Environmental Law & Property Rights

Ripening Federal Property Rights Claims

*By J. David Breemer**

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." This guarantee promises compensation for property owners subject to laws and regulations that invade, or excessively limit the use of, property.[1] However, securing that promise in the courts is procedurally difficult. Most importantly, before a court will even consider whether a local or state government has caused a compensable taking of private property, the property owner must demonstrate that his takings claim is "ripe" for judicial review.[2]

In general, the ripeness doctrine is designed to prevent courts from entangling themselves in abstract disputes, that is, disputes where there is as yet no concrete conflict of rights or injuries. The goals of the ripeness doctrine are to ensure that judicial power complies with the constitutional demand that such power address an actual "case and controversy," and to ensure that judicial resources are not needlessly or prematurely expended on hypothetical grievances.[3] The Supreme Court has established specific ripeness rules for federal takings claims. These rules place strong, though not insurmountable, barriers between property owners and their constitutional right to secure just compensation for a taking of their property. In some jurisdictions, the ripeness rules for takings claims may apply to other property rights claims. Therefore, to understand modern federal takings law, and the state of property rights in general, one must understand takings ripeness doctrine. This requires familiarity with the Court's 1985 decision in *Williamson County Regional Planning Commission v. Hamilton Bank*,[4] as it applies to property rights claims filed in state and federal courts.

I. THE WILLIAMSON COUNTY FRAMEWORK

A. Overview

The Supreme Court granted certiorari in *Williamson County* to consider "whether federal, state, and local governments must pay money damages to a landowner whose property allegedly has been 'taken' temporarily by the application of government regulations."[5] However, the Court never reached this issue. Instead, it focused on the ripeness of the property owner's claims. The *Williamson County* Court initially ruled that a federal takings claim is unripe until the "government entity charged with implementing the regulations has reached *a final decision regarding the application of the regulations to the property at issue*."[6] The Court ruled that there was no final decision, and thus no ripe takings claim, because the property owner had failed to apply for available regulatory variances that might have loosened some of the challenged land use restrictions.[7] The Court applied the same analysis to the owner's due process claim.[8]

Although the *Williamson County* Court's final-decision ripeness analysis effectively decided the case against the property owner, it did not stop there. Instead, it articulated and applied a second, more novel ripeness requirement. Specifically, the Court ruled that a federal takings claim is "complete" and therefore ripe after a property owner has first sought, and has been denied, just compensation through a state's available and "adequate procedures."[9] The Court did not exhaustively define the types of "state procedure" that might ripen a federal takings claim, but it ultimately held that the *Williamson County* property owner's takings claim was premature because it had failed to seek compensation through Tennessee's inverse condemnation procedure before raising its takings claim in federal court.[10] The Court did not apply the state procedures requirement to a due process claim that sought invalidation of the offending regulation and damages, rather than "just compensation."[11]

Williamson County thus established two hurdles for a property owner wishing to obtain just compensation for an alleged invasion of property under the Takings Clause of the Fifth Amendment. First, the owner must demonstrate that the alleged invasion arose from a final agency decision (the final decision requirement).[12] Second, the owner must show that he has sought, but been denied, just compensation in a state court procedure (the state procedures requirement).[13]

B. The State Procedures Prong Applies Only to Ripeness in Federal Courts

Williamson County did not distinguish between state and federal courts in articulating its two ripeness requirements, but the decision left some question as to whether the state procedures prong applied equally in state and federal courts. Some of the reasoning behind the state procedures rule suggests that completed state litigation is a ripeness predicate in any judicial forum.[14] Yet the claim in *Williamson County* arose from and was held unripe in federal court,[15] not a state court, and precedent cited by the *Williamson County* Court for the state procedures rule is directed toward federal court ripeness.[16]

In the aftermath of *Williamson County*, state courts diverged on the application of the state procedures rule. Some held that it required a property owner to complete state law takings litigation before raising a federal takings claim in the state court.[17] In *San Remo Hotel v. City and County of San Francisco*, the Court resolved this conflict. *San Remo* held that *Williamson County* does not require a federal takings claimant to fully and unsuccessfully litigate a state law damages action prior to filing a federal claim in *state* court.[18] A property owner may file a federal takings claim in state court simultaneously with any other claims.[19] This means that *Williamson County*'s "state procedures" rule applies only in federal courts, while the final decision requirement applies in both state and federal forums.[20]

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II. FINAL DECISION RIPENESS

According to *Williamson County*, a final decision exists when the government reaches "a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."[21] The *Williamson County* decision further noted that, sometimes, a property owner will have to unsuccessfully seek a variance from a challenged property restriction to obtain a final decision.[22]

Since *Williamson County*, lower courts have had ample opportunity to construe and apply the final decision requirement to both takings and due process claims. Unfortunately, many courts have failed to understand the limits of the requirement. For instance, in the takings context, some courts have misconstrued finality ripeness to require a decision that denies a property owner all or substantially all economically beneficial use of property.[23] This is wrong. Construing finality to demand a particular level of impact on property use effectively converts a ripeness standard into a test for whether a property owner has a valid claim on the merits.[24] Final decision ripeness is not concerned with whether a property owner has a winning claim; it is simply concerned with ensuring that a land use decision is concrete enough to allow a court to even consider whether it rises to the level of a taking.[25] In short, a final decision for takings or due process ripeness exists whenever any challenged land use restriction—whatever its impact—is concretely applied to the subject property.[26]

The variance principle is also misunderstood. Many courts assume that this principle requires pursuit of available administrative appeals, like an application to a Zoning Board of Appeals,[27] but it does not. Unlike a valid variance mechanism, which potentially limits the reach of an initial land use regulation or decision, an administrative appeal remedies such a decision. *Williamson County* expressly *rejected* exhaustion of administrative or state law judicial remedies as a final decision predicate.[28]

Even when there is a potential variance procedure, a landowner is not always required to pursue it. This is because finality ripeness ultimately derives from the exhaustion of agency discretion over application of a particular land use regulation,[29] not on whether the landowner has submitted multiple applications.[30] The variance requirement does not apply if the agency has no real discretion to grant one, or the agency's decision as to restricting a particular land use is already reasonably certain.[31] A landowner also need not pursue a variance if it is part of a futile or unfair process.[32]

When constrained by its purpose and *Williamson County*'s guidelines, the final decision ripeness requirement makes some sense. It essentially mirrors and implements the general and established ripeness requirement that an issue be "fit for review" before it can be adjudicated.[33] But when *Williamson County*'s self-imposed limits on final decision ripeness are neglected, the doctrine promotes bureaucratic obfuscation, delay, and indecision, and judicial timidity in declaring property rights violations. This state of affairs can eviscerate property rights as completely as the most onerous overt restriction.[34]

III. THE STATE PROCEDURES FEDERAL COURT "RIPENESS" REQUIREMENT

A. The State Procedures Requirement Ripens Nothing

A property owner wishing to pursue his federal right to just compensation in federal court, rather than in state court, must contend with *Williamson County*'s state procedures ripeness predicate, as well as the final decision rule. The rationale behind requiring state litigation for ripeness has always been suspect,[35] but, as originally articulated, the rule simply seemed to establish a temporary hurdle for federal takings claims.[36] As described in *Williamson County*, the state procedures ripeness principle anticipates that federal courts will hear a federal takings claim after the would-be claimant is denied monetary relief in state court.[37] It is at this point that the alleged federal taking can be deemed to be "without just compensation," and therefore federally actionable.

Unfortunately, the state procedures doctrine has never functioned as advertised because the requirement clashes with res judicata doctrines that bar plaintiffs from splitting their claims between separate lawsuits.[38] More to the point, the principles of claim and issue preclusion hold that a plaintiff may not go to federal court with a claim or issue that was or could have been litigated on the merits in a previous lawsuit. Given these rules, the very act of ripening a federal takings claim for federal court through a state court suit actually extinguishes any possibility for subsequent federal review.[39]

Because of its unstated effect in extinguishing federal review at the moment of ripeness, the state procedures rule has been accurately described a "trap" for unwary property owners. Many lower courts have expressed discomfort with the interaction of the state procedures rule and res judicata, but the Supreme Court approved of it in *San Remo*.[40] There, the Court confirmed that federal takings claims "ripened" for federal review are paradoxically barred from that forum.[41] Notably, four concurring justices in *San Remo* expressed a desire to overrule the state litigation aspect of *Williamson County* ripeness in an appropriate future case.[42] But despite being presented with repeated petitions on the issue since *San Remo*, the Court has strangely declined to follow up.

Until the Supreme Court overturns the state litigation rule, the bottom line is that most as-applied federal takings claims must be litigated in state court, or not at all. Notably, facial takings claims may not be subject to the same limits.[43] Many circuits allow facial takings claims to be raised in federal court without compliance with *Williamson County*'s state compensation litigation requirement.[44]

B. The State Procedures Requirement Should Not Bar Other Property Rights Claims from Federal Court

While *Williamson County* articulated the state procedures requirement exclusively for takings claims, some courts have held that it also applies to due process and equal protection-based property rights claims.[45] There is, however, no doctrinal basis for this extension of *Williamson County*. In *Williamson County*, the Supreme Court clearly derived the state litigation rule from the special nature of the "Just Compensation Clause" of the Fifth Amendment.[46] Property rights claims that do not

invoke the Just Compensation Clause logically do not trigger *Williamson County*'s demand for state court compensation litigation.[47] *Williamson County* itself confirmed these limits by declining to apply the state litigation rule to a due process claim in that case that sought invalidation and damages, not "just compensation."[48]

Nevertheless, some courts have indirectly subjected due process and/or equal protection claims to the state procedures barrier by subsuming those claims in the protections (and ripeness rules) of the Takings Clause.[49] But this reasoning is no longer viable after the Supreme Court's decision in *Chevron v. Lingle*.[50]

Lingle made clear that due process and equal protection violations are not addressed or remedied by the Takings Clause.[51] Since property rights claims arising under the Due Process and Equal Protection Clauses are not covered by the Takings Clause, there is no authority for treating them as unripe takings claims.[52] Beginning with the Ninth Circuit's 2007 decision in *Crown Point Development LLC v. City of Sun Valley*,[53] federal courts have explicitly held that, after *Lingle*, due process claims offer a distinct avenue for constitutional relief from onerous land use regulation.

A proper understanding of the injuries addressed by due process or equal protection land use claims confirms they cannot be analyzed as an adjunct of a takings claim subject to *Williamson County*. The core injury in a takings claim is the government's refusal to provide just compensation.[54] But due process and equal protection injuries have nothing to do with a failure to provide just compensation;[55] they hinge on irrational treatment and failure of notice and/or hearing.[56] Property rights claims asserting non-takings injuries are subject to independent treatment. Under traditional due process and equal protection law, there is no place for state court litigation as a ripeness predicate.[57] The state litigation ripeness rule is accordingly limited to as-applied federal takings claims.

CONCLUSION

Williamson County and progeny establish strong ripeness barriers to judicial review of property rights claims. However, when correctly applied, these barriers are not insurmountable. The final decision ripeness requirement is not markedly different than traditional ripeness doctrine; if there is a concrete land use decision and injury to property, finality exists, and a claim is fully justiciable in state court. In federal courts, however, the claimant must generally do more. With some exceptions, such a litigant must also satisfy Williamson County's state compensation procedures ripeness prong. While this ripeness rule is indeed a powerful bar to federal review of takings claims, it should not apply to or hinder other property rights claims, such as those arising under due process or equal protection guarantees.

Endnotes

1 *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (U.S. 2005).

2 *See* Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186, 192-94 (1985); Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001).

3 County Concrete Corp. v. Town of Roxbury, 442 F.3d 159, 164 (3rd Cir. 2006) ("The ripeness doctrine serves 'to determine whether a party has brought an action prematurely and counsels abstention until such time as a dispute is sufficiently concrete to satisfy the constitutional and prudential requirements of the doctrine.'") (citations omitted).

4 473 U.S. 173 (1985).

5 Williamson County, 473 U.S. at 185.

6 *Id*. at 186.

7 *Id*. at 186-188.

8 *Id*. at 200.

9 *Id*. at 194.

10 *Id*. at 196.

11 *Id*. at 198-200.

12 *Id*. at 186-88, 200.

13 *Id*. at 194.

14 473 U.S. at 195 n.13 ("[B]ecause the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.").

15 *Id*. at 175.

16 *See id*. at 195 (citing *Parratt v. Taylor*, 451 U.S. 527 (1981)).

17 *See* San Remo Hotel v. City and County of San Francisco, 545 U.S. 323, 351 n.2 (Rehnquist, C.J., concurring) (citing cases).

18 *Id*. at 346 (*Williamson County* "does not preclude state courts from hearing simultaneously a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution.").

19 *Id.*

20 *See, e.g.,* Kitchen v. City of Newport News, 657 S.E.2d 132, 139 (Va. 2008) ("Based on *San Remo Hotel*, we are persuaded that contrary to the City's contentions, Kitchen was not required to seek a remedy under state law [] without success before the circuit court could consider his Fifth Amendment claim").

21 473 U.S. at 191.

22 *Id*. at 190-92.

23 *See, e.g.,* Adrian v. Town of Yorktown, 2007 WL 1467417, *8 (S.D.N.Y. 2007) ("In order for a decision to be deemed final, the decision must deny Plaintiffs 'all reasonable beneficial use of [their] property.'").

24 *Compare Lingle*, 544 U.S. at 538 (A regulatory taking occurs when regulations "deprive an owner of 'all economically beneficial us[e]' of her property.") (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992)). Thus, if courts construe ripeness to require a denial of all economic use, they wrongly demand a meritorious claim.

25 *Williamson County*, 473 U.S. at 191 (ripeness requires "a final, definitive position regarding how it will apply the regulations at issue to the particular land in question"); *County Concrete Corp.*, 442 F.3d at 164 (once a "decision maker has arrived at a definitive position on the issue" the property owner has been inflicted with "an actual, concrete injury") (quoting *Williamson*, 473 U.S. at 192)).

26 *Williamson*, 473 U.S. at 191.

27 *See, e.g.,* Tobin v. Centre Tp., 954 A.2d 741, 748 (Pa. Cmwlth. 2008) (takings claim "not ripe because they had not exhausted the statutory remedy" of invalidating the subject ordinance).

28 *Williamson County*, 473 U.S. at 193; *see also* DLX, Inc. v. Kentucky, 381 F.3d 511, 517 (6th Cir. 2004) ("administrative exhaustion is explicitly not a component of a federal takings claim"); Maguire Oil Co. v. City of Houston, 243 S.W.3d 714, 720 (Tex.App.-Hous. (14 Dist.), 2007) ("[A]n

[administrative] appeal... would not be determinative of ripeness.").

29 Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 738 (1997).

30 *Palazzolo*, 533 U.S. at 620-22 (once agency discretion is utilized, a claim is ripe, as "[r]ipeness doctrine does not require a landowner to submit applications for their own sake.... [but a landowner] is required to explore development opportunities... only if there is uncertainty as to the land's permitted use.").

31 *Id.*

32 *Palazzolo*, 533 U.S. at 621 ("Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision.") (citing Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 698 (1999)).

33 *See Williamson County*, 473 U.S. at 191 (explaining that "until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question," the Court cannot evaluate the takings issues of the "economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations") (citations omitted).

34 *See, e.g.,* Hallco Texas, Inc. v. McMullen County, 221 S.W.3d 50, 63 (Tex. 2006) (Hecht, J., dissenting) ("This case illustrates how the government can use this ripeness requirement to whipsaw a landowner. The government can argue either that there was no request for a variance when there should have been, or that the request was not specific enough, or that it was not reasonable enough, or that there was insufficient time to consider it—and therefore the landowner's regulatory-takings claim is premature, unripe, and should be dismissed. Or else it can argue that a request for a variance would be a waste of time, or that none was authorized, or that the landowner should have known his ridiculous proposal would never be seriously considered—and therefore his claim is late, barred, and should be dismissed. One way or the other, the result is the same. Ripening a regulatory-takings claim thus becomes a costly game of "Mother, May I," in which the landowner is allowed to take only small steps forwards and backwards until exhausted."). *See generally* Donald J. Kochan, *Ripe Standing Vines and the Jurisprudential Tasting of Matured Legal Wines: Property and Public Choice in the Permitting Process* (June 10, 2009), BYU Journal of Public Law, Vol. 24, No. 1, 2009 (forthcoming).

35 *See San Remo Hotel*, 545 U.S. 348-49 (Rehnquist, C.J., concurring); J. David Breemer, *You Can Check Out But You Can Never Leave: The Story of* San Remo Hotel—*The Supreme Court Relegates Federal Takings Claims to State Courts Under a Rule Intended to Ripen the Claims for Federal Review*, 33 B.C. Envtl. Aff. L. Rev. 247, 291-99, 305 (2006).

36 *DLX, Inc.*, 381 F.3d at 518 (*Williamson County* "clearly contemplates that after a state just-compensation proceeding, a federal-court action will be filed.").

37 *Id.*

38 *See San Remo*, 545 U.S. at 351 (Rehnquist, C.J., concurring) ("[O]ur holding today [enforcing res judicata over ripe claims] ensures that litigants who go to state court to seek compensation will likely be unable later to assert their federal takings claims in federal court"); *DLX, Inc.*, 381 F.3d at 519-20 ("The availability of federal courts to hear federal constitutional takings claims has often seemed illusory, because under *Williamson County* takings plaintiffs must first file in state court, as DLX did, before filing a federal claim, and because in deciding that federal claim, preclusive effect must be given to that prior state-court action under 28 U.S.C. & sect; 1738 according to the res judicata law of the state.").

39 *Id.*; *see also* Rockstead v. City of Crystal Lake, 486 F.3d 963, 968 (7th Cir. 2007) ("Although the Williamson line of cases that requires the property owner to seek compensation in the state courts speaks in terms of 'exhaustion' of remedies, that is a misnomer. For if... the property owner goes through the entire state proceeding [on the merits], and he loses, he cannot maintain a federal suit.").

40 545 U.S. at 338.

41 *Id*; *see also id*. at 351 (Rehnquist, C.J., concurring).

42 *Id.* at 352 (Rehnquist, C.J., concurring).

43 *Suitum*, 520 U.S. at 736 ("[F]acial challenges to regulation are generally ripe the moment the challenged regulation is passed").

44 *See* Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Galarza, 484 F.3d 1, 14 (1st Cir. 2007) (as "a facial statutory challenge, its takings claim need not be brought first to a Commonwealth body, either administrative or judicial"); Quicken Loans, Inc. v. Wood, 449 F.3d 944, 953 (9th Cir. 2006) (same).

45 *See* River Park, Inc. v. City of Highland Park, F.3d 164, 167 (7th Cir. 1994); Bateman v. City of West Bountiful, 89 F.3d 704, 709 (10th Cir. 1996); Bigelow v. Michigan Dept. of Natural Resources, 970 F.2d 154 (6th Cir. 1992).

46 473 U.S. at 194 n.13 ("[B]ecause the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.").

47 *Murphy*, 402 F.3d 342, 349-50 (2005) (holding that "because we are not confronted with such a [takings] claim, this [state compensation] aspect of *Williamson County* is not implicated" with respect to ripening a due process claim); Herrington v. Sonoma County, 834 F.2d 1488, 1499 n.10 (9th Cir.1987) (the requirement to seek "'just compensation' from state entities.... does not apply to the due process and equal protection claims at issue here"); McKenzie v. City of White Hall, 112 F.3d 313, 317 (1997) (same).

48 473 U.S. at 200.

49 *Bateman*, 89 F.3d at 709; Miller v. Campbell County, 945 F.2d 348, 352-353 (10th Cir. 1991); Buckles v. Columbus Municipal Airport Authority, 90 Fed. Appx. 927, 931 (6th Cir. 2004); Montgomery v. Carter County, Tennessee, 226 F.3d 758, 769 (6th Cir. 2000).

50 544 U.S. 528 (2005).

51 *Id*. at 542 ("[A] regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause.... But such a test is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment").

52 *See Lanier*, 520 U.S. at 272 n.7 (explaining that a substantive due process claim is barred only when the behavior challenged by the claim is "covered by a specific constitutional provision").

53 506 F.3d 851, 854 (9th Cir. 2007); *see also* A Helping Hand, L.L.C. v. Baltimore County, 515 F.3d 356, 369 (4th Cir. 2008) (following *Crown Point*); Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd., 509 F.3d 1020, 1024 (9th Cir. 2007) (same).

54 *Williamson County*, 473 U.S. at 194-95.

55 *Lingle*, 544 U.S. at 543 (if a land use decision "is so arbitrary as to violate due process – that is the end of the inquiry. No amount of compensation can authorize such action.").

56 Samaad v. City of Dallas, 940 F.2d 925, 932 (5th Cir. 1991) (equal protection injury is distinct from a takings injury); *Warren*, 411 F.3d 697, 708 (2005) ("[Plaintiffs'] procedural due process claim is not ancillary to their takings claim, but addresses a separate injury-the deprivation of a property interest without a predeprivation hearing.").

57 Zinermon v. Burch, 494 U.S. 113, 125 (1990) (holding that neither substantive due process claim nor procedural due process claim against non-random deprivations of property are subject to a state court exhaustion rule); Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (equal protection land use claim adjudicated on merits free of any ripeness or exhaustion hurdle).