> Outside the context of the Takings Clause, few argue that this possibility justifies relegating constitutional claims to state courts.

For example, some Establishment Clause claims require a determination of whether a “reasonable observer . . . aware of the history and context of the community and forum in which [the conduct occurred]” would view the practice as communicating a message of government endorsement or disapproval of religion.<sup>54</sup> State judges may well have more detailed knowledge of their community’s perceptions than federal judges. But that does not stop aggrieved parties from bringing Establishment Clause cases to federal court.<sup>55</sup>

<sup>52</sup> *Knick*, 139 S. Ct. at 2187–88 (Kagan, J., dissenting). For an academic statement of much the same argument, see Eric A. Lindberg, Multijurisdictionality and Federalism: Assessing the Impact of *San Remo* on Regulatory Takings, 57 *UCLA L. Rev.* 1819, 1859–62 (2010).

<sup>53</sup> For numerous examples, see Ilya Somin, Federalism and Property Rights, 2011 *U. Chi. Legal F.* 53, 80–84.

<sup>54</sup> *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O’Connor, J., concurring).

<sup>55</sup> Of course, federal district judges also live in the communities where they preside—they don’t exist in some federal ether—and, as leading citizens, may even better perceive local goings-on.

The Supreme Court has also ruled that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>56</sup> Whether any given speech is likely to incite “imminent lawless action” may well depend on variations in local conditions that state judges know more about than federal judges.

There are also plenty of other constitutional rights claims where the outcome depends in part on interpretations of state law. For example, the controversial “partial birth” abortion case, *Stenberg v. Carhart*, turned in large part on whether Nebraska law forbade all “partial birth” abortions, or just those that use one particular medical procedure. The Supreme Court split 5-4 on this apparently difficult question of state-law interpretation.<sup>57</sup> Yet it was not, as a result, relegated to state court.

Both Justice Kagan and some legal scholars argue that property-rights issues are especially suitable for relegation to state court because property rights are ultimately created by state law in the first place.<sup>58</sup> But this supposed fact does not give state judges any greater expertise advantage in property rights cases than they have in other constitutional cases where the outcome may depend on interpretations of state law or local conditions. Moreover, the theory ignores the fact that property rights have a basis in natural rights as well as purely positive state law. Indeed, the existence of property rights long predates state law, or indeed any law enacted by modern states. The natural-rights understanding of property rights was a crucial feature of the original meaning of the Takings Clause and other constitutional provisions protecting property rights.<sup>59</sup>

<sup>56</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>57</sup> *Stenberg v. Carhart*, 530 U.S. 914 (2001).

<sup>58</sup> See, e.g., Knick, 139 S. Ct. at 2187–88 (Kagan, J., dissenting); Frank I. Michelman, Property, Federalism, and Jurisprudence: A Comment on *Lucas* and Judicial Conservatism, 35 Wm. & Mary L. Rev. 301, 305–07 (1993); Melvyn R. Durchslag, Forgotten Federalism: The Takings Clause and Local Land Use Decisions, 59 Md. L. Rev. 464, 494 (2000); Stewart E. Sterk, The Federalist Dimension of Regulatory Takings Jurisprudence, 114 Yale L.J. 203, 226–29 (2004).

<sup>59</sup> The points raised in this paragraph are explicated in detail in Somin, Federalism and Property Rights, *supra* note 53, at 84–86, which also advances other criticisms of this particular justification for relegating takings cases to state court.

As Chief Justice William Rehnquist noted in his concurring opinion in *San Remo Hotel*, written on behalf of four justices, “the Court has not explained why we should hand authority over federal takings claims to state courts, based simply on their relative familiarity with local land-use decisions and proceedings, while allowing plaintiffs to proceed directly to federal court in cases involving, for example, challenges to municipal land-use regulations based on the First Amendment or the Equal Protection Clause.”<sup>60</sup> If the expertise rationale is not enough to justify consigning these types of cases to state court, takings cases should not be treated any differently.

Furthermore, there is no reason to assume that state judges necessarily have greater knowledge of Takings Clause issues than federal judges do. Many state court judges are not property-law experts, and some federal judges do have relevant expertise. The differences depend far more on the backgrounds of individual judges than on whether they are members of state or federal judiciaries.

In many takings cases, the relevant issues involve difficult questions of interpretation of federal constitutional law precedents, on which federal judges presumably have greater expertise than their state counterparts. At the very least, there is no good reason to think that state judges have any expertise advantage here that is greater than that which they enjoy on many other issues that are routinely considered by federal courts.<sup>61</sup>

In *Rucho v. Common Cause*, the Supreme Court ruled that challenges to political gerrymandering cannot be considered by federal courts because they raise nonjusticiable “political questions.”<sup>62</sup> In her dissent, Justice Kagan criticized the majority’s claim that gerrymandering could be left to the consideration of state courts.<sup>63</sup> “But what do those [state] courts know,” Kagan asked, “that this Court does not? If they can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn’t we?”<sup>64</sup>

<sup>60</sup> *San Remo Hotel*, 545 U.S. at 350–51 (Rehnquist, C.J., concurring) (internal citations omitted).

<sup>61</sup> For more detailed discussion of this issue, see Somin, *Federalism and Property Rights*, *supra* note 53, at 86–88.

<sup>62</sup> 139 S. Ct. 2484 (2019).

<sup>63</sup> *Id.* at 2524 (Kagan, J., dissenting).

<sup>64</sup> *Id.*

That is an excellent question. But it applies just as readily to her own dissent in *Knick*. If state courts' potentially superior knowledge of redistricting in their states does not justify consigning political gerrymandering cases to their exclusive control, the same goes for takings cases. Indeed, there is far more federal jurisprudence outlining "neutral and manageable standards" in the latter field than in the former, where the Supreme Court prior to *Rucho* never definitively decided whether the issue was even justiciable. And state courts surely have at least as much an advantage over federal courts in understanding their own states' redistricting processes as they might on property rights issues.<sup>65</sup>

*D. Treating State and Local Officials as "Constitutional Malefactors"*

Justice Kagan's dissent offers yet another rationale for treating takings cases differently from other constitutional rights cases when she argues that doing otherwise would unfairly treat well-meaning state and local officials as "constitutional malefactors":

[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.<sup>66</sup>

But, in fact, the majority does not turn government officials into "constitutional malefactors" merely because they enact a "regulatory program." It just holds that aggrieved property owners can then bring

<sup>65</sup> There is, perhaps, also a tension between Chief Justice Roberts's majority opinion in *Rucho* and his opinion in *Knick*, since the latter ignores arguments of comparative state court expertise. But the tension is minor, at most, since Roberts in *Rucho* does not rely on superior state court expertise so much as on the idea that state constitutions might have provisions with more precise standards for adjudicating gerrymandering claims than those of the federal Constitution. *Id.* at 2507–08.

<sup>66</sup> *Knick*, 139 S. Ct. at 2187 (Kagan, J., dissenting).

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 did not pay. The same exact thing happens when the regulatory program in question is challenged in state court, and the latter rules that it was a taking. As a practical matter, government regulators face the same risks of being declared “malefactors” who are required to pay compensation whether the case is brought in federal court or not.

The only difference arises in cases where a state court would declare that a policy is not a taking in a situation but a federal court would decide otherwise.<sup>67</sup> But state and local officials cannot complain that they are being treated “unfairly” merely because they can no longer get away with actions that federal courts—the ultimate interpreters of the federal Constitution—would invalidate.

It may well be true that state land-use regulators cannot completely avoid engaging in at least some policies that courts will later declare to be takings, contrary to officials’ expectations. But this is just one of many areas of government policy where a government cannot completely avoid engaging in conduct that sometimes violates constitutional rights and therefore will be subject to remedial rulings issued by courts.

In Justice Kagan’s terms, any police department that sometimes carries out searches or seizures cannot always “know in advance” whether some will turn out to be violations of the Fourth Amendment and cannot completely avoid engaging in some that turn out to be illegal. Thus, they cannot “do [their] work without fear of wrongdoing.”<sup>68</sup> Any police department that questions suspects probably cannot completely avoid situations where the questioning violates the Fifth Amendment right against self-incrimination. The same is true of jurisdictions that regulate the “time, place, and manner” of speech (thereby risking violations of the Free Speech Clause),<sup>69</sup> jurisdictions that regulate firearms (thereby risking violations of the Second Amendment),<sup>70</sup> and many other types of regulation that routinely risk running afoul of constitutional rights.

<sup>67</sup> This issue is discussed in more detail in Part IV.B, *infra*.

<sup>68</sup> Knick, 139 S. Ct. at 2187 (Kagan, J., dissenting).

<sup>69</sup> See *Ward v. Rock against Racism*, 491 U.S. 781 (1989) (holding that the government may regulate the time, place, and manner of speech, but laying out a three-part test such regulations must follow).

<sup>70</sup> See *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (ruling that the Second Amendment applies to state and local governments).



In each of these situations, government officials can reduce the incidence of constitutional violations by paying close attention to relevant judicial precedents and setting out policies that attempt to comply with them. But it is virtually impossible to completely avoid such violations because of the ambiguity and vagueness of some of the relevant legal rules and the sheer volume of law enforcement operations and regulations. Any government that engages in routine law enforcement, “time, place, and manner” speech regulation, or firearms regulation is likely to occasionally become a “constitutional malefactor.”

The same point applies to land-use regulations and the Takings Clause. Well-run state and local governments can work to minimize violations, but cannot avoid them completely. If that unfortunate state of affairs is not enough to consign speech cases, Second Amendment cases, or Fourth Amendment cases to state court, it should not doom takings cases to that fate either.

#### *E. The Habeas Analogy*

Some have argued that *Williamson County* is not really so unusual in barring a category of constitutional rights cases from federal court because the same thing happens when restrictions on habeas corpus make it difficult to secure federal court review of state court rulings on the constitutional rights of criminal defendants.<sup>71</sup> The combination of the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA) and later Supreme Court rulings interpreting it have indeed put severe limits on the availability of federal judicial review in such cases.<sup>72</sup>

But limitations on habeas review in federal court are still not as far-reaching as those *Williamson County* imposed on takings claims. The relevant Supreme Court cases place tight constraints on habeas review of state court decisions on issues involving criminal

<sup>71</sup> See, e.g., Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts’ Misguided Attempts to Avoid Preclusion under Williamson County*, 26 *Ecology L.Q.* 1, 38 (1999) (arguing that “[r]elegating takings claims to state court does not, therefore, flout the intent of § 1983 any more than does relegating the claims of victims of official misconduct or criminal defendants to state court”); Lindberg, *supra* note 52, at 1877–78 (making the same analogy).

<sup>72</sup> For a recent discussion, see Lynn Adelman, *Who Killed Habeas Corpus?*, *Dissent* (Winter 2018), <https://www.dissentmagazine.org/article/who-killed-habeas-corpus-bill-clinton-aedpa-states-rights>.

defendants' rights, but do not foreclose such review entirely, allowing it to continue in at least some categories of particularly egregious state court errors.<sup>73</sup> By contrast, the combination of *Williamson County* and *San Remo Hotel* barred federal court review of takings cases regardless of how badly state courts may have erred.<sup>74</sup>

A second noteworthy difference is that *Williamson County* was purely a judicially created doctrine, while AEDPA limitations on habeas are based on a congressionally enacted statute, which requires federal court deference to state court determinations of defendants' constitutional rights so long as the latter are "reasonable" and bars granting relief based on anything but "clearly established" Supreme Court precedent.<sup>75</sup> While Supreme Court cases interpreting AEDPA may have gone too far, they were at least relying on a statutory restriction rooted in Congress's power to pass laws determining the jurisdiction of the federal courts. Arguably, the Court's interpretation of AEDPA is more deferential to state courts than the statute actually requires.<sup>76</sup> One might even argue that the relevant provision of AEDPA is itself unconstitutional.<sup>77</sup> But the issue at least raises difficulties that are absent in *Williamson County*, which was a purely judicially invented constraint on judicial review.

Ultimately, AEDPA and the Supreme Court cases interpreting it place fewer sweeping constraints on federal court review of constitutional rights than *Williamson County*. And those constraints are also, at least in large part, grounded in a federal statute.

At the same time, I do agree that AEDPA and the resulting habeas jurisprudence have serious flaws.<sup>78</sup> Few if any of those who

<sup>73</sup> See, e.g., *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (limiting habeas review to "extreme malfunctions" of the state criminal justice system "where there is no possibility that fair-minded jurists could disagree").

<sup>74</sup> See discussion in Part I, *supra*.

<sup>75</sup> 28 U.S.C. § 2254(d).

<sup>76</sup> See Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 *Mich. L. Rev.* 1219 (2015) (making that argument).

<sup>77</sup> See, e.g., James S. Liebman & William F. Ryan, "Some Effectual Power": The Quality and Quantity of Decisionmaking Required of Article III Courts, 98 *Colum. L. Rev.* 696, 814–15 (1998) (making that argument).

<sup>78</sup> I agree with many of the criticisms raised in Adelman, *supra* note 72, and Reinhardt, *supra* note 76.

analogize *Williamson County* to the AEDPA cases actually support the latter. The proper remedy, therefore, is not to relegate both takings claims and defendants' rights to state courts, but instead to ensure strong federal judicial review for both. In that regard, *Knick* might even help habeas reformers insofar as it lends new weight to the principle that all federal constitutional rights deserve the protection of federal courts.

### III. Overruling Precedent

For observers who do not have a special interest in property rights issues, the most controversial aspect of the *Knick* decision may well be its overruling of a longstanding precedent.<sup>79</sup> The establishment of a new 5-4 conservative majority on the Supreme Court has led many on the left to fear that a variety of significant liberal precedents may be imperiled.<sup>80</sup> In his dissent in *Franchise Tax Board v. Hyatt*, another recent case overruling precedent, Justice Stephen Breyer complained that "[t]oday's decision can only cause one to wonder which cases the Court will overrule next."<sup>81</sup> Justice Kagan's dissent in *Knick* also relies heavily on the argument that it was inappropriate for the Court to overrule precedent in this case.<sup>82</sup> There is also obviously a longstanding broader debate over the extent to which the Court should be willing to overrule wrongly decided precedent.

I will not try here to resolve the broader issue of when overruling precedent is appropriate as a general matter.<sup>83</sup> I limit myself to the narrower task of explaining why the overruling of *Williamson County* is consistent with the Court's admittedly somewhat imprecise

<sup>79</sup> Cf. Tadhg A.J. Dooley & David Roth, Supreme Court Update, National Law Review, June 26, 2019, <https://www.natlawreview.com/article/supreme-court-update-knick-v-township-scott-no-17-647-nc-dep-t-revenue-v-kimberley> ("*Knick* stands on its own as an important constitutional takings decision, but may well be remembered most as another example of the Roberts Court chipping away at longstanding precedent.").

<sup>80</sup> Cf. Henry Gass, Overruled: Is Precedent in Danger at the Supreme Court?, Christian Science Monitor, June 25, 2019, <https://www.csmonitor.com/USA/Justice/2019/0625/Overruled-Is-precedent-in-danger-at-the-Supreme-Court>.

<sup>81</sup> *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting).

<sup>82</sup> *Knick*, 139 S. Ct. at 2184–88 (Kagan, J., dissenting).

<sup>83</sup> I offer some thoughts on recent developments in that debate in Ilya Somin, The Rights and Wrongs of Overruling Precedent, Reason: Volokh Conspiracy, June 26, 2019, <https://reason.com/2019/06/26/the-rights-and-wrongs-of-overruling-precedent/>.

standards for overruling constitutional precedent, and why Justice Kagan is wrong to argue that the *Knick* majority implicitly overruled numerous other precedents that long predated *Williamson County*.<sup>84</sup>

#### A. *Knick and the Court's Precedent on Overruling Precedent*

The majority's decision to overrule *Williamson County* is consistent with the Court's own previously stated criteria for overruling constitutional precedent. We might call that doctrine the Court's "precedent about precedent."

The Court has stated that it will "overrule an erroneously decided precedent . . . if: (1) its foundations have been 'eroded' by subsequent decisions; (2) it has been subject to 'substantial and continuing' criticism; and (3) it has not induced 'individual or societal reliance' that counsels against overturning it."<sup>85</sup> Some cases also highlight the "workability" of the precedent in question.<sup>86</sup> An additional factor that the Court considers is whether the original decision was "well reasoned."<sup>87</sup> Furthermore, as Chief Justice Roberts points out in his majority opinion in *Knick*, the doctrine of stare decisis "'is at its weakest when we interpret the Constitution,' as we did in *Williamson County*, because only this Court or a constitutional amendment can alter our holdings."<sup>88</sup>

*Williamson County* fits all these criteria well. The double standard against takings claims that it established has been "eroded" by later Supreme Court decisions that explicitly caution against treating the Takings Clause—and property rights generally—as the "poor relation" of constitutional law.<sup>89</sup> Recent decisions have gradually cut back on other areas where takings claims have been disfavored relative to other constitutional rights cases.<sup>90</sup> In addition, post-*Williamson*

<sup>84</sup> *Id.* (citing *Gass*, *supra* note 80).

<sup>85</sup> *Lawrence v. Texas*, 539 U.S. 558, 587 (2003) (internal citations omitted).

<sup>86</sup> *Janus v. State, Cty., and Mun. Employees*, 138 S. Ct. 2448, 2478 (2018).

<sup>87</sup> *Montejo v. Louisiana*, 556 U.S. 778, 793 (2009).

<sup>88</sup> *Knick*, 139 S. Ct. at 2177 (internal citation omitted).

<sup>89</sup> See especially *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) (holding that there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation").

<sup>90</sup> For discussion of two notable examples, see Ilya Somin, *Two Steps Forward for the "Poor Relation" of Constitutional Law: Koontz, Arkansas Game & Fish, and the Future of the Takings Clause*, 2012–2013 *Cato Sup. Ct. Rev.* 215 (2013).

*County* rulings have held that local government land-use regulations can be challenged in federal court on other constitutional grounds, such as the First Amendment.<sup>91</sup> This makes *Williamson County* even more anomalous than it was before.

There is also little doubt that *Williamson County* has been subject to “substantial and continuing” criticism. As Chief Justice Roberts notes, “The decision has come in for repeated criticism over the years from Justices of this Court and many respected commentators.”<sup>92</sup> The ruling has been the object of widespread criticism by legal scholars.<sup>93</sup> Perhaps more importantly, in a concurring opinion in *San Remo Hotel*, Chief Justice Rehnquist noted that *Williamson County* had severe flaws, was inconsistent with the Court’s treatment of other constitutional rights, and “ha[d] created some real anomalies, justifying our revisiting the issue.”<sup>94</sup> Rehnquist wrote that, although he had joined in the *Williamson County* ruling back in 1985, he had since come to believe that the state-litigation requirement of that ruling “may have been mistaken.”<sup>95</sup> Rehnquist’s concurrence was joined by three other members of the Court: Justices Anthony Kennedy,

<sup>91</sup> See, e.g., *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (First Amendment challenge to restrictions on locations of adult businesses).

<sup>92</sup> *Knick*, 139 S. Ct. at 2178 (citing examples).

<sup>93</sup> For examples of the many critiques, see, e.g., R.S. Radford & Jennifer Fry Thompson, *The Accidental Abstention Doctrine: After Thirty Years, the Case for Diverting Federal Takings Claims to State Court under Williamson County Has Yet to Be Made*, 67 *Baylor L. Rev.* 567 (2015); Joshua D. Hawley, *The Beginning of the End? Horne v. Department of Agriculture and the Future of Williamson County*, 2012–2013 *Cato Sup. Ct. Rev.* 245 (2013); J. David Breemer, *Overcoming Williamson County’s Troubling State Procedures Rule: How the England Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 *J. Land Use & Envtl. L.* 209 (2003); Peter A. Buchsbaum, *Should Land Use Be Different? Reflections on Williamson County Regional Planning Board v. Hamilton Bank*, in *Taking Sides on Takings Issues: The Public & Private Perspective* 471, 473–74 (Thomas E. Roberts ed., 2002); Michael M. Berger & Gideon Kanner, *Shell Game! You Can’t Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 *Urb. Law.* 671, 673 (2004); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 *Wash. U. J.L. & Pol’y* 99, 102–03 (2000); Ilya Somin, *Supreme Court Will Hear Important Property Rights Case, Reason: Volokh Conspiracy*, Mar. 5, 2018, <https://reason.com/volokh/2018/03/05/supreme-court-will-hear-important-proper>.

<sup>94</sup> *San Remo Hotel*, 545 U.S. at 351 (Rehnquist, C.J., concurring).

<sup>95</sup> *Id.* at 348.

Sandra Day O'Connor and Clarence Thomas.<sup>96</sup> Justice O'Connor had also been on the Court in 1985 and also joined in the *Williamson County* majority. Few Supreme Court decisions have been so seriously questioned by four members of the Court, including two who initially supported it. If this does not qualify as "substantial and continuing criticism," it is hard to imagine what does.

When it comes to "workability," the catch-22 created by the combination of *Williamson County* and *San Remo Hotel* has made the decisions' rules "unworkable," as Roberts emphasized.<sup>97</sup> If any procedural rule qualifies as such, it is one where the very action that is a prerequisite to filing a case in federal court also prevents the plaintiff from doing so. The ability of defendants to defeat takings cases by "removing" them to federal court and then getting them dismissed for lack of conformity to *Williamson County* is another indication of how unworkable the state exhaustion requirement was.<sup>98</sup>

For reasons already discussed,<sup>99</sup> the reasoning of *Williamson County* is unusually bad. This flaw supports its reversal. As Roberts puts it, the decision "was not just wrong. Its reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence."<sup>100</sup>

The reversal of *Williamson County* does admittedly upset some "reliance interests." Some state and local governments that might otherwise have prevailed in takings cases filed in state court will probably now lose them in federal court. But, as Chief Justice Roberts points out, the Court does not usually give credence to reliance interests that depend on rules that do not "'serve as a guide to lawful behavior.' . . . Our holding that uncompensated takings violate the Fifth Amendment will not expose governments to new liability; it will simply allow into federal court takings claims that otherwise would have been brought as inverse condemnation suits in state court."<sup>101</sup>

If an uncompensated restriction on property rights is constitutionally valid, the government should be able to defend it successfully

<sup>96</sup> *Id.*

<sup>97</sup> Knick, 139 S. Ct. at 2178–79.

<sup>98</sup> See discussion of this problem in Part I, *supra*.

<sup>99</sup> See Part I, *supra*.

<sup>100</sup> Knick, 139 S. Ct. at 2178.

<sup>101</sup> *Id.* at 2179 (quoting *United States v. Gaudin*, 515 U.S. 506, 521 (1995)).

in federal court. Constitutionally valid policies do not require the protection of the *Williamson County* doctrine, and such protection is not extended against any other types of constitutional claims. Ultimately, the only “reliance interests” protected by *Williamson County* were those of state and local governments that engaged in uncompensated takings that would be struck down in federal court but upheld by state courts that are biased in their favor or erroneously interpret relevant federal takings precedent. That is not an interest anywhere near strong enough to justify continuing to bar an entire category of constitutional rights cases from access to federal court.

Chief Justice Roberts also effectively responded to Justice Kagan’s argument that *Williamson County* should be given the “enhanced” form of stare decisis deference usually applied to statutory decisions because Congress could reverse it by enacting a statute eliminating the “preclusion trap” the Court upheld in *San Remo Hotel*.<sup>102</sup> This would only partly fix the problems created by *Williamson County*, as there would still be a double standard between takings claims and other constitutional rights. As Roberts points out, “takings plaintiffs, unlike plaintiffs bringing any other constitutional claim, would still have been forced to pursue relief under state law before they could bring suit in federal court. Congress could not have lifted that unjustified exhaustion requirement because, under *Williamson County*, a property owner had no federal claim until a state court denied him compensation.”<sup>103</sup> Moreover, if applied consistently, Justice Kagan’s argument would justify giving enhanced status to any precedents establishing judicially created barriers to bringing constitutional rights claims in federal court, so long as Congress could potentially reverse or mitigate them.

None of these points should be decisive for those who believe that *Williamson County* was right on the merits, as the dissenting justices in *Knick* clearly do. But these considerations do count against keeping it in place simply based on adherence to the doctrine of stare decisis. They should also quiet concerns that *Knick* heralds a more general trend toward a greater willingness to overrule precedent.<sup>104</sup>

<sup>102</sup> *Id.* at 2189 (Kagan, J., dissenting).

<sup>103</sup> *Id.* at 2179.

<sup>104</sup> I do not, here, take up the issue of whether other recent reversals of precedent depart from the Court’s established criteria for doing so.

Anyone who concludes that *Williamson County* was wrong for the reasons outlined by the *Knick* majority (and those described in this article) should have no qualms about the Court's decision to reverse its 1985 precedent. If the majority erred, it was in its substantive critique of *Williamson County*, not in concluding that the case should be overruled if that critique was sound.

*B. Does Knick Implicitly Overrule "Precedent after Precedent after Precedent"?*

In addition to defending *Williamson County* on grounds of stare decisis, Justice Kagan's dissent also argues that the *Knick* majority implicitly overruled numerous precedents going back to the 1890 case of *Cherokee Nation v. Southern Kansas Railway Co.*<sup>105</sup> She contends that the majority's approach "requires declaring precedent after precedent after precedent wrong."<sup>106</sup> These cases all mandate that the Takings Clause "does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken" provided the government offers "reasonable, certain and adequate provision for obtaining compensation" after the fact.<sup>107</sup>

In his majority opinion, Chief Justice Roberts argues that these cases can be explained by the Court's unwillingness to provide injunctive relief against takings in situations where the property owner was able to get compensation; 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."<sup>108</sup> Justice Kagan responds by pointing out that the distinction between compensation and injunctive relief "played little or no role in our analyses" in those cases.<sup>109</sup>

Both Roberts and Kagan ignore a far more significant distinction between most of the precedents the latter relies on and cases such as *Knick* and *Williamson County*. There is a crucial difference between a case where the government concedes there is a taking but merely

<sup>105</sup> 135 U.S. 641 (1890). For Justice Kagan's discussion of these cases, see *Knick*, 139 S. Ct. at 2182, n.1 & 2184–87 (Kagan, J., dissenting).

<sup>106</sup> *Knick*, 139 S. Ct. at 2186 (Kagan, J. dissenting).

<sup>107</sup> *Id.* at 2182 (quoting *Cherokee Nation*, 135 U.S. at 659).

<sup>108</sup> *Knick*, 139 S. Ct. at 2176–77.

<sup>109</sup> *Id.* at 2185 (Kagan, J., dissenting).



delays paying compensation, and a situation where the government denies that any taking has occurred at all. By definition, the latter scenario is *not* a situation where the government provides “reasonable, certain and adequate provision for obtaining compensation” after the fact.<sup>110</sup> Compensation from the state is uncertain—and thus also potentially inadequate—for the simple reason that the government denies that any compensation is due at all, and state courts could potentially endorse that position—even if federal courts might have decided the case differently.

Cases where both sides agree that compensation is due might be characterized simply as disputes over the timing and amount of compensation, which can usually be resolved by factual determinations about the value of the property in question. By contrast, disputes over whether a taking has occurred at all are textbook examples of litigation over whether there has been a violation of federal constitutional law—precisely the sort of issue that belongs in federal court, if anything does. While a state court could potentially rule against the government on the issue of whether a taking has occurred, the same thing could happen whenever a state denies that it has violated some other constitutional right.

As Robert Thomas asks in a critique of Kagan’s opinion, “isn’t there a big difference between an eminent domain quick take where the government occupies now, with the corresponding recognition of the absolute obligation to pay whatever the court later determines is just compensation, and a regulatory taking where the government is exercising some other power, and absolutely denies that it needs to pay *anything*?”<sup>111</sup>

A close look at the pre-*Williamson County* cases cited by Justice Kagan shows that all of those brought against state and local governments (and some brought against the federal government) were in fact cases where compensation was “certain” because the government had already conceded that a taking had occurred and payment was due. In *Cherokee Nation*, the 1890 case to which Kagan traces the

<sup>110</sup> *Cherokee Nation*, 135 U.S. at 659.

<sup>111</sup> Robert H. Thomas, *Knick Analysis*, Part IV: Why Not Let Sleeping Dogs Lie? The Dissent and Stare Decisis, Inverse Condemnation Blog, June 24, 2019, <https://www.inversecondemnation.com/inversecondemnation/2019/06/knick-analysis-part-iv.html>.

doctrine in question, Congress had mandated that “full compensation shall be made to the owner for all property to be taken” for the construction of a railroad that would pass through land owned by Native American tribes.<sup>112</sup> Because Congress had already authorized compensation for the land taken for the railroad, the Court ruled that “this provision is sufficiently reasonable, certain and adequate to secure the just compensation to which the owner is entitled.”<sup>113</sup> The key point, however, is that “the owner is entitled to reasonable, certain and adequate provision for obtaining compensation *before his occupancy is disturbed.*”<sup>114</sup> There can be no such advance assurance of “reasonable, certain and adequate” compensation in a case where the government denies that any compensation is due in the first place.

Virtually all the other cases cited by Justice Kagan are similar. Those brought against state and local governments (and some against the federal government) involve scenarios where the government conceded in advance that compensation is due, and the only issue was its timing or amount.<sup>115</sup>

<sup>112</sup> Cherokee Nation, 135 U.S. at 659.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* (emphasis added).

<sup>115</sup> See *Dohany v. Rogers*, 281 U.S. 362, 366–70 (1930) (state recognized the duty to compensate and enacted legislation to do so for land taken for a railroad); *Joslin Mfg. Co. v. Providence*, 262 U.S. 668, 677–78 (1923) (city committed to providing compensation to owners of land taken for the acquisition of water); *Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 586–87 (1923) (government agreed in advance to provide compensation for land taken by eminent domain); *Hays v. Port of Seattle*, 251 U.S. 233, 234–38 (1920) (city formally asserted title over the owner’s property, thereby essentially conceding that the property had been taken); *Bragg v. Weaver*, 251 U.S. 57 (1919) (government recognized obligation to compensate owners for land taken for purposes of repairing an adjoining road); *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 242–43, 251–54 (1905) (state authorized compensation for the use of eminent domain to condemn property for a railroad); *Williams v. Parker*, 188 U.S. 491, 502–04 (1903) (state legislature recognized liability and provided compensation for the taking of property by eminent domain, and had the power to impose that liability on the City of Boston despite lack of “technical” estoppel); *Backus v. Ft. St. Union Depot Co.*, 169 U.S. 557, 565–68 (1898) (state recognized obligation to compensate for damage to property that state law treated as the equivalent “condemnation” of property interests for the construction of railroad tracks); *Sweet v. Rechel*, 159 U.S. 380, 382, 400–02 (1895) (state recognized duty to compensate owners for the taking of and allocation of funds for that purpose). These cases are all cited in *Knick*, 139 S. Ct. at 2182 n.1 (Kagan, J., dissenting).

Three cases were brought against the federal government in situations where the latter denied there had been a taking.<sup>116</sup> But a takings claim against the federal government must necessarily be heard in federal court, regardless of the issue involved. And if the condemning authority refuses to pay at the time of the taking, the remedy will be an award of compensation paid after the fact, regardless of exactly which federal court hears the case and at which time.

Thus, such cases do not raise the possibility of denying access to federal court for a federal constitutional claim and do not change the nature of the compensation remedy successful plaintiffs stand to receive. As the Supreme Court noted in one of these decisions, “if the authorized action in this instance does constitute a taking of property for which there must be just compensation under the Fifth Amendment, the Government has impliedly promised to pay that compensation and has afforded a remedy for its recovery by a suit in the Court of Claims.”<sup>117</sup> The same point applies to Kagan’s citation of cases involving takings claims brought against the federal government under the Tucker Act, which requires such cases to be brought in the Court of Federal Claims.<sup>118</sup>

Kagan’s reliance on late-19th and early-20th century cases brought against state and local governments is also problematic for another reason. Those cases were decided before the Supreme Court recognized that the Takings Clause (and the rest of the Bill of Rights) was “incorporated” against the states. As a result, takings claims brought against state and local governments in federal court could only be litigated under the Due Process Clause of the Fourteenth Amendment, utilizing the Court’s so-called substantive due process doctrine.<sup>119</sup> Takings cases decided under the Due Process Clause during this era were often litigated under rules that gave greater deference to the government than those brought under the Takings Clause (which could only be used against the federal government).<sup>120</sup> Thus, we

<sup>116</sup> See *Yearsley v. W. A. Ross Constr. Co.*, 309 U.S. 18, 21–23 (1940); *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932); *Crozier v. Krupp A.G.* 224 U.S. 290, 305–06 (1912).

<sup>117</sup> *Yearsley*, 309 U.S. at 21.

<sup>118</sup> See *Knick*, 139 S. Ct. at 2186 (Kagan, J., dissenting) (discussing several such cases).

<sup>119</sup> For a discussion of this distinction and its importance, see Ilya Somin, *The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain* 123–26 (rev. ed. 2016).

<sup>120</sup> See *id.* at 50–51, 123–24.

should not assume that the former cases represent the Court's considered judgment of how takings claims against states and localities should be handled if the Takings Clause had applied to them.

In his concurring opinion in *Knick*, Justice Clarence Thomas went further than Chief Justice Roberts's majority opinion, arguing that,

[t]he Fifth Amendment does not merely provide a damages remedy to a property owner willing to "shoulder the burden of securing compensation" after the government takes property without paying for it. Instead, it makes just compensation a "prerequisite" to the government's authority to "tak[e] property for public use." A "purported exercise of the eminent-domain power" is therefore "invalid" unless the government "pays just compensation before or at the time of its taking."<sup>121</sup>

Thomas therefore rejects the "'sue me' approach to the Takings Clause" under which the government is free to undertake policies that take private property without paying compensation in advance or simultaneously with the taking. Logically, Thomas makes a compelling point. The fact that compliance with the Constitution may be difficult for governments that enact extensive regulatory programs does not relieve them of those obligations. But unlike the majority opinion, Thomas's argument probably would require overruling of a substantial number of pre-*Williamson County* precedents holding that the Takings Clause does not require advance or contemporaneous compensation.<sup>122</sup>

Practically speaking, however, the difference between his approach and the majority's will usually be modest, at most. Either way, government regulators will sometimes violate the Takings Clause even if they try, in good faith, to avoid doing so. And either way the practical remedy for the violation of constitutional rights would be a lawsuit for compensation, filed after the fact.

The key difference might be that Thomas's theory might allow injunctive relief in some situations where Roberts's would not.<sup>123</sup>

<sup>121</sup> *Knick*, 139 S. Ct. at 2180 (Thomas, J., concurring) (internal citations omitted).

<sup>122</sup> See discussion of these cases earlier in this Part.

<sup>123</sup> See *Knick*, 139 S. Ct. at 2180 (Thomas, J., concurring) (rejecting the argument that government regulators should be able to pursue regulatory programs free of the threat of injunction).

But it is far from clear that there would be any significant number of such cases. As Thomas notes, “[i]njunctive relief is not available when an adequate remedy exists at law. And even when relief is appropriate for a particular plaintiff, it does not follow that a court may enjoin or invalidate an entire regulatory ‘program.’”<sup>124</sup>

#### **IV. The Practical Impact of *Knick***

Will *Knick* have any significant real-world effect? To put the question a different way, does it really matter whether takings cases are brought in state court or federal court? In many situations, the answer is likely to be “no.” Both state and federal courts must address many of the same issues and follow the same federal court takings precedents.

On the other hand, there are cases where errors or biases by state courts are likely to lead to the denial of compensation in cases where federal courts would have ruled otherwise. State courts also sometimes create burdensome procedural obstacles to takings lawsuits that federal courts avoid. It is also possible—though far from certain—that *Knick* will create new opportunities to expand substantive protections for property rights.

Critics of *Knick* argue that it could generate a flood of new federal court litigation. It is by no means clear that this will happen. But if it does, it may well turn out to be a good thing.

##### *A. The Problem of State Court Bias*

As Justice Joseph Story explained in the canonical 1816 case of *Martin v. Hunter’s Lessee*, one of the most important reasons why federal courts have ultimate jurisdiction over federal constitutional issues is “the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution.”<sup>125</sup> The Court emphasized the danger that leaving such issues under the final control of state courts would pose, giving free reign to possible state court bias in favor of their own state governments. As Justice Story put it, “[t]he Constitution has presumed . . . that State attachments,

<sup>124</sup> *Id.* (internal citation omitted).

<sup>125</sup> *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 347–48 (1816) (Story, J.).

State prejudices, State jealousies, and State interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.”<sup>126</sup>

Potential bias by state courts in takings cases is more than just a theoretical problem, given the reality that many state judges are elected and have close ties to state parties and political leaders who adopt policies that result in regulatory takings.<sup>127</sup> Government officials can even deliberately arrange the appointment of judges likely to rule in favor of their preferred regulatory programs in takings cases.<sup>128</sup> In recent years, judicial elections in many states have increasingly been contested by parties and interest groups in much the same way as elections for “political” offices,<sup>129</sup> thereby increasing the extent to which state judges have ties to broader political coalitions and are likely to serve their interests.

State court bias need not manifest itself in the form of deliberate efforts by judges to bend the law to favor the interests of state and local governments. Rather, the political process can skew things in favor of the selection of judges with a pro-government orientation in takings cases, or at least those that challenge politically significant regulatory policies favored by the dominant political forces in the state.

Another potentially significant practical consequence of *Knick* is helping to ensure effective enforcement of a uniform federal “floor” for constitutional rights. One of the major purposes of “incorporating” the Bill of Rights against the states in the first place was to ensure adherence to such a floor. As Akhil Reed Amar puts it, “the federal Constitution stands as a secure political safety net—a floor below which state law may not fall.”<sup>130</sup> Even if state courts do not have any systematic bias against takings claims, some are likely to fall below the federal floor through a combination of random

<sup>126</sup> *Id.* at 347.

<sup>127</sup> See Ilya Somin, *Stop the Beach Renourishment and the Problem of Judicial Takings*, 6 Duke J. Const. L. & Pol’y 91, 99–100 (2011) (discussing this problem and its implications for takings jurisprudence).

<sup>128</sup> See *id.* at 99 (discussing this problem).

<sup>129</sup> See research collected in *Judicial Elections in the 21st Century* (Chris W. Bonneau & Melinda Gann Hall eds., 2016).

<sup>130</sup> Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1100 (1988). See also generally, Amar, *The Bill of Rights*, *supra* note 39, chs. 8–10.

variation, idiosyncrasies of political and legal cultures, and other factors. We readily acknowledge the need for federal judicial review to ensure uniform application of a federal floor with respect to other constitutional rights. The Takings Clause is no exception.

Allowing takings plaintiffs access to federal court can also help block state court procedural rules that inhibit effective vindication of property owners' rights to compensation. To take just one prominent example, California has a rule denying compensation in situations where restrictions on land use that would otherwise be considered compensable takings are simply "normal" delays in the process of obtaining a permit—even when the "normal" delay results from a mistake by a state regulatory agency, which erred in denying the owner's right to develop his or her land.<sup>131</sup> Such delays can last for years at a time.<sup>132</sup> New Jersey courts have adopted a similar approach.<sup>133</sup>

#### *B. Will There Be a Flood of New Federal Takings Cases?*

Critics of *Knick* fear that the decision will have a more harmful impact, leading to a surge of new takings cases in federal court. In her dissent, Justice Kagan warns that "[t]oday's decision sends a flood of complex state-law issues to federal courts. It makes federal courts a principal player in local and state land-use disputes."<sup>134</sup> Others have noted that there may be an especially significant expansion of federal takings litigation in states such as California, which have unusually severe land-use regulations.<sup>135</sup>

Predictions that *Knick* will result in a "flood" of new federal court takings litigation may be overstated. Plaintiffs will only have

<sup>131</sup> See *Landgate v. Cal. Coastal Comm'n*, 953 P.2d 1188, 1200–01 (Cal. 1998).

<sup>132</sup> See *id.* at 1208 (Brown, J., dissenting) (noting that the case involved a two-year delay). For an analysis, see Stephen E. Abraham, *Landgate—Taken but Not Used*, 31 *Urb. Law.* 81 (1999).

<sup>133</sup> *Pheasant Bridge Corp. v. Twp. of Warren*, 777 A.2d 334 (N.J. 2001) (holding there can be no "temporary taking" during the period it takes the landowner to successfully challenge an illegal ordinance restricting his or her ability to develop property). But see *Eberle v. Dane Cty. Bd. of Adjustment*, 595 N.W.2d 730, 742 n.25 (Wis. 1999) (rejecting this approach).

<sup>134</sup> *Knick*, 139 S. Ct. at 2188–89.

<sup>135</sup> See, e.g., David G. Savage, *Supreme Court Bolsters Rights for Developers and Property Owners in California and Elsewhere*, *L.A. Times*, June 21, 2019, <https://www.latimes.com/politics/la-na-pol-supreme-court-property-rights-taking-20190621-story.html>.

incentives to bring such cases in situations where they can prevail in federal court but are significantly less likely to do so in state court. Bringing cases that are doomed to defeat will only saddle property owners with litigation costs and delays that most would surely prefer to avoid.

Property rights advocates such as the Pacific Legal Foundation—the public interest law firm that represented Mary Rose Knick—could well use this case as an opportunity to bring new ones seeking to strengthen protection for property rights under the Takings Clause. But, once again, such groups have an incentive to bring cases that are likely to prevail. Strategic public-interest litigators have every reason to avoid creating negative precedents that could hurt their cause.

If it turns out that there is indeed a large amount of new takings litigation in federal court as a result of *Knick*, that would indicate that state courts (at least in some parts of the country) have been severely underprotecting property owners' constitutional rights, taking advantage of the *Williamson County* regime to deny takings claims that federal courts would have upheld. In that scenario, the "flood" of new claims would be a feature rather than a bug.

Indeed, such an increase in litigation is a salutary result of any Supreme Court decision that strengthens protections for constitutional rights that have long been underenforced. Few today lament the "flood" of new civil rights cases that arose after *Brown v. Board of Education* undermined *Plessy v. Ferguson* by greatly increasing federal court scrutiny of state segregation laws.<sup>136</sup> Similarly, federal courts began to take a more active role in protecting criminal defendants' constitutional rights after the Warren Court adopted a series of precedents "incorporating" various parts of the Bill of Rights against the states and imposing more rigorous standards for their protection.<sup>137</sup> Here too, the additional litigation was entirely justified insofar as state courts had failed to provide proper protection for the rights in question.

Justice Kagan laments the possibility that *Knick* "makes federal courts a principal player in local and state land-use disputes."<sup>138</sup> But federal courts *should be* principal players in any area of public policy

<sup>136</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>137</sup> For an overview of these rulings, see Lucas A. Powe, Jr., *The Warren Court and American Politics* chs. 15–16 (2002).

<sup>138</sup> *Knick*, 139 S. Ct. at 2188–89 (Kagan, J., dissenting).



where the government systematically violates federal constitutional rights—especially if state courts fail to adequately protect them. That is a big part of what federal courts are for.

If something like a “flood” of new federal takings cases does emerge, it is possible that courts will take the opportunity to further develop currently vague or otherwise underspecified aspects of takings jurisprudence. Some observers also believe that it might enable more conservative judges—including those on the Supreme Court—to strengthen protection for property rights.<sup>139</sup>

However, it is far from clear that *Knick* presages a major revolution in favor of stronger protection for constitutional property rights under the Takings Clause. Because of the egregious nature of the double standard established by *Williamson County*, overruling it should have been relatively low-hanging fruit for property rights advocates. Indeed, such overruling was likely favored by Justice Kennedy, who had joined in Chief Justice Rehnquist’s concurring opinion in *San Remo Hotel* suggesting it should be reversed.<sup>140</sup> The Court actually decided to hear *Knick* before Kennedy retired in late June 2018, and the resulting reversal of *Williamson County* probably would have occurred even if Kennedy had stayed on the Court and not been replaced by Justice Kavanaugh. The ruling therefore tells us relatively little about the potential future agenda of the new conservative majority on the Court.

Perhaps more importantly, the 5-4 split on the Court in *Knick*, with the justices splitting along ideological lines, suggests that the Court remains deeply divided on property rights issues. In recent years, the liberal justices have sometimes joined with the conservatives in ruling against the government in several important takings cases.<sup>141</sup> The liberals’ strong stance against reversing *Williamson County* suggests that they may not be willing to go much further in strengthening enforcement of the Takings Clause. If so, such expansion may prove difficult, since it would apply only to issues on which there is

<sup>139</sup> See, e.g., Robert H. Thomas, *Knick Analysis, Part V: What Next?*, Inverse Condemnation Blog, June 24, 2019, <https://www.inversecondemnation.com/inversecondemnation/2019/06/knick-analysis-part-v-whats-next.html> (raising this possibility).

<sup>140</sup> See discussion of this opinion in Part III.A, *supra*.

<sup>141</sup> For an analysis of some important examples, see Somin, Two Steps Forward, *supra* note 90.

full agreement among the five conservative justices. In the long run, it is difficult to firmly entrench strong judicial protection for any constitutional right unless there is substantial support for it from jurists on both sides of the ideological spectrum.<sup>142</sup>

The liberal justices' opposition to *Knick* may be due in part to concerns about reversing precedent, with an eye to preserving more significant liberal precedents that might be imperiled by the new conservative majority.<sup>143</sup> But it is notable that Justice Kagan's dissent forcefully defends *Williamson County* as right on the merits not merely on stare decisis grounds, at times arguing that takings issues are almost uniquely suited for relegation to state court.<sup>144</sup> It remains to be seen whether this deep skepticism about federal judicial protection of property rights extends beyond the specific issues raised in *Knick*.

As this article goes to press in the late summer of 2019, it is far too early to judge the impact of *Knick* on takings jurisprudence. Federal courts are just beginning to hear cases that, under *Williamson County*, would have been consigned to state court.<sup>145</sup> In one of the first lower-court opinions to cite *Knick*, the U.S. Court of Appeals for the Federal Circuit ruled that the decision actually harms property owners in one noteworthy sense. *Knick's* holding that a takings claim accrues as soon as the taking occurs implies that the statute of limitations begins to toll at that point as well, even if it happens "before the effect of the regulatory action is felt and actual damage to the property interest is entirely determinable."<sup>146</sup>

That ruling, by the court that hears most appeals of takings cases brought against the federal government, could potentially make it harder for plaintiffs in regulatory takings cases to initiate their claims in time to avoid the statute of limitations, while simultaneously also having enough evidence to demonstrate the extent of compensation

<sup>142</sup> I discuss the significance of cross-ideological support for judicial protection of property rights in more detail in Ilya Somin, *Taking Property Rights Seriously? The Supreme Court and the "Poor Relation" of Constitutional Law* at 38–41, George Mason Law & Economics Research Paper No. 08-53, 2008, <http://ssrn.com/abstract=1247854>.

<sup>143</sup> See discussion of this issue in Part III, *supra*.

<sup>144</sup> *Knick*, 139 S. Ct. at 2188–90 (Kagan, J., dissenting).

<sup>145</sup> See, e.g., *Mangal v. City of Pascagoula*, 2019 WL 3413850 at \*2 (S.D. Miss. July 29, 2019) (applying *Knick* to reject ripeness argument for relegating a takings case to state court).

<sup>146</sup> *Campbell v. United States*, 2019 WL 3483204 at \*5 (Fed. Cir. Aug. 1, 2019).

necessary to offset the damage caused by the government action in question.<sup>147</sup> One possible answer to this dilemma is that the statute of limitations for takings claims should only toll when the plaintiff knew or reasonably should have known about the damage inflicted by the taking. This would be similar to the approach some courts take in medical malpractice tort cases, where they have held that the statute of limitations only tolls when the plaintiff knew or should have known that the doctor had committed a negligent act, such as leaving a foreign object in the patient's body after an operation.<sup>148</sup>

Another, more far-reaching possibility is that a Takings Clause violation should not be seen as a discrete act but as a continuing constitutional violation that goes on for as long as the government denies the owner the property right in question without paying compensation. This theory is consistent with the *Knick* majority's holding that a violation commences the moment the taking occurs, based on the idea that property rights exist in time as well as space, so each additional increment of time during which the right is violated exacerbates the violation.<sup>149</sup>

## Conclusion

*Knick v. Township of Scott* should go down in history as a case that eliminated an egregious double standard that barred numerous takings cases from federal court in situations where other constitutional rights claims would not have been barred. Of course, it is also notable for overruling a longstanding precedent at a time when there are heated debates over the principle of stare decisis.

The ultimate impact of *Knick* is likely to take some years to determine. Much depends on how many new takings cases are brought in federal court as a result, and how they are resolved. But, at the very least, *Knick* has established the important principle that takings plaintiffs are entitled to their day in federal court.

<sup>147</sup> For an early analysis of this case and its potential implications, see Robert H. Thomas, Lattice of Coincidence: Regulatory Takings Claim Accrues When Regulator Makes Final Decision (*Williamson County Lives!*), Not When Appeals Are Exhausted, Inverse Condemnation Blog, Aug. 2, 2019, <https://www.inversecondemnation.com/inversecondemnation/2019/08/lattice-of-coincidence-regulatory-takings-claim-accrues-when-regulator-makes-final-decision-not-when.html>.

<sup>148</sup> See, e.g., *Johnson v. St. Patrick's Hosp.*, 417 P.2d 469 (Mont. 1966).

<sup>149</sup> See discussion in Part II.A, *supra*.