



Graveyard of Federal Claims?

"I don't want to know what the law says. I want to know who the judge is." — Roy M. Cohn

Roy Cohn was one of the most disgusting figures of 20th century American law, whose red-baiting and homophobia were exceeded in awfulness only by his mentoring of Donald Trump. But when it comes to the Supreme Court's Takings case this, he was certainly prescient.

Today in my Land Use class, we listened to the oral argument in *Knick v. Township of Scott PA*, which we might call the Roy Cohn case. *Knick* is in many ways not really a Takings case at all. The plaintiff owns a piece of property in Pennsylvania; another township resident says that one of her ancestors is buried in a grave in the middle of the property and wanted to visit. Knick said no; it's her property, dammit. So the township passed an ordinance saying that any cemetery in the jurisdiction had to grant a public right-of-way during daylight hours. Knick sued.

So? What's the big deal? Turns out a lot.

Knick wanted to bring this case in federal court, but since 1985, pursuant to the famous case of *Williamson County Planning Comm'n v Hamilton Bank*, Takings plaintiffs have to bring their cases in state court first. The reasoning is straightforward. The Takings Clause doesn't say that states can't take private property: it says that they can't take private

property *without just compensation*, and the state needs to an opportunity to provide that compensation. So, the Court said, you have to go to state court first.

But attention civil procedure geeks! If the plaintiff goes to state court *first*, that means she will go to state court *last*, because going to federal court afterwards means that she will be *claim precluded* (formerly known as *res judicata*): she already had the opportunity to fully and fairly litigate her claim, so she doesn't get another bite at the apple.

Why should anyone care about this? Why would this case make it to the Supreme Court again? Is there really that much of a difference?

You could argue it a bunch of ways. Burt Neuborne's famous article [The Myth of Parity](#) argued that civil rights plaintiffs should always want to go to federal court: he claimed that 1) the judges are better with technical legal matters; 2) they will not shy away from making constitutionally based ruling; and 3) their insulation from election will make them more amenable to siding with plaintiffs. Several years later, my former colleague Bill Rubenstein countered with [The Myth of Superiority](#), where he argued that in many cases — particularly the LGBT rights cases that he had litigated with the ACLU — state courts were often *better* than federal courts, particularly since they might be more accustomed to dealing with the family law issues that often arise in LGBT rights cases.

But if we are being serious, particularly in the Takings context, none of these (relatively) value-neutral explanations are at issue. Politics is.

It's no accident that Donald Trump and Mitch McConnell are rapidly remaking the federal judiciary. McConnell virtually shut down the confirmation process during President Obama's last two years — most famously with Merrick Garland — and has now gone the other way, jamming judges through with alarming speed and a completely supine Republican caucus. For the first time ever, a California judge was confirmed to the Ninth Circuit against the wishes of California's two (Democratic) senators. McConnell seems content in the knowledge that he might destroy American democracy and send the world to hell in a handbasket, but at least he will have extremely conservative judges with him in the handbasket.

Meanwhile, several of the states with the most valuable property in the most successful areas of the country are blue states: [not always, but often](#). That means that they will have Democratic or at least relatively centrist Republican governors, with a more centrist or even liberal judiciary. If you are a takings plaintiff, that means you want to get out of state court. And that is what is at issue here.

My students and I listened to the *first* argument in this case, before Brett Kavanaugh came on the court. The breakdown seemed relatively straightforward, and predictably ideological. [Professor Miriam Seifter's analysis for SCOTUSBlog](#) suggests that Chief Justice Roberts and Justice Gorsuch might be wary of overruling *Williamson County*, and literally turning every land use dispute into a potential federal case. She could be right: the last time the Supremes considered overruling *Williamson County*, in the 2005 case of *San Remo Hotel v San Francisco*, they decided 5-4 to maintain it, with the 5th vote coming surprisingly from Justice Scalia. Perhaps Roberts or Gorsuch will be wary, as Scalia was, of turning the federal courts, in Richard Posner's words, into "the Grand Mufti of local zoning." Indeed, it doesn't take much of a cynic to figure that the private property rights bar, once Gorsuch replaced Scalia, figured that it came close last time and would try again. (Brief side note, Seifter reports that Solicitor General Noel Francisco argued that Knick could get into federal court through 28 USC 1331, which is the general federal question statute. This would be tantamount to overruling *Williamson County*: Seifter says Brett Kavanaugh was sympathetic to that idea).

But if the plaintiffs get their way, which I expect, also expect that we will start seeing more private property owners winning these cases, and more local land use and environmental statutes being challenged. Takings law is so maddeningly flexible — which is to say, seemingly-contentless — that it means that judges will have wide discretion even before anything would get to the Supreme Court. Get ready.