Preface

This 2019 edition of the treatise discusses important developments, particularly in the areas of takings law, free speech, religious freedom, telecommunications law and environmental law—the latter area being the subject of continuing significant deregulation initiatives by the Trump administration. We highlight these developments here and discuss them in far more depth in the relevant chapters.

In Chapters 3 and 12, we discuss the Supreme Court’s ruling in *Knick v. Township of Scott, Pennsylvania*, which eliminated the requirement that property owners must first exhaust state court remedies before seeking compensation for a takings claim in federal court. *Knick* thus overruled the “state compensation” prong of the ripeness doctrine that the Court had announced in its 1985 ruling in *Williamson County Regional Planning Commission v. Hamilton Bank*. That portion of *Williamson County* had posed a dilemma for plaintiffs who, after bringing their takings claims under the relevant state procedure to satisfy this requirement, faced the risk they would be barred from relitigating their takings claims in federal court under the doctrine of *res judicata* (claim preclusion). That risk became a near certainty twenty years after *Williamson County* when the Court unanimously held, in *San Remo Hotel, L.P. v. City and County of San Francisco, California*, that the federal full faith and credit statute precluded further litigation in federal court of issues that had been adjudicated by a state court. The effect of *San Remo*, in conjunction with *Williamson County* was to leave few, if any, instances where a takings plaintiff could gain access to federal court once state litigation had concluded. The *Knick* ruling left intact the first prong of *Williamson County*’s ripeness doctrine, requiring a final determination by the government before a property owner can bring a takings claim.

In Chapter 5, covering Freedom of Expression, we continue to report on how the lower federal courts are dealing with sign regulation issues raised by the Supreme Court’s 2015 ruling in *Reed v. Town of Gilbert, AZ*. In a decision issued too late to be fully discussed in the edition, *Thomas v. Bright*, a Sixth Circuit panel unanimously upheld the district court’s ruling that the Tennessee Billboard Act was an unconstitutional content-based regulation of speech because it exempted on-premise commercial signs from a general content-neutral prohibition on advertising billboards. This decision conflicts with recent rulings from the Third Circuit and Ninth Circuit. We will explore this issue more
In matters of religious freedom, in Chapter 7 we examine the efforts of the Supreme Court to find a principled approach to determining when religious displays on public property violate the establishment clause. We discuss the Court’s 2019 ruling in *American Legion v. American Humanist Association*, addressing whether the display of a 32-foot tall Latin Cross on Maryland state property as the main feature of a memorial to local soldiers who had died in World War I violated the establishment clause. The Fourth Circuit had ruled that it did, and while seven Justices voted to reverse the Fourth Circuit, the Court produced seven opinions in the process, thus failing again to produce a coherent standard for evaluating when religious displays on public property violate the establishment clause. We also report on *Tree of Life Christian Schools v. City of Upper Arlington, Ohio*, an attempt by the Sixth Circuit Court of Appeal to find the proper test for a violation of RLUIPA’s equal terms provision, and note that the U.S. Department of Justice Attorney General announced the “Place to Worship Initiative,” which seeks to increase the Department’s enforcement of RLUIPA, and to educate religious leaders, county and municipal officials, and the general public about RLUIPA.

In Chapter 8, we discuss the issuance by EPA on September 12, 2019, of a pre-publication version of the final rule repealing the 2015 Obama Administration Waters of the United States (WOTUS) rule. The final rule, which will be effective 60 days from the date of publication in the Federal Register, restores the regulatory text that existed prior to the 2015 WOTUS rule. The replacement rule is expected to be issued in 2020 and will be discussed in the next edition of this treatise.

In Chapter 10 we have added a new Section on “Regulation of Small Cell Wireless Technology” that reviews the FCC’s 2018 actions to facilitate the deployment of small cell wireless technology for 5G networks. We discuss the FCC Declaratory Ruling that interpreted how the provisions of TCA § 253 and § 332(c)(7) that limit state or local regulations that “effectively prohibit” the provision of wireless services should be applied and provided guidance on when certain state and local non-fee requirements that are allowed under the Act—such as aesthetic and undergrounding requirements—may constitute an effective prohibition of service. We also discuss the FCC’s “Third Report & Order” which established two new shot clocks for small cell wireless facilities: 60 days for collocation on preexisting structures and 90 days for new construction.

As always, we hope that readers will find this latest edition of the treatise easy to use, and helpful in understanding the impact of federal law on the regulation of land use and real estate.
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