**The Federal Courthouse Door Opens At Last!**

By R. S. Radford\*

 Justice denied, or only justice delayed? After more than three decades, property owners have finally regained the right to sue for a taking of their property in federal court! If you’re wondering how this could ever have been in question, a little Supreme Court history is in order.

Until 1978, the Court had no real standards for telling when government regulations become so onerous that they amount to a taking for which compensation is required under the Fifth Amendment. A landmark decision handed down that year, *Penn Central Transportation Co. v. City of New York*, was intended to remedy that problem. The three “*Penn Central* factors” – the character of the regulation, its economic impact, and the owner’s investment-backed expectations – have proven notoriously difficult to pin down in any given case, but at least they are better than no standards at all.

Then in 1985, the Court announced one of the most bizarre and unjustifiable procedural rules of all time: a citizen whose property is “taken” by local regulations could not sue for compensation in federal court! In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* the Court ruled that – despite the fact that a takings claim arises under the U.S. Constitution and is normally brought forward under section 1983 of the Civil Rights Act – no *federa*l lawsuit can be filed until the property owner has sought and been denied compensation in *state* court.

 The stated rationale for this new rule was, plainly speaking, nonsense, and the *Williamson County* Court had apparently not even thought through the foreseeable consequences of the doctrine it created. For the effect of *Williamson County* was not just to bar property owners from federal court until they had “ripened” their claims through state litigation, as the decision plainly stated. Rather, it barred them from federal court forever! As the Supreme Court acknowledged many years later in the *San Remo Hotel* case, a final decision from a state court normally precludes any further litigation of the same issue in *any* court, state or federal.

 Scores of petitions were filed over the years, asking the Court to reconsider *Williamson County* in view of its lack of doctrinal basis and its devastating effect on property owners. Finally, one such opinion was granted last year, and on June 21, 2019, *Williamson County* was struck down!

 In *Knick v. Township of Scott* (brilliantly briefed and argued by J. David Breemer of the Pacific Legal Foundation), Chief Justice John Roberts announced that “takings claims against local governments should be handled the same as other claims under the Bill of Rights. *Williamson County* erred in holding otherwise.” Pulling no punches, the Chief Justice continued, “*Williamson County* was not just wrong. Its reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence.” To which one can only respond, that’s what we’ve been saying for 34 years!

 If anything could dampen the celebration over *Knick*, it is reading Justice Kagan’s dissent, which was joined by the other three justices making up the Court’s liberal wing. In the dissent’s view, there was nothing wrong with *Williamson County* at all! Permanently relegating violations of the Fifth Amendment’s Takings Clause to state court posed no real problem for the dissenters. The real victims, in Justice Kagan’s view, are local regulators. Holding that local boards and agencies have violated the Constitution merely because their actions take someone’s property without compensation, she frets, “is not a fair position in which to place persons carrying out their governmental duties.” You read that right. After more than 30 years of wrongfully denying property owners a federal forum to redress violations of their federal constitutional rights, suddenly fairness matters.

 The most sobering point here is that, before Justice Kavanaugh was confirmed, the Court was split 4-4 between Chief Justice Robert’s view of *Williamson County* and Justice Kagan’s. And without the votes of the two newest members of the Court, Justices Gorsuch and Kavanaugh, the Kagan dissent would now be the law of the land! Our rights sometimes hang by the slenderest of threads.

 Of course, gaining access to federal court doesn’t automatically translate to winning more takings claims. Arguably one of the worst takings decisions of all time was the Ninth Circuit’s en banc opinion in *Guggenheim v. City of Goleta*, in which Judge Kleinfeld upheld the city’s rent control ordinance by answering *Penn Central*’s three-part inquiry with a single imperative – it’s rent control! A lifetime appointment to the federal bench may insulate judges from local political pressures, but it doesn’t guarantee they will be receptive to constitutional arguments by property owners.

 Still, just as the *Penn Central* standards are better than no standards at all, having the choice of a federal forum is better than having no choice. Federal trial judges tend to be more familiar with the requirements of the Constitution than their state counterparts, and local regulators will undoubtedly be more cautious about infringing on protected rights and liberties if they know they risk winding up in federal court. Justice Kagan may consider this unfair, but for property owners it’s a breath of fresh air after three decades of oxygen deprivation.

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