

Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 8
Issue 2 2001-2002

Article 4

2001

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Recommended Citation

Joel Block, *Taking Claims: Are the Federal Courts Truly Open? John Corporation v. City of Houston*, 8 Mo. Envtl. L. & Pol'y Rev. 74 (2001)
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TAKINGS CLAIMS: ARE THE FEDERAL COURTS TRULY OPEN?

*John Corporation v. City of Houston*¹

I. INTRODUCTION

The Fifth Amendment was enacted to protect private property owners from government deprivation of their property without just compensation. Since the ratification of the Constitution, this well-turned phrase – the deprivation of property without compensation - has been polished, extended and altered by many a judicial opinion. This note, in grappling with the outright destruction of property and the legal ramifications thereof, argues that through the procedural treatment of the Fifth Amendment Takings Clause, the federal judiciary has effectively denied a large number of property owners suffering deprivation of their property rights at the hand of the government access to the federal court.

II. FACTS AND HOLDING

In 1991, the City of Houston (“the City”), Texas, issued an order requiring the demolition of an apartment complex located within the City.² In 1995, Van Ngoc Pham (“Pham”), president of The John Corporation, entered into a contract with Winkler Investment Group to purchase that same apartment complex.³ The parties agreed on a price of \$1.9 million for the purchase which included fifty-three apartment buildings, six utility buildings, and a mailroom.⁴

Subsequently, Pham spoke with city officials about a plan to rehabilitate the ailing structures.⁵ As a result of these discussions, he executed a Bond Agreement with the City that contained the conditions under which Pham was permitted to rehabilitate the buildings.⁶ In order to secure the building permits for his apartments, Pham posted a \$70,000 bond with the City.⁷ Immediately thereafter, Pham began renovating the structures, but his efforts were impaired by actions taken by the City.⁸ The City did a number of things, including: evicting tenants; refusing to issue occupancy permits for completed buildings; stalling the issue of permits allowing reconstruction of three fire-damaged buildings; and issuing a number of citations the City refused to remove after the problem was repaired, which severely inhibited Pham’s attempts to renovate his buildings.⁹ Finally, during the summer of 1997, the City hired Cherry Moving Company to demolish forty-one of the apartment buildings and some of the fencing on the perimeter of the property.¹⁰

In response to the destruction of his property, Pham filed suit in state court against the Winkler Investment Group, the City, and Cherry Moving Company.¹¹ Pham alleged violations of due process and equal protection rights under the Fifth, Eighth, and Fourteenth amendments to the U.S. Constitution, as well as violations of the Texas Constitution and other state law.¹² Thereafter, Pham nonsuited the claims against the City and Cherry Moving. The claims against Winkler Investment Group were severed and tried in state court.¹³

In May, 1998, The John Corporation and U.S. Vanguard (“Appellants”) filed an action based on 42 U.S.C. §1983 in the United States District Court for the Southern District of Texas.¹⁴ The City and Cherry Moving responded with a motion to remand and a motion to dismiss for lack of subject matter jurisdiction, respectively.¹⁵ The District Court

¹ *John Corporation v. City of Houston*, 214 F.3d 573. (5th Cir. 2000).

² *Id.* at 575.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 576.

dismissed the claims without prejudice¹⁶ to refiling in the appropriate state venue.¹⁷ The Plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit.¹⁸ The Fifth Circuit reversed the District Court's decision in part and affirmed it in part, holding that the takings claim was unripe, the substantive due process clause was not subsumed by the Takings Clause and was ripe, and the procedural due process claims were unripe.¹⁹

III. LEGAL BACKGROUND

A. Fifth Amendment

The Bill of Rights, constituting the first ten amendments to the U.S. Constitution, was ratified on December 15, 1791.²⁰ The Fifth Amendment provides in relevant part, "nor [shall any citizen] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."²¹ The power to deprive private citizens of their property for public purposes has long been held as a power inherently vested in government.²² Just as inherent, however, is the necessity of just compensation upon such deprivation.²³ The power of eminent domain remained largely unused in the United States until the Supreme Court recognized such a power in *Kohl v. United States*.²⁴

Prior to the enactment of the Fourteenth Amendment in 1868, the provision in the Fifth Amendment guaranteeing just compensation upon property deprivation via eminent domain did not extend to state governments. However, with the ratification of the Fourteenth Amendment, the protections in the entire Bill of Rights were extended, granting protection to United States citizens from actions of individual state governments.

Since its emergence in *Kohl*, the power of eminent domain has taken many forms, including physical invasion, appropriation, and as seen in *John Corporation*, outright destruction of property. In addition, the Supreme Court has held that government regulation so severe that it deprives property of all economic benefit to the owner is a taking protected by the Fifth Amendment.²⁵

B. Ripeness

The requirement of ripeness attendant to cases involving Fifth Amendment protection (as incorporated through the Fourteenth Amendment) from property deprivation on the part of the government emanates from two sources.²⁶ First, the U.S. Constitution, Article III, Section I contains the "cases and controversies" requirement for federal courts.²⁷

¹⁶ The phrase "without prejudice" refers to fact that the court will allow the plaintiffs to refile the case. If the court had dismissed the case "with prejudice," this would preclude refiling.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 575 & 586.

²⁰ U.S. Const. Amend. I; USCA, Historical Notes (Westlaw Online).

²¹ U.S. Const. Amend. V.

²² Nichols on Eminent Domain, vol. 1, §1.12, (June 2000) Stating that the power of eminent domain existed since the rule of the Romans. But the term *dominium eminentus* originated in 1625, and subsequent suggestions for the term included *imperium domini*, which meant government dominion over private land.

²³ Nichols on Eminent Domain, vol. 1, §1.11, (June 2000) Noting that although just compensation is not inherent in the definition of eminent domain, it is inherent in the valid exercise of such power.

²⁴ *Kohl v. United States*, 91 U.S. 367 (1876). In *Kohl*, the United States was attempting to purchase land for government buildings pursuant to an act of Congress, the claimants owned a leasehold estate on some of the property to United States was attempting to purchase. *Id.* The Supreme Court affirmed the trial court's ruling that the United States validly exercised its power of eminent domain. *Id.*

²⁵ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The court held that, "where regulation denies all economically beneficial or productive use of land" just compensation must be provided without a case-specific inquiry into the importance of the government objective instigating the regulation of property. *Id.* at 1015.

²⁶ Robert Meltz, Dwight H. Merriam, and Richard M. Frank, *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* 48 (Island Press, 1999).

²⁷ U.S. Const., Art. III, Sec. I states in relevant part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens

Ripeness furthers this end by requiring that courts hear takings claims that are actual cases, and are not merely disputes that have not yet run their natural judicial course within the state compensation apparatus.²⁸ The second source of the ripeness requirement springs from courts' prudential power.²⁹ Judicial prudence dictates that courts hear only cases with complete records and cases that do not require speculation on the part of the judiciary.³⁰

Within the last two decades, the Supreme Court has narrowed the ripeness requirements for takings cases, making such cases and ostensible remedies more difficult to pursue in federal court.³¹ The leading case in recent times is *Williamson County Regional Planning Commission v. Hamilton Bank*.³² In the *Williamson County* case, the U.S. Supreme Court established a two-step process for fulfilling the ripeness requirement attendant to federal adjudication.³³ The first step is comprised of government action, usually administrative; the government agency involved in the claim must reach a final decision on the claimant's application.³⁴ Second, the claimant must turn to state courts and exhaust his or her options within that judicial framework.³⁵ Subsequent to *Williamson County*, the Ninth Circuit ruled in *Dodd v. Hood River County*³⁶ that state constitutional grounds are the only grounds that satisfy the second prong of the *Williamson County* two prong test.³⁷

Another landmark case decided since *Williamson County* is *Suitum v. Tahoe Regional Planning Agency*.³⁸ In *Suitum*, Justice Souter, writing for the majority, stated that the claim presented was ripe even though the property owner had not attempted to sell her transferable development rights.³⁹ In his concurrence, Justice Scalia concluded that the government agency involved at the administrative level admitted, "'we know the full extent of the regulation's impact in restricting [Mrs. Suitum's] development of her own land. . . [.]' That is all we need to know to conclude that the final decision requirement has been met."⁴⁰ This opinion appears to make the muddy water a bit clearer, but not much; essentially, the denial of transferable development rights may not be an absolutely essential element of a ripeness requirement if the full regulatory impact on the land in question is accurately assessed by the administrative agency involved.

Two crucial issues lie hidden in the discussion of state remedies and federal ripeness for takings claims.⁴¹ Either claim preclusion or issue preclusion can be fatal to a federal takings claim. Claim preclusion is relevant because it bars pursuit of a cause of action that has been adjudicated.⁴² Thus, a developer who pursues a takings claim in federal court and loses may be prevented by claim preclusion (also known as *res judicata*) from pursuing the same claim in federal court.⁴³ Likewise, issue preclusion prevents a landowner who had the opportunity to pursue a takings claim in state court, but did not, from raising that same claim in federal court.⁴⁴ This legal puzzle can effectively block access to federal courts for landowners who have had their claim adjudicated in state court.⁴⁵

of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

²⁸ See Meltz, et al. *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* at 48.

²⁹ Meltz, et al. *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* at 48.

³⁰ *Id.*

³¹ *Id.*

³² 473 U.S. 172 (1985), *infra*, note 38.

³³ Meltz, et al. *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* at 51.

³⁴ *Id.* at 51.

³⁵ *Id.* This requirement, however, necessarily raises questions of issue preclusion or collateral estoppel. Is an issue adjudicated in state court still ripe for review—and thus not precluded under collateral estoppel—in federal court. *Id.* citing Gideon Kanner, *Inverse Condemnation—Remedies, Just Compensation*, Nov. 1995, at 10. This prong also satisfies the requirements inherent in the fifth amendment, that a property interest has been deprived by the government, absent just compensation. Meltz, et al. *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* at 51.

³⁶ 59 F.3d 852 (9th Cir. 1995).

³⁷ Meltz, et al. *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* at 52.

³⁸ 117 S.Ct. 1659 (1997).

³⁹ Meltz, et al. *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* at 57, citing *Suitum*, 117 S.Ct. at 1662.

⁴⁰ Meltz, et al. *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* at 59, citing *Suitum*, 117 S.Ct. at 1673.

⁴¹ These two issues are issue preclusion and claim preclusion.

⁴² Meltz, et al. *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* at 60.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* However, an ironic twist in civil procedure is inserted in the discussion at this point. Under 28 U.S.C.S. §1441(a) a defendant in a civil action—such as the government in takings claims—may remove a case from state to federal court if it is based on a matter falling under the original

In the last ten years, the Fifth Circuit has handed down two decisions directly related to the Supreme Court's *Williamson County* ripeness requirement. The first decision, in *Samaad v. City of Dallas*,⁴⁶ carved out an exception to *Williamson County*'s requirement that plaintiffs must first seek compensation through state procedures for takings of private land for private uses. And the second decision, in *Rolf v. City of San Antonio*,⁴⁷ concerned the deprivation of private property by the government in bad faith.

In *Rolf*, the Plaintiffs alleged that their land was taken because they asserted their First Amendment rights vocally and politically in opposing local government action.⁴⁸ Plaintiffs collected signatures and purchased land to block a local government ordinance that would create a reservoir in San Antonio, Texas.⁴⁹ The City Council of San Antonio abandoned the reservoir project after a public vote approved a measure to terminate the project.⁵⁰ However, plaintiffs contended that the City Council continued condemnation procedures against their land in retaliation for their action to halt the reservoir project.⁵¹ The District Court dismissed plaintiffs takings claim as unripe under *Williamson County*.⁵² The Fifth Circuit agreed, holding that, although the property deprivation was in bad faith—i.e. retaliatory, the takings claim was unripe since plaintiffs had not availed themselves of state compensation procedures.⁵³ In doing so, the Fifth Circuit addressed a key portion of *Williamson County*'s requirement - implicit notion that state procedures must be exhausted since they are adequate to deal with takings claims.⁵⁴ In *Rolf*, the Fifth Circuit held that, "A state's procedure is adequate even though its law is unsettled whether the claimant would be entitled to compensation."⁵⁵

In *Samaad*, the plaintiffs lived near a public fairground that was used for grand prix automobile races for a few days over a period of two years; the races generated noise that gave rise to the plaintiffs' complaint.⁵⁶ Plaintiffs alleged that their enjoyment and use of their property was inhibited by the private use of government property.⁵⁷ In evaluating the Plaintiffs' claims, the Fifth Circuit held that "*Williamson County* does not apply to those claims in which plaintiffs contend that defendants took their property for a private purpose."⁵⁸

IV. INSTANT DECISION

In its opinion in *John*, the Fifth Circuit Court of Appeals first noted that the standard of review is de novo for motions to dismiss. The Court must take as true the facts alleged in the complaint and only affirm the dismissal if the lower court lacked power derived from statutory or constitutional sources to properly consider the case.⁵⁹ The Court then narrowed the discussion and focused on the particular effect of a 42 U.S.C. §1983 claim on jurisdictional issues.⁶⁰ The Court stated that it would sustain jurisdiction of a claim under 42 U.S.C. §1983 where the "right of petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another[.]"⁶¹ However, the Court noted a caveat to this standard where it is obviously apparent that the claim is filed merely to obtain jurisdiction or is plainly frivolous.⁶²

jurisdiction of a federal court, thus the plaintiff in a takings action is barred from the federal courts, but the government may remove to a federal forum at its option. *Id.* at note 70.

⁴⁶ 940 F.2d 925 (5th Cir. 1991)

⁴⁷ 77 F.3d 823 (5th Cir. 1996)

⁴⁸ *Rolf*, 77 F.3d at 826.

⁴⁹ *Id.* In their opposition to the reservoir project, the Plaintiffs purchased a tract of land in the proposed reservoir site. *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* Plaintiffs had collected 72,000 signatures to force the reservoir project to a vote where it the voters terminated the project. *Id.*

⁵² *Id.* at 828.

⁵³ *Id.* at 827.

⁵⁴ *Williamson County* 473 U.S. at 194.

⁵⁵ *Rolf*, 77 F.3d at 827-28.

⁵⁶ *Samaad*, 940 F.3d at 927-28.

⁵⁷ *Id.* at 928.

⁵⁸ *Id.* at 936.

⁵⁹ *John Corporation*, 214 F.3d at 573.

⁶⁰ *Id.*

⁶¹ *Id.* at 575 (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998)).

⁶² *John Corporation*, 214 F.3d at 576.

Next, the Court examined the facts in the Plaintiffs' complaint.⁶³ First, the Court noted that the complaint alleged the City, in destroying Plaintiffs' property, violated Plaintiffs' rights of the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution.⁶⁴ The Court then listed the district court's treatment of each claim; and started with the district court's dismissal the Eighth Amendment claim as frivolous.⁶⁵ Relying on *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*⁶⁶, the district court found that Plaintiffs' takings claim was unripe because the Plaintiffs' failed to adequately exhaust state procedures for obtaining just compensation.⁶⁷ Regarding Plaintiffs' due process and equal protection claims, the district court found that, under *Graham v. Connor*⁶⁸, those claims were embodied in the takings claim and, thus, also unripe.⁶⁹ The Fifth Circuit then necessarily defined its task as deciding whether the district court properly dismissed the Plaintiffs' claims.⁷⁰

As the first step of its analysis, the Fifth Circuit Court of Appeals recognized that Appellants' claim was based on 42 U.S.C. §1983, and therefore the Court looked at the specific right that was allegedly infringed.⁷¹ The Court then looked at the three primary rights guaranteed by the Fourteenth Amendment regarding deprivation of property.⁷²

First, the Court discussed procedural due process, which requires fair procedure when the government deprives a person of life, liberty or property.⁷³ Second, the Court examined substantive due process that bars certain government action regardless of procedural precaution.⁷⁴ The third concept emanating from the Fourteenth Amendment, the Court explained, is equal protection, which safeguards individuals from government action that serves to treat similarly situated individuals unequally.⁷⁵ The Court noted that other rights in the Bill of Rights are incorporated through the Fourteenth Amendment, particularly the Takings Clause in the Fifth Amendment, which guarantees individuals the right to just compensation when the government deprives them of their property for public use.⁷⁶

The Court then discussed Appellants' specific claims, including: the unconstitutional infirmities contained in the ordinance under which the City issued the demolition order; that the City was estopped from destroying the buildings due to the length of time between the demolition order in 1991 and the demolition in 1997; the demolition of buildings for which occupancy permits had been issued; and the lack of due process in deprivation of Appellants' property.⁷⁷

The Court further noted that Appellants' vigorously maintained the absence of a takings claim from their allegations.⁷⁸ In doing so, the Appellants drew a distinction between land taken by the City via the City's powers of eminent domain and land taken by the City via its police power.⁷⁹ The Court, after surveying some of the fundamental takings cases, rejected the Appellants attempt to distinguish the deprivation of property on the legal power by which it was deprived.⁸⁰ Based on this analysis, and after a deeper examination of the wording of the complaint, the Court concluded that there had indeed been a taking, notwithstanding Appellants' allegations.⁸¹

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ 473 U.S. 172 (1985).

⁶⁷ *John Corporation*, 214 F.3d at 576 (citing *Williamson County*, 473 U.S. 172 (1985)).

⁶⁸ 490 U.S. 386 (1989).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*, 42 U.S.C. §1983 states in relevant part, "Every person who, under color of statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...[.]"

⁷² *John Corporation*, 214 F.3d at 577.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 577-8.

⁷⁸ *Id.* at 578. Presumably, the Appellants make this argument to avoid the inevitable result under *Graham v. Connor*, whereby the Supreme Court held that when there are general (i.e. nontextual) and specific (i.e. textual) Constitutional violations alleged, the claims covered by a specific Constitutional provision subsume the more generalized claim. See *infra* pgs. 7-8.

⁷⁹ *John Corporation*, 214 F.3d at 578.

⁸⁰ *Id.* The court looked at *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *First English Evangelical Lutheran Church v. County of Los Angeles* 482 U.S. 304 (1987). In *Pennsylvania Coal*, the Supreme Court held that a statute prohibiting subsurface mining when the miner did not own the surface rights, but had reserved the subsurface rights when it transferred the property was a taking since it was regulation that went "too far." In *Lucas*, the Supreme Court ruled that regulation that deprived a parcel of land of

After the Court revisited the question of jurisdiction regarding the Appellants' substantial claims, it considered the Appellants' Eighth Amendment claims.⁸² The court followed the line of cases proffered by the Appellants back to the case of *Ingraham v. Wright*.⁸³ In *Ingraham*, the Supreme Court ruled that the Eighth Amendment was applicable only to those convicted of a crime and not to schoolchildren who were the subject of corporal punishment.⁸⁴ Thus, the Fifth Circuit ruled, in the instant case, that the Appellants' Eighth Amendment claim was frivolous as it was based on the destruction of property pursuant to a demolition order and not on an adjudication of guilt as required by the Eighth Amendment under *Ingraham*.⁸⁵

After it dispensed with Appellants' Eighth Amendment claim, the Court considered the propriety of the district court's dismissal of Appellants' takings, due process and equal protection claims.⁸⁶ In analyzing the takings claim, the Court noted the authority of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.⁸⁷ In *Williamson County*, the Supreme Court held that a takings claim was unripe for review since the Appellant failed to exhaust state remedies.⁸⁸ Following the Supreme Court's ruling in *Williamson County*, the Fifth Circuit held that the takings claim in the instant case was unripe for review because, although Appellants filed a claim in state court, they subsequently nonsuited defendants and refiled in federal court and, thus, did not exhaust state remedies.⁸⁹ Attendant to this analysis, the Court recognized an exception to which was established in *Samaad v. City of Dallas*.⁹⁰

Next, the Court examined the effect of *Graham v. Connor*⁹¹ on the instant case.⁹² The Court noted that the Supreme Court in *Graham* held that when there are two claims on one set of facts, the more particularized claim encapsulates the general claim.⁹³ In *Graham*, the petitioner was diabetic and suffering from symptoms of insulin deprivation.⁹⁴ He asked a friend to take him to a convenience store to purchase some orange juice to alleviate his symptoms.⁹⁵ Upon entering the store, he noticed a long line and hastily exited to search for other sources of relief.⁹⁶ A police officer noticed his rapid departure and stopped Graham and his companion for questioning.⁹⁷ Other police officers arrived for assistance; those officers handcuffed Graham and ignored his attempts to explain his worsening condition.⁹⁸

all economic benefit was a taking. In *First English*, the Supreme Court held that when the government temporarily deprives an individual of his property, the individual has suffered a taking and is due just compensation. In footnote five of its opinion, the court observed that the Appellants also attempt to disguise their taking claim by asserting that property the City destroyed is not a 'taking' since it is not used for a public purpose. The court flatly rejected this distinction. *John Corporation* at 579.

⁸¹ *John Corporation*, 214 F.3d at 579. In footnote nine of its opinion, the court took a deeper look at the substantive due process versus takings question. They noted that the lexicon of each concept are often intermingled. A noteworthy example is from *Agins v. City of Tiburon* 447 U.S. 225 at 260: "Holding that a zoning ordinance constitutes a taking if it does not 'substantially advance a legitimate government interest.'"

⁸² *John Corporation*, 214 F.3d at 579-80.

⁸³ *Id.* at 580; *Ingraham v. Wright*, 430 U.S. 651 (1977).

⁸⁴ *Id.*

⁸⁵ *Id.* In footnote eleven of its opinion, the court notes the strong language in *Ingraham* pertaining to the frivolous nature of the Appellants' instant claim: "the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured formal adjudication of guilt in accordance with due process of law, where the state seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment." 430 U.S. at 671-72.

⁸⁶ *John Corporation*, 214 F.3d at 580.

⁸⁷ 473 U.S. 172 (1985).

⁸⁸ *John Corporation*, 214 F.3d at 580; In *Williamson County*, 473 U.S. 172 (1985), the Appellant sought just compensation based on a regulatory taking. The Appellant won on the trial level when a jury awarded \$350,000. The trial judge granted a judgment notwithstanding the verdict, but the damages were reinstated on appeal. The Supreme Court granted certiorari and held that the Appellant's taking claim was not ripe for Federal review until Appellant had exhausted all state remedies. 473 U.S. at 186.

⁸⁹ *John Corporation*, 214 F.3d at 581. In footnote thirteen, the court gives Appellants guidance as to the appropriate steps to take regarding state court process.

⁹⁰ 940 F.2d 925 (5th Cir. 1991); In *Samaad*, the Fifth Circuit recognized an exception to *Williamson County*'s rule, that a claim is ripe when it would "almost certainly" be adjudged a taking deserving of just compensation. *John Corporation*, 214 F.3d at 581, quoting *Samaad v. City of Dallas*, 940 F.2d 925.

⁹¹ 490 U.S. 386 (1989).

⁹² *John Corporation*, 214 F.3d at 582.

⁹³ *Id.*

⁹⁴ *Graham v. Connor*, 490 U.S. 386 (1989).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

Graham was eventually released, but sustained injuries as a result of this ordeal.⁹⁹ He filed suit against the police officers under 42 U.S.C. §1983 and the Fourteenth Amendment to the U.S. Constitution.¹⁰⁰ Both the trial court and the Court of Appeals held that the officers did not use force for sadistic and unrealistic reasons and dismissed the complaint.¹⁰¹ The Supreme Court granted certiorari and held that the appropriate analysis for all claims where law enforcement officials used force during an arrest was the "objective reasonableness" standard found in the Fourth Amendment and not a substantive due process standard.¹⁰²

In the instant case, the Court noted the holding in *Graham*, and explained that its purpose is to prevent the unnecessary expansion of substantive due process when there is a textual provision for the protection sought by the claimant.¹⁰³ The Court also observed that in a situation where there are multiple claims, it will examine each in turn and not inappropriately consolidate claims.¹⁰⁴ The Court surveyed several cases¹⁰⁵ where courts applied the holding in *Graham* to Takings claims, and summarized these cases by listing three outcomes attendant to application of *Graham* to a takings claim.¹⁰⁶ First, the broader claim may be dismissed; second, the entire claim may be consolidated into the takings claim; and third, the claim may be bifurcated with the takings claim analyzed separately, and the remainder of the claim examined under due process standards.¹⁰⁷ The Court noted some cases¹⁰⁸ where courts have considered takings and due process claims without noting the effect of *Graham*; the Court concluded those courts regarded the particular substantive due process claims as maintaining rights not covered under the Takings Clause.¹⁰⁹ The Court then linked these decisions together to conclude that there was no "blanket rule" that *Graham* must be used when there are takings and due process claims to merge both claims into the takings claim.¹¹⁰ Instead, the Court articulated the general rule, which states each case should be analyzed separately to detect which rights appropriately rest under Takings Clause protection and which rights should be examined under a substantive due process lens.¹¹¹

Next, the Court applied *Williamson County* to the instant case.¹¹² The Court noted the standard of ripeness prescribed by two rules emanating from *Williamson County*.¹¹³ A claim is unripe for review if there is an absence of a final decision, or when the claimants fail to seek just compensation from the state.¹¹⁴ Parallel to *Williamson County*'s prescription for finality in a takings claim is a similar standard for a due process claim; it, too, is unripe for review in the absence of a final decision.¹¹⁵ The Court held that this standard of ripeness is applied mostly to claims other than the "due process takings" claim considered in *Williamson County*.¹¹⁶

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *John Corporation*, 214 F.3d at 582.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 582-3. The court surveyed the following cases: "South County Sand & Gravel v. Town of South Kingstown, 160 F.3d 834, 835 (1st Cir. 1998) (applying *Graham* to facial due process challenge to ordinance); *Macri v. King County*, 126 F.3d 1125, 1129 (9th Cir. 1997) (holding that substantive due process claim alleging no legitimate public purpose was based on conduct that implicated the Takings Clause), cert. denied, 522 U.S. 1153, 118 S.Ct. 1178, 140 L.Ed.2d 186 (1998); *Tri County*, 104 F.3d at 459 (applying *Graham*, but finding claim was not fully covered by Takings Clause); *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996) (relying in part on *Graham* to hold that plaintiff's due process and equal protection claims were subsumed into the Takings Clause); *Armendariz*, 75 F.3d at 1318-20 (holding that plaintiffs' substantive due process claim was pre-empted by the Fourth Amendment and by the Takings Clause)."

¹⁰⁶ *Id.* at 583.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 583. The Court mentioned *Berger v. City of Mayfield Heights*, 154 F.3d 621 (6th Cir. 1998); *Texas Manufactured Housing Ass'n, Inc. v. City of Nederland*, 101 F.3d 1095, 1106 (5th Cir. 1996); *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208 (11th Cir. 1995); *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375 (2d Cir. 1995).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 584. The reasoning is relatively simple: the Takings Clause guarantees just compensation when property is deprived from a citizen by government action, however a taking claim is not triggered, i.e. the claim is not ripe, until just compensation has been denied by the state. *Id.* at 581.

¹¹⁵ *Id.* at 584.

¹¹⁶ *Id.*

The Court then surveyed a plethora of cases¹¹⁷ applying the standard in *Williamson County*.¹¹⁸ The Court concluded its survey with a brief observation of the policy followed by the Tenth Circuit, which applied the *Williamson County* rule where due process, equal protection and takings claims share the same factual background.¹¹⁹ However, given the Supreme Court's subsequent discussions of *Graham*, and other circuits' approach to similar claims, the Fifth Circuit declined to follow the rule employed by the Tenth Circuit.¹²⁰ The Court stated that *Graham* applies to substantive due process claims.¹²¹ In the instant case, the Court limited its application of *Williamson County* to the takings claims raised by Appellant.¹²²

The final portion of the opinion consisted of the Court's assessment of whether Appellant's claims properly invoked federal question jurisdiction under the rules articulated in *Graham* and *Williamson County*.¹²³ The Court began with a review of the Appellants' complaint, and concluded that along with the takings claim there exists a substantive due process claim.¹²⁴ Upon further examination of the complaint, the Court determined that the Appellants' also raised a due process claim when they asserted that the statute under which their property was destroyed was unconstitutionally vague, both facially and as applied.¹²⁵ The Court concluded that this claim was ripe for review.¹²⁶ The Court also concluded that the Appellants' equal protection claim was ripe since it rested on grounds separate from the takings claim and was not susceptible to merger under *Graham*.¹²⁷

The Court next considered Appellants' due process claims.¹²⁸ The Court observed that the due process claims were less convincing than the takings claim primarily because the lower courts had not yet been afforded the opportunity to determine whether Appellants had been allowed their constitutionally guaranteed procedure.¹²⁹ The Court's final determination in the corpus of its opinion was its response to Appellants' allegation that the Fifth Circuit's decision in *Hidden Oaks Limited v. City of Austin*,¹³⁰ intimates that procedural due process claims are not subject to the ripeness requirements found in *Williamson County*.¹³¹ In its response, the Court explained that the distinction from *Hidden Oaks* lies in the breadth of the claim: in the instant case, the due process claims were inextricably linked to the takings claim, while in *Hidden Oaks*, the due process claim arose from facts separate from those supporting a takings claim.¹³²

¹¹⁷ *Id.* The Court said the following: "*McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997) ("Because the City's decisions to deny zoning and building permits absent surrender of the privacy buffer were final, the McKenzies' due process and equal protection claims are ripe."); *Strickland v. Alderman*, 74 F.3d 260, 265 (11th Cir. 1996) ("As applied due process and equal protection claims are ripe for adjudication when the local authority has rendered its final decision with respect to the application of the regulation."); *Taylor Inv., Ltd.*, 983 F.2d at 1292-94 (applying *Williamson County*'s finality rule to due process and equal protection claims involving township's revocation of use permit); *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 96-97 (2d Cir. 1992) (applying only *Williamson County*'s finality requirement to claims of arbitrary and capricious action), cert. denied, 507 U.S. 987, 113 S.Ct. 1586, 123 L.Ed.2d 153 (1993); *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990) ("In evaluating the ripeness of due process or equal protection claims arising out of the application of land use regulations, we employ the same final decision requirement that applies to regulatory takings claims.")

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 585.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* citing *United States v. Insko* 496 F.2d 204, "Vaguely phrased measures run afoul of substantive due process requirements by failing to convey with reasonable certainty the statute's intended sweep." *Id.* at 208.

¹²⁶ *John Corporation*, 214 F.3d at 585.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ 138 F.3d 1036 (5th Cir. 1998).

¹³¹ *John Corporation*, 214 F.3d at 585.

¹³² *Id.* at 586. In *Hidden Oaks v. City of Austin*, 138 F.3d 1036 (1998), the Appellants' owned an apartment complex, and the city alleged that it violated housing codes. The City imposed utility holds on the units whereby new tenants could not establish utility connections. The owners of the complex agreed to specified changes, but the City did not immediately release the holds. The owners sued, alleging a takings and a procedural due process violations. The takings claim was dismissed prior to trial, but, as the court noted in the instant case, the procedural due process claims were allowed to proceed since they were connected to utility deprivation, an injury other than a takings claim.

In its conclusion, the Court summarized its opinion by holding that Appellants' claims invoked subject matter jurisdiction.¹³³ Accordingly, the Court reversed in part, affirmed in part, and remanded the decision of the lower court for factual development as well as for procedural determinations.¹³⁴

V. COMMENT

The doctrines of issue and claim preclusion are broadly applicable in American jurisprudence. However, Takings cases are saddled with another requirement that enhances the fatal effect of claim preclusion and issue preclusion on Takings claims. That additional layer that can serve to bar claims from federal court is the Williamson County ruling by the Supreme Court.¹³⁵ A potentially unjust circumstance results when a plaintiff files a takings claim in state court, then the defendant removes to federal court pursuant to 28 U.S.C. §1441(a), and the federal court dismisses due to lack of ripeness. Back in state court, the defendant might be successful in asserting a claim preclusion defense as the claim has been adjudicated—albeit not on its merits—and the state court is prohibited from trying the claim.

The John Corporation decision is sound; however, its result stems from precedents that serve to impede justice when the government takes land from private citizens. Most notably among these foundational decisions is the decision in Williamson County.¹³⁶ In 1973, a developer submitted a plan for a cluster development of Temple Hills Country Club Estates.¹³⁷ The preliminary plat was approved, and the developer commenced the second phase of approval, preparation and submission of a final plan. However, the ordinance governing this type of development was changed in 1977, before approval of the final plat.¹³⁸ Naturally, the agency overseeing the process denied the submission of the final plat as did the bodies in the administrative appeal structure.¹³⁹ The developer sued in federal court under §1983 alleging a Taking.¹⁴⁰ The jury awarded the plaintiff \$350,000; however, the judge entered a judgment notwithstanding the verdict, holding that the taking was temporary and, therefore, was not a taking as a matter of law.¹⁴¹ The Sixth Circuit Court of Appeals reversed and the Supreme Court granted certiorari.¹⁴² The resulting opinion contained two requirements for ripeness.¹⁴³

The first requirement, found in the Supreme Court's opinion in Williamson County, is the finality requirement.¹⁴⁴ This prong stipulates that a claimant must seek a final determination from the government.¹⁴⁵ This requirement includes seeking a variance from the ruling.¹⁴⁶ The second prong requires that the plaintiff pursue their claim through the state courts.¹⁴⁷ In the absence of an adequate state adjudication system, this ruling effectively bars the timely recovery of just compensation. *Southview Associates, Ltd. v. Bongartz*¹⁴⁸ is a good illustration of this high bar to adjudication, and thus of decisions that serve to impede justice for Takings claims under the guise of ripeness.¹⁴⁹

In *Southview*, the Appellant purchased a tract of land for development in Vermont in 1982.¹⁵⁰ In 1985, the Appellant filed an application with the District III Environmental Commission for a permit allowing development under the guidelines of Act 250, and environmental safeguard statute in Vermont.¹⁵¹ Two years and several hearings later, the Commission denied the application because of its adverse impact on a deeryard contained within the proposed site.¹⁵²

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ The Supreme Court in *Williamson County* developed two requirements for ripeness that, together, can greatly impede a claimants access to the Federal courts. See Meltz, *The Takings Issue*, note 37-39, *supra*.

¹³⁶ This case is discussed further at note 82 *supra*, however, some further elucidation may be helpful.

¹³⁷ *Williamson County*, 473 U.S. at 177.

¹³⁸ *Id.* at 178.

¹³⁹ *Id.* at 181.

¹⁴⁰ *Id.* at 182.

¹⁴¹ *Id.* at 183.

¹⁴² *Id.* at 183 and 185.

¹⁴³ Meltz, *The Takings Issue*, at 51.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* The Fifth Circuit has modified this requirement; for further illumination, see note 84 *supra*.

¹⁴⁸ 980 F.2d 84 (2d. Cir. 1992).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 89.

¹⁵¹ *Id.* at 90.

¹⁵² *Id.*

Appellants then appealed to the Vermont Environmental Board in 1987; it, too, denied the application.¹⁵³ The appellants took their case to the Vermont Supreme Court, and in 1989 that court upheld the rulings of the various administrative agencies below, and denied the appellants' application.¹⁵⁴ Without further remedial action or appeals, the Appellants filed a 42 U.S.C. §1982 action in Federal District Court for the District of Vermont.¹⁵⁵ That court dismissed the claims based on rules 12(b)(1) and 12(b)(6) of the Rules of Federal Procedure.¹⁵⁶ The Appellants brought their case to the United States Court of Appeals for the Second Circuit. The Second Circuit, using the requirements in Williamson County, inquired into the ripeness of the Appellants' claims.¹⁵⁷ Appellants maintained they suffered a physical Taking and therefore Williamson County was not applicable to their claims.¹⁵⁸ The court held that this was clearly a regulatory taking and applied both prongs of Williamson County to Appellants' claims.¹⁵⁹ First, the court examined the instant case in light of the final decision requirement in Williamson County.¹⁶⁰ This part of the opinion clearly demonstrated the difficulty posed to claimants who want federal review of their claims but simply cannot obtain a final decision under the rubric pronounced in Williamson County. The Second Circuit ruled that even though the Appellants in this case have obtained review by two separate administrative boards as well as the Vermont Supreme Court, their decision is not final because they had only submitted one plan to the Vermont Environmental Board.¹⁶¹ The court implied that the Appellants must submit some other, perhaps more feasible plan to the Board, have that plan rejected, and thus somehow obtain the coveted status of ripeness.¹⁶² This type of decision begs the question of how many iterations of a plan submitted by a developer be denied before the claim is ripe?¹⁶³ As for the state court compensation prong, the Second Circuit found this prong unsatisfied as well.¹⁶⁴ The court found that "[t]he Vermont Supreme Court recognize[d] a cause of action for a taking generally, even if it had yet to decide whether recovery can be had for a regulatory taking."¹⁶⁵ Thus, the Second Circuit implied that the Appellant in this case was completely foreclosed from federal review of its claims until it filed a lawsuit in Vermont state court and went through the state courts to the Vermont Supreme Court (again) and was unsuccessful at every level of review. In this case, it took ten years from the time of the land purchase to the Second Circuit only to have that court refuse to adjudicate the Appellants claims. In some respects it seems as if this prolonged time of adjudication could or should constitute a temporary taking.¹⁶⁶

¹⁵³ *Id.* at 91.

¹⁵⁴ *Id.* at 92.

¹⁵⁵ *Id.* at 88.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 95.

¹⁵⁸ *Id.* at 95. Appellants claimed they suffered a physical taking as Vermont would not allow them to develop their property in a way that would exclude the deer from their property. Thus, the deer could physically occupy their property without remedy. *Id.* at 92.

¹⁵⁹ *Id.* at 96.

¹⁶⁰ *Id.* at 97.

¹⁶¹ *Id.* at 98.

¹⁶² *Id.* at 99.

¹⁶³ In *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496 (9th Cir.1990), the developer submitted four iterations of the same plan, each making the development smaller, and each was rejected.

¹⁶⁴ *Southview Associates* at 100.

¹⁶⁵ *Id.*

¹⁶⁶ See discussion of First English in note 75, *supra*.

VI. CONCLUSION

The Fifth Amendment was enacted to protect property owners from the seamy underbelly of eminent domain.¹⁶⁷ However, as courts have continually spun the pottery wheel upon which the concept of Taking rests, it has emerged with quite a high hurdle to adjudication. The Supreme Court's holding in *Williamson County* prevents Federal adjudication of Takings claims until there is a final decision and unless all applicable state remedies have been exhausted. The *John Corporation* decision highlights this injustice as the Fifth Circuit Court of Appeals remands this case primarily because of lack of ripeness since the claim has not wound its way through prescribed state court procedures for procuring just compensation as required by the Fifth Amendment.

JOEL BLOCK

¹⁶⁷ The origin of this word and the attendant concept is further developed in note 21, *supra*.