

The Accidental Abstention Doctrine:  
After Thirty Years, the Case for Diverting Federal Takings  
Claims to State Court Under *Williamson County*  
Has Yet to Be Made

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Why is it so hard for the Supreme Court to admit its mistakes? There is a substantial body of literature dealing with the inevitability of error in legal systems and methods to minimize, accommodate, or mitigate the damage caused by legal error.<sup>1</sup> But little of this analysis addresses the unique systemic damage that can arise from outright Supreme Court blunders.<sup>2</sup>

Even at the highest level, some types of judicial mistakes are more serious than others. Misunderstanding the facts of a case can result in civil

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<sup>1</sup> See, e.g., STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 79, 82, 95–96 (1987). See generally R.S. Radford, *Statistical Error and Legal Error*, 21 LOY. L.A. L. REV. 843 (1988); Leonard R. Jaffee, *Of Probativity and Probability: Statistics, Scientific Evidence, and the Calculus of Chance at Trial*, 46 U. PITT. L. REV. 925 (1985).

<sup>2</sup> For an interesting recent exception, see generally Kurt T. Lash, *The Cost of Judicial Error: Stare Decisis and the Role of Normative Theory*, 89 NOTRE DAME L. REV. 2189 (2014).

or criminal sanctions being imposed upon the innocent or allow the culpable to evade rightful penalties. The costs of such errors are normally borne primarily by the parties to the case; there are little systemic costs unless such mistakes become so common as to affect the composition of cases that are taken to trial.<sup>3</sup>

The creation of procedural rules, by contrast, especially those going to questions of jurisdiction, is likely to have consequences for the legal system as a whole. Indeed, mistakes at this level—the creation of jurisdictional hurdles arising from misunderstandings, faulty reasoning, or inadequate anticipation of consequences—can have impacts that transcend the legal system per se, creating negative externalities that ripple throughout the social order.

Notwithstanding the significant damage that can be imposed by flawed doctrines created by the Supreme Court, history has shown that the Court is extremely reluctant to revisit its errors, even when a doctrine is widely recognized as defective.<sup>4</sup> For example, it took a quarter of a century for the Court to admit that a regulatory takings test it set forth in *Agins v. City of Tiburon*<sup>5</sup> was in fact a due process standard.<sup>6</sup> Even though only two members of the unanimous *Agins* Court were still on the bench 25 years later, correcting *Agins*'s doctrinal error was viewed by the justices as requiring them to “eat crow.”<sup>7</sup> Yet the conceptual error at issue in *Agins* was a relatively minor one of doctrinal miscategorization.<sup>8</sup> At worst, takings plaintiffs setting out a claim under *Agins* would henceforth be required to add a showing of economic injury to their complaint.<sup>9</sup> A far more serious doctrinal error, one that has gone unaddressed for three decades, is

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<sup>3</sup> See sources cited in Radford, *supra* note 1, at 870 n.134.

<sup>4</sup> See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255, 255 (1980), *abrogated by* *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005).

<sup>5</sup> *Id.*

<sup>6</sup> *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540 (2005).

<sup>7</sup> See Transcript of Oral Argument at 21, *Lingle*, 544 U.S. 528 (No. 04-163) (“JUSTICE SCALIA: I mean, so we have to eat crow no matter what we do. Right?”).

<sup>8</sup> *Lingle*, 544 U.S. at 531.

<sup>9</sup> That is because post-*Agins*, most regulatory takings claims fall within the analytical framework of *Penn Central Transportation Corp. v. City of New York*, 438 U.S. 104 (1978). That framework requires not only an evaluation of the “character” of a challenged regulation—i.e., whether it complies with *Agins*'s requirement of substantially advancing legitimate state interests—but also an inquiry into the measure's economic impact on the property owner. *Id.* at 124. See generally R.S. Radford, *Just a Flesh Wound? The Impact of Lingle v. Chevron on Regulatory Takings Law*, 38 URB. LAW. 437 (2006).

embodied in the misconceived “state procedures” ripeness doctrine of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.<sup>10</sup>

Virtually from its inception, the rule created by *Williamson County*—that a regulatory takings claim brought in federal court under the United States Constitution is not ripe for adjudication until compensation has been sought in state court—has been widely criticized as having no coherent doctrinal basis.<sup>11</sup> In practice, plaintiffs seeking to ripen their claims in accordance with the plain language of *Williamson County* faced the likelihood of dismissal, under accepted principles of claim and issue

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<sup>10</sup> 473 U.S. 172, 194 (1985).

<sup>11</sup> See *infra* Part I; see also, e.g., Michael M. Berger, *The Ripeness Game: Why Are We Still Forced to Play?*, 30 TOURO L. REV. 297, 298 (2014) (“As practiced in land use cases, [*Williamson County*’s] ripeness rule was nonsense when first articulated and it remains nonsense today.”) (footnote omitted); Michael M. Berger & Gideon Kanner, *Shell Game! You Can’t Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 URB. LAW. 671, 673 (2004); John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the “Ripeness Mess”? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 URB. LAW. 195, 246 (1999); Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 URB. LAW. 307, 312 n.12 (1998). See generally, e.g., J. David Breemer, *The Rebirth of Federal Takings Review? The Courts’ “Prudential” Answer to Williamson County’s Flawed State Litigation Ripeness Requirement*, 30 TOURO L. REV. 319 (2014); J. David Breemer, *Ripeness Madness: The Expansion of Williamson County’s Baseless “State Procedures” Takings Ripeness Requirement to Non-Takings Claims*, 41 URB. LAW. 615 (2009); 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 (2006); Scott A. Keller, Note, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the Williamson County State Litigation Requirement for Regulatory Takings Claims*, 85 TEX. L. REV. 199 (2006); J. David Breemer, *Overcoming Williamson County’s Troubling State Procedures Rule: How the England Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. LAND USE & ENVTL. L. 209 (2003); Peter A. Buchsbaum, *Should Land Use Be Different? Reflections on Williamson County Regional Planning Board v. Hamilton Bank*, in TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES 471 (Thomas E. Roberts ed., 2002); Stephen E. Abraham, *Williamson County Fifteen Years Later When Is a Takings Claim (Ever) Ripe?*, 36 REAL PROP. PROB. & TR. J. 101 (2001); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U. J. L. & POL’Y. 99 (2000); Madeline J. Meacham, *The Williamson Trap*, 32 URB. LAW. 239 (2000); Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1 (1992); Michael M. Berger, *Anarchy Reigns Supreme*, 29 WASH. U.J. URB. & CONTEMP. L. 39 (1985).

preclusion, when they returned to federal court.<sup>12</sup> Finally, in 2005, the Supreme Court recognized that, in most instances, a plaintiff whose federal takings claim is diverted to state court pursuant to *Williamson County*'s "ripeness" doctrine would be permanently deprived of a federal forum.<sup>13</sup> In short, the practical effect would be the same as dismissal pursuant to abstention by the federal courts.<sup>14</sup>

The Supreme Court has never directly reviewed the question of whether, as a general matter, abstention is required or even appropriate in Fifth Amendment takings cases. Yet in a seemingly unrelated decision handed down more than a decade after *Williamson County*, the Court held that dismissing such cases would be improper under its express abstention doctrines.<sup>15</sup> The Court has thus created a doctrinal paradox: couched in terms of "ripeness," *Williamson County* in fact created a *de facto* abstention doctrine that applies under circumstances in which the Court has held abstention to be improper!<sup>16</sup> This article traces the origin and development of this paradox and concludes that the most straightforward method of resolving it would be for the Court to summon the courage to admit its mistake and overrule *Williamson County*.

Part I describes the historical context of *Williamson County* and the curious circumstances under which the state procedures requirement became incorporated into the decision. Part II traces *Williamson County*'s effect on federal takings claims, which, in conjunction with the doctrines of *res judicata* and collateral estoppel, tended to extinguish those claims, rather than ripen them for federal adjudication. Part III covers *San Remo Hotel*, the Supreme Court decision blessing that result. Part IV considers

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<sup>12</sup> See *infra* Part II.

<sup>13</sup> See *San Remo Hotel v. City & Cty. of S.F.*, 545 U.S. 323, 348 (2005), discussed *infra* Part III; see also Breemer, *You Can Check Out But You Can Never Leave*, *supra* note 11, at 247. Although they agreed with the majority's judgment in *San Remo Hotel*—that the full faith and credit statute precluded petitioners from litigating their takings claims in federal court—Justices O'Connor, Kennedy, and Thomas joined Justice Rehnquist's concurring decision, which he wrote "to explain why . . . part of our decision in *Williamson County* . . . may have been mistaken." 545 U.S. at 348 (Rehnquist, J., concurring).

<sup>14</sup> The Supreme Court has fashioned a number of doctrines directing the lower federal courts to abstain from hearing particular classes of cases in favor of state-court adjudication. For a brief overview of these express abstention doctrines, see ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 783–88 (5th ed. 2007) and LARRY W. YACKLE, *FEDERAL COURTS* 491–541 (3rd ed. 2009).

<sup>15</sup> See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 721 (1996), discussed *infra* Part IV.

<sup>16</sup> See *infra* Parts III–IV.

two conflicting lines of pre- *Williamson County* cases, in which federal judges in both the Fourth and Ninth Circuits routinely abstained from adjudicating federal takings claims, but differed sharply on which of the Supreme Court's abstention doctrines to apply. Rather than granting cert to address that well-established split of authority, or to articulate a rationale for why federal takings cases should be relegated to state court, the Supreme Court handed down *Williamson County*.<sup>17</sup> At the same time, it began to restrict the application of the express abstention doctrines on which the federal courts had been relying to avoid adjudicating a broad array of cases.<sup>18</sup> Part V shows that federalism principles cannot justify *Williamson County*'s accidental abstention doctrine and postulates that, in light of recent Supreme Court decisions, its days may be numbered.

I. THE *WILLIAMSON COUNTY* DECISION CREATED A "RIPENESS" DOCTRINE LACKING ANY COHERENT RATIONALE

A. *The Background and Context of Williamson County*

*Williamson County Regional Planning Commission v. Hamilton Bank*<sup>19</sup> came to the Supreme Court during a time of great doctrinal uncertainty. Just six years earlier, in *Penn Central Transportation Co. v. City of New York*, the Supreme Court had recognized that restrictive land-use regulations could become so onerous as to comprise a *de facto* taking of private property for public use without just compensation.<sup>20</sup> But when such a situation arose, what was the appropriate remedy?

The California Supreme Court had recently announced, in *Agins v. City of Tiburon*, that the only remedy available for a regulatory taking in the courts of that state was invalidation of the offending regulation.<sup>21</sup> The High Court agreed to review *Agins* to determine whether the states are required to provide a compensation remedy for violations of the Takings Clause.<sup>22</sup> But instead, a unanimous Court determined that the City of Tiburon's land-use

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<sup>17</sup> See *infra* Part IV.

<sup>18</sup> See *infra* Part IV.

<sup>19</sup> See generally 473 U.S. 172 (1985).

<sup>20</sup> 438 U.S. 104, 124 (1978).

<sup>21</sup> 598 P.2d 25, 31 (Cal. 1979).

<sup>22</sup> Jurisdictional Statement at 1, *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (No. 79-602).

restrictions did not amount to a taking, so the availability of compensation was irrelevant.<sup>23</sup>

Just days after handing down its decision in *Agins*, the Supreme Court agreed to take up the compensation issue in another regulatory takings case, *San Diego Gas & Electric Co. v. City of San Diego*.<sup>24</sup> In that case, as in *Agins*, a California court had dismissed a takings claim on the grounds that just compensation for a regulatory taking was not available in that state as a matter of law, and the constitutional propriety of that policy was the sole issue presented to the Court.<sup>25</sup> A majority of the *San Diego Gas* Court, however, ultimately dismissed the property owner's appeal on the grounds that the California judiciary had not yet rendered a final decision on whether a taking had in fact occurred.<sup>26</sup> Justice Brennan filed a stinging dissent, arguing that the decision of the California court was final, and that compensation for the taking was due:

[O]nce a court establishes that there was a regulatory "taking," the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation.<sup>27</sup>

It was in this doctrinally unsettled context that the Court agreed, three years later, to hear *Williamson County*. Unlike *Agins* and *San Diego Gas*, this case involved a takings claim that had been fully adjudicated by a trial court.<sup>28</sup> The county's denial of required permits had halted the development of a previously approved residential subdivision, contributing to the loss of the property in foreclosure.<sup>29</sup> A federal jury found these actions amounted to a violation of the Takings Clause, granted injunctive relief requiring the

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<sup>23</sup> *Agins v. City of Tiburon*, 447 U.S. 255, 263 (1980), *abrogated by* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

<sup>24</sup> 450 U.S. 621, 621 (1981); *see also* *San Diego Gas & Elec. Co. v. City of San Diego*, 447 U.S. 919, 919 (1980) (order agreeing to hear the case on the merits, filed six days after *Agins* was decided).

<sup>25</sup> *See* Jurisdictional Statement at 1–2, *San Diego Gas*, 447 U.S. 919 (No. 79-678).

<sup>26</sup> *San Diego Gas*, 450 U.S. at 633.

<sup>27</sup> *Id.* at 653 (Brennan, J., dissenting) (footnote deleted).

<sup>28</sup> *See Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 182–83 (1985).

<sup>29</sup> *Id.* at 178–82.

county to allow the development to proceed, and awarded just compensation in the amount of \$350,000 for the temporary taking of the undeveloped portion of the subdivision.<sup>30</sup> The district court overturned the jury's award of damages, but it was reinstated on appeal.<sup>31</sup> Citing Justice Brennan's dissent in *San Diego Gas*, the Sixth Circuit Court of Appeals concluded, "We agree with Justice Brennan's reasoning and hold that compensation must be paid for a temporary regulatory taking."<sup>32</sup>

The county petitioned the Supreme Court for a writ of certiorari, posing the question of whether "a purported temporary interference with an investor's profit expectation constitutes an unconstitutional 'temporary' taking under the Fifth Amendment of the United States Constitution such that money damages should be allowed."<sup>33</sup> The petition was granted on October 1, 1984,<sup>34</sup> as the Court put it, "to address the question 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."<sup>35</sup> This was the issue that was addressed by Williamson County's opening brief on the merits and Hamilton Bank's opposition, as well as by amicus briefs filed by 26 governmental, professional, and public-interest groups and entities urging affirmance or reversal of the Sixth Circuit's opinion.<sup>36</sup>

### *B. How the "State Procedures" Issue was Injected Into the Case*

A single amicus brief—that of the Solicitor General, filed on behalf of the United States—took a different tack.<sup>37</sup> The first question addressed in the Brief for the United States was:

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<sup>30</sup> *Id.* at 175. The jury found that the county's actions left the owner with no economically viable use of the as-yet-undeveloped land, a finding that was undisturbed on appeal. See *Hamilton Bank of Johnson City v. Williamson Cty. Reg'l Planning Comm'n*, 729 F.2d 402, 406 (6th Cir. 1984).

<sup>31</sup> *Williamson Cty.*, 473 U.S. at 175.

<sup>32</sup> *Hamilton Bank*, 729 F.2d at 409.

<sup>33</sup> Brief for the Petitioners at 1, *Williamson Cty.*, 473 U.S. 172 (No. 84-4).

<sup>34</sup> *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 469 U.S. 815 (1985) (granting cert.).

<sup>35</sup> *Williamson Cty.*, 473 U.S. at 185 (citing *Williamson Cty.*, 469 U.S. 815).

<sup>36</sup> See Breemer, *Overcoming Williamson County's Troubling State Procedures Rule*, *supra* note 11, at 215.

<sup>37</sup> Brief for the United States as Amicus Curiae Supporting Petitioners at 1, *Williamson Cty.*, 473 U.S. 172 (No. 84-4).



[w]hether, under this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), respondent's claim that its property was taken without just compensation in violation of the Fifth and Fourteenth Amendments should have been dismissed because respondent did not pursue procedures under state law to obtain compensation or show that those procedures are inadequate.<sup>38</sup>

This was a remarkable proposition for two reasons. First, in the 196 years of the Court's existence, no prior opinion had suggested even in dicta that plaintiffs complaining of a violation of the Fifth Amendment's Takings Clause were required to seek compensation in state court.<sup>39</sup> Second, the issue had not been raised, briefed, or argued at any point in the previous thirty months of litigation, nor did Williamson County itself ever address the possibility that the takings claim against it was not ripe.<sup>40</sup> Even the Solicitor General, having raised the issue in briefing, devoted only two sentences of his prepared argument to the significance of available state remedies, and sidestepped a direct question from the Court concerning the ripeness of Hamilton Bank's claim by opining: "I think it tends to blend in with the question of *whether there should be abstention* on the state law question of whether the commission had properly applied state law."<sup>41</sup> This response could hardly have been expected to clarify matters, since the argument the Solicitor General had placed before the Court dealt with ripeness, not abstention.<sup>42</sup> Nor had anyone, at any point in the proceedings, questioned whether the commission "had properly applied state law," since no state law was at issue.<sup>43</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> See, e.g., Joshua D. Hawley, *The Beginning of the End? Home v. Department of Agriculture and the Future of Williamson County*, CATO SUP. CT. REV. 245, 246 (2012–2013) ("[I]n no case before *Williamson County* did any federal or state court ever suggest that it lacked jurisdiction to hear a takings claim, or that the claim was somehow premature, merely because the claimant had not yet attempted to obtain compensation from the government.").

<sup>40</sup> When asked by the Court at oral argument whether Hamilton Bank should have sought compensation in state court, the county's attorney replied, "[T]he government plans to argue that portion of it." Transcript of Oral Argument at 5, *Williamson Cty.*, 473 U.S. 172 (No. 84-4).

<sup>41</sup> *Id.* at 25–26 (emphasis added).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* The Solicitor General's brief may have been influenced by a law review article published three years earlier by Professor William Ryckman. See William E. Ryckman, Jr., *Land Use Litigation, Federal Jurisdiction, and the Abstention Doctrines*, 69 CALIF. L. REV. 377, 395 (1981). In the context of exploring the applicability of abstention to land-use disputes, Ryckman

Hamilton Bank's brief on the merits deftly punctured the Solicitor General's implied analogy between takings cases and the procedural due process issue posed by *Parratt v. Taylor*, noting that *Parratt* dealt with random and unauthorized acts of state employees, for which pre-deprivation state procedures were unavailable by definition.<sup>44</sup> Since regulatory takings effected by restrictive land-use regulations normally occur only after exhaustive formal proceedings, *Parratt* is clearly inapposite and there is no logical bar to seeking a "post-deprivation remedy" (i.e., just compensation) in federal court.<sup>45</sup>

Hamilton Bank's brief also corrected the Solicitor General's assertion that just compensation for the taking would have been available under Tennessee law, if the case had been filed in state court initially.<sup>46</sup> This point—that Tennessee's inverse condemnation proceedings did not apply to

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suggested that, "if a taking case proceeds on a theory of inverse condemnation and the plaintiff seeks only monetary compensation, it could be argued that the case . . . is *unripe for challenge in a federal forum* until a state court has reviewed the action and decided the amount of compensation due under state law." *Id.* at 395 n.104 (emphasis added). Ryckman prefaced his version of the state procedures rule by asserting that "the relevant constitutional command, after all, is that a state must 'pay a just compensation for property taken for public use.'" *Id.* at 395 (quoting *O'Grady v. City of Montpelier*, 573 F.2d 747, 752 (2d Cir. 1978)). This point would establish a doctrinal basis for the state procedures requirement if it were true, but of course it is not—there is no reference at all to states in the text of the Takings Clause, whether as sources of compensation or otherwise. It was perhaps for this reason that Justice Blackmun's opinion revised the line to, "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson Cty.*, 473 U.S. at 194. This formulation has the advantage of being true, but implies nothing about the relative superiority of state courts vis-à-vis their federal counterparts as venues for seeking compensation.

<sup>44</sup>Brief for Respondent Hamilton Bank of Johnson City at 68-69, *Williamson Cty.*, 473 U.S. 172 (No. 84-4). In *Parratt v. Taylor*, the plaintiff, an inmate at a Nebraska state prison, sued the prison warden after some hobby materials he had ordered were delivered to the prison but lost before reaching him. 451 U.S. 527, 529 (1981). He brought suit in federal district court under 42 U.S.C. § 1983, alleging that the warden deprived him of property without due process of law in violation of the Fourteenth Amendment. *Id.* at 529-30. The Supreme Court ruled that the state's actions did not violate the inmate's due process rights because the loss of the hobby materials resulted from state actors' random and unauthorized acts, rather than from an established state procedure. *Id.* at 543. And, the state's tort law provided the inmate with sufficient, post-deprivation means of redress that satisfied federal due process requirements. *Id.* at 543-44.

<sup>45</sup>Brief for the Respondent, *supra* note 46, at 68-69. (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982)).

<sup>46</sup>*Id.* at 67 n.16 (noting that one of the remedial Tennessee statutes cited by the Solicitor General was not available to seek review of zoning decisions and the other applied only to takings effected by physical occupation).

regulatory takings, and therefore offered no remedy in this case—was reiterated at oral argument, without questioning from the Court.<sup>47</sup>

### *C. The Court Adopted the Argument of the Solicitor General*

The *Williamson County* Court seemed uncertain how to resolve the case following oral argument. Justice Blackmun, who was assigned to write the majority opinion, candidly recorded his impression that “I am not sure I fully understand this case.”<sup>48</sup> Justice Rehnquist, who had reservations about treating the case as coming under the Takings Clause at all,<sup>49</sup> seemed taken with the alternative of reversing on ripeness grounds – but only if Justice Blackmun would tie the rationale for dismissal to *Parratt*.<sup>50</sup> Ultimately, despite the urging of his clerk that it was “dangerous to leave the impression that *Parratt* is directly analogous to takings claims,”<sup>51</sup> Blackmun acquiesced.

Acknowledging the Court’s two previous failures to resolve the availability of a compensation remedy for temporary takings, the *Williamson County* majority once more set aside this issue “for another day.”<sup>52</sup> Hamilton Bank’s claim for compensation was found to be premature because a regulatory takings claim “is not ripe until the government entity charged with implementing the regulations has reached a final decision

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<sup>47</sup>Transcript of Oral Argument, *supra* note 42, at 36–37. Years later, the Tennessee Supreme Court confirmed that no compensation remedy was in fact available under state law for plaintiffs in Hamilton Bank’s position. *See B & B Enters. of Wilson Cty. v. City of Lebanon*, 318 S.W.3d 839, 845 (Tenn. 2010). Nevertheless, the *Williamson County* Court simply asserted the opposite to be true, and did not suggest this might be an unsettled question of state law.

<sup>48</sup>Justice Blackmun’s hand-written notes (Feb. 18, 1985) (on file with the Library or Congress).

<sup>49</sup>Memorandum from Justice Rehnquist to Chief Justice Warren Burger (Feb. 25, 1985) (on file with the Library of Congress).

<sup>50</sup>Memorandum from Justice Rehnquist to Chief Justice Warren Burger (June 10, 1985) (on file with the Library of Congress).

<sup>51</sup>Memorandum from Vicki Been to Justice Blackmun (June 12, 1985) (on file with the Library of Congress).

<sup>52</sup>*Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 185 (1985). That day came two years later in *First English Evangelical Lutheran Church of Glendale v. Cty. of L.A., Cal.*, 482 U.S. 304, 321 (1987), when the Supreme Court affirmed that temporary regulatory takings are compensable. *See also Ark. Game & Fish Comm’n v. U.S.*, 133 S. Ct. 511, 519 (2012) (quoting *First English*, 482 U.S. at 321) (“Once the government’s actions have worked a taking of property, ‘no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.’”).

regarding the application of the regulations to the property at issue,” which had not occurred in this case.<sup>53</sup>

Having disposed of the bank’s takings claim as unripe for lack of a final decision, the Court’s opinion could have concluded at that point. But in what is technically dicta, Justice Blackmun went on to set out a “second reason” for reversing the Sixth Circuit—because the property owner “did not seek compensation through the procedures the State provided for doing so.”<sup>54</sup> The majority took pains to avoid proclaiming this holding for what it was—an unprecedented requirement, coined on the spur of the moment, without briefing or argument in the lower courts. However, Justice Blackmun’s efforts to ground the state procedures requirement in the Court’s previous jurisprudence merely highlighted the absence of any plausible rationale for the new rule.<sup>55</sup>

Perhaps most oddly, the *Williamson County* opinion cites *Ruckelshaus v. Monsanto Co.*<sup>56</sup> as demonstrating that the Court had “held that takings claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act.”<sup>57</sup> Yet the “process provided by the Tucker Act” is a suit for just compensation for the taking, filed in federal court!<sup>58</sup> Takings claimants bringing suit under the Tucker Act in the Court of Federal Claims are not advised that their claims are “premature” until they have sought compensation in some other forum, least of all in state court.<sup>59</sup> The passage in *Monsanto* cited by Justice Blackmun in fact stands for the wholly unrelated proposition that declaratory and injunctive relief are not available as remedies for a taking

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<sup>53</sup> *Williamson Cty.*, 473 U.S. at 186. Because the County’s board of zoning appeals could have issued a variance from the development restrictions that comprised the basis of the complaint, but the developer never applied for one, the Court held that it was impossible to determine the ultimate economic impact of the restrictions, or their effect on the owner’s investment-backed expectations. *Id.* at 200.

<sup>54</sup> *Id.* at 194.

<sup>55</sup> *Id.* at 194–97.

<sup>56</sup> 467 U.S. 986, 1016–20 (1984).

<sup>57</sup> *Williamson Cty.*, 473 U.S. at 195 (quoting *Monsanto*, 467 U.S. at 1016–20).

<sup>58</sup> Under the Tucker Act, the Court of Federal Claims has jurisdiction over “any claim against the United States founded upon . . . the Constitution.” 28 U.S.C. § 1491(a)(1) (2014). This jurisdiction is exclusive for claims over \$10,000. 28 U.S.C. § 1346(a)(2). Claims for just compensation against the federal government in any amount greater than \$10,000 must therefore be brought in the Court of Federal Claims.

<sup>59</sup> See 28 U.S.C. § 1491(a)(1); 28 U.S.C. § 1346(a)(2).

by the federal government, regardless of the forum.<sup>60</sup> Thus, Monsanto's claim for equitable relief was in no sense "premature;" the suit was barred for failing to seek just compensation in the appropriate federal court—that is, for failing to do exactly what Hamilton Bank did!<sup>61</sup>

From *Monsanto*, the *Williamson County* Court skipped to *Parratt* in its effort to find some doctrinal mooring for the state procedures requirement.<sup>62</sup> The majority expressly recognized the objections Hamilton Bank had raised to the *Parratt* analogy—notably that *Parratt* dealt only with "random and unauthorized" violations of procedural due process, which by their nature could not be remedied by pre-deprivation procedures.<sup>63</sup> Yet even though this recognition destroyed any correspondence between *Parratt* and a typical regulatory takings claim, Justice Blackman shored up the defective analogy by simple assertion:

"Likewise, because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not 'complete' until the State fails to provide adequate compensation for the taking."<sup>64</sup>

This sentence is notable in part because of its critical ambiguity: both the Williamson County Planning Commission and the Tennessee courts are referred to as "the State," suggesting some institutional identity between the entity responsible for the taking (the Commission), and a putative source of a compensation remedy (the state judiciary).<sup>65</sup> But the identification of the two public entities is plainly spurious.<sup>66</sup> Had the final clause read, "the

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<sup>60</sup> See *Monsanto*, 467 U.S. at 1016 ("Equitable relief is not available to enjoin an alleged taking of private property for public use . . . when a suit for compensation can be brought against the sovereign subsequent to the taking.").

<sup>61</sup> *Id.* at 1013.

<sup>62</sup> *Williamson Cty.*, 473 U.S. at 195.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See *id.*

<sup>66</sup> See Breemer, *The Rebirth of Federal Takings Review?*, *supra* note 11, at 326 ("The state court is not the entity taking property. Takings almost always arise from the acts of a local government or a state agency . . ."); Michael B. Kent, Jr., *Weakening the "Ripeness Trap" for Federal Takings Claims: Sansotta v. Town of Nags Head and Town of Nags Head v. Toloczko*, 65 S.C. L. Rev. 935, 945 (2014) ("[I]n most cases, the 'government' will be the state or local agency doing the alleged taking. The state judicial system, by contrast, provides a forum to

Planning Commission's action here is not 'complete' until the Tennessee state courts fail to provide adequate compensation for the taking," the underlying non sequitur would have been obvious. Why should it be the special responsibility of the Tennessee state courts, rather than the United States District Court for the Middle District of Tennessee, to enforce the terms of the United States Constitution on a county agency? Because that fundamental question is addressed nowhere in the Court's opinion, *Williamson County's* state procedures requirement remains to this day a rule without a rationale.

All that remained to support the Court's new doctrine was Justice Blackmun's self-evident yet vacuous observation that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."<sup>67</sup> Obviously, plaintiffs do not bring suit for a violation of the Takings Clause unless they can allege there has been a taking without just compensation; that is the gravamen of the complaint.<sup>68</sup> The question the *Williamson County* Court chose to address was, what is the proper court to adjudicate such complaints?<sup>69</sup> Justice Blackmun's tautological recitation of the constitutional text sheds no light whatsoever on that question.<sup>70</sup> Yet these words were destined to become virtually a mantra, endlessly repeated by federal judges as the basis for dismissing fully ripe Fifth Amendment claims by litigants who had come before them to establish that their property had been taken without just compensation.<sup>71</sup>

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remedy the uncompensated taking, just like a federal court does.") (footnote omitted). *But see* John Echeverria, *Horne v. Department of Agriculture: An Invitation to Reexamine "Ripeness" Doctrine in Takings Litigation*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10735, 10744 (2013) ("[G]overnment regulators and the state courts are elements of a single state entity, and therefore one cannot say that 'the state' has effected a taking until it has been determined that property has been taken and the state courts have refused compensation.").

<sup>67</sup> *Williamson Cty.*, 473 U.S. at 194.

<sup>68</sup> U.S. CONST. amend. V.

<sup>69</sup> *Williamson Cty.*, 473 U.S. at 185.

<sup>70</sup> *See, e.g.*, John Martinez & Karen L. Martinez, *A Prudential Theory for Providing a Forum for Federal Takings Claims*, 36 REAL PROP. PROB. & TR. J. 445, 460 (2001) ("[I]t makes sense that a claimant must ask for and be denied compensation before the judicial machinery may be mobilized to determine whether the government has violated the Just Compensation Clause. However, the person from whom, or entity from which, the claimant should request compensation, and in what form, remain undetermined.")

<sup>71</sup> *See, e.g.*, *Downing/Salt Pond Partners, L.P. v. R.I. and Providence Plantations*, 643 F.3d 16, 20 (1st Cir. 2011) (finding federal takings claim unripe under "state litigation" requirement because, under *Williamson County*, "the Fifth Amendment 'does not proscribe the taking of property; it proscribes taking without just compensation . . .'" (quoting *Williamson Cty.*, 473 U.S.

At the time *Williamson County* was handed down, almost no commentators grasped the significance of the new state procedures rule. The most common reaction to the opinion was frustration that the Court had once again failed to reach the issue of whether compensation is required for a temporary taking.<sup>72</sup> Several analysts focused on *Williamson County*'s "final decision" requirement—which was, after all, the grounds on which the decision rested.<sup>73</sup> Others casually reported the new state procedures

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at 194)); *Peters v. Vill. of Clifton*, 498 F.3d 727, 730 n.4 (7th Cir. 2007) (dismissing landowner's regulatory takings claim from federal court as unripe under *Williamson County* for failure to pursue state procedures because "no constitutional violation occurs until just compensation has been denied." (quoting *Williamson Cty.*, 473 U.S. at 195 n.13)); *Henry v. Jefferson Cty. Planning Comm'n*, 34 F. App'x 92, 95–96 (4th Cir. 2002) (dismissing federal takings claim as unripe under *Williamson County*'s state procedural requirement because "the mere taking of a landowner's property does not violate the Fifth Amendment; the violation occurs only when the property is taken *and* the landowner has been denied just compensation.") (emphasis in original); *Macene v. MJW, Inc.*, 951 F.2d 700, 704 (6th Cir. 1991) ("[I]f a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." (quoting *Williamson Cty.*, 473 U.S. at 195)); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1404 (9th Cir. 1989) (finding federal physical takings claim unripe under *Williamson County* for failure to satisfy state procedures requirement), *overruled on other grounds by Armendariz v. Penman*, 75 F.3d 1311, 1326 (9th Cir. 1996); *see also* Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion under Williamson County*, 26 *ECOLOGY L.Q.* 1, 10 n.49 (1999) (listing additional cases); Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Cases*, 10 *J. LAND USE & ENVTL. L.* 91, 117 n.160 (1994) (listing additional cases).

<sup>72</sup>*See, e.g.*, David O. Stewart, *Supreme Court Report: Other Rulings*, A.B.A.J., Oct. 1985, at 120 ("For the third time in five years the Court did not reach the merits of a claim that application of a local zoning ordinance unconstitutionally took property without just compensation."); Cullen Christie Wilkerson, Comment, *Just Compensation for Temporary Regulatory Takings: A Discussion of Factors Influencing Damage Awards*, 35 *EMORY L.J.* 729, 731 (1986) ("[I]n *Williamson County Regional Planning Comm'n v. Hamilton Bank*, the Court, faced with the same issue, refused to rule on the merits of plaintiff's case, holding that his claim was 'premature' and not ready for adjudication.") (footnote omitted).

<sup>73</sup>*See, e.g.*, Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 *U. CHI. L. REV.* 153, 166 (1987) ("Since the developer in *Hamilton Bank* had failed to exhaust all avenues afforded by local zoning ordinances, the claim was ruled premature."); Stewart, *Supreme Court Report: Other Rulings*, *supra* note 74, at 120 ("In *Williamson County Regional Planning Commission v. Hamilton Bank*, No. 84-4, the Court found that the plaintiff's claim was not ripe because the plaintiff had not sought zoning variances.").

requirement as if it were quite unproblematic.<sup>74</sup> Only Henry Paul Monaghan, writing in the *Columbia Law Review*, seemed to grasp the fundamental incoherence of the Court's new doctrine, and its potential implications for the future of takings law:

No authority supports the use of ripeness doctrine to bar federal judicial consideration of an otherwise sufficiently focused controversy simply because corrective state judicial process had not been invoked. . . . Ripeness is concerned only with the timing of access to the district courts; *but Parratt completely bars access*, if the state corrective process is adjudged "adequate."<sup>75</sup>

The full significance of this observation would gradually be brought home to takings plaintiffs over the coming decades.

## II. THE PROCEDURAL SURPRISE: HOW "RIPENING" A CLAIM FOR FEDERAL ADJUDICATION IN COMPLIANCE WITH *WILLIAMSON COUNTY* IN FACT EXTINGUISHES THE CLAIM

Although the reasoning behind *Williamson County*'s state procedures rule is opaque, the language is clear. Throughout the opinion, the Court emphasized that Hamilton Bank's claim was *not* barred from federal court; it was merely "premature"<sup>76</sup> for adjudication in that forum, because the dispute was "not yet ripe."<sup>77</sup> More than once, the opinion expressly states that takings claims may not be litigated in federal court *until* the claimant has utilized whatever compensatory procedures the state provides.<sup>78</sup> On a plain-meaning interpretation of the text, it is no exaggeration to conclude that "[t]here simply is no rational way for an English-speaking person to read *Williamson County* other than holding that property owners can satisfy

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<sup>74</sup> See, e.g., Kenneth M. Murchison, *Local Government Law*, 46 LA. L. REV. 491, 491 n.4 (" . . . Williamson County Regional Planning Comm'n v. Hamilton Bank, 105 S. Ct. 3018 (1985) (land developer's taking claim is not ripe until local government reaches a final decision regarding the application of its regulations to property at issue and the land developer has exhausted state law procedures for obtaining just compensation).").

<sup>75</sup> Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979, 989–90 (1986) (emphasis added).

<sup>76</sup> *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985).

<sup>77</sup> *Id.* at 194 (emphasis added).

<sup>78</sup> *Id.* at 195–96.



those newly-minted ripeness requirements and thereby render their claim ripe for federal court litigation . . . .”<sup>79</sup>

Such a plain-meaning interpretation of the opinion is consistent with traditional conceptions of ripeness.<sup>80</sup> In his classic article on the topic, Professor Nichol wrote, “[t]he ‘basic rationale’ of the ripeness requirement is ‘to prevent courts, through the avoidance of *premature* adjudication, from entangling themselves in abstract disagreements.’”<sup>81</sup> The emphasis on prematurity—and indeed, the point of the doctrine’s underlying analogy to ripening fruit—is that an unripe claim *will* be suitable for adjudication, in the forum in which it has been brought, at some future time.<sup>82</sup> Both supporters of *Williamson County* and its detractors agree on this essential understanding of the nature of the ripeness doctrine.<sup>83</sup>

Nowhere does *Williamson County* hint at the possibility that, once a plaintiff has unsuccessfully sought compensation in state court, his taking claim may be precluded from subsequent federal litigation by operation of *res judicata* or collateral estoppel. This possibility was not raised by the briefs of either the Solicitor General or Hamilton Bank, nor was it addressed at oral argument, nor do Justice Blackmun’s papers suggest that preclusion was ever mentioned, by anyone, while the case was before the Court.<sup>84</sup> The conclusion seems inescapable that, given the last-minute injection of the state procedures argument into the case and the limited time available for reflection before the decision had to be written, preclusion never came up simply because nobody thought of it!

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<sup>79</sup> Berger, *Supreme Bait & Switch*, *supra* note 11, at 105.

<sup>80</sup> See, e.g., *Abbot Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds* by *Califano v. Sanders*, 430 U.S. 99 (1977); *Toilet Goods Assn. v. Gardner*, 387 U.S. 158, 164 (1967); *Harrison v. PPG Indus.*, 446 U.S. 578, 603 (1980); *Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 579–80 (1985).

<sup>81</sup> Nichol, *supra* note 75, at 161 (*quoting Abbot Labs.*, 387 U.S. at 148) (emphasis added).

<sup>82</sup> *Id.* at 169.

<sup>83</sup> See, e.g., *Echeverria*, *supra* note 68, at 10736 (“[I]f the issue is one of ripeness, this implies that a takings claim may not be ripe in federal court at the moment, but could become ripe in the future once the plaintiff or the defendant has taken steps that ripen the claim.”); Berger, *The Ripeness Game: Why Are We Still Forced to Play?*, *supra* note 11, at 306 (“Absence of ripeness necessarily means that things need to—and can—be done to make the matter ripe.”) (footnote omitted).

<sup>84</sup> See generally Brief for the Respondent, *supra* note 46; Brief for the United States, *supra* note 37; Transcript of Oral Argument, *supra* note 42; Chief Justice Blackmun’s Notes, *supra* note 50.

In practice, however, it quickly became clear that the state procedures “ripeness” requirement was incompatible with principles of claim and issue preclusion as ordinarily applied in other contexts. Claim preclusion, or *res judicata*, bars the subsequent litigation of claims that were, or could have been, brought in any judicial proceeding that results in a final judgment on the merits between the same parties.<sup>85</sup> Issue preclusion, or collateral estoppel, bars the subsequent litigation of issues of fact or law that were resolved in a prior judicial proceeding between the parties, regardless of the claims in which they arose.<sup>86</sup> Most important, the Full Faith and Credit Act requires federal courts to give any final judgment of a state court the same preclusive effect it would have in the state where it was rendered.<sup>87</sup> Thus, once a Fifth Amendment takings claim has been litigated in state court pursuant to *Williamson County*, federal courts must subsequently apply that state’s doctrines of *res judicata* and collateral estoppel, which in most instances will prevent the case from being heard in federal court at all.<sup>88</sup> The fundamental conceptual predicate of *Williamson County*’s state procedures rule—that submitting a federal takings claim to state court would “ripen” it for subsequent litigation in federal court—turned out to be a procedural non sequitur.<sup>89</sup> Far from ripening such a claim, complying with *Williamson County* in fact extinguishes it.<sup>90</sup>

For two decades, the conflict between *Williamson County*’s putative ripeness doctrine and preclusion principles imposed immense costs, uncertainty, and injustice on property owners who sought to vindicate their federal constitutional rights in federal court.<sup>91</sup> The Supreme Court had strongly noted, in other contexts, the fundamental importance of ensuring

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<sup>85</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 17 (AM. LAW INST. 1982).

<sup>86</sup> *Id.* § 27.

<sup>87</sup> 28 U.S.C. § 1738 (2014).

<sup>88</sup> *See, e.g.,* *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 80–85 (1984) (reviewing competing policy objectives of 42 U.S.C. § 1983 and the Full Faith and Credit Act, concluding that allowing litigants to bring their state claims in state court and return to federal court to litigate their federal claims “may seem attractive from a plaintiff’s perspective, [but] it is not the system established by § 1738.”).

<sup>89</sup> *Overstreet, supra* note 73, at 117 (“[T]he existence of an adequate process for receiving state compensation in a land use case means that a taking claim is always unripe and hence never justiciable in federal court.”).

<sup>90</sup> *See, e.g.,* *Berger, Supreme Bait & Switch, supra* note 11, at 102 (“[T]he very act of ripening a case also ends it.”).

<sup>91</sup> *See, e.g., id.* at 106–09; *Breemer, Overcoming Williamson County’s Troubling State Procedures Rule, supra* note 11, at 240–42.

that litigators bringing federal constitutional claims against state entities should not be deprived of an opportunity to try their case in a federal forum.<sup>92</sup> This imperative is especially strong when, as was the case in *Williamson County* itself, the plaintiff invokes federal court jurisdiction under 42 U.S.C. 1983.<sup>93</sup> Yet *Williamson County* had the apparently unforeseen effect of barring Fifth Amendment takings claimants from federal court, and forcing them to litigate their constitutional grievances, against their will, before the state judiciary.

Despite recognizing that barring federal takings claims from federal court directly conflicted with the “ripeness” terminology of *Williamson County*,<sup>94</sup> most federal judges continued to repeat Justice Blackmun’s tautology that the Constitution proscribes only takings without just compensation,<sup>95</sup> while simultaneously invoking state preclusion rules to prevent litigants from proving that such takings had occurred.<sup>96</sup> A few

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<sup>92</sup> See *England v. La. State Bd. of Med. Exam’rs*, 375 U.S. 411, 415 (1964):

There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court’s determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that [w]hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.

(internal quotations and citations omitted). See also *Willcox v. Consol. Gas Co.*, 212 U.S. 19, 40 (1909) (“The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.”).

<sup>93</sup> See *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (“The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights . . . .”); see also *Patsy v. Bd. of Regents*, 457 U.S. 496, 504 (1982) (holding that § 1983 does not impose any administrative exhaustion requirement on litigants in part because “. . . Congress intended [§ 1983] to throw open the doors of the United States courts to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights, and to provide these individuals immediate access to the federal courts . . . .”) (internal quotations and citations omitted).

<sup>94</sup> See, e.g., *Wilkinson v. Pitkin Cty. Bd. of Cty. Comm’rs*, 142 F.3d 1319, 1325 n.4 (10th Cir. 1998); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1302–03 (11th Cir. 1992).

<sup>95</sup> *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985). See also cases cited *supra* note 73.

<sup>96</sup> See, e.g., *Peduto v. City of N. Wildwood*, 878 F.2d 725, 728–29 (3rd Cir. 1989) (recognizing that the combination of *Williamson’s* state procedures rule and New Jersey’s claim

courts, however, struck by both the logical contradictions and unjust results that followed from trying to reconcile a literal interpretation of *Williamson County* with preclusion doctrine, attempted to find work-arounds.<sup>97</sup> The most important of these was an extension of the concept of reserving federal claims under *England v. Louisiana State Board of Medical Examiners*.<sup>98</sup>

*England* set out a modification of abstention doctrine applicable when federal constitutional plaintiffs are required to litigate their claims in state court.<sup>99</sup> Under this doctrine, plaintiffs who are compelled by abstention to litigate state-law issues in state court may expressly reserve any accompanying federal claims for subsequent federal-court litigation.<sup>100</sup> In an effort to make sense of *Williamson County*'s ripeness terminology, some federal courts ruled that the same procedure could be used by takings plaintiffs to preserve their Fifth Amendment claims for federal adjudication after being denied compensation in state court.<sup>101</sup> But preserving their federal claims for federal adjudication was not the only procedural challenge facing plaintiffs trying to comply with *Williamson County*'s state procedures rule. Issue preclusion presented an even more daunting hurdle, since the issues litigated in a state-court takings claim normally overlap with, or even duplicate, the issues that must be resolved in a federal lawsuit for a Fifth Amendment taking.<sup>102</sup>

Whether an *England* reservation could be stretched far enough to protect litigants against both claim and issue preclusion stemming from their compliance with *Williamson County* is a question that ultimately led to a

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preclusion doctrine have the effect of denying plaintiffs a federal forum for their federal constitutional claims); *Rainey Bros. Constr. Co. v. Memphis & Shelby Cty. Bd. of Adjustment*, 967 F. Supp. 998, 1004 (1997) (recognizing that the interaction of *Williamson County* and the Full Faith and Credit Act "requires that a plaintiff landowner assert his federal claims in the state courts.").

<sup>97</sup> See, e.g., *Fields*, 953 F.2d at 1303; see also Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1267–68 (2004). See generally Breemer, *Overcoming Williamson County's Troubling State Procedures Rule*, *supra* note 11, at 244–51.

<sup>98</sup> See generally 375 U.S. 411 (1964).

<sup>99</sup> See *id.* at 421.

<sup>100</sup> See *id.* at 421–22.

<sup>101</sup> See, e.g., *Fields*, 953 F.2d at 1305–06; see also Friedman, *supra* note 99, at 1267–68 (describing the use of *England* reservations as a way to accommodate "somewhat stray" Supreme Court doctrines like *Williamson County*). See generally Breemer, *Overcoming Williamson County's Troubling State Procedures Rule*, *supra* note 11, at 244–51.

<sup>102</sup> Breemer, *You Can Check Out But You Can Never Leave*, *supra* note 11, at 261.

direct conflict between the Second and Ninth Circuit Courts of Appeals.<sup>103</sup> The Ninth Circuit ruled, in *Dodd v. Hood River County*, that an *England* reservation in the *Williamson County* context protects only against claim preclusion.<sup>104</sup> Once a plaintiff has complied with *Williamson County*'s state procedures rule, issue preclusion would block subsequent federal adjudication of any questions of law or fact that had been considered in the state-court proceedings.<sup>105</sup> As one commentator put it:

[I]n refusing to allow an exception to issue preclusion for takings claims ripened by state court litigation required by *Williamson County*, *Dodd II* closed the window for takings claims in federal courts, leaving only a small crack for those instances in which state takings law fails to incorporate a federal standard. In so doing, *Dodd II* increased the tension between preclusion doctrine and *Williamson County*'s apparent intent to allow takings claims in federal court after the required state court litigation.<sup>106</sup>

Five years after *Dodd*, the Second Circuit found this outcome unacceptable and established a contrary rule in *Santini v. Connecticut Hazardous Waste Management Service*.<sup>107</sup> In *Santini*, the plaintiff had complied with *Williamson County* by seeking compensation for a taking in state court under the Connecticut constitution, litigating no federal claims.<sup>108</sup> When the Connecticut Supreme Court denied relief, Santini brought a Fifth Amendment takings claim in federal court.<sup>109</sup> The Second Circuit rejected the government's defense that Santini's federal claim was barred by issue preclusion, stating:

It would be both ironic and unfair if the very procedure that the Supreme Court required Santini to follow before bringing a Fifth Amendment takings claim—a state-court

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<sup>103</sup> *Id.* at 263–65.

<sup>104</sup> 136 F.3d 1219, 1230 (9th Cir. 1998).

<sup>105</sup> *See id.* at 1225–28.

<sup>106</sup> Breemer, *You Can Check Out But You Can Never Leave*, *supra* note 11, at 263 (citations omitted).

<sup>107</sup> 342 F.3d 118, 118 (2d Cir. 2003), *overruled by* *San Remo Hotel v. City & Cty. of S.F.*, 543 U.S. 323 (2005).

<sup>108</sup> *See id.* at 122–23.

<sup>109</sup> *Id.* at 124.

inverse condemnation action—also precluded Santini from ever bringing a Fifth Amendment takings claim. We do not believe that the Supreme Court intended in *Williamson County* to deprive all property owners in states whose takings jurisprudence generally follows federal law (*i.e.*, those to whom collateral estoppel would apply) of the opportunity to bring Fifth Amendment takings claims in federal court.<sup>110</sup>

By holding that an *England* reservation would protect federal takings claims against both claim and issue preclusion when a plaintiff complied with *Williamson County*'s state procedures requirement, the *Santini* Court created a clear conflict with *Dodd*.<sup>111</sup> The Supreme Court agreed to resolve the question the following year, when it granted certiorari in *San Remo Hotel v. City and County of San Francisco*.<sup>112</sup>

### III. *SAN REMO HOTEL* COMPLETED *WILLIAMSON COUNTY*'S TRANSITION FROM A RIPENESS STANDARD TO AN ABSTENTION DOCTRINE

The *San Remo Hotel* case came to the Supreme Court after a long and arduous history of both state and federal litigation.<sup>113</sup> The plaintiffs alleged that their property had been taken by operation of a San Francisco regulation imposing heavy fees for the “conversion” of residential hotel rooms to tourist use.<sup>114</sup> The lawsuit was initially filed in federal court but—at the plaintiffs’ request—the Ninth Circuit Court of Appeals invoked *Pullman* abstention and directed the district court to stay further proceedings pending litigation of *San Remo Hotel*'s state claims.<sup>115</sup> The appellate panel noted that the plaintiffs were free to return to federal court to litigate their Fifth Amendment takings claim following adjudication of the state-law issues, so long as they reserved their federal claims pursuant to *England*.<sup>116</sup>

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<sup>110</sup> *Id.* at 130.

<sup>111</sup> *See id.*

<sup>112</sup> 543 U.S. 1032, 1032 (2004) (granting cert.).

<sup>113</sup> *See Breemer, You Can Check Out But You Can Never Leave*, *supra* note 11 at 265–67.

<sup>114</sup> *See San Remo Hotel v. City & Cty. of S.F.*, 545 U.S. 323, 326–27 (2005).

<sup>115</sup> *See San Remo Hotel v. City & Cty. of S.F.*, 145 F.3d 1095, 1105 (9th Cir. 1998). For a discussion of *Pullman* abstention, *see infra* Part IV.B.1.

<sup>116</sup> *San Remo Hotel*, 145 F.3d at 1106 n.7.

A subsequent inverse condemnation action was dismissed by the state trial court, but the California Court of Appeals reversed.<sup>117</sup> The state Supreme Court set aside the appellate decision, ruling that the city's demand of \$567,000 to allow the hotel to remain in the business of renting its rooms to tourists did not violate the California constitution.<sup>118</sup> This holding drew a stinging dissent by Justice Janice Rogers Brown, who described San Francisco's revenue-generating regulatory regime as a "kleptocracy."<sup>119</sup> The one thing both the majority and the dissent agreed upon, however, was that San Remo Hotel had properly reserved its Fifth Amendment cause of action, which it was now free to litigate in federal court.<sup>120</sup>

But upon returning to the federal forum where their takings claim had been stayed four years earlier, the San Remo Hotel plaintiffs were now told their federal cause of action had been extinguished by issue preclusion.<sup>121</sup> In an argument that closely tracked the Second Circuit's *Santini* ruling, the plaintiffs maintained:

[T]here should be no issue preclusion where a plaintiff is required to litigate in state court pursuant to *Pullman* abstention and his federal claims have been specifically reserved under *England*, or where a plaintiff cannot assert a ripe takings claim in federal court until he has sought compensation in state court under *Williamson County*. Plaintiffs argue that 'involuntary' trips to state court in these circumstances should not preclude federal adjudication of federal claims.<sup>122</sup>

The Ninth Circuit disagreed, expressly rejecting *Santini* and finding that: "[W]e are compelled to follow [Ninth Circuit precedent] and hold that the doctrine of issue preclusion can apply to bar relitigation in federal court of issues necessarily decided in state court, notwithstanding that plaintiffs

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<sup>117</sup> See *San Remo Hotel, L.P. v. City & Cty. of S.F.*, 100 Cal. Rptr. 2d 1, 4 (2000), *rev'd in part*, 41 P.3d 87 (Cal. 2002).

<sup>118</sup> See *San Remo Hotel, L.P. v. City & Cty. of S.F.*, 41 P.3d 87, 107–111 (2002).

<sup>119</sup> *Id.* at 128 (Brown, J., dissenting).

<sup>120</sup> See *id.* at 91 n.1 ("[N]o federal question has been presented or decided in this case."); *Id.* at 128 (Brown, J., dissenting) ("I . . . hope the plaintiffs find a more receptive forum in the federal courts.").

<sup>121</sup> *San Remo Hotel, L.P. v. S.F. City & Cty.*, 364 F.3d 1088, 1094 (9th Cir. 2004).

<sup>122</sup> *Id.*

must litigate in state court pursuant to *Pullman* and/or *Williamson County*.<sup>123</sup> The Supreme Court granted certiorari to resolve whether issue preclusion bars the litigation of a Fifth Amendment takings claim in federal court, solely because the plaintiff has complied with *Williamson County*'s state procedures requirement.<sup>124</sup>

Justice Stevens's unanimous opinion treated the case as if it merely posed the question of whether the judiciary can carve out exceptions to an act of Congress – the Full Faith and Credit Act.<sup>125</sup> Viewed that narrowly, the answer was clearly no.<sup>126</sup> In language suggesting the plaintiffs were engaging in some sort of chicanery, Justice Stevens framed the issue as one of “giving losing litigants access to an additional appellate tribunal,”<sup>127</sup> and proclaimed that the Ninth Circuit was “correct to decline petitioners’ invitation to ignore the requirements of 28 U.S.C. § 1738.”<sup>128</sup>

Strangely missing from the *San Remo Hotel* opinion was any justificatory rationale for forcing federal takings claimants to risk issue preclusion by relegating their cases to state court in the first place. *Williamson County*'s state procedures requirement was treated as given, and if that rule had the effect of barring plaintiffs from asserting violations of their federal rights in federal court, the majority saw no grounds for concern.<sup>129</sup> In place of Justice Stewart's ringing affirmation of the need to assure access to the federal courts under Section 1983,<sup>130</sup> Justice Stevens noted dismissively, “it is entirely unclear why [petitioners'] preference for a federal forum should matter for constitutional or statutory purposes.”<sup>131</sup>

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<sup>123</sup> *Id.* at 1096.

<sup>124</sup> See Petition for Writ of Certiorari at 1, *San Remo Hotel, L.P. v. City & Cty. of S.F.*, 543 U.S. 1032 (2004) (No. 04-340); *San Remo Hotel, L.P. v. City & Cty. of S.F.*, 545 U.S. 323, 323 (2005).

<sup>125</sup> See *San Remo Hotel*, 545 U.S. at 337 (“[U]nder our limited grant of certiorari, we have only one narrow question to decide: whether we should create an exception to the full faith and credit statute, and the ancient rule on which it is based . . .”).

<sup>126</sup> See *id.* at 326–27.

<sup>127</sup> *Id.* at 345.

<sup>128</sup> *Id.* at 347–48.

<sup>129</sup> See *id.* at 346.

<sup>130</sup> See *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

<sup>131</sup> *San Remo Hotel*, 545 U.S. at 344 (emphasis deleted). In addition to availing themselves of section 1983's “very purpose” – “[interposing] the federal courts between the States and the people, as guardians of the people's federal rights,” *Mitchum*, 407 U.S. at 242 – practical considerations often motivate a takings plaintiff's preference for a federal, as opposed to state, forum. See, e.g., Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1120–21 (1977)



Perhaps the most remarkable feature of the *San Remo Hotel* decision was the colloquy between Justice Stevens and Chief Justice Rehnquist, writing in concurrence, on the adequacy of state courts as fora for litigating federal takings claims. Justice Stevens found the issue unproblematic, noting that it is “hardly a radical notion” to consign federal constitutional claimants to state court.<sup>132</sup> In place of the concern earlier Courts had shown for ensuring federal constitutional protections for citizens whose rights are violated under color of state law, Justice Stevens offered the greater familiarity of state judges with the issues arising in takings cases:

[T]here is scant precedent for the litigation in federal district court of claims that a state agency has taken property in violation of the Fifth Amendment’s Takings Clause. . . . [S]tate courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations.<sup>133</sup>

In response, Chief Justice Rehnquist pointed out that the supposed greater expertise of state judges does not preclude federal adjudication of federal constitutional claims in other contexts:

[T]he Court has not explained why we should hand authority over federal takings claims to state courts, based simply on their relative familiarity with local land-use decisions and proceedings, while allowing plaintiffs to proceed directly to federal court in cases involving, for example, challenges to municipal land-use regulations

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(arguing that federal courts are better suited for, and more favorable to, federal constitutional litigants for institutional reasons, including their greater technical competence at handling federal constitutional issues, and insulation from local political pressures). *See also* Overstreet, *supra* note 73, at 92–93 (explaining the importance of a federal forum to takings plaintiffs who normally sue local or state governments and who will encounter elected judges from the same geographical region in state court).

<sup>132</sup>*San Remo Hotel*, 545 U.S. at 346–47. Oddly, the example Justice Stevens gave for this point was *Williamson County*’s first prong, requiring a final administrative determination. *Id.* But cases that lack finality are not consigned to state court. They are dismissed as unripe in any court, state or federal.

<sup>133</sup>*Id.* at 347. The opinion does not comment on whether the greater familiarity of state courts with takings claims may be the result of *Williamson County* itself.

based on the First Amendment, or the Equal Protection Clause.<sup>134</sup>

He might well have added that Justice Douglas had both anticipated and responded to Justice Stevens's argument 40 years earlier, in his *England* concurrence:

[T]he complexity of local law to federal judges is inherent in the federal court system as designed by Congress. Resolution of local law questions is implicit in diversity of citizenship jurisdiction. Since *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, the federal courts under that head of jurisdiction daily have the task of determining what the state law is. The fact that those questions are complex and difficult is no excuse for a refusal by the District Court to entertain the suit.<sup>135</sup>

Regardless of the merits of the Stevens-Rehnquist exchange, however, one thing is clear: it has nothing whatsoever to do with ripeness. Debates over the appropriateness of state versus federal jurisdiction presume the existence of ripe disputes to adjudicate. Even the one case cited by Justice Stevens as evidencing a policy analogous to the relegation of federal takings claims to state court did not involve ripeness in any way.<sup>136</sup> As has been noted elsewhere:

“The *San Remo Hotel* Court barely discussed ripeness in reaching its holding. . . . [The] decision spends more time discussing comparative competency, suggesting that the Court was more focused on federalism or judicial economy than defining the record.”<sup>137</sup>

After *San Remo Hotel*, it is no longer possible to describe *Williamson County*'s second prong as a ripeness doctrine. Although the *San Remo Hotel* Court unanimously agreed that the usual effect of the state procedures rule would be to bar federal constitutional claimants from federal court, no

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<sup>134</sup> *Id.* at 350–51 (Rehnquist, C.J., concurring in the judgment) (internal citations omitted).

<sup>135</sup> *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 426 (1964) (Douglas, J., concurring).

<sup>136</sup> See *San Remo Hotel*, 545 U.S. at 347 (citing *Fair Assessment in Real Estate Assessment Assn., Inc. v. McNary*, 454 U.S. 100 (1981), a taxpayer challenge to a state tax measure).

<sup>137</sup> Eric A. Lindberg, Comment, *Multijurisdictionality and Federalism: Assessing San Remo Hotel's Effect on Regulatory Takings*, 57 UCLA L. REV. 1819, 1860–61 (2010).

attempt was made to ground this outcome in conventional principles of ripeness.<sup>138</sup> Instead, the procedural roadblock was simply rationalized by “the presumed parity of state and federal courts for the litigation of federal rights.”<sup>139</sup> In effect, *San Remo Hotel* examined the state procedures rule as a *de facto* doctrine of federal abstention, and opined that takings claimants were not harmed by the loss of federal jurisdiction, since state courts were equally (or more) competent to adjudicate their complaints.<sup>140</sup>

But the Court’s analysis skipped a crucial step. It was both understandable and proper for *San Remo Hotel* to tacitly acknowledge that *Williamson County*’s second prong is not a ripeness rule, since it effectively extinguishes most claims rather than rendering them fit for federal adjudication. But this recognition does not in itself justify turning to an analysis of the *effect* of *Williamson County* as an abstention doctrine. The missing premise, which neither *San Remo Hotel* nor any other decision of the Court has provided, is a showing that shunting federal takings claims to state court is justified (or justifiable) under any recognized principles of federal abstention.<sup>141</sup> In fact, as will be shown in the following section, no such justification could have been advanced, for the state procedures rule finds no more support in the Court’s abstention doctrines than in ordinary conceptions of ripeness.

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<sup>138</sup> See *San Remo Hotel*, 545 U.S. at 347–48.

<sup>139</sup> Jamison E. Colburn, *Splitting the Atom of Property: Rights Experimentalism as Obligation to Future Generations*, 77 GEO. WASH. L. REV. 1411, 1436 (2009).

<sup>140</sup> A few commentators had already pointed out the resemblance of *Williamson County*’s state procedures rule to an abstention doctrine, thereby anticipating *San Remo Hotel*. See Friedman, *supra* note 99, at 1270 n.185 (“*Williamson County* is . . . in all practical respects an abstention doctrine rather than a ripeness doctrine.”); STEVEN J. EAGLE, REGULATORY TAKINGS 1061 (3d ed. 2005) (*Williamson County*’s purported ripeness rules “are, at least in part, an example of abstention principles.”); Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464, 496 (2000) (*Williamson County*’s second prong is “analogous to the abstention requirement of *Younger v. Harris* . . .”).

<sup>141</sup> See, e.g., Keller, *supra* note 11, at 222 n.161. (“[T]here has been virtually no analysis of whether the State Litigation prong is . . . a valid judicially developed jurisdiction stripping rule.”).

IV. CREATING A DOCTRINAL PARADOX: *WILLIAMSON COUNTY*'S  
ACCIDENTAL ABSTENTION RULE PERMITS FEDERAL COURTS TO  
DECLINE TO EXERCISE ARTICLE III JURISDICTION UNDER  
CIRCUMSTANCES IN WHICH EXPRESS ABSTENTION WOULD NOT BE  
ALLOWED

A. *Williamson County Is a Cautionary Example of Why the Supreme Court Should Avoid Deciding Questions Not Presented in the Petition or Argued in the Courts Below*

The Supreme Court generally adheres to certain internal policies designed to ensure that important questions of first impression are not decided hastily and without guidance from the deliberation of lower courts.<sup>142</sup> For example, Supreme Court Rule 14.1(a) provides that “[o]nly the questions set out in the petition [for certiorari], or fairly included therein, will be considered by the Court.”<sup>143</sup> The rationale for such a restriction is straightforward:

“Our faithful application of Rule 14.1(a) . . . helps ensure that we are not tempted to engage in ill-considered decisions of questions not presented in the petition.”<sup>144</sup>

Similarly, as a prudential matter, the Court has often expressed its reluctance to allow parties before it to raise issues that were not argued and decided in the proceedings below.<sup>145</sup> When a case has been litigated through the federal courts, it is only in “exceptional” circumstances that the Court will consider a question that was not fully vetted and passed upon below—

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<sup>142</sup>EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE § 6.26(b) (9th ed. 2007).

<sup>143</sup>SUP. CT. R. 14(1)(a).

<sup>144</sup>*Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 34 (1993). The Court continued: “Faithful application [of Rule 14.1(a)] will also inform those who seek review here that we continue to strongly ‘disapprove the practice of smuggling additional questions into a case after we grant certiorari.’” *Id.* (quoting *Irvine v. Cal.*, 347 U.S. 128, 129 (1954)).

<sup>145</sup>*See, e.g., Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168 (2004) (“We ordinarily do not decide in the first instance issues not decided below.”) (internal quotation marks omitted) (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) (per curiam)); *see also Glover v. U.S.*, 531 U.S. 198, 205 (2001) (“In the ordinary course we do not decide questions neither raised nor resolved below.”); *accord* GRESSMAN, *supra* note 145, § 6.26(b).

even if it is squarely presented in the petition for certiorari.<sup>146</sup> This policy is similar to that of allowing inter-circuit conflicts to “percolate” through the appellate courts, rather than resolving them immediately:

The Court may perceive several general benefits of letting an issue percolate among the lower federal courts. First, the issue may resolve itself as more circuits address it, precluding the need for the Court to address the issue. Second, even if the Court expects an issue to remain unresolved, percolation can provide the Court with a wealth of well-reasoned lower-court perspectives addressing the issue in the event the Court later tackles it. Proponents of percolation argue that this process leads to better Supreme Court opinions.<sup>147</sup>

Or, as another commentator has put it, “Better ten wrong decisions in the lower courts than one half-baked opinion from the Supreme Court.”<sup>148</sup>

Unfortunately, in the Court’s haste to dispose of *Williamson County* without reaching the underlying question of compensation for temporary takings, both of the foregoing precepts were violated.<sup>149</sup> The issue of diverting federal takings claims to state court was not even hinted at in the questions presented in the agency’s petition for certiorari, no doubt because it had not been raised, briefed, argued, or decided at any stage of the proceedings below.<sup>150</sup> Consequently, *Williamson County*’s state procedures requirement was crafted without benefit of any prior deliberations, resulting in the creation of an ad-hoc abstention doctrine that was not fully understood, even by some justices who participated in the decision, for two decades.<sup>151</sup>

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<sup>146</sup> See *U.S. v. Mendenhall*, 446 U.S. 544, 551 n.5 (1980); *Duignan v. U.S.*, 274 U.S. 195, 200 (1927). But see generally Joan Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts’ Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521 (2012) (reviewing cases in which the Supreme Court has nevertheless ruled on issues that had not been raised or decided below).

<sup>147</sup> Robert M. Lawless & Dylan Lager Murray, *An Empirical Analysis of Bankruptcy Certiorari*, 62 MO. L. REV. 101, 106 (1997) (footnotes omitted).

<sup>148</sup> Stewart A. Baker, *A Practical Guide to Certiorari*, 33 CATH. U. L. REV. 611, 618 (1984).

<sup>149</sup> See generally *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

<sup>150</sup> See generally *Hamilton Bank of Johnson City v. Williamson Cty. Reg’l Planning Comm’n*, 729 F.2d 402 (6th Cir. 1984), *rev’d*, 473 U.S. 172 (1985).

<sup>151</sup> See *San Remo Hotel, L.P. v. City & Cty. of S.F.*, 545 U.S. 323, 352 (2005) (Rehnquist, C.J., concurring) (“I joined the opinion of the Court in *Williamson County*. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic.”).

This outcome is especially troubling because cases in which federal courts had abstained from adjudicating federal takings claims were “percolating” throughout the federal judiciary at the time *Williamson County* was taken up, and had been for some time.<sup>152</sup> Because the High Court failed to review any of those decisions, a hodgepodge of conflicting approaches was allowed to evolve among the circuit courts of appeals.

*B. The Lower Federal Courts Abstained From Adjudicating Fifth Amendment Takings Claims Under a Variety of Conflicting Theories Prior to Williamson County, With No Guidance from the Supreme Court*

As was previously noted, William Ryckman anticipated *Williamson County*'s state procedures ripeness requirements in a law review article published four years before the decision was handed down.<sup>153</sup> The subject of Ryckman's inquiry, however, was not ripeness, but abstention.<sup>154</sup> Concerned over an influx of land-use cases into federal courts in the 1960s and '70s, Ryckman argued that most such disputes should be relegated to state court.<sup>155</sup> Ryckman acknowledged that property owners were turning to the federal judiciary to escape “local bias against federal [constitutional] claims,”<sup>156</sup> fearing that the vindication of their federal rights would be compromised by the “political and psychological pressures affecting state courts.”<sup>157</sup> Yet these considerations were outweighed, in Ryckman's view, by the “essentially local character of [land-use] disputes,” which he believed called for the federal judiciary to stand aside.<sup>158</sup>

Ryckman's essay was just one salvo in an emerging scholarly dialogue over the merits of federal abstention in regulatory takings cases, a dialogue

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<sup>152</sup> See Berger, *Supreme Bait & Switch*, *supra* note 11, at 100–01 (2000) (“In the old days, judges issued abstention orders when property owners had the temerity to seek federal court application of the federal constitution. Those orders required the owners to repair to state court to see whether resolution of state law issues might moot or, at least, confine the federal issues. This shunted many regulatory taking cases into state courts.”) (footnotes omitted).

<sup>153</sup> See Ryckman, *supra* note 45, at 395 n.104.

<sup>154</sup> See *id.* at 380.

<sup>155</sup> See *id.*

<sup>156</sup> *Id.* at 378.

<sup>157</sup> *Id.* at 379.

<sup>158</sup> See *id.* at 380. Ryckman did not explain how land-use disputes differ in this regard from the vast majority of federal constitutional litigation, which typically arises from relatively minor conflicts between local authorities and citizens residing within their jurisdiction.

that was prematurely terminated by *Williamson County*.<sup>159</sup> This academic interest was sparked by the simple reality that many federal courts had in fact been abstaining from adjudicating these cases for more than a decade – since shortly after the Supreme Court opened the door to filing such claims under 42 U.S.C. § 1983.<sup>160</sup>

### 1. The Ninth Circuit Relegated Takings Claims to State Court Under *Pullman* Abstention

For at least a decade prior to *Williamson County*, courts in the Ninth Circuit routinely invoked *Pullman* abstention to avoid adjudicating Fifth Amendment takings claims.<sup>161</sup> The *Pullman* doctrine originated in *Railroad Commission of Texas v. Pullman Co.*, in which the Supreme Court ordered a federal district court to abstain from issuing an injunction pending a state court determination of the scope and meaning of a Texas statute.<sup>162</sup> The plaintiffs challenged a Texas Railroad Commission regulation requiring that all sleeping cars on Texas trains be operated by a Pullman conductor, rather than a porter.<sup>163</sup> The lawsuit sought to enjoin enforcement of the regulation on the grounds that it violated both the Texas statute under which the

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<sup>159</sup> See, e.g., Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 541–42 (1982) (suggesting that judges who abstain in land-use cases “lack familiarity with the abstention doctrine or . . . their eagerness to dispose of cases outweighs any legitimate effort to adhere to established doctrine”.); Note, *Land Use Regulation, the Federal Courts, and the Abstention Doctrine*, 89 YALE L.J. 1134, 1135 (1980) (advocating a general policy of abstention in land-use cases, but arguing against a categorical rule); John T. Harris, *Application of the Abstention Doctrine to Inverse Condemnation Actions in Federal Court*, 4 PEPP. L. REV. 1, 3 (1977) (calling for restricting abstention in land use cases to exceptional circumstances).

<sup>160</sup> See Berger, *Supreme Bait & Switch*, *supra* note 11, at 100–01, 127–29 (2000); See, e.g., *Fralin & Waldron, Inc. v. City of Martinsville*, 370 F. Supp. 185, 190–91 (W.D. Va. 1973), *aff’d* 493 F.2d 481 (4th Cir. 1974); see also Brain W. Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 HOFSTRA PROP. L.J. 73, 86 (1988).

<sup>161</sup> See, e.g., *Newport Invs., Inc. v. City of Laguna Beach*, 564 F.2d 893, 895 (9th Cir. 1977); *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092, 1095 (9th Cir. 1976); *Sederquist v. City of Tiburon*, 590 F.2d 278, 282–83 (9th Cir. 1978); *Beck v. Cal.*, 479 F. Supp. 392, 399 (C.D. Cal. 1979).

<sup>162</sup> 312 U.S. 496, 501–02 (1941).

<sup>163</sup> *Id.* at 497–98. In Texas, Pullman conductors were uniformly Caucasian, while porters were African American. *Id.*

Commission derived its authority, and various provisions of the federal constitution.<sup>164</sup>

The Supreme Court overturned the granting of an injunction, reasoning that a favorable disposition of the state law claim—that the Commission had exceeded or violated its authority under the statute—would resolve the case and thereby eliminate the need to issue a federal constitutional ruling.<sup>165</sup> The Court also noted that federal courts lacked expertise in interpreting Texas law and that were they to construe the statute, any ruling would be merely a “forecast” because “the last word” on the statute’s meaning belonged exclusively to the Texas Supreme Court.<sup>166</sup> Finally, the *Pullman* Court emphasized the importance of avoiding the creation by the federal judiciary of “needless friction with state policies.”<sup>167</sup> It concluded by directing the district court to retain the case on its docket while the parties litigated the scope and meaning of the state law in the Texas courts.<sup>168</sup>

Subsequent cases have emphasized the limited circumstances under which *Pullman* abstention is appropriate.<sup>169</sup> The net effect of the decisions applying *Pullman* over more than seven decades has been to confine the doctrine closely to the paradigm case:

[One] in which the federal constitutional challenge turns on a state statute, the meaning of which is unclear under state law. If the state courts would be likely to construe the statute in a fashion that would avoid the need for a federal constitutional ruling or otherwise significantly modify the federal claim, the argument for abstention is strong.<sup>170</sup>

Otherwise, federal courts are bound by their “unflagging obligation” to hear the case.<sup>171</sup>

In the Ninth Circuit, the appropriateness of *Pullman* abstention is evaluated under a three-part test first set forth in *Canton v. Spokane School*

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<sup>164</sup> *Id.* at 498.

<sup>165</sup> *Id.* at 498–501.

<sup>166</sup> *Id.* at 499–500.

<sup>167</sup> *Id.* at 500.

<sup>168</sup> *Id.* at 501–02.

<sup>169</sup> See generally CHEMERINSKY, *supra* note 14, at 790–97; YACKLE, *supra* note 14, at 504–09.

<sup>170</sup> *Harris Cty. Comm’rs Court v. Moore*, 420 U.S. 77, 84 (1975).

<sup>171</sup> *Colo. River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976).



*District No. 81.*<sup>172</sup> Courts in that circuit will stay federal proceedings pending state-court adjudication of a question of state law when:

(1) The complaint “touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open.” (2) “Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy.” (3) The possibly determinative issue of state law is doubtful.<sup>173</sup>

Early on, the Ninth Circuit determined that the first of these factors is satisfied by any dispute involving land-use regulations, which were deemed by definition to comprise a “sensitive area of social policy meeting the first *Canton* requirement.”<sup>174</sup> Bringing regulatory takings claims under the second and third *Canton* factors required considerably more ingenuity since these cases virtually never involve a statewide enactment that has not been construed by the state’s highest court, comparable to the Railroad Commission’s regulation in *Pullman*. Rather, the Ninth Circuit courts focused on the existence of routine state-law claims that might be filed in conjunction with a Fifth Amendment takings claim, such as a petition for writ of mandate to set aside a zoning board’s decision.<sup>175</sup> Since the outcome of such state claims is uncertain in the sense that the outcome of any litigation is uncertain, virtually any cause of action based on state law could be held to satisfy the second and third *Canton* factors, resulting in abstention on the federal takings claim.<sup>176</sup> Indeed, the Ninth Circuit went so far as to suggest that the existence of a possibly determinative state-law claim was sufficient to merit *Pullman* abstention in takings cases *even if the claim had not been raised*.<sup>177</sup> And in at least one case, although the

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<sup>172</sup> 498 F.2d 840, 845 (9th Cir. 1974).

<sup>173</sup> *Id.*

<sup>174</sup> *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092, 1094 (9th Cir. 1976).

<sup>175</sup> *See, e.g., Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838, 838 (9th Cir. 1979); *Sederquist v. City of Tiburon*, 590 F.2d 278, 282 (9th Cir. 1978).

<sup>176</sup> *See, e.g., Sederquist*, 590 F.2d at 282–83 (“We do not claim the ability to predict whether a state court would decide that the city here abused its discretion . . . .”); *Beck v. Cal.*, 479 F. Supp. 392, 399 (C.D. Cal. 1979) (paraphrasing *Sederquist* in context of inverse condemnation claim against California Coastal Commission).

<sup>177</sup> *See, e.g., Santa Fe Land Improvement*, 596 F.2d at 840 (abstaining in part because “the state courts may possibly find that the city has exceeded its authority based upon Cal. Gov’t Code § 65912. . . . *That Santa Fe did not specifically raise the question does not foreclose consideration*”).

California Supreme Court had spoken definitively on the state-law question at issue, the Ninth Circuit deemed *Pullman* abstention to be appropriate in case the state's high court might change its mind.<sup>178</sup>

In a 1982 survey of section 1983 cases brought in the Federal District Court of the Central District of California, Theodore Eisenberg found that none of the judges who ordered *Pullman* abstention in land-use cases “specified the unclear question of state law that supported abstention.”<sup>179</sup> The author surmised that “[t]he failure to specify unclear questions of state law suggests that federal judges lack familiarity with the abstention doctrine or that their eagerness to dispose of cases outweighs any legitimate effort to adhere to established doctrine.”<sup>180</sup> Unfamiliarity with the formal requirements of *Pullman* abstention may be a plausible explanation for some district court abstention orders, but can hardly explain Ninth Circuit doctrine. Indeed, on one occasion the court of appeals affirmed a district court's invocation of *Pullman* abstention in a takings case, even though the lower court had identified no state law issue whatsoever—uncertain or otherwise—that could be resolved so as to moot the federal constitutional claim.<sup>181</sup>

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*of the issue as a basis for abstention.”*) (emphasis added). *Accord* C-Y Dev. Co. v. City of Redlands, 703 F.2d 375, 378 (9th Cir. 1983) (speculating that a state court might rule in favor of the landowner under § 65912 “[a]lthough C-Y has not raised the point . . .”) (emphasis added).

<sup>178</sup>Bank of Am. Nat'l Trust & Sav. Ass'n v. Summerland Cty. Water Dist., 767 F.2d 544, 547 (9th Cir. 1985) (asserting that the California Supreme Court's unequivocal foreclosure of just compensation as a remedy for a regulatory taking in *Agins v. City of Tiburon*, 24 Cal. 3d 266 (1979), *abrogated by* First English Evangelical Lutheran Church of Glendale v. Cty. of L.A., 482 U.S. 304 (1987), “stands on something of a precedential precipice,” and therefore “it is appropriate as a matter of comity to allow the state to make or alter its own law.”).

<sup>179</sup>Eisenberg, *supra* note 162, at 541; *see also* *Land Use Regulation, the Federal Courts, and the Abstention Doctrine*, *supra* note 162, at 1149 (suggesting that only a minority of land use cases in federal courts involve unclear state issues that affect constitutional claims); Blaesser, *supra* note 163, at 86 (“In the majority of the decisions that apply *Pullman* abstention, the courts have not addressed the extent to which the state law question is unsettled . . .”).

<sup>180</sup>Eisenberg, *supra* note 162, at 542.

<sup>181</sup>Newport Invs., Inc. v. City of Laguna Beach, 564 F.2d 893, 895 (9th Cir. 1977) (“The district judge obviously believed, as we do, that the California courts are fully capable of making a proper determination of the particular issues that they should undertake, in the first instance, to resolve.”). Similarly, in *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092, 1095 (9th Cir. 1976), the Ninth Circuit affirmed *Pullman* abstention based on its general observation that “California courts have yet to decide the precise extent to which the state and its municipalities may limit the development of private property.”

“Judicial manipulation of the uncertain–state–law requirement” was identified as a dubious element in the Ninth Circuit’s use of *Pullman* abstention in land-use cases as far back as 1980.<sup>182</sup> In particular, the fact that the outcome of state litigation might be uncertain because it turns on the facts of particular cases has been held to be an inadequate basis for abstention.<sup>183</sup> “Pullman abstention is used to avoid unnecessary interference with a valid state program by erroneous interpretation of an uncertain state legal issue. Federal and state courts are equally capable of applying settled state law to a difficult set of facts.”<sup>184</sup> Furthermore, as another analyst noted:

In most cases alleging inverse condemnation . . . no interpretation of state law can avoid or modify the constitutional issues presented. . . . [E]ven if the acts alleged to constitute a taking were unauthorized or otherwise invalid under the applicable state law, they have nevertheless taken place. The only issue requiring resolution is whether the acts are sufficient to constitute a taking under the fifth or fourteenth amendments.<sup>185</sup>

The doctrinal unsoundness of the Ninth Circuit’s abstention rationale was not lost even on some panels within the circuit. In *Pearl Investment Co. v. City & County of San Francisco*, the court grudgingly followed circuit precedent in affirming *Pullman* abstention in a Fifth Amendment takings case, even though the challenged regulation was unambiguous and had already been construed by the California Supreme Court.<sup>186</sup> The district court had nevertheless abstained, reasoning straightforwardly that “the resolution of state law questions is doubtful in virtually every case involving land use or zoning issues.”<sup>187</sup> The appellate panel objected that:

An outcome is not “doubtful” or “uncertain” just because it turns on the facts of the particular case. Uncertainty for purposes of *Pullman* abstention means that a federal court

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<sup>182</sup> See *Land Use Regulation, the Federal Courts, and the Abstention Doctrine*, *supra* note 162, at 1143 n.55.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* (citations omitted).

<sup>185</sup> Harris, *supra* note 162, at 10.

<sup>186</sup> See 774 F.2d 1460, 1464–65 (9th Cir. 1985).

<sup>187</sup> *Id.* at 1465.

cannot predict with any confidence how the state's highest court would decide an issue of state law. Resolution of an issue of state law might be uncertain because the particular statute is ambiguous, or because the precedents conflict, or because the question is novel and of sufficient importance that it ought to be addressed first by a state court. We do not find those factors to be present in this case.<sup>188</sup>

Nevertheless, having pointed out the defect in the circuit's precedent of applying *Pullman* to such claims, the *Pearl Investment* court acquiesced to that precedent and affirmed the district court's order of abstention.<sup>189</sup>

Having reinterpreted *Pullman*'s "uncertain state law" requirement to cover any case in which the outcome of a state proceeding might be in doubt, and applying that standard to any Fifth Amendment takings case in which a state-law claim might conceivably dispose of the dispute, the final step in the evolution of the Ninth Circuit's abstention was a small one. The California Constitution, after all, contains a prohibition on the taking of private property without just compensation.<sup>190</sup> To the extent this provision can be considered the mirror image of the Fifth Amendment's Takings Clause, then any regulatory takings claim arising in California *could* theoretically be pled as a violation of the state constitution. Federal courts in the Ninth Circuit could therefore abstain in such cases so that "the California courts [may] be afforded the initial opportunity of interpreting the constitution of their own state in relation to the appellant's complaint,"

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<sup>188</sup> *Id.* (citation omitted).

<sup>189</sup> *Id.* (citation omitted). Despite the superiority of *Williamson County* as a vehicle for clearing takings cases from the federal courts' calendar, the Ninth Circuit still occasionally applies *Pullman* abstention to dispose of such cases, notwithstanding the doctrinal deficiency of this practice. Reviewing the applicability of *Pullman*'s "uncertain state law" criterion to the facts of *Sinclair Oil Corp. v. Cty. of Santa Barbara*, 96 F.3d 401 (9th Cir. 1996), for example, the court acknowledged that "the conventional inverse condemnation claim advanced by Sinclair does not appear to be particularly extraordinary or unique, and Sinclair does not raise a novel claim of statutory interpretation." *Id.* at 409–10. With a nod to *Pearl Investment*, the *Sinclair* court added, "[w]e recognize that we cannot appropriately direct the district court to refrain from exercising its jurisdiction over this litigation solely because the suit involves an inverse condemnation action." *Id.* at 410. (citing *Pearl Investment*, 774 F.2d at 1465 n.3). But then it did exactly that and upheld the invocation of *Pullman* abstention because the restrictive land-use plan Sinclair challenged as a Fifth Amendment taking "has not yet been challenged in the state courts." *Id.* at 410.

<sup>190</sup> CAL. CONST. art. I, § 19.

since the outcome of that determination would be, by definition, uncertain.<sup>191</sup>

This reasoning, as one observer pointed out, “would support *Pullman* abstention in all takings cases brought in federal court.”<sup>192</sup> And that is precisely how the Ninth Circuit applied the doctrine, until *Williamson County* provided a new and even broader tool to achieve the same result.<sup>193</sup>

## 2. The Fourth Circuit Developed a Policy of Dismissing Takings Cases Under *Burford* Abstention

The Fourth Circuit, like the Ninth, evinced a “strong judicial preference” to abstain in land use cases prior to *Williamson County*.<sup>194</sup> The approaches taken in the two circuits, however, conflicted in important respects. In what may be the earliest case anticipating (but rejecting) the rule of *Williamson County*, a defendant public service corporation argued in 1970 that federal inverse condemnation proceedings should be dismissed because the plaintiff “should be required to seek a remedy in the state courts under Virginia’s constitutional prohibition against taking property for a public use without just compensation.”<sup>195</sup> The Fourth Circuit summarily rejected this plea, noting without further discussion that a party alleging a Fifth Amendment taking “is not required to exhaust state judicial remedies.”<sup>196</sup>

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<sup>191</sup>*Newport Invs., Inc. v. City of Laguna Beach*, 564 F.2d 893, 894 (9th Cir. 1977); *see also* *Sederquist v. City of Tiburon*, 590 F.2d 278, 282 (9th Cir. 1978) (“[A] state court might avoid the federal constitutional issues by deciding that an illegal taking under the California Constitution has occurred.”).

<sup>192</sup>*Land Use Regulation, the Federal Courts, and the Abstention Doctrine*, *supra* note 162, at 1143 n.55.

<sup>193</sup>The point of the Ninth Circuit’s abstention doctrine was nowhere spelled out more clearly than in *C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 380 (9th Cir. 1983) (“Were we to vacate the abstention order and remand for proceedings on the merits, the district court would need to decide the difficult questions of whether a taking had occurred and what constitutional remedy or remedies are required.”). In other words, the court would be required to exercise its Article III jurisdiction in the same manner as any other court, adjudicating any other constitutional claim.

<sup>194</sup>*Blaesser*, *supra* note 163, at 100. “Between 1972 and 1988, the courts in the Fourth Circuit ordered abstention in 60 percent of all land use cases, and in 40 percent of land use cases brought under section 1983.” *Id.* at 101–02.

<sup>195</sup>*Ballard Fish & Oyster Co. v. Glaser Constr. Co.*, 424 F.2d 473, 474–75 (4th Cir. 1970).

<sup>196</sup>*Id.* at 475.

Considering the question in more detail five years later, the Maryland District Court expressly rejected what would come to be the Ninth Circuit's doctrine.<sup>197</sup> Noting that "most state constitutions have a number of provisions . . . which are patterned on federal constitutional rights,"<sup>198</sup> the court refused to order *Pullman* abstention in a takings case simply because the state constitution's ban on uncompensated takings was a mirror image of the Fifth Amendment's Takings Clause.<sup>199</sup> In a warning that was destined to be forgotten, the court observed, "[a]bstention must rest on sound jurisprudential underpinnings; it must not be a label for a visceral aversion to our Article III obligation to adjudicate."<sup>200</sup> Nonetheless, this "visceral aversion" to adjudicate takings claims eventually became as much a hallmark of Fourth Circuit doctrine as it was in the Ninth Circuit, albeit under a different rationale.<sup>201</sup>

In *Caleb Stowe Associates, Ltd. v. County of Albemarle, Va.*, a panel of the Fourth Circuit invoked abstention *sua sponte* in an appeal of a takings case brought subject to diversity jurisdiction that had been fully litigated in the trial court.<sup>202</sup> Quoting its own holding in a previous land-use case that did not involve a takings claim, the appellate court declined to exercise its Article III jurisdiction because:

The courts of Virginia have extensive familiarity and experience with such matters, and we believe that they should have the initial opportunity to pass upon them. A state adjudication may well avoid the necessity of a decision on the federal constitutional question[s] presented as well as avoid needless friction in federal-state relations over the administration of purely state affairs.<sup>203</sup>

Abstention was ordered pursuant to *Louisiana Power & Light Co. v. City of Thibodaux*, a case in which a city had condemned property under a

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<sup>197</sup> *Donohoe Constr. Co. v. Md.-Nat'l Capital Park & Planning Comm'n*, 398 F. Supp. 21, 25 (D. Md. 1975).

<sup>198</sup> *Id.* at 25.

<sup>199</sup> *See id.* at 26.

<sup>200</sup> *Id.* at 30.

<sup>201</sup> *See generally, e.g., Pomponio v. Fauquier Cty. Bd. of Supervisors*, 21 F.3d 1319 (4th Cir. 1994).

<sup>202</sup> 724 F.2d 1079, 1080 (4th Cir. 1984).

<sup>203</sup> *Id.* (quoting *Fralin & Waldron, Inc. v. City of Martinsville*, 493 F.2d 481, 482–83 (4th Cir. 1974)).

state eminent domain statute.<sup>204</sup> There, the property owner argued that the statute did not delegate condemnation authority to the city, and this question had never been addressed by the state's highest court.<sup>205</sup> The Supreme Court affirmed the district court's decision to abstain in *Thibodaux*, finding it appropriate for the federal court "to ascertain the meaning of a disputed state statute from the only tribunal empowered to speak definitively—the courts of the State under whose statute eminent domain is sought to be exercised."<sup>206</sup>

*Thibodaux* abstention has been restricted quite narrowly to diversity cases turning on the interpretation of uncertain or ambiguous state laws dealing with issues "intimately involved with [the States'] sovereign prerogative."<sup>207</sup> It would therefore seldom be of direct relevance to regulatory takings claims.<sup>208</sup> Partly because of this limitation, shortly after its application of *Thibodaux* in *Caleb Stowe Associates*, the Fourth Circuit began routinely applying *Burford* abstention in all takings and other land-use cases brought under section 1983.<sup>209</sup>

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<sup>204</sup> *Caleb Stowe Assoc.*, 724 F.2d at 1080; *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 25 (1959).

<sup>205</sup> *Thibodaux*, 360 U.S. at 30; *City of Thibodaux v. La. Power & Light Co.*, 153 F.Supp. 515, 516–17 (E.D. La. 1957), *rev'd*, 255 F.2d 774 (5th Cir.1958), *rev'd*, 360 U.S. 25 (1959).

<sup>206</sup> *Thibodaux*, 360 U.S. at 29, 30–31.

<sup>207</sup> *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 717 (1996) (quoting *Thibodaux*, 360 U.S. at 28). In *Cty. of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 185 (1959), decided on the same day as *Thibodaux*, the Court found that abstention was improperly invoked in a challenge to the City of Pittsburgh's authority to take property by eminent domain and subsequently rent it for use by private businesses. The Court reasoned that unlike the never-construed statute in *Thibodaux*, the measure authorizing Pittsburgh's use of eminent domain was "clear and certain;" the only issue in the case was whether the city abused that power by taking the plaintiff's property for private use. *Id.* at 196. Since resolution of the case would have no broader implications for the city's authority generally, abstention was inappropriate. *Id.* at 185.

<sup>208</sup> Fifth Amendment takings claims typically arise from the application of local land-use regulations, implicating state law only indirectly or not at all. *See generally, e.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013) (district's denial of development permit challenged as a taking); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (conditions to approval of a city building permit challenged as a taking); *First English Evangelical Lutheran Church of Glendale v. Cty. of L.A.*, 482 U.S. 304 (county building prohibition challenged as a taking); *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (denial of county development permits challenged as a taking); *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104 (denial of city building permit challenged as a taking).

<sup>209</sup> *See Pomponio v. Fauquier Cty. Bd. of Supervisors*, 21 F.3d 1319, 1327 (4th Cir. 1994) ("Other than the initial variation in our decisions generated by the application of *Thibodaux* in *Fralin & Waldron*, we have applied *Burford* abstention to land use and zoning cases.").

*Burford* abstention rests on the policy objective of allowing state courts to resolve important state matters without undue interference from the federal judiciary.<sup>210</sup> Unlike *Pullman* or *Thibodaux*, in which federal courts postpone review in the hope that the state proceedings will void the need for a federal ruling,<sup>211</sup> *Burford* counsels that, when specific conditions are satisfied, federal courts should dismiss a case entirely in favor of state court adjudication.<sup>212</sup> The doctrine holds that where a lawsuit implicates complex state administrative procedures that govern an important state interest, and where regulation of that interest encompasses a need for judicial uniformity, federal courts should decline jurisdiction.<sup>213</sup>

In the titular case, *Burford v. Sun Oil Co.*, a drilling company sought an injunction in federal court challenging, as a due process violation, the Texas Railroad Commission's grant of a permit to a competitor to drill four new oil wells.<sup>214</sup> The Supreme Court held that the district court should have abstained from hearing the case because of the importance of oil to the Texas economy and because of the complex regulatory scheme that the state had evolved to allocate drilling rights, including the concentration of jurisdiction to hear legal challenges in the courts of a single county.<sup>215</sup> The Court found that the nature of oil extraction made it essential that rights relating to operators in the same field be allocated uniformly.<sup>216</sup> Disrupting that uniformity by allowing federal courts to issue injunctions that might conflict with Commission orders and state court rulings would undermine Texas's particularized scheme and disrupt an industry essential to the state's economy.<sup>217</sup>

It is not obvious how the policy rationale for *Burford* abstention could apply to a typical regulatory takings case. As a threshold matter, because it is grounded in a concern to avoid disrupting uniform, complex state

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<sup>210</sup> *Burford v. Sun Oil Co.*, 319 U.S. 315, 332, 334 (1943).

<sup>211</sup> See *Thibodaux*, 360 U.S. at 30–31; *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941).

<sup>212</sup> See *Burford*, 319 U.S. at 334.

<sup>213</sup> *Id.* at 315, 320, 325, 333–34; see CHEMERINSKY, *supra* note 14, at 802–03; YACKLE, *supra* note 14, at 510, 512 (“Abstention is warranted if the exercise of federal jurisdiction will seriously interfere with coordinated state regulatory schemes in which administrative agencies and state courts function as partners to bring technical expertise to bear on peculiarly complex and important local matters—involving at least some questions of state regulatory law.”).

<sup>214</sup> 319 U.S. at 316–17.

<sup>215</sup> *Id.* at 319–20.

<sup>216</sup> *Id.* at 319.

<sup>217</sup> *Id.* at 325, 333–34.



regulatory schemes, *Burford* “has generally been limited to state-level regulatory programs.”<sup>218</sup> Yet most takings defendants are local governmental entities, not statewide agencies. As one analyst has noted, courts that abstained from hearing takings claims under *Burford* did so “without questioning whether the policy against interference with state administrative programs should apply with equal force to municipalities.”<sup>219</sup>

Moreover, in *Burford*, “it is important to note that the policy in question was of such great importance to the state that a single court of review was established to ensure consistent policy.”<sup>220</sup> Specialized state courts to ensure uniformity of land-use decisions are almost unknown in the United States.<sup>221</sup> The Fourth Circuit, however, simply excised this element of the doctrine “[a]long the way,” in its progressive broadening of *Burford*’s applicability to virtually all land-use disputes.<sup>222</sup>

By the mid-1980s, the Fourth Circuit had developed a sort of hybrid *Pullman-Burford* abstention for takings claims, requiring no uncertainty in state law or any special need for uniformity, calling for the outright dismissal of federal takings claims primarily because land-use policies were deemed to be “a particularly sensitive local matter.”<sup>223</sup> Describing such litigation as a somewhat devious attempt by property owners to “disguise

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<sup>218</sup> *Land Use Regulation, the Federal Courts, and the Abstention Doctrine*, *supra* note 162, at 1148 (footnote omitted).

<sup>219</sup> *Id.* at 1143. The author goes on to argue: “[A]bstention is more appropriate in cases involving state rather than purely local land use policies. A lesser degree of deference toward local policies is appropriate because local governments are not restrained by the plurality of interests that compete at the state level and can more easily be manipulated to further narrow, parochial interests.” *Id.* at 1151–52 (footnotes omitted).

<sup>220</sup> Harris, *supra* note 162, at 9.

<sup>221</sup> See *Land Use Regulation, the Federal Courts, and the Abstention Doctrine*, *supra* note 162, at 1148 (“In contrast to the regulatory scheme challenged in *Burford*, state land use programs generally do not provide for review of regulatory decisions by a single court or set of courts.”). The only exception the authors are aware of is the State of Oregon’s Land Use Board of Appeals, which has exclusive jurisdiction to review all land use cases where the government is a party. See Mary J. Deits & Martin B. Vidgoff, *There’s Something about LUBA (Land Use Board of Appeals)*, 36 WILLAMETTE L. REV. 431, 431–33, 435 (2000). Although Massachusetts has a dedicated Land Court Department within its trial court, it enjoys exclusive jurisdiction over only limited matters not including takings cases. MASS. GEN. LAWS ANN. ch. 185, § 1 (West 2006).

<sup>222</sup> *Pomponio v. Fauquier Cty. Bd. of Supervisors*, 21 F.3d 1319, 1327 (4th Cir. 1994); *Browning-Ferris, Inc. v. Balt. Cty., Md.*, 774 F.2d 77, 80 (4th Cir. 1985) (“We . . . find that a final appeal to a central administrative court with special expertise and jurisdiction to decide only certain kinds of cases is not an absolute prerequisite for the application of *Burford* abstention.”).

<sup>223</sup> Blaesser, *supra* note 163, at 101.

the issues as federal claims,”<sup>224</sup> the Circuit justified its routine invocation of abstention in these cases by declaring, “[w]e can conceive of few matters of public concern more substantial than zoning and land use laws,” a statement that is difficult to accept at face value.<sup>225</sup>

*C. Although the Supreme Court Never Resolved These Conflicts, Subsequent Decisions Eventually Foreclosed Dismissal of Takings Cases on Abstention Grounds*

Conventional wisdom has it that a conflict among the Circuits is a major determinant in granting certiorari review, and there has seldom been a more stark conflict than existed on the applicability of abstention to Fifth Amendment takings cases.<sup>226</sup> The Ninth Circuit was adamant in rejecting dismissal of these cases under *Burford*, primarily because most states do not consider uniformity in land-use and zoning matters sufficiently important to channel disputes into a specialized court or system of courts.<sup>227</sup> Conversely, the Fourth Circuit simply ignored that requirement for *Burford* abstention, which it systematically applied in takings cases, in preference to retaining

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<sup>224</sup> *Pomponio*, 21 F.3d at 1327.

<sup>225</sup> *Id.* Throughout the time it was applying *Burford* abstention to avoid adjudicating takings cases, the Fourth Circuit routinely heard constitutional claims against local school districts. *See Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 343 (4th Cir. 2001) (applying Equal Protection Clause to local school district’s desegregation plan). Taken literally, the quoted passage from *Pomponio* implies that the circuit chose to exercise its jurisdiction over these cases, rather than abstaining, because it considered the operation and racial composition of local schools to be a matter of *less* public concern than the impact of zoning laws.

<sup>226</sup> *See* GRESSMAN, *supra* note 148, at 242 (“One of the primary purposes of the certiorari jurisdiction is to bring about uniformity of decisions . . . among the federal courts of appeals.”).

<sup>227</sup> *See, e.g., Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092, 1096 (9th Cir. 1976) (holding, on facts similar to those of *Williamson County*, that dismissal pursuant to *Burford* abstention would be inappropriate partly because “California has not sought to concentrate challenges to the actions of any of the agencies involved here in a particular court or set of courts.”); *Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838, 839, 841 (9th Cir. 1979) (reversing dismissal under *Burford* on a claim that plaintiff’s land had been downzoned to public use); *Isthmus Landowners Ass’n v. California*, 601 F.2d 1087, 1090 (9th Cir. 1979) (reversing dismissal under *Burford* in part because “California has not sought to concentrate challenges to the actions of the Coastal Zone Conservation Commission in a particular court.”); *C-Y Dev. Co. v. City of Redlands*, 703 F.2d 375, 381 (9th Cir. 1983) (holding dismissal under *Burford* to be inappropriate, citing to *Isthmus Landowners Association*, *Santa Fe Land Improvement*, and *Rancho Palos Verdes*).

jurisdiction under *Pullman*, as advocated by the Ninth Circuit.<sup>228</sup> The Supreme Court never granted certiorari in any of the regulatory takings cases with which the circuit courts of appeals were creating a crazy-quilt pattern of conflicting abstention rules.<sup>229</sup> Indeed, nothing in the record of the Court's deliberations in *Williamson County* suggests that anyone connected to the proceedings was even aware of these cases, or their relevance to the issue the Solicitor General's brief had injected into takings law.<sup>230</sup>

When compared to any of the Court's express abstention doctrines, *Williamson County* greatly relaxed the requirements for declining to exercise Article III jurisdiction. Like *Burford*, *Williamson County* allows federal courts to dismiss constitutional claims outright, rather than retaining jurisdiction pending resolution of state-law issues. But *Williamson County* imposes no conditions regarding the need for complex state administrative procedures governing an important state interest, the provision of specialized state courts of review, or even a generalized need for judicial uniformity, as *Burford* requires. Neither does *Williamson County* require any uncertainty in the relevant state law, which is the minimum requirement for abstaining under *Pullman*. Rather, in straightforward disregard of the "unflagging obligation" of federal courts to exercise the jurisdiction mandated to them by Congress,<sup>231</sup> *Williamson County* provides that federal judges may waive jurisdiction merely by virtue of the fact that a plaintiff brings a case arising under the Takings Clause of the Fifth Amendment.

Ironically, only four years after *Williamson County* was decided, the Supreme Court began to tighten its standards for diverting federal claims to state court under its express abstention doctrines. In *New Orleans Public Service, Inc. v. Council of the City of New Orleans (NOPSI)*, a power company sought to increase its electricity rates to cover the costs of constructing a nuclear reactor.<sup>232</sup> The local ratemaking agency denied the application, whereupon the company sued in federal court, arguing that the agency's order was preempted by a previous determination by the Federal

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<sup>228</sup> See *Pomponio*, 21 F.3d at 1328 ("Dismissal is the usual rule in this circuit."); Meredith v. Talbot Cty., Md., 828 F.2d 228, 232 (4th Cir. 1987).

<sup>229</sup> See generally, e.g., *Pomponio*, 21 F.3d 1319; *Belk*, 269 F.3d 305.

<sup>230</sup> See, e.g., Justice Blackmun's Papers; Brief for the United States, *supra* note 37. See generally *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

<sup>231</sup> *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

<sup>232</sup> 491 U.S. 350, 353–55 (1989).

Energy Regulatory Commission.<sup>233</sup> The Fifth Circuit affirmed the district court's dismissal on abstention grounds, but the Supreme Court reversed.<sup>234</sup> Reiterating that federal courts "lack the authority to abstain from the exercise of jurisdiction" that has been conferred upon them by Congress,<sup>235</sup> the Court emphasized that *Burford* abstention applies only when difficult questions of state law must be resolved, complex state administrative procedures are at issue, and there is a definitive need for uniformity of regulation.<sup>236</sup> "While *Burford* is concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a potential for conflict with state regulatory law or policy."<sup>237</sup>

While *NOPSI* called into question the appropriateness of invoking *Burford* in most cases raising Fifth Amendment takings claims,<sup>238</sup> that practice was virtually foreclosed by *Quackenbush v. Allstate Insurance Co.*<sup>239</sup> *Quackenbush* involved an action by the California Insurance Commissioner to recover assets of a defunct insurance company, under various tort and contract theories.<sup>240</sup> The case was removed to federal district court, which invoked *Burford* as grounds for remanding the matter back to state court.<sup>241</sup> The Supreme Court, noting that its abstention doctrines derive from "the discretion historically enjoyed by courts of equity," held that remanding on abstention grounds was inappropriate because the lawsuit sought damages, not equitable or discretionary relief.<sup>242</sup> Although no regulatory takings claim was involved in *Quackenbush*, the accepted remedy for a violation of the Takings Clause is normally damages, not an injunction or other kinds of discretionary relief.<sup>243</sup> Thus

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<sup>233</sup> *Id.*; see also YACKLE, *supra* note 14, at 511.

<sup>234</sup> *New Orleans Pub. Serv., Inc.*, 491 U.S. at 350, 373.

<sup>235</sup> *Id.* at 358.

<sup>236</sup> *Id.* at 361; see also YACKLE, *supra* note 14, at 511 (noting that "the Court made it clear in *NOPSI* that *Burford* does *not* require federal district courts to dismiss routine cases in which plaintiffs mount federal attacks on orders issued by state regulatory agencies") (emphasis in original); CHEMERINSKY, *supra* note 14, at 805.

<sup>237</sup> *New Orleans Pub. Serv., Inc.*, 491 U.S. at 362 (internal citations and quotations omitted).

<sup>238</sup> See *id.* at 361–62.

<sup>239</sup> 517 U.S. 706, 731 (1996).

<sup>240</sup> *Id.* at 709.

<sup>241</sup> *Id.* at 709–10.

<sup>242</sup> *Id.* at 727–28, 731.

<sup>243</sup> See *First English Evangelical Lutheran Church v. Cty. of L.A.*, 482 U.S. 304, 314, 319 (1987); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) ("Equitable relief is not

*Quackenbush* established that dismissal (or remanding to state court) under *Burford* is never appropriate in a takings case seeking just compensation.<sup>244</sup>

*NOPSI* apparently had no effect on the Fourth Circuit's enthusiasm for dismissing federal takings claims in favor of state resolution. Indeed, in a 1994 decision, that Circuit stated that *NOPSI* had actually *reinforced* its belief in the appropriateness of waiving Article III jurisdiction in such cases.<sup>245</sup> Ignoring the fact that most takings claims neither raise state-law issues nor challenge the application of a state-wide regulatory scheme, and the states involved have evidenced little or no interest in establishing uniformity in the application of local zoning and planning codes, the Fourth Circuit continued to rely on *Burford* because regulatory takings cases supposedly comprise "a classic example of situations in which the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'"<sup>246</sup> *Quackenbush* finally put an end to the Circuit's routine dismissal of federal takings claims under *Burford*.<sup>247</sup> At that point, however, Fourth Circuit courts like the courts of other circuits began turning to *Williamson County* to accomplish the same ends that the Supreme Court prevented them from achieving with *Burford*.<sup>248</sup>

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available to enjoin an alleged taking of private property for public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking.") (footnote omitted).

<sup>244</sup> *Quackenbush* did not foreclose a stay of proceedings in an action for damages to allow a state claim to proceed, pursuant to *Pullman, Thibodaux*, or other abstention doctrines that do not require termination of the federal-court action. 517 U.S. at 731.

<sup>245</sup> See *Pomponio v. Fauquier Cty. Bd. of Supervisors*, 21 F.3d 1319, 1327 (4th Cir. 1994).

<sup>246</sup> *Id.* (quoting *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 361 (1989)).

<sup>247</sup> See *Front Royal & Warren Cty. Indust. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 282 (4th Cir. 1998) (noting that *Quackenbush* "appears to have implicitly overruled" the Circuit's doctrine on dismissing takings claims pursuant to *Burford*).

<sup>248</sup> There is no record of the Fourth Circuit dismissing a regulatory takings claim as unripe under *Williamson County*'s second prong prior to *Quackenbush*. Since that decision, however, *Williamson County* has become the Circuit's preferred means of disposing of such claims. See *Greenspring Racquet Club, Inc. v. Balt. Cty.*, Nos. 99-2444, 00-1012, 2000 WL 1624496, at \*3-4 (4th Cir. Oct. 31, 2000); *Henry v. Jefferson Cty. Planning Comm'n*, 34 F. App'x 92, 95-96 (4th Cir. 2002); *Shooting Point, L.L.C. v. Cumming*, 238 F. Supp. 2d 729, 740 (E.D. Va. 2002), *aff'd*, 368 F.3d 379 (4th Cir. 2004); *Reeves v. St. Mary's Cty. Comm'rs*, 268 F. Supp. 2d 576, 581-82 (D. Md. 2003), *aff'd*, 127 F. App'x 682 (4th Cir. 2005); *Fourth Quarter Props. IV, Inc. v. City of Concord*, 127 F. App'x 648, 651-54 (4th Cir. 2005).

V. STANDARDLESS AND DISCRETIONARY, *WILLIAMSON COUNTY*'S ACCIDENTAL ABSTENTION DOCTRINE IS INCOMPATIBLE WITH THE FEDERAL JUDICIARY'S "UNFLAGGING OBLIGATION" TO EXERCISE ITS ARTICLE III JURISDICTION

Since 1996, when *Quackenbush* foreclosed dismissing federal takings claims under *Burford* abstention, federal courts have routinely accomplished the same goal by invoking *Williamson County*'s state procedures rule.<sup>249</sup> Indeed, while the Supreme Court has progressively restricted the applicability of express abstention doctrines like *Burford* and *Pullman*,<sup>250</sup> *Williamson County* provides unconditional latitude for federal courts to decline to exercise their jurisdiction in takings cases, solely at their discretion.<sup>251</sup> There could hardly be a sharper conflict with the supposed "unflagging obligation" of federal courts to exercise the jurisdiction assigned to them by Congress.<sup>252</sup>

As Professor Redish has pointed out, the refusal of federal judges to adjudicate claims falling squarely within their Article III jurisdiction necessarily raises separation of powers issues.<sup>253</sup> Moreover, routinely shunting federal constitutional claims to state court seems impossible to reconcile with the Supreme Court's caveat in *Wisconsin v. Constantineau*, that abstention "should not be ordered merely to await an attempt to vindicate the claim in a state court."<sup>254</sup> Yet no court declining to exercise its jurisdiction pursuant to *Williamson County* has set out a clear statement of its authority to flout the Congressional mandate to adjudicate claims brought under 42 U.S.C. § 1983 (as virtually all Fifth Amendment takings

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<sup>249</sup>Declining to exercise Article III jurisdiction pursuant to *Williamson County* has become so common that filing a section 1983 claim in federal court alleging violation of rights guaranteed under the Fifth Amendment has been found to be frivolous in the First Circuit. *See Efron v. Mora Dev. Corp.*, 675 F.3d 45, 46 (1st Cir. 2012).

<sup>250</sup>*See, e.g., Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 718, 730 (1996); *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 359, 368 (1989); *Harris Cty. Comm'rs Court v. Moore*, 420 U.S. 77, 84 (1975); *Wis. v. Constantineau*, 400 U.S. 433, 439 (1971) (rejecting abstention in a constitutional challenge to a state law authorizing officials to prohibit specific people from purchasing alcohol, noting that abstention would "negate the history of the enlargement of the jurisdiction of the federal district courts.").

<sup>251</sup>*Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-95 (1985).

<sup>252</sup>*Colo. River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976).

<sup>253</sup>*See* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 *YALE L.J.* 71, 71, 76-77 (1984).

<sup>254</sup>400 U.S. at 439.

claims are), or to dismiss a federal constitutional cause of action merely “to allow the State the opportunity to evaluate Plaintiff’s claims and determine if compensation is warranted.”<sup>255</sup>

Indeed, returning to the most perplexing facet of *Williamson County*, no court has yet advanced *any* coherent rationale for the state procedures requirement. The discussion of *Williamson County*’s state procedures rule in *San Remo*, as noted previously, had nothing to do with ripeness—but neither did it set out a rationale for abstention.<sup>256</sup> The endlessly repeated mantra that the Fifth Amendment proscribes “only” takings without just compensation is a statement of the issue the courts are asked to adjudicate in takings cases, not a reason for refusing to adjudicate it.<sup>257</sup> It is suggestive of the conceptual vacuity of the state procedures requirement that, three decades after the doctrine was coined, analysts are still groping for a coherent rationale to support it.

#### A. *Federalism Cannot Provide the Missing Rationale*

Some commentators have suggested that the relegation of federal takings claims to state court may originate in principles of federalism.<sup>258</sup>

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<sup>255</sup> *Colony Cove Props. v. City of Carson*, No. CV-07065-PA-JWJ (C. Dist. Cal. Nov. 24, 2009) (Order Granting Mot. to Dismiss).

<sup>256</sup> See *supra*, text accompanying notes 134–37.

<sup>257</sup> See, e.g., *Downing/Salt Pond Partners, L.P. v. R.I. & Providence Plantations*, 643 F.3d 16, 20 (1st Cir. 2011) (“[T]he Fifth Amendment ‘does not proscribe the taking of property; it proscribes taking without just compensation.’”) (quoting *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985)); *McCarthy v. City of Cleveland*, 626 F.3d 280, 288 (6th Cir. 2010) (same); *Adam Bros. Farming, Inc. v. Cty. of Santa Barbara*, 604 F.3d 1142, 1147 (9th Cir. 2010) (same); *Yaklich v. Grand Cty.*, 278 F. App’x 797, 802 (10th Cir. 2008) (same); *Chainey v. Street*, 523 F.3d 200, 223 (3d Cir. 2008) (same); *Peters v. Vill. of Clifton*, 498 F.3d 727, 731 (7th Cir. 2007) (same); *Henry v. Jefferson Cty. Planning Comm’n*, 34 F. App’x 92, 95 (4th Cir. 2002) (same); *Agripost, Inc. v. Miami-Dade Cty.*, 195 F.3d 1225, 1229, n.8 (11th Cir. 1999) (same); *Southview Assoc., Ltd. v. Bongartz*, 980 F.2d 84, 99 (2d Cir. 1992) (same).

<sup>258</sup> See, e.g., John Echeverria, *Horne v. Department of Agriculture: An Invitation to Reexamine “Ripeness” Doctrine in Takings Litigation*, *supra* note 68, at 10748 (“The just-compensation prong of *Williamson County* ripeness doctrine, properly reconceived, has nothing to do with ripeness and everything to do with federalism.”); Michael R. Salvas, *A Structural Approach to Judicial Takings*, 16 LEWIS & CLARK L. REV. 1381, 1384 n.7 (2012) (suggesting that *Williamson County* and *San Remo* “reflect a concern on the Court for federalism in the takings context, though only in providing procedural protections”); Lindberg, *supra* note 139, at 1853 (“Principles of federalism help explain why it makes sense to delegate the majority of regulatory takings litigation to state courts.”); Kovacs, *supra* note 73, at 47 (“State court enforcement of

Certainly, a concern for the fundamental values of federalism runs through all the Court's express abstention doctrines.<sup>259</sup> Moreover, Justice Stevens's *San Remo* disquisition on the adequacy of state courts as fora for adjudicating federal constitutional claims has been interpreted as an appeal to federalism, although that term does not appear in the majority opinion.<sup>260</sup>

*Williamson County* itself did not mention federalism as a rationale for banning Hamilton Bank's takings claim from federal court.<sup>261</sup> Indeed, in his *San Remo* concurrence, Chief Justice Rehnquist noted that "[t]he Court today makes no claim that any . . . longstanding principle of comity toward state courts in handling federal takings claims existed at the time *Williamson County* was decided, nor that one has since developed."<sup>262</sup> He went on to point out that the majority's invocation of greater state-court familiarity with local land use disputes is not obviously comparable to "the type of historically grounded, federalism-based interests" that justify the relegation of other claims to state court.<sup>263</sup> The lower federal courts have

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federal law is . . . central to the principle of federalism.") (citations omitted). These arguments are related to, but distinct from, the broader thesis that federalism requires the outright gutting of the Takings Clause. See, e.g., Durchslag, *supra* note 142, at 521 (arguing that all land-use regulations that do not physically appropriate property or deprive it of all value "should be judged according to a rational basis standard").

<sup>259</sup> See, e.g., *Burford v. Sun Oil Co.*, 319 U.S. 315, 332–33 (1943) (describing "a doctrine of abstention appropriate to our federal system whereby the federal courts, exercising a wise discretion, restrain their authority because of scrupulous regard for the rightful independence of the state governments and for the smooth working of the federal judiciary . . ." (quoting *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941)) (internal quotations and citations omitted); see also CHEMERINSKY, *supra* note 14, at 784 ("[A]bstention doctrines are defended as the judicial creation of common law rules necessary to serve essential interests, especially the protection of states in the system of federalism."); Ryckman, *supra* note 45, at 380 (noting that abstention doctrines "are the product of equitable and federalism considerations . . .").

<sup>260</sup> See Lindberg, *supra* note 139, at 1853.

<sup>261</sup> Cf. Breemer, *You Can Check Out But You Can Never Leave*, *supra* note 11, at 289 ("Indeed, the fact is that for eighty years prior to *Williamson County*, no court suggested that comity or any other doctrine should cut back on the federal role on adjudicating just compensation claims.").

<sup>262</sup> *San Remo Hotel v. City & Cty. of S.F.*, 545 U.S. 323, 350 (2005) (Rehnquist, C.J., concurring in the judgment).

<sup>263</sup> *Id.* In addition to having only a tenuous connection to federalism, Justice Stevens's appeal to the greater familiarity of state courts with state-law issues seems especially inapt in the context of 42 U.S.C. § 1983. See Blaesser, *supra* note 163, at 74 ("[B]ecause the essence of a section 1983 action is the assertion of a national right, federal judges may have a greater understanding of and sympathy with constitutional goals.") (footnote omitted).



been similarly reticent to tie *Williamson County*'s state procedures requirement to a concern for federalism.<sup>264</sup>

Notwithstanding this lack of support in the case law, however, Stewart Sterk has attempted to ground the state procedures requirement in a version of federalism that defers completely to state-law determinations concerning the nature, scope, and even existence of private property rights.<sup>265</sup> Given such a regime, Sterk worries that “if federal district courts were free to hear takings claims in the first instance, their determinations would not have the benefit of any comparable record with respect to state law.”<sup>266</sup>

This argument has obvious shortcomings. If it were true, for example, that federal courts are inherently unsuited to hear takings cases due to the complexity and variability of state laws that define property,<sup>267</sup> how is the Court of Federal Claims able to adjudicate such claims against the federal government?<sup>268</sup> The nature of the property rights at issue is invariant, regardless of whether those rights are alleged to have been violated by federal, state, or local entities. Yet a review of the cases reveals no instance in which the Court of Federal Claims has expressed any difficulty in comprehending the definition or scope of the relevant property interest, or failed to reach a decision for lack of a more developed “record with respect to state law.”<sup>269</sup>

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<sup>264</sup> See, e.g., Carol M. Rose, *What Federalism Tells Us About Takings Jurisprudence*, 54 UCLA L. REV. 1681, 1681 (2007) (“[T]he courts have paid very little overt attention to federalism concerns of any kind in takings jurisprudence . . .”). But see *Holliday Amusement Co. of Charleston v. S.C.*, 493 F.3d 404, 409 (4th Cir. 2007) (“*San Remo* underscored the principle of federalism at the core of *Williamson*'s prudential ripeness requirements.”).

<sup>265</sup> See Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251, 299–300 (2006). Sterk had developed his theory of “takings federalism” previously, but returned to the subject in the wake of *San Remo Hotel* because he believed it capable of justifying that decision's banishment of federal takings claims from federal court. See Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 205–07 (2004).

<sup>266</sup> Sterk, *The Demise of Federal Takings Litigation*, *supra* note 273, at 293.

<sup>267</sup> See *id.* at 290 (“[V]ariation in the content of background state law makes national uniformity impossible.”).

<sup>268</sup> The Court of Federal Claims has heard regulatory takings claims against the federal government since 1959. See *Bydton v. U.S.*, 175 F. Supp. 891, 891 (Ct. Cl. 1959) (per curiam); see also Joshua I. Schwartz, *Public Contracts Specialization as a Rationale for the Court of Federal Claims*, 71 GEO. WASH. L. REV. 863, 875–76 (2003) (suggesting that the Court of Federal Claims may have developed special expertise in adjudicating takings cases).

<sup>269</sup> Sterk, *The Demise of Federal Takings Litigation*, *supra* note 273, at 293.

At a more fundamental level, the proposition that property rights are entirely a positive creation of state law is vigorously disputed. As Ilya Somin has argued:

[T]he assumption that property rights are merely the creation of state law without any intrinsic meaning in federal constitutional law is a flawed one. In reality, the institution of private property long predates the existence of American states, or indeed modern states of any kind. The text, original meaning, and historical understanding of the Takings Clause are in large part based on natural law notions of property rights that hold that such rights have a moral basis and origin independent of state law. It is true that the Supreme Court has noted that “[p]roperty interests, of course, are not created by the Constitution” but instead “stem from an independent source such as state-law rules.” But it has never held that state authority in this field is unlimited or that state law is the exclusive source of the definition of property rights.<sup>270</sup>

In the final analysis, however, debates over the plausibility of a federalism-based rationale for *Williamson County* are misplaced. Such arguments must, by their very nature, be directed to the propriety of the federal judiciary hearing certain types of claims—disputes over state tax measures, for example,<sup>271</sup> or suits to enjoin state criminal prosecutions.<sup>272</sup> In the case of *Williamson County*, the issue is whether federal courts should defer to their state counterparts in hearing claims that a state or local government has incurred liability for compensation under the Takings Clause. But the Supreme Court has made it clear that *Williamson County*’s state procedures requirement does not apply to takings claims per se, but only to *plaintiffs* who file such claims in federal court in the first instance. Governmental defendants in those same cases enjoy unimpeded access to a federal forum by asserting removal jurisdiction<sup>273</sup> under *City of Chicago v. International College of Surgeons*.<sup>274</sup> This procedural asymmetry has been

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<sup>270</sup> Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEGAL F. 53, 86 (footnotes omitted).

<sup>271</sup> See *Fair Assessment in Real Estate Assessment Ass’n v. McNary*, 454 U.S. 100, 116 (1981) (barring challenges to “validity of state tax systems in federal courts”).

<sup>272</sup> See *Beal v. Mo. Pac. R.R. Corp.*, 312 U.S. 45, 48–49 (1941).

<sup>273</sup> 28 U.S.C. § 1441(a) (2012).

<sup>274</sup> 522 U.S. 156, 174 (1997). In *Int’l College of Surgeons*, the Court upheld the jurisdiction of a federal court to adjudicate an action, including a regulatory takings claim that had been removed from state court by the municipal defendant. *Id.* at 160–61, 174.

frequently noted,<sup>275</sup> but to date no one has advanced a federalism-based rationale that explains why plaintiffs raising regulatory takings claims must be relegated to state court, while defendants may elect to have the identical claims adjudicated in federal court, should they choose to do so. Once the case has been removed at the defendant's behest, a federal judge goes about the routine business of hearing evidence concerning the impact of regulatory restrictions on the property at issue,<sup>276</sup> with no more concern for the "complex factual, technical, and legal questions"<sup>277</sup> of state land-use law than would pertain in hearing a pendant state claim for trespass or a quiet-title action.<sup>278</sup>

In short, the accidental abstention doctrine of *Williamson County* not only violates the stringent conditions the Court has established to justify waiving jurisdiction under its express abstention doctrines, it does not even share the broad, federalism-based rationale upon which all those doctrines rely.

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<sup>275</sup> See, e.g., *Del-Prairie Stock Farm, Inc. v. Cty. of Walworth*, 572 F. Supp. 2d 1031, 1033 (E.D. Wis. 2008) ("*Williamson County* and *City of Chicago* are in direct conflict."); see also Keller, *supra* note 11, at 219 (noting that *Int'l College of Surgeons* confirms that *Williamson County*'s state procedures prong is not a ripeness requirement); Michael M. Berger, *Inverse Condemnation Practice Pointers: The Owner's Viewpoint*, ALI-ABA Course of Study Materials, SP011 ALI-ABA 867, August 2008, at 943-44 (complaining that it could not have been the Supreme Court's intention "to create a dual system of justice whereby plaintiffs in regulatory taking cases must file suit in state court and must not be permitted to darken a federal courthouse door until they have concluded the state court suits, but defendants have free access to federal courts at their whim") (footnote omitted).

<sup>276</sup> Unless, of course, the defendant first moves to dismiss the takings claim as unripe under *Williamson County* because the plaintiff failed to seek compensation in state court. See Breemer, *The Rebirth of Federal Takings Review?*, *supra* note 11, at 333-35 n.79 ("Despite the obvious ironies in this argument . . . [t]he federal reporter is filled with . . . federal decisions dismissing a federal takings claim as unripe under *Williamson County* after removal short-circuited state court litigation and brought the claim to federal court in a premature state."). But see *Sansotta v. Town of Nags Head*, 724 F.3d 533, 544-47 (4th Cir. 2013) (finding that defendant's removal of takings claim from state to federal court waived state-litigation requirement).

<sup>277</sup> *San Remo Hotel v. City & Cty. of S.F.*, 545 U.S. 323, 347 (2005).

<sup>278</sup> Federal judges also seem to be as competent as their state counterparts at hearing evidence to determine the amount of compensation required for a taking, as the removing defendant discovered to its chagrin in *Yamagiwa v. City of Half Moon Bay*, 523 F. Supp. 2d 1036, 1088, 1112 (N.D. Cal. 2007) (awarding \$36,795,000 in compensation for a taking, in a case that originated in California state court but was removed by the city to the Federal District Court for the Northern District of California).

*B. Is More Crow On the Menu? The Supreme Court Seems Poised to Disavow Williamson County*

Until the *San Remo* concurrence, the Supreme Court gave no sign that it realized the severe impact of the state procedures rule, or its lack of justification. Nevertheless, the Court seems to have been gradually distancing itself from the doctrine.

Initially, *Williamson County*'s second prong was taken to be an outright jurisdictional bar to litigating takings claims in federal court.<sup>279</sup> In *Suitum v. Tahoe Regional Planning Agency*, however, the Court for the first time referred to the state procedures requirement as a "prudential ripeness hurdle."<sup>280</sup> This point was reiterated in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, wherein the majority noted that the petitioner's failure to seek just compensation did not bar its Fifth Amendment takings claim because such a requirement was not jurisdictional.<sup>281</sup> In a footnote, the Court deemed the takings claim to be ripe merely because "petitioner has been deprived of property," with no mention of *Williamson County*'s fatuous truism that the Fifth Amendment only proscribes takings without just compensation.<sup>282</sup> Even more remarkably, Justice Kennedy's concurrence characterized the state procedures requirement as dicta, and seemed to blame it for the lack of a well-developed takings doctrine in the federal courts—a problem he foresaw as continuing "[u]ntil *Williamson County* is reconsidered."<sup>283</sup>

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<sup>279</sup> See, e.g., *Austin v. City & Cty. of Honolulu*, 840 F.2d 678, 682 (9th Cir. 1988) ("Because *Williamson County* affects our jurisdiction to hear takings claims, we must apply it retroactively. 'A court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . .' Contrary to Austin's assertion, we have no discretion to extend our jurisdiction to hear his claim.") (emphasis added; citations omitted).

<sup>280</sup> 520 U.S. 725, 733–34 (1997) (*Williamson County* established "two independent prudential hurdles to a regulatory takings claim brought against a state entity in federal court.") (emphasis added). The Court had previously characterized *Williamson County*'s first prong, requiring administrative finality, as a prudential ripeness doctrine in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012–13 (1992). J. David Breemer suggests that "[t]he conversion of the state litigation rule into a prudential concept . . . probably arises from the persistent, general consensus that the requirement is not a well-reasoned or functional ripeness concept." Breemer, *The Rebirth of Federal Takings Review?*, *supra* note 11, at 347–48.

<sup>281</sup> 560 U.S. 707, 728–29 (2010).

<sup>282</sup> *Id.* at 729 n.10.

<sup>283</sup> *Id.* at 742 (Kennedy, J., concurring in part and concurring in the judgment).

Finally, in 2013 in *Horne v. United States Department of Agriculture*,<sup>284</sup> a unanimous Court seemed plainly dismissive of the conceptual underpinnings of *Williamson County*.<sup>285</sup> In *Horne*, the Ninth Circuit had dismissed the petitioner's takings claim against the federal government as "premature," because the claimant had not first sought just compensation in the Court of Federal Claims.<sup>286</sup> The Supreme Court swept aside the government's argument that the takings claim was not ripe for adjudication in federal district court, stating: "[a] 'case' or 'controversy' exists once the government has taken private property without paying for it. Accordingly, *whether an alternative remedy exists does not affect the jurisdiction of the federal court.*"<sup>287</sup> The significance of this language for the state procedures-requirement was surely not lost on the Court, since it appears in a footnote at the end of a paragraph discussing *Williamson County*'s relevance to *Horne*.<sup>288</sup> As has been noted elsewhere, "[a]lthough the Supreme Court's opinion in *Horne* did not explicitly cast doubt on *Williamson County*, its logic certainly did."<sup>289</sup>

Although the Court's implicit repudiation of *Williamson County* in *Stop the Beach* and *Horne* was oblique, it is significant that no Justice took issue with the language in those opinions that seemed to reject the conceptual basis of the state procedures requirement. It may be that these decisions will be seen, in retrospect, as the logical precursors to the ultimate overruling of *Williamson County*.<sup>290</sup>

## VI. CONCLUSION

*Williamson County*—apparently without conscious intention—authorizes federal courts to refrain from exercising their jurisdiction over fully ripe federal constitutional claims whenever individual judges find it "prudent" to do so. Lacking any grounding in the equitable considerations

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<sup>284</sup> See generally 133 S. Ct. 2053 (2013).

<sup>285</sup> *Id.* at 2062.

<sup>286</sup> See *Horne v. U.S. Dep't of Agric.*, 673 F.3d 1071, 1079 (9th Cir. 2012) (citing to *Williamson County*), *rev'd* 133 S. Ct. 2053 (2013).

<sup>287</sup> *Horne*, 133 S. Ct. at 2062 n.6 (emphasis added).

<sup>288</sup> *Id.*

<sup>289</sup> Michael W. McConnell, *Horne and the Normalization of Takings Litigation: A Response to Professor Echeverria*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10749, 10751 (2013).

<sup>290</sup> See Joshua D. Hawley, *supra* note 41, at 266 ("If the *Horne* case represents the first step toward recovering [the pre-*Williamson County* understanding of the Takings Clause], it will be a case worth remembering.").

underlying the Court's express abstention doctrines, and with no principled basis in federalism, the only plausible rationale for the continued existence of *Williamson County's* state procedures rule is the "visceral aversion" of some federal jurists to comply with their constitutional obligation to adjudicate Fifth Amendment takings claims.<sup>291</sup>

While the Court should never lightly overturn its precedents,<sup>292</sup> correcting its mistakes should be a priority. *Williamson County's* hastily crafted, poorly-thought-out state procedures requirement has imposed incalculable losses on landowners and deprived them of rights supposedly guaranteed by both the Constitution and Congress. It is time to eat more crow.

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<sup>291</sup> *Donohoe Constr. Co. v. Md.-Nat'l Capital Park & Planning Comm'n*, 398 F. Supp 21, 30 (D. Md. 1975).

<sup>292</sup> *See* LASH, *supra* note 2, at 1 ("Stability, predictability and public confidence in the presumptive legitimacy of current law all can be undermined by departures from, or formal overruling of, prior precedent.").