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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

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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

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Abstract: On June 20, 2005, the Supreme Court of the United States issued its decision in *San Remo Hotel, L.P. v. City of San Francisco*, holding that property owners with "takings" claims arising under the Fifth Amendment could not obtain federal review after litigating in state court in compliance with the ripeness requirements of *Williamson County Regional Planning Commission v. Hamilton Bank*. The case presented the specific question of whether federal takings claimants could invoke an exception to claim and issue preclusion doctrines under *England v. Louisiana State Board of Medical Examiners* because *Williamson County* forced them to involuntarily litigate in state court. This Article reviews the *San Remo* decision, criticizing the majority's narrow interpretation of *England* and the result in banishing takings claims to state courts. The Article then explores the *Williamson County* ripeness requirement, and condemns the majority's decision for failing to explicitly address *Williamson County*'s flaws. Finally, the Article considers whether *San Remo* closes the federal courthouse door to takings claims seeking noncompensatory relief.

Introduction

On June 20, 2005, the Supreme Court of the United States issued its decision in *San Remo Hotel, L.P. v. City of San Francisco* (*San Remo IV*),

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a case involving the right of private property owners to seek just compensation in federal court for violations of the Takings Clause of the Fifth Amendment.[1] The case seemed to require the Court to return to the ripeness requirements of *Williamson County Regional Planning Commission v. Hamilton Bank* to determine whether they interacted with issue preclusion to strip federal takings claimants of a federal forum for their complaint.[2] In *Williamson County*, the Court held that federal takings claims were unripe until the claimant unsuccessfully sought compensation in state court,[3] indicating that federal review was available upon satisfaction of this ripeness hurdle.[4] Unfortunately, *Williamson County* neglected to explain how compliance with the state procedures requirement would affect traditional jurisdictional doctrines,[5] such as

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[1] 125 S. Ct. 2491, 2495 (2005).

[2] *See* 473 U.S. 172, 186–97 (1985).

[3] *Id.* at 194. There is voluminous commentary on *Williamson County*'s state compensation procedures requirement. *See, e.g.*, Stephen E. Abraham, Williamson County *Fifteen Years Later: When Is a Takings Claim (Ever) Ripe?*, 36 Real Prop. Prob. & Tr. J. 101, 104 (2001); 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); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U. J.L. & Pol'y 99, 102 (2000); 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, 210 (2003); 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); Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. W. L. Rev. 1, 22–24 (1992); Max Kidalov & Richard H. Seamon, *The Missing Pieces of the Debate Over Federal Property Rights Legislation*, 27 Hastings Const. L.Q. 1, 5 (1999) ("The U.S. Supreme Court has developed rules that make it almost impossible for federal courts to remedy violations of the Just Compensation Clause by local land-use agencies."); 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, 2 (1999); Madeline J. Meacham, *The* Williamson *Trap*, 32 Urb. Law. 239, 239 (2000); Thomas E. Roberts, *Procedural Implications of* Williamson County/First English *in Regulatory Takings Litigation: Reservations, Removal, Diversity, Supplemental Jurisdiction, Rooker-Feldman, and Res Judicata*, [2001] 31 Envtl. L. Rep. (Envtl. Law Inst.) 10,353 [hereinafter Roberts, *Procedural Impliciations*]; Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 37 (1995) [hereinafter Roberts, *Ripeness*].

[4] *Williamson County*, 473 U.S. at 194–97; *see* DLX, Inc. v. Kentucky, 381 F.3d 511, 518 n.3 (6th Cir. 2004) (noting that *Williamson County* "clearly contemplates that a takings plaintiff who loses her claim in state court will have a day in federal court").

[5] Wilkinson v. Pitkin County Bd. of County Comm'rs, 142 F.3d 1319, 1323 (10th Cir. 1998) ("*Williamson* . . . does not discuss res judicata and collateral estoppel").

claim and issue preclusion,[6] that generally bar federal courts from hearing previously litigated cases.[7]

Confronted with a ripeness rule that seemed to trigger both federal review under *Williamson County* and application of preclusion under the Full Faith and Credit Act,[8] federal courts struggled to identify the circumstances in which they could hear federal takings claims.[9] Without guidance from the Supreme Court on this issue, many lower courts concluded that the preclusion doctrines prevailed.[10] This produced a counter-response in which many courts held that takings plaintiffs could insulate themselves from claim preclusion by expressly reserving their federal takings claims for federal review under *England*

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[6] *See generally San Remo IV*, 125 S. Ct. 2491 (2005). Under claim preclusion, or "res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Id.* at 2500 n.16 (quoting Allen v. McCurry, 449 U.S. 90, 94 (1980)). Under issue preclusion, or "collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Id.*

[7] *Williamson County*'s state procedures requirement also triggers jurisdictional problems under the *Rooker-Feldman* doctrine, as well as under preclusion doctrine. *See id.* at 2509 (Rehnquist, C.J., concurring). The *Rooker-Feldman* doctrine refers to *Rooker v. Fidelity Trust Co.* and *District of Columbia Court of Appeals v. Feldman*, two cases in which "state-court losers [brought federal actions] complaining of injuries caused by state-court judgments . . . and inviting district court review and rejection of those judgments." Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 125 S. Ct. 1517, 1521–22 (2005). In both cases, the Supreme Court held that the district courts lacked jurisdiction "[b]ecause . . . authority to review a state court's judgment [vests] solely in [the Supreme] Court." *Id.* at 1526. Prior to *Exxon*, some courts had held that takings claims ripened by state court litigation in compliance with *Williamson County* were precluded from federal courts under *Rooker-Feldman*. *See* Henry v. Jefferson County Planning Comm'n, 34 F. App'x 92, 96 n.2 (4th Cir. 2002).

[8] *See San Remo IV*, 125 S. Ct. at 2509 (Rehnquist, C.J., concurring). For a general discussion of the effects of the state procedures requirement and the doctrines of res judicata and collateral estoppel, see Berger, *supra* note 3, at 105–09; Breemer, *supra* note 3, at 240–44, 251–53; Thomas E. Roberts, *Fifth Amendment Takings Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 URB. LAW. 479, 500–01 (1992).

[9] *See DLX, Inc.*, 381 F.3d at 521–22 (discussing "various ways" in which federal courts have wrestled with the *Williamson County* preclusion problem).

[10] *See* Berger, *supra* note 3, at 102 ("When property owners follow *Williamson County* and first sue in state court, they are met in some federal circuits with the argument that the state court litigation, far from *ripening* the federal cause of action, instead has *extinguished* it."); Kidalov & Seamon, *supra* note 3, at 10–11 ("The district-court route [for litigating a takings claim] may prove fruitless . . . because litigation of the taking claim there ordinarily will be barred by the doctrines of issue or claim preclusion . . . ."); Kovaks, *supra* note 3 at 18 ("The combination of *Williamson County* and § 1738 [mandating application of the doctrines of preclusion], therefore, effectively precludes adjudication of federal takings claims in federal court.").

v. Louisiana State Board of Medical Examiners.[11] Nevertheless, in conjunction with issue preclusion principles, *Williamson County* ultimately generated a strange doctrine that lured takings claimants into state courts with the promise of federal review, only to permanently banish them from federal courts at the moment of ripeness.[12]

No case better illustrates the pernicious nature of the state procedures-preclusion problem than *San Remo IV.*[13] San Remo did everything it could to secure federal jurisdiction consistent with *Williamson County*: it unsuccessfully sought just compensation in California state court under a state law takings claim, explicitlv reserved its federal takings claims for federal review under *England*,[14] and did not litigate any federal issues in state court.[15] Nevertheless, the Ninth Circuit Court of Appeals held that San Remo's ripened claims could not be heard in federal court because the claims were barred by issue preclusion.[16]

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[11] 375 U.S. 411, 420–22 (1964); *see DLX, Inc.*, 381 F.3d at 521–22. *See generally infra* notes 50–64 and accompanying text.

[12] *See DLX, Inc.*, 381 F.3d at 519–21.

> The availability of federal courts to hear federal constitutional takings claims has often seemed illusory, because under *Williamson County* takings plaintiffs must first file in state court . . . before filing a federal claim, and because in deciding that federal claim, preclusive effect must be given to that prior state-court action under [the Full Faith and Credit Act] . . . . The barring of the federal courthouse door to takings litigants seems an unanticipated effect of *Williamson County*, and one which is unique to the takings context, as other § 1983 plaintiffs do not have the requirement of filing prior state-court actions . . . .

Id.

For commentary criticizing the preclusive effect of the state procedures requirement, see Berger, *supra* note 3, at 102 ("In *Williamson County* . . . the Court expanded on the doctrine of ripeness in regulatory taking cases transforming the ripeness doctrine from a minor anomaly into a procedural monster."); Kidalov & Seamon, *supra* note 3, at 5 ("The U.S. Supreme Court has developed rules that make it almost impossible for federal courts to remedy violations of the Just Compensation Clause by local land-use agencies."); Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 ZONING & PLAN. L. REP. 17, 27 (1997) (state procedures requirement has "dramatic" and "absurd" application); Roberts, *Ripeness*, *supra* note 3, at 71 (describing *Williamson County*'s state procedures requirement as a "fraud or hoax on landowners.").

[13] 125 S. Ct. 2491 (2005).

[14] *Id.*

[15] San Remo Hotel L.P. v. City of San Francisco (*San Remo II*), 41 P.3d 87, 91 n.1 (Cal. 2002) ("Plaintiffs sought no relief in state court for violation of the Fifth Amendment to the United States Constitution. They explicitly reserved their federal causes of action. As their petition for writ of mandate, as well, rests solely on state law, no federal question has been presented or decided in this case.").

[16] *San Remo III*, 364 F.3d at 1098–99.

Rather than maturing its claims for federal review, San Remo's dutiful compliance with *Williamson County* had precluded any federal claim.[17]

The Supreme Court's grant of certiorari in *San Remo IV* seemed destined to clarify the long-standing controversy over the nature of *Williamson County*'s state procedural ripeness requirement and the ability of takings claimants to reserve federal takings claims under *England*.[18] Ultimately, the majority decision in *San Remo IV* strictly applied preclusion,[19] refused to apply *England* in the takings context,[20] and approvingly concluded that San Remo's federal just compensation claims could *never* be heard in federal court.[21] But the Court failed to pay any meaningful attention to the *Williamson County* requirement that put San Remo in this position.[22]

This Article reviews the preclusion and *Williamson County* issues raised by the Supreme Court's decision, and its consequences for federal takings claimants. Part I reviews the evolution of *Williamson County*'s state procedures rule, specifically exploring the claim and issue preclusion problems it engendered, and the lower courts' attempt to find a compromise solution in *England*. Part II summarizes the *San Remo* litigation, ending with the opinion by the U.S. Supreme Court. Part III critiques the majority's refusal to grant a preclusion exception to takings claimants in San Remo's position. Part IV criticizes the majority's treatment of *Williamson County*'s state procedures requirement. This section argues that *San Remo IV*'s result in permanently thrusting many takings claimants into state court rests entirely on *Williamson County*'s doctrinally unsupportable ripeness rules. It then questions the majority's refusal to address *Williamson County* and the concurrences' objections to the state procedures rule. Finally, Part IV argues that, while *San Remo IV* and *Williamson County* may close the federal courthouse door to many takings claimants, the door remains slightly ajar for some types of claims. The Article concludes that the Court should over-

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[17] *See id.* at 1096.

[18] *See San Remo IV*, 125 S. Ct. 2491, 2504–06 (2005). Prior to taking the *San Remo IV* case, the Supreme Court had been buffeted by a series of certiorari petitions seeking clarification of *Williamson County*. *See, e.g.*, Kottschade v. City of Rochester, 319 F.3d 1038 (8th Cir. 2003), *cert. denied*, 540 U.S. 825 (2003); Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment, 178 F.3d 1295 (6th Cir. 1999), *cert. denied*, 528 U.S. 871 (1999); *Dodd II*, 136 F.3d 1219 (9th Cir. 1998), *cert. denied*, 525 U.S. 923 (1998); Macri v. King County, 126 F.3d 1125 (9th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998).

[19] *See San Remo IV*, 125 S. Ct. at 2504–06.

[20] *Id.* at 2502–04.

[21] *Id.* at 2506–07.

[22] *See infra* text accompanying notes 202–06.

turn *Williamson County*'s state procedures requirement or Congress should loosen the Full Faith and Credit Act to allow all federal takings claims to be heard in federal court.

I. The Setting: Preclusion Doctrine Stifles *Williamson County*'s State Procedures Requirement and Triggers a Backlash in the Federal Courts

In *Williamson County Regional Planning Commission v. Hamilton Bank*, the Supreme Court of the United States agreed to review a single question: whether a landowner denied the right to complete an approved subdivision was entitled to damages for a temporary regulatory taking.[23] This issue was, however, never reached by the Court. Instead, the *Williamson County* opinion was concerned only with the procedural question of whether the takings claim was ripe for review.[24] The Court held that it was not, positing two reasons.[25] First, the Court held the claim was premature because the planning commission had not made a final decision on the bank's development proposal.[26] The Court stressed that no claim was "ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."[27]

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[23] Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 181–82 (1985).

[24] *Id.* at 199–200.

[25] *Id.*

[26] *Id.* at 186.

[27] *Id.* The final decision concerning the ripeness rule arose from the fact that courts cannot determine whether the application of land use regulations to a claimant's property "goes too far" and causes a taking without a concrete idea of what the government has prohibited. *Id.* at 190–91, 199. The Court explained:

> We need not pass upon the merits of petitioners' arguments, for even if viewed as a question of due process, respondent's claim is premature. Viewing a regulation that "goes too far" as an invalid exercise of the police power, rather than as a "taking" for which just compensation must be paid, does not resolve the difficult problem of how to define "too far," that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. As we have noted, resolution of that question depends, in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property.

The Court then articulated and applied a second, more novel ripeness rule.[28] Reasoning from the premise that there is no violation of the Just Compensation Clause until the property owner is denied just compensation, and therefore that a "State's action . . . is not 'complete' until the State fails to provide adequate compensation,"[29] the Court ruled that if 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 state procedure and been denied just compensation.[30] Applying this principle, the Court held that the bank's takings claim was "premature" and "not yet ripe" for federal review until the Bank sought compensation through Tennessee's inverse condemnation procedures.[31]

At this moment, the *San Remo IV* dispute became inevitable. To understand why, it is necessary to trace the evolution of the state procedures requirement in the federal courts, and particularly, the courts' struggle to reconcile the rule's ripeness purpose with the law of claim and issue preclusion.

A. *Claim Preclusion, the State Procedures Requirement, and the Reservation Exception*

The state procedures rule seemed relatively simple in the immediate aftermath of *Williamson County*: federal takings claimants had to raise and lose their just compensation claims in state courts to ripen their federal claims, but once they did, their claims were mature for review in federal court.[32] However, it quickly became apparent that this simple view was inconsistent with—and might not survive—traditional applications of the Full Faith and Credit Act.[33]

The Full Faith and Credit Act requires federal courts to give state court judgments the same effect given to those judgments by the state from which they arise.[34] This means that, "a federal court must give to

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Id. at 199–200. For sharp criticism of the final decision aspect of *Williamson County*, see 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, 328–30 (1998).

[28] *See Williamson County*, 473 U.S. at 194.

[29] *Id.* at 195.

[30] *Id.* at 194–95.

[31] *Id.* at 194–97.

[32] *See id.*

[33] *See* DLX, Inc. v. Kentucky, 381 F.3d 511, 519–20 (6th Cir. 2004).

[34] 28 U.S.C. § 1738 (2000). The Full Faith and Credit Act provides in pertinent part: "Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and

a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered."[35] In short, federal courts are statutorily bound to apply a state's law of issue preclusion and claim preclusion when confronted with cases previously litigated in state courts.[36]

Claim preclusion—known as res judicata—is a doctrine that "bars future litigation of claims that were brought or could have been brought in a prior proceeding that resulted in a final judgment on the merits."[37] Issue preclusion, or collateral estoppel, is different from claim preclusion because it bars litigation of any factual or legal issues resolved in a prior proceeding, without respect to whether the claims from which the issues arise were previously litigated.[38]

On their face, claim and issue preclusion are in tension with *Williamson County*'s ripeness purposes because, when preclusion controls, prior litigation totally bars subsequent litigation; failed state court litigation does not ready takings claims for federal review, but simply leaves them dead. This outcome is in tension with the apparent intent of *Williamson County*.[39] Nevertheless, as the following section illus-

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Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." *Id.*

[35] Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81 (1984).

[36] *See id.* at 80–85.

[37] W.J.F. Realty Corp. v. Town of Southhampton, 220 F. Supp. 2d 140, 146 (E.D.N.Y. 2002).

[38] *See* Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 127 (2d Cir. 2003) ("Collateral estoppel may preclude the relitigation of an issue that was actually litigated in a previous action, even if the claim in which the issue arises in the subsequent action was not brought and could not have been brought in the previous action whose judgment gives rise to the estoppel."); RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.").

[39] *See* Berger, *supra* note 3, at 102 (describing the state procedures rule as applied by lower courts as "bizarre" and not "what the *Williamson County* court intended because it is inherently nonsensical and self-stultifying"); Peter A. Buchsbaum, *Should Land Use Be Different? Reflections on* Williamson County Regional Planning Board v. Hamilton Bank, *in* TAKINGS SIDES ON TAKINGS ISSUES, (Roberts, ed., ABA 2002) 471 ("No issue has bedeviled takings law more than ripeness—that is, when is it suitable to bring such a claim in federal court"); Roberts, *Ripeness, supra* note 3, at 71 ("One understandable reaction to the prong two [state compensation procedures] requirement . . . is that it perpetrates a fraud or hoax on landowners. The courts say: 'Your suit is not ripe until you seek compensation from the state courts,'" but when the landowner does these things, the court says: Ha ha, now it is too late.).

trates, early federal decisions favored a strict application of preclusion doctrine,[40] effectively barring ripe takings claims from federal court.[41]

1. Claim Preclusion Trumps Ripeness

In a 1992 decision, the Eleventh Circuit Court of Appeals aptly summarized and addressed the claim preclusion problem confronting federal takings plaintiffs and the courts following *Williamson County*:

> On the one hand, *Williamson County* requires potential federal court plaintiffs to pursue any available state court remedies that might lead to just compensation . . . . On the other hand, if a litigant brings a takings claim under the relevant state procedure, he runs the risk of being barred from returning to federal court; most state courts recognize res judicata and collateral estoppel doctrines that would require a state court litigant to raise his federal constitutional claims with the state claims, on pain of merger and bar of such federal claims in any attempted future proceeding. Thus, when a would-be federal court litigant ventures to state court to exhaust any potential avenues of obtaining compensation, in order to establish that a taking "without just compensation" has actually occurred as required by *Williamson County*, he finds himself forced to raise the federal law takings claim even though he would prefer to reserve the federal claim for resolution in a section 1983 suit brought in federal court.[42]

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[40] *See* Wilkinson v. Pitkin County Bd. of County Comm'rs, 142 F.3d 1319, 1324 (10th Cir. 1998); Palomar Mobilehome Park Ass'n v. City of San Marcos, 989 F.2d 362, 364–65 (9th Cir. 1993); Peduto v. City of N. Wildwood, 878 F.2d 725, 727–29 (3d Cir. 1989); Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment, 178 F.3d 1295 (6th Cir. 1999) *aff'g* 967 F. Supp. 998, 1003–06 (W.D. Tenn. 1997).

[41] *See* Kovacs, *supra* note 3, at 2 (*Williamson County*'s state procedures rule, "in combination with preclusion doctrines . . . effectively bars plaintiffs from raising federal takings claims in federal court").

[42] Fields v. Sarasota Manatee Airport Auth., 953 F.2d 1299, 1303 (11th Cir. 1992). One leading commentator put it more derisively:

> When property owners follow *Williamson County* and first sue in state court, they are met in some federal circuits with the argument that the state court litigation, far from *ripening* the federal cause of action, instead has *extinguished* it. Under these [federal] courts' reasoning, the state proceedings are *res judicata*, and thus bar the pursuit of the now-ripened federal action. Thus, the very act of ripening a case also ends it.

- Berger, *supra* note 3, at 102.

The ultimate result of enforcing preclusion was that federal takings claimants were relegated, against their will, to the state courts.[43]

Although some courts recognized that rigidly applying preclusion to prevent ripe takings claims from being heard in federal court was "difficult to reconcile [with] the ripeness requirement of *Williamson*,"[44] most courts initially refused to recognize any exceptions to preclusion for ripened takings claims.[45] This trend reached its zenith in the 1998 case of *Wilkinson v. Pitkin County*.[46] In *Wilkinson*, the Tenth Circuit Court of Appeals sympathized with takings claimants trying to sue in federal court after they had engaged in the state court litigation required by *Williamson County*, but nevertheless refused to conclude that compliance with *Williamson County* operated as an exception to preclusion:

> We conclude the *Williamson* ripeness requirement is insufficient to preclude application of res judicata and collateral estoppel principles in this case. As in [another case], the facts set forth in the state court actions are the same facts necessary for a determination of the federal claims. Also, . . . plaintiffs asserted federal claims in the state court proceedings, which were fully adjudicated, (or they could have done so), and the Colorado rules against claim splitting required them to do so.[47]

Thus, *Wilkinson* and similar cases established that—under normal circumstances—federal claims litigated in state court in accordance with *Williamson County* would be barred from federal court by claim preclusion.[48] These early decisions also recognized the tension between this strict application of claim preclusion and the ripeness purposes of *Williamson County*. Plaintiffs and courts looking for a way to reconcile preclusion with *Williamson County*'s apparent intent to allow takings

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[43] Berger, *supra* note 3, at 102.

[44] *Wilkinson*, 142 F.3d at 1325 n.4; *see Fields*, 953 F.2d at 1302–03.

[45] *Peduto*, 878 F.2d at 728–29 (rejecting argument that it was "wrong that the procedure outlined in *Williamson* and New Jersey's [claim preclusion rules] . . . should deny them a federal forum where they may present their federal claims."); *Rainey Bros Constr. Co.*, 967 F. Supp. at 1004 ("the interaction between *Williamson County* and the Full Faith and Credit Act [preclusion rules] requires that a plaintiff landowner assert his federal claims in the state courts.").

[46] *See* 142 F.3d at 1324–25.

[47] *Id.* at 1324–25 (citation omitted).

[48] *See id.*; Palomar Mobilehome Park Ass'n v. City of San Marcos, 989 F.2d 362, 362 (9th Cir. 1993).

claims in federal court soon identified a possible compromise in *England v. Louisiana State Board of Medical Examiners.*[49]

2. The "*England* Reservation" Solution

In *England*, the Supreme Court appeared to establish a method allowing federal litigants with constitutional claims to avoid preclusion when compelled to litigate in state court against their will.[50] The case arose when the State of Louisiana refused to issue would-be chiropractors a license to practice, since they had not fulfilled the educational prerequisites required to practice medicine.[51] The chiropractors sued in federal district court, claiming that the denial of their application violated due process.[52] Deciding that the claims could be resolved under state law depending on whether the state license law properly applied to the chiropractors, the district court invoked the abstention doctrine, directing the plaintiffs to go to state court to definitively resolve the state law issue.[53]

In state court, the chiropractors argued both the state law issues and their federal due process claims.[54] They did so to comply with a prior Supreme Court decision, *Government & Civic Employees Organizing Committee v. Windsor*,[55] which seemed to declare that a state court litigant must raise all claims, including federal constitutional claims.[56] When the state courts held that the statute was properly applied to the chiropractors without violating due process, the chiropractors reasserted their due process claims in federal district court.[57] Applying preclusion principles, the district court held that the claims were barred because the chiropractors had raised them in the prior state court proceedings.[58]

On certiorari, the Supreme Court reversed.[59] The Court expressed concerns that an unwilling state court litigant would be barred from a preferred federal forum, but recognized that some state court litigants might be deemed to "forgo [the] right to return to the District Court"

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[49] 375 U.S. 411 (1964).
[50] *Id.* at 421.
[51] *Id.* at 412–13.
[52] *Id.* at 413.
[53] *Id.*
[54] *Id.* at 413–14.
[55] 353 U.S. 364 (1957).
[56] *England*, 375 U.S. at 420.
[57] *Id.* at 414.
[58] *Id.*
[59] *Id.* at 423.

by "freely and without reservation submit[ting] his federal claims for decision by the state courts."[60] But this basis for preclusion was problematic because *Windsor* was understood to mean that state court litigants *must* raise related constitutional claims.[61] If so, then some state court litigants who did not consent to state adjudication of constitutional claims could nevertheless be deemed to have so consented and to have waived their right to district court review out of an effort to comply with *Windsor*.[62]

To resolve this dilemma, the Court in *England* clarified that *Windsor* did not require a state court litigant to actually put the claims before the court; it meant only that a party "must inform those courts what his federal claims are, so that the state statute may be construed 'in light of' those claims."[63] Therefore, "mere compliance with *Windsor* will not support a conclusion, much less create a presumption, that a litigant has freely and without reservation litigated his federal claims in the state courts and so elected not to return to the District Court."[64]

However, recognizing that there was still room for confusion, the Court further held that an involuntary state court plaintiff could absolutely preserve federal review by making an express, on the record, reservation of any federal claims for resolution in federal court:

> That is, [the plaintiff] may inform the state courts that he is exposing his federal claims there only for the purpose of complying with *Windsor*, and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions. . . . When the reservation has been made . . . his right to return will in all events be preserved.[65]

3. Federal Courts Extend *England* to Takings Claims

Although a few early post-*Williamson County* courts recognized *England* as a potential method for takings claimants to avoid claim preclusion, the Eleventh Circuit Court of Appeal's 1992 decision in *Fields v.*

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[60] *Id.* at 419.

[61] *See id.* at 420.

[62] *England*, 375 U.S. at 414–15.

[63] *Id.* at 420 (citing Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358, 1364–65 (1960)).

[64] *Id.*

[65] *Id.* at 421–22.

Sarasota Manatee Airport Authority was the first appellate decision to thoroughly analyze and accept the technique.[66]

In *Fields*, the question presented was "whether the district court erred in concluding that Florida collateral estoppel and res judicata principles precluded the federal courts from hearing the homeowners' federal law takings claim" after state courts had previously rejected the owner's state law takings claim.[67] In other words, the court intended to "decide whether the interplay of *England* and *Williamson County* creates an exception to the operation of [claim preclusion]."[68] The Eleventh Circuit was not fully convinced that the *England* reservation was applicable in the takings context, because "the *England* process" was technically pertinent to claims that could be filed first in federal court.[69] Nevertheless, the court concluded that *England* could be legitimately extended to claims that were filed initially in state court, provided that the state action was *involuntary*.[70]

Applying this conclusion in light of *Williamson County*'s state litigation rule, the *Fields* court held "that would-be federal court litigants who are forced to pursue state court proceedings in order to satisfy exhaustion requirements imposed by federal law incident to a takings clause claim are 'involuntarily' in the state courts, and therefore qualify for the [*England*-type] exception to generally applicable res judicata principles."[71] Property owners forced by *Williamson County* to file takings claims in state court could avoid claim preclusion in the federal courts by making a "reservation of their federal constitutional claims on the record."[72]

Over the next decade, federal courts got in line with *Fields* in viewing the *England* reservation as an exception to the application of claim

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[66] 953 F.2d 1299, 1309 n.10 (11th Cir. 1992).

[67] *Id.* at 1302. The court had previously decided in *Jennings v. Caddo Parish School Boar*, a non-takings case, that a litigant may reserve federal claims for federal review by expressly reserving the federal claims from the state court litigation, the *Fields* court declared that "[t]he application of *Jennings* to the present dispute provides the central issue in this appeal." *Id.* at 1303.

[68] *Id.* at 1304.

[69] *Id.* at 1305.

[70] *Id.* at 1305–06. For support, the *Fields* court relied on a footnote in *Migra v. Warren City School District Board of Education*—which involved claims originally raised in state court—implying that *England* applied "when a litigant with a federal constitutional claim is involuntarily in state court." *Id.* at 1306 (citing *Migra*, 465 U.S. 75, 85 n.7 (1984)).

[71] *Id.* at 1306.

[72] *Fields*, 953 F.2d at 1309 n.10. Because the plaintiffs in *Fields* had not made a reservation to state court resolution of their federal takings claims when filing in state court, the Eleventh Circuit applied Florida claim preclusion to dismiss their federal takings claim. *Id.*

preclusion to ripened federal takings claims.[73] Although a few decisions concluded that *England* was inapplicable to takings claims because, unlike the claims in *England*, takings claims could not be raised in federal court in the first instance,[74] the vast majority followed *Fields* in concluding that the crux of *England* was whether the state court litigant was involuntarily in state court; if so, the *England* reservation was available.[75] Therefore, takings claimants could reserve their federal claims for federal review—avoiding claim preclusion in federal court—because *Williamson County* gave them no choice but to file in state court.[76]

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[73] *See, e.g.*, *San Remo III*, 364 F.3d 1088, 1094 (9th Cir. 2004) ("The City does not dispute that the plaintiffs' *England* reservation was sufficient to avoid the doctrine of *claim* preclusion."); DLX, Inc. v. Kentucky, 381 F.3d 511, 523 (6th Cir. 2004) (adopting *England* reservation to avoid claim preclusion); Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 130 (2d Cir. 2003) (holding that the "state court's judgment on the state-law claim would not have preclusive effect in the subsequent federal action."); Saboff v. St. John's River Water Mgmt. Dist., 200 F.3d 1356, 1359–60 (11th Cir. 2000) (holding that a reservation applies); Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, 135 F.3d 275, 283 (4th Cir. 1998) (adopting an *England* reservation). In rejecting the argument that *England* was only applicable to state court litigants who were in state court by prior abstention at the federal level, the Sixth Circuit explained the fundamental basis for the court's unwillingness to adopt a crabbed view of *England*: "extension of *England* to unwilling state court litigants is necessary to avoid grave unfairness." *DLX, Inc.*, 381 F.3d at 523 n.9. *But see* 17A Charles Alan Wright et al., Federal Practice & Procedure § 4243 (2d ed. 1988 & Supp. 2005)) ("The *England* procedure strictly speaking is applicable only if a case was begun in federal court . . . .").

[74] Peduto v. City of N. Wildwood, 878 F.2d 725, 729 n.5 (3d Cir. 1989) ("[A]s plaintiffs here invoked the jurisdiction of the state court in the first instance, the application of *England* has no relevance here . . . ."); Fuller Co. v. Ramon I. Gil, Inc., 782 F.2d 306, 312 (1st Cir. 1986) ("In order to make an *England* reservation, a litigant must establish its right to have its federal claims adjudicated in a federal forum by properly invoking the jurisdiction of the federal court in the first instance."); *see also* Ganz v. City of Belvedere, 739 F. Supp. 507, 509 (N.D. Cal. 1990) (explaining that plaintiff could retain federal jurisdiction of section 1983 takings claims by filing first in federal court, securing abstention, raising state claims in state court and making an *England* reservation). For further discussion of this argument, see *DLX, Inc.*, 381 F.3d at 531 (Baldock, J., concurring).

[75] *See supra* notes 67–74.

[76] *Santini*, 342 F.3d at 130.

By 2005, a clear majority of the circuits[77] and many state courts[78] had recognized that federal takings claimants could use the *England* reservation approach. Other circuits expressed a favorable view of escaping claim preclusion under *England*.[79] However, few of these courts paused to consider whether the *England* reservation would effect application of issue preclusion. The courts were soon compelled to confront this question and the possibility that, when limited to claim preclusion, the *England* approach had no practical effect on federal jurisdiction over takings claims.

B. *Issue Preclusion: The Final Barrier Between Federal Takings Claims and Federal Court*

The doctrine of issue preclusion presents an independent barrier to federal review of ripe takings cases because it bars relitigation of any factual or legal issues decided in a prior proceeding, regardless of whether claim preclusion applies.[80] Issue preclusion may bar review of a case that involves issues already considered even though the case raises claims entirely different from those raised in a prior proceeding. Therefore, issue preclusion could bar a federal takings case involving issues raised in a prior, *Williamson County*-mandated state court proceeding, even if the federal takings claims were reserved under *England* and never raised in state court:

> The requirement of *Williamson County* that a property owner must pursue compensation through available state procedures, such as a state-law inverse condemnation action,

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[77] *See DLX, Inc.*, 381 F.3d at 521–22 ("[N]o court has held that where a plaintiff reserves its federal claims in an *England* reservation . . . and does not litigate them in the state courts, that *claim* preclusion will operate to bar a federal-court action.").

[78] Hallco Texas, Inc. v. McMullen County, 94 SW.3d 735, 739 (2002). The court stated that:

> [a] claimant may reserve his federal claims for litigation in federal court by following a three-step procedure: (1) the litigant first files in federal court; (2) the federal court abstains and stays the federal proceedings until the state courts resolve all state-law questions; and (3) the litigant informs the state courts of his intention to return, if necessary, to federal court on his federal constitutional questions after the state-court proceedings are concluded.

- *Id.*

[79] *See* Kottschade v. City of Rochester, 319 F.3d 1038, 1041–42 (8th Cir. 2003) ("The suggestion [that an *England* reservation avoids claim preclusion] has the virtue of logic and is tempting."); Instructional Sys., Inc. v. Computer Curriculum Corp., 35 F.3d 813, 820–23 (3d Cir. 1994).

[80] *See Santini*, 342 F.3d at 127; RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

> before bringing a Fifth Amendment takings claim has created a Catch-22 for takings plaintiffs. Under *Williamson County*, a plaintiff may not bring a Fifth Amendment takings claim without first having unsuccessfully pursued a state-law takings claim. Under traditional notions of collateral estoppel, however, the state court's adverse judgment will often preclude the plaintiff's subsequent Fifth Amendment takings claim.[81]

Thus, as with the claim preclusion controversy, courts had to determine whether issue preclusion would be allowed to trump the intent of *Williamson County*'s state procedures rule and whether *England* was available as an exception.

1. The *Dodd* Paradigm: Issues Litigated in a State Law Action Bar (Almost) All Federal Takings Issues

In *Dodd v. Hood River County* (*Dodd I*), the Ninth Circuit Court of Appeals established that issue preclusion could bar even a ripe federal takings claim that had been properly reserved for federal review during state law takings litigation.[82] The Dodds raised and lost state law takings claims in Oregon state court, expressly reserving their federal takings claim for federal review.[83] The district court dismissed their attempt to reassert the claims in federal court.[84] On appeal, the Ninth Circuit concluded that the *England* reservation protected the Dodds' complaint from claim preclusion.[85] However. the court recognized a potential, additional issue preclusion barrier,[86] remanding the case to the district court for a determination of whether the prior state law takings judgment "was an equivalent determination under the federal taking clause so as to invoke the doctrine of issue preclusion."[87]

When the case returned to the Ninth Circuit, the court more explicitly applied issue preclusion against the Dodds' claims.[88] The court first rejected the argument that the *England* reservation immunized the Dodds' complaint from issue preclusion, holding that the

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[81] *Santini*, 342 F.3d at 127.

[82] *See* Dodd v. Hood River County (*Dodd II*), 136 F.3d 1219, 1230 (9th Cir. 1998); Dodd v. Hood River County (*Dodd I*), 59 F.3d 852, 863 (9th Cir. 1995).

[83] *Dodd I*, 59 F.3d at 856–57.

[84] *Id.* at 857.

[85] *Id.* at 862.

[86] *Id.* at 863.

[87] *Id.*

[88] *Dodd II*, 136 F.3d at 1224–28.

reservation only avoided claim preclusion.[89] Issue preclusion therefore applied and operated to bar the Dodds from litigating any legal or factual aspect of their federal takings claim that had already been considered as part of the state court litigation.[90] However, because Oregon takings law did not include diminished "investment-backed expectations" as a regulatory takings test, the state courts could not have actually decided that issue.[91] On this basis, the court concluded that the Dodds could litigate their investment-backed expectations theory in federal court.[92]

Thus, in 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.[93] 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.[94] This conflict weighed on the federal courts[95] and commentators.[96] In 2003, the Second Circuit Court of Appeals broke ranks.[97]

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[89] *Id.* at 1227. The court elaborated as follows:

> Nor does the Dodds' previous reservation of this federal takings claim under the doctrine of *England* . . . prevent operation of the issue preclusion doctrine. Because the Dodds were effectively able to reserve their claim for federal court, . . . the reservation doctrine does not enable them to avoid preclusion of issues actually litigated . . . .

Id. (citations omitted). Applying issue preclusion, the court barred the portion of the Dodds' federal claim that rested on an alleged denial of all economic use of their property, holding that a sufficiently identical issue was considered and rejected by the Oregon courts. *Id.* at 1225–26.

[90] *See id.* at 1225–28.

[91] *See id.* at 1228–29.

[92] *Id.* at 1228–29. Ending the Dodds' fourteen year odyssey through state and federal courts, the Ninth Circuit resolved the investment-backed expectations in the County's favor. *Id.* at 1230.

[93] For discussion of the extent to which the *Dodd II* approach would allow takings claimants to escape issue preclusion and decisions recognizing a distinction between state and federal law that might bring a claimant within *Dodd II*'s narrow window for avoiding preclusion, see Breemer, *supra* note 3, at 253–57 and accompanying footnotes.

[94] *See* Berger & Kanner, *supra* note 3, at 687.

[95] Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 130 (2d Cir. 2003) ("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."); Wilkinson v. Pitkin County Bd. of County Comm'rs, 142 F.3d 1319, 1325 n.4 (10th Cir. 1998) ("It is difficult to reconcile the ripeness requirement of *Williamson* with the laws of res judicata and collateral estoppel.").

2. *Santini v. Connecticut Hazardous Waste Management Service*: The Second Circuit Rejects *Dodd I*

In *Santini v. Connecticut Hazardous Waste Management Service*, the Second Circuit Court of Appeals rejected *Dodd I*'s approach to the issue preclusion problem.[98] The Connecticut Waste Management Service (the Service) secretly considered Santini's land as a site for a nuclear waste dump.[99] When the Service selected Santini's property as a potential site and made this decision public, Santini sued in Connecticut state courts, alleging that the Service had committed a temporary regulatory taking by destroying his ability to develop, market, and sell previously developable land.[100]

No federal takings claims were litigated in the state proceeding.[101] When the Connecticut Supreme Court rejected Santini's state takings claims, Santini sued in federal district court, this time raising takings claims under the U.S. Constitution.[102] The Service opposed the court's jurisdiction largely on claim and issue preclusion grounds.[103] Santini argued that "the unique procedural posture of post-*Williamson County* takings claims requires . . . exceptions to the preclusion doctrines."[104]

The Second Circuit acknowledged that under an "ordinary" application of issue preclusion, Santini's federal takings claims would be barred due to the actual litigation of state takings issues in state

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[96] *See, e.g.*, Berger & Kanner, *supra* note 3, at 687–90 (decrying application of preclusion to ripe takings claims as "a diabolical trap"); Delaney & Desiderio, *supra* note 3, at 201 (stating that due to preclusion, "the Takings Clause remains a 'poor relation' to other protections in the Bill of Rights"); Kanner, *supra* note 27, at 332–33 (asserting that the intersection of *Williamson County* and preclusion shows "constitutional rights of landowners as not quite deserving of a full measure of judicial protection, on par with other constitutional rights.").

A few isolated commentators found nothing awry in the "*Williamson* Trap." *See* Meacham, *supra* note 3, at 257 ("Until and unless . . . just compensation has been denied because a property owner has been denied a full and fair opportunity to litigate her takings claim in state court, a plaintiff's choice of federal court *can and should* be properly denied . . . .").

[97] *See Santini*, 342 F.3d at 126–30.

[98] *Id.* at 127–28.

[99] *Id.* at 122.

[100] *Id.* at 122–23.

[101] *Id.* at 126–27. Under Connecticut law, the federal claims could not be raised in state court until after the state law claims failed. *Id.*

[102] *Id.* at 124.

[103] *Santini*, 342 F.3d at 126.

[104] *Id.*

court.[105] But the court refused to engage in a rigid application of issue preclusion because:

> 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 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.[106]

Resolving to "part ways with most of our sister circuits,"[107] the *Santini* court held that an *England*-type reservation would insulate ripe takings claims from both claim and issue preclusion.[108] This effort created a direct conflict with *Dodd*, which would reemerge in the case of *San Remo Hotel L.P. v. City of San Francisco*.[109]

II. The Story of the *San Remo Hotel*

A. San Remo IV's *Factual and Procedural History*

At its core, the San Remo Hotel is a tale of a federal takings claimant who litigated for twelve years in state and federal forums in an effort to ripen the claim for a federal court—in accordance with the directions of the Supreme Court of the United States and the Ninth Circuit Court of Appeals—but eventually found out that the directions were nothing but a cruel joke, sending the hotel in the exact opposite direction it wanted to go.[110] Instead of guiding the hotel to federal court, the ripeness directions in *Williamson County Regional Planning Commission v. Hamilton Bank* banished the hotel to state court.[111]

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[105] *Id.* at 126–27. The Second Circuit concluded that claim preclusion was inapplicable "because Santini neither brought, nor could have brought, a Fifth Amendment takings claim in the Connecticut state court action . . . ." *Id.* at 127.

[106] *Id.* at 130.

[107] *Id.* at 128.

[108] *Id.* at 130.

[109] *San Remo IV*, 125 S. Ct. 2491, 2500–07 (2005).

[110] *See San Remo III*, 364 F.3d 1088, 1091–94 (9th Cir. 2004).

[111] *See id.* at 1096.

The case began when the hotel sought to convert low cost residential units to tourist use pursuant to the City's Hotel Conversion Ordinance (HCO).[112] The City agreed to grant a conversion permit, but only if the hotel first paid $567,000.[113] Believing this requirement was "'an out-and-out plan of extortion,'" prohibited by *Nollan v. California Coastal Commission*,[114] the hotel's owners sued the City in federal court, claiming that the fee requirements of the HCO effected an unconstitutional taking of their property, both facially and as-applied.[115] When the initial litigation reached the Ninth Circuit, the court found San Remo's as-applied takings claim not ripe because the hotel had not sought just compensation in California courts as required by *Williamson County*.[116] On the facial claims, the court invoked abstention, staying all federal proceedings until San Remo litigated its state law claims—including a claim that the HCO did not apply to the hotel—in state courts.[117]

The hotel then filed a complaint in state court carefully reserving its federal claims under *England v. Louisiana State Board of Medical Examiners* for later review by the district court.[118] The case appealed to the Supreme Court of California which held that under state law, the heightened scrutiny for exactions evident in *Nollan* and *Dolan v. City of Tigard*[119] did not apply to the monetary exaction imposed on San Remo.[120] Applying a more deferential standard, the court rejected San Remo's state law takings claims.[121] However, the majority, concurring and dissenting justices stressed that San Remo had reserved its federal takings claims for federal review, had not raised such claims in state court, and that no state court had ever addressed those claims.[122]

San Remo then attempted to return to federal court to litigate its unresolved federal takings claims, asserting that the Constitution of

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[112] *Id.* at 1092.

[113] *See San Remo II*, 41 P.3d 87, 95 (Cal. 2002).

[114] 483 U.S. 825, 837 (1987) (quoting J.E.D. Assocs. v. Atkinson, 432 A.2d 12, 14–15 (N.H. 1981)).

[115] *San Remo III*, 364 F.3d at 1096–97. The hotel owner's takings claim relied heavily on *Nollan*. *See id.*

[116] San Remo Hotel v. City of San Francisco (*San Remo I*), 145 F.3d 1095, 1102 (9th Cir. 1998).

[117] *Id.* at 1104–05.

[118] *See* 375 U.S. 411 (1964); *San Remo II*, 41 P.3d at 91.

[119] 512 U.S. 374 (1994).

[120] *See San Remo II*, 41 P.3d at 100–06 (citing *Dolan*, 512 U.S. 374 (1994); *Nollan*, 483 U.S. 825 (1987)).

[121] *Id.* at 106–11.

[122] *Id.* at 91 n.1; *id.* at 118 (Baxter, J., concurring and dissenting); *see id.* at 128 (Brown, J., dissenting).

the United States required a more exacting level of scrutiny than California law.[123] The district court, however, held that the prior state court litigation barred renewed federal litigation under the doctrine of issue preclusion.[124] The Ninth Circuit affirmed, concluding that San Remo's *England* reservation did not protect it from issue preclusion and refusing to follow *Santini* in recognizing a general exception to preclusion for takings claimants forced into state court by *Williamson County*.[125] The U.S. Supreme Court subsequently granted San Remo's petition for certiorari on the following question: "whether 'a Fifth Amendment Takings claim [is] barred by issue preclusion based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal Takings Claim?'"[126]

B. *The Supreme Court Banishes Federal Just Compensation Claims to State Courts*

In an opinion issued on June 20, 2005, the Supreme Court unanimously affirmed the Ninth Circuit Court of Appeal's application of issue preclusion against San Remo's claims, refusing to recognize an exception—under *England* or otherwise—that would allow the claims in federal court after the failed state court litigation.[127] In so doing, the majority neglected to explicitly consider the *Williamson County* rule driving the preclusion problem, even while its opinion appeared to implicitly endorse that requirement.[128] However, four concurring justices roundly criticized *Williamson County* and its effect in relegating compensation claims to state courts, while agreeing that San Remo's compliance with *Williamson County* triggered preclusion and therefore barred its claims.[129]

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[123] *See San Remo III*, 364 F.3d 1088, 1093 (9th Cir. 2004).

[124] *Id.* at 1094.

[125] *Id.* at 1095–96.

[126] *San Remo IV*, 125 S. Ct. 2491, 2495 n.1 (2005) (alteration in original) (quoting Petition for Writ of Certiorari at *i, *San Remo IV*, 125 S. Ct. 2491 (2005) (No. 04-340)).

[127] *Id.* at 2491, 2500–07.

[128] *Id.* at 2506.

[129] *See id.* at 2507–10 (Rehnquist, C.J., concurring).

1. The Majority Opinion Part I: Just Compensation Claimants Cannot Invoke the *England* Reservation

According to the majority, *San Remo IV* presented only the "narrow" question of whether the Court should create an exception to the Full Faith and Credit Act, "in order to provide a federal forum for litigants who seek to advance federal takings claims that are not ripe until the entry of a final state judgment denying just compensation."[130] Addressing *England*, the majority held that a state court plaintiff could invoke the *England* reservation to preserve federal review only when the plaintiff (1) first properly invokes federal jurisdiction over a federal claim, and (2) the "federal court abstains from deciding [the] federal . . . issue to enable the state courts to address an antecedent state-law issue" that "may moot the federal controversy."[131]

The Court explained that the *England* reservation was not meant to give state courts "an opportunity to adjudicate an issue that is functionally identical to the federal question" sought to be reserved.[132] The reservation is available where there exists a constitutional attack on "a state statute that can be avoided if a state court construes the statute in a particular manner."[133] In short, the federal issues must be "distinct" from the state law issues sent to state court.[134]

Based on this understanding, San Remo was theoretically entitled to invoke the *England* reservation only with respect to its facial takings claims.[135] According to the Court, the reservation was possible for the facial claims because those claims were properly filed in federal court and that court had abstained on the claims to allow a state court determination on the issue of the scope of the HCO, which had "the potential of mooting [the] facial challenge" by "overturning the City's original classificiation of the . . . Hotel as a 'residential' property [subject to the HCO]."[136] Nevertheless, the Court held that San Remo had

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[130] *Id.* at 2501 (majority opinion). More particularly, given the argument presented to the Court by plaintiffs, the issue for resolution was whether federal courts could exercise de novo review over federal takings claims "whenever plaintiffs reserve their claims under *England*," during the course of prior state court litigation, or otherwise, "regardless of what issues the state court may have decided or how it may have decided them." *Id.*

[131] *Id.* at 2502.

[132] *San Remo IV*, 125 S. Ct. at 2502.

[133] *Id.* (citing England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 420 (1964)).

[134] *Id.*; *see also id.* at 2506 ("Petitioners did not have the right . . . to seek state review of the same substantive issues they sought to reserve. The purpose of the *England* reservation is not to grant plaintiffs a second bite at the apple in their forum of choice.").

[135] *Id.* at 2503.

[136] *Id.*

effectively waived the reservation for its facial claims by broadening its state law action to include the merits of its facial takings claims.[137] Because San Remo "effectively asked the state court to resolve the same federal [takings] issues they asked it to reserve,"[138] the *England* reservation could not protect the facial claims from preclusion.[139] As for San Remo's as-applied claims, the majority held that the *England* reservation was never available to preserve federal review because those claims were unripe and therefore "never properly before the District Court" in the first place.[140]

2. Part II: Just Compensation Claimants Have No Right to A Federal Forum

Turning from *England*, the majority considered San Remo's more general contention that the Court should recognize a preclusion exception to effectuate *Williamson County*'s intent to permit takings claims in federal court following compliance with the state procedures requirement.[141] The majority rejected this argument as improperly assuming "a right to vindicate . . . federal claims in a federal forum" free from preclusion.[142] The majority scolded: "issues actually decided in valid state-court judgments may well deprive plaintiffs of the 'right' to have their federal claims relitigated in federal court."[143]

As a second reason for rejecting San Remo's request that the Court create a preclusion exception to effectuate the ripeness promises of *Williamson County*, the majority asserted that it had no power to articulate exceptions to the Full Faith and Credit Act.[144] The power resided in Congress: "Even when the plaintiff's resort to state court is involuntary and the federal interest in denying finality is robust, we have held

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[137] *Id.*

[138] *San Remo IV*, 125 S. Ct. at 2503.

[139] *Id.*

[140] *Id.*

[141] *Id.* at 2504.

[142] *Id.*

[143] *Id.* The majority relied heavily on *Allen v. McCurry*, 449 U.S. 90 (1980). *Id.* at 2504–05. The majority read *Allen*'s application of the Full Faith and Credit Act to close off a federal forum even when the would-be federal "plaintiff would have preferred not to litigate in state court, but was required to do so by statute or prudential rules." *Id.* at 2504. In applying this principle against San Remo, the majority dismissed the distinction that, unlike in *Allen*, San Remo had attempted to invoke the federal court's jurisdiction as an initial matter. *Id.* at 2505. The Court found this attempt of no relevant significance for application of *Allen* because San Remo's as-applied claims were not ripe when it sought jurisdiction. *Id.*

[144] *Id.* at 2505.

that Congress '"must 'clearly manifest" its intent to depart from [the Full Faith and Credit Act].'"[145] Finding that "Congress has not expressed any intent to exempt from the full faith and credit statute federal takings claims," the majority concluded it could not, and would not, craft its own exception.[146]

Finally, the majority criticized San Remo's plea for a preclusion exception as overstating "the reach of *Williamson County*."[147] San Remo was wrong in contending that *Williamson County* forced all its federal claims into a state court proceeding that would trigger preclusion; San Remo's facial takings claims were ripe from the start and, therefore, could have been raised directly in federal court.[148] San Remo also erred in suggesting that *Williamson County* might be construed to require prior state law takings proceedings to ripen a federal claim in state court, and so combine with preclusion to bar federal claims from both federal and state court.[149] The majority held that state courts could "simultaneously [hear] a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution."[150]

The majority did recognize that its strict construction of preclusion would mean "a significant number of plaintiffs will necessarily litigate their federal takings claims in state courts."[151] However, the majority considered this result unremarkable and appropriate, because it believed that the "'final decision'" ripeness rule and other developments predating *Williamson County* had minimized the federal courts' role in takings litigation and given state courts more experi-

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[145] *San Remo IV*, 125 S. Ct. at 2505 (quoting Kremer v. Chem. Constr. Corp., 456 U.S. 461, 477 (1982)).

[146] *Id.* The majority specifically stated that, in the absence of a Congressional mandate to the contrary, it would "apply [the] normal assumption that the weighty interest in finality and comity trump the interest in giving losing litigants access to an additional appellate tribunal." *Id.*

[147] *Id.* at 2506.

[148] *Id.*

[149] *Id.*

[150] *Id.* The majority claimed that "[r]eading *Williamson County* to preclude plaintiffs from raising [federal takings] claims in the alternative [in state court] would erroneously interpret our cases as requiring property owners to 'resort to piecemeal litigation or otherwise unfair procedures.'" *Id.* (quoting MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 350 n.7 (1986)). Interestingly, this same principle could support rejection of *Williamson County*, but for some reason the majority did not see fit to address *Williamson County*'s primary effect, its impact on federal litigation, much less conclude that it amounts to an "unfair procedure." *MacDonald*, 477 U.S. at 350 n.7.

[151] *San Remo IV*, 125 S. Ct. at 2506.

ence in that area.[152] The majority opined that "state 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."[153] Finally, the majority justified relegation of takings claims to state courts on the basis of a tax case, *Fair Assessment in Real Estate Ass'n v. McNary*,[154] which bars taxpayers from asserting constitutional challenges against "'the validity of state tax systems in federal courts.'"[155]

In conclusion, the majority scoffed at San Remo's claims as "little more than the concern that it is unfair to give preclusive effect to state-court proceedings that are not chosen, but are instead *required* in order to ripen federal takings claims."[156] Even if unfair, the majority noted that the Court was "not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum."[157]

3. The Concurring Opinion: *Williamson County* Was Wrong

In a concurrence written by the late Chief Justice Rehnquist—and joined by Justices O'Connor, Kennedy and Thomas—four justices agreed that preclusion barred San Remo's claims "[w]hatever the reasons for petitioners' chosen course of litigation in the state courts."[158] But in so doing, the concurrence sharply questioned the doctrinal basis and preclusive impacts of *Williamson County*'s state procedures requirement.[159]

The concurrence complained that "[i]t is not obvious that either constitutional or prudential principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim."[160] The concurrence also questioned *Williamson County*'s reliance on *Ruckelshaus v. Monsanto Co.*[161] and *Parratt v. Taylor*[162] as precedent for the state procedures requirement.[163] The concurrence

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[152] *Id.* (quoting Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985)).

[153] *Id.* at 2507.

[154] 454 U.S. 100 (1981).

[155] *San Remo IV*, 125 S. Ct. at 2507 (quoting *Fair Assessment*, 454 U.S. at 116).

[156] *Id.*

[157] *Id.*

[158] *Id.* (Rehnquist, C.J., concurring).

[159] *Id.* at 2508.

[160] *Id.*

[161] 467 U.S. 986 (1984).

[162] 451 U.S. 527 (1981).

[163] *San Remo IV*, 125 S. Ct. at 2508 n.1 (Rehnquist, C.J., concurring).

additionally recognized that "*Williamson County*'s state-litigation rule has created some real anomalies . . . " in combination with preclusion and the *Rooker-Feldman* doctrine,[164] that prevent ripe claims from being heard in federal court.[165] This led the concurring justices "to think that the justifications for [*Williamson County*'s] state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic."[166] Finally, Chief Justice Rehnquist's concurrence rejected the majority's reliance on the *Fair Assessment* tax case, as there was no "longstanding principle of comity toward state courts" in takings cases that would justify extending *Fair Assessment* to relegate all just compensation claims to state courts.[167]

Believing that experience showed *Williamson County*'s state procedures rule to be "mistaken,"[168] and finding no reason "why federal takings claims in particular should be singled out to be confined to state court in the absence of any asserted justification or congressional directive,"[169] the concurring justices advocated reconsidering the propriety of the state procedures requirement in a future "appropriate case."[170]

III. The Court Should Not Have Singled Out Just Compensation Claimants as Unfit to Invoke *England* or Another Preclusion Exception to Obtain a Federal Forum for Ripe Claims

The most startling aspect of the *San Remo IV* opinion is the majority's conclusion that ripe federal just compensation claims must now be heard exclusively in state courts because such claims can never avoid preclusion.[171] This jurisdictional revolution rests on two dubious conclusions: first, that takings claimants are undeserving of a preclusion exception; and second, that *Williamson County v. Hamilton Bank*'s state procedures requirement should not be disturbed in requiring

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[164] *Id.* at 2508; *see supra* note 7 (defining the *Rooker-Feldman* doctrine).

[165] *San Remo IV*, 125 S. Ct. at 2509 (Rehnquist, C.J., concurring).

[166] *Id.* at 2509–10.

[167] *Id.* at 2508–09.

[168] *Id.* at 2507.

[169] *Id.* at 2509.

[170] *Id.* at 2510. The concurrence concluded that *San Remo IV* was not the appropriate case to consider *Williamson County* because "no court below has addressed the correctness of *Williamson County*, neither party has asked us to reconsider it, and resolving the issue could not benefit petitioners." *Id.*

[171] *See supra* Part II.

just compensation claims to be filed initially in state court.[172] The first conclusion is explicit; the second is implicit.[173] Because the operation of the state procedures requirement is critical to the Supreme Court's opinion, the majority's refusal to directly address that requirement is the great puzzle of *San Remo IV*. However, the Court's thin construction of *England v. Louisiana State Board of Medical Examiners* and its general refusal to create a preclusion exception for takings claimants forced into state court litigation are disturbing in their own right, and worthy of careful consideration.

To usefully explore *San Remo IV*'s construction of preclusion and the role of the *England* reservation, we must be clear about the scope of the Court's preclusion holding. Although the question presented concerned only issue preclusion and *England*'s ability to shield takings claimants from that doctrine,[174] the question the Court answered was whether *England* provided an exception to the application of the Full Faith and Credit Act (the Act),[175] which the *San Remo IV* Court pointedly noted includes both issue *and* claim preclusion.[176] *San Remo IV*'s refusal to recognize an *England* exception to the Act for takings claimants is therefore properly construed as a refusal to recognize an exception to either issue preclusion *or* claim preclusion.[177]

As noted above, the Court construed *England* to be unavailable to claimants complying with *Williamson County* because it considered the following to be necessary conditions for reservation: proper invocation of the federal court's jurisdiction prior to state court litigation and application of abstention,[178] which directs the case to state court to allow that court to decide a state statutory issue that may moot the federal controversy.[179] Through this interpretation, *England* is no help

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[172] *See San Remo IV*, 125 S. Ct. 2491, 2506–07 (2005); *see also id.* at 2508 (Rehnquist, C.J., concurring) (stating that "once a government entity has reached a final decision with respect to a claimant's property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court."); Stardust Mobile Estates LLC v. City of San Buenaventura, 142 F. App'x 300, 301 (9th Cir. 2005) (stating that *San Remo IV* declined to "reconsider" the ripeness requirements of *Williamson County*).

[173] *See San Remo IV*, 125 S. Ct. at 2506–07.

[174] *See* Brief for Petitioner at i, *San Remo IV*, 125 S. Ct. 2491 (No. 04-340).

[175] *San Remo IV*, 125 S. Ct. at 2501.

[176] *Id.* at 2500.

[177] Although the Court does not make this point expressly, it does so by result and by stressing—after making clear that San Remo could not avoid issue preclusion under *England*—that "[f]ederal courts . . . are not free to disregard *28 U.S.C. § 1738* [the Full Faith and Credit Act]." *Id.* at 2502 (emphasis added); *see also id.* at 2505.

[178] *See id.* at 2503.

[179] *See id.* at 2502.

to would-be federal takings claimants because a lack of ripeness prevents the plaintiffs from properly invoking federal jurisdiction in the first instance and their state court litigation does not center on a state statutory issue.[180] This is an unnecessarily mechanical view of *England* and its application to takings claims.[181]

A. *Involuntary State Court Litigation Seems More Important to* England *Than "Properly Invoking Federal Jurisdiction"*

In *England*, the Court appeared driven to secure a federal forum for all federal claimants that did not freely submit their claims to state court.[182] The Court's concern was that federal constitutional plaintiffs could lose federal district court review "without . . . consent and through no fault of [their] own" by being thrust into involuntary state court litigation that would trigger preclusion.[183] This smacked of unfairness not only because it took the choice of a state forum, and federal preclusion, out of the plaintiff's hands,[184] but also because it left only the possibility of Supreme Court review, which the Court considered an inadequate substitute for district court proceedings.[185]

The *England* reservation seemed designed to respond to the unfairness of precluding district court review based on involuntary state court litigation by allowing plaintiffs to neutralize the preclusive effects of that litigation, thereby regaining the ability to litigate in federal court.[186] As such, it reflected the Court's understanding that preclusion is fairly applied only when it results from the litigant's own choices.[187] Thus, the *England* Court stressed: "if a party *freely and without reservation* submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then—whether or not he seeks direct review . . . in this Court—he has elected to forgo his right to return

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[180] *See id.* at 2503, 2505.

[181] *See supra* Part I.A.3 (discussing cases recognizing the ability of takings claimants to invoke the *England* reservation).

[182] *See* 375 U.S. 411, 418 (1964) (expressing desire to craft a rule preventing "procedural *trap*s operating to deprive [litigants involuntarily in state court] of their right to a District Court determination of their federal claims." (emphasis added)); Wicker v. Bd. of Educ. of Knott County, 826 F.2d 442, 446 (6th Cir. 1987) (filing by plaintiff in state court prior to federal court abstention order may utilize *England* reservation).

[183] *England*, 375 U.S. at 415.

[184] *See id.*

[185] *Id.* at 416.

[186] *See id.* at 418–20.

[187] *Id.* at 417 ("The possibility of appellate review by this Court of a state court determination may not be substituted, *against a party's wishes*, for his right to litigate his federal claims fully in the federal courts." (emphasis added)).

to the District Court."[188] Given the Court's sense that it is fair to apply federal preclusion only to plaintiffs whose own actions trigger preclusion—those who willingly litigate federal issues in state court—the availability of the *England* reservation seemed to hinge on whether plaintiffs are in state court involuntary, not upon the precise procedural path that got them there.[189]

It is true that the *England* Court, in crafting the reservation, referred to a plaintiff who had "properly invoked the [court's] jurisdiction."[190] But this may reasonably be viewed as nothing more than an innocuous reference to the facts of *England*. Certainly, it is difficult to view the reference to a plaintiff who "properly" invokes jurisdiction as a mandatory prerequisite to the *England* reservation—and availability of federal review—when *England* otherwise appears willing to deny a federal forum only to plaintiffs whose voluntary acts invite preclusion.[191] In the post-*England* case of *Migra v. Warren City School District Board of Education*, the Court appeared to confirm that the issue of voluntariness was more important than adherence to a precise procedural template—properly invoking jurisdiction in the first instance—when it stated *England* applies "when a litigant with a federal constitutional claim is involuntarily in state court."[192] Prior to *San Remo IV*, the federal courts were virtually unanimous in concluding that *England*'s primary focus was the voluntariness of litigation.[193]

Given *England*'s reasoning, prospective federal takings plaintiffs had reason to believe they could invoke the *England* reservation even though they could not properly invoke federal jurisdiction, and secure abstention.[194] Such claimants were, after all, forced to engage in state court takings litigation against their will by *Williamson County*.[195] For this reason, they could be deprived of a federal forum due to "no fault of [their] own,"[196] thus implicating the fairness concerns at the heart of

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[188] *Id.* at 419 (emphasis added).

[189] *See* Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 130 (2d Cir. 2003); Fields v. Sarasota Manatee Airport Auth., 953 F.2d 1299, 1305–06 (11th Cir. 1992).

[190] *England*, 375 U.S. at 415.

[191] *See id.* at 415–20.

[192] *Fields*, 953 F.2d at 1306; *see Migra*, 465 U.S. 75, 85 n.7 (1984).

[193] *See supra* notes 70–79 and accompanying text.

[194] *See supra* notes 182–92.

[195] *See San Remo IV*, 125 S. Ct. 2491, 2508 (2005) (Rehnquist, C.J., concurring).

[196] *England*, 375 U.S. at 415.

England. Many federal courts agreed with this reading of *England*;[197] the *San Remo IV* Court, however, did not.[198]

B. *The State Statutory Issue Requirement Is Not Necessary to* England

Although the conclusion that plaintiffs must be able to properly invoke federal jurisdiction probably ended the possibility that federal just compensation claimants could use the *England* reservation, the Court closed the deal by further noting that *England* only applies when the would-be federal litigant is sent to state court to litigate a state *statutory* issue.[199] This proposition appears to have arisen from the understanding that the *England* reservation operates to preserve federal claims while a state court makes a determination that "may moot the federal controversy."[200] The *San Remo IV* Court seems to suggest that a state statutory issue is an indispensable element of this process.[201]

However, it is hardly clear that a statutory issue is always necessary to moot a federal claim; state constitutional protections may also suffice.[202] This is especially true in the takings context where a ruling on a state constitutional takings provision may result in just compensation under state law and thereby moot a federal claim for just compensation.[203] Indeed, the entire point of *Williamson County*'s state compensation procedures requirement is to provide an opportunity for "the state courts [to] adjust state law to avoid or alter the constitutional question."[204] Therefore, while *England* is surely designed to preserve federal claims while state law litigation determines whether they are moot, there is no obvious reason why a state statutory issue must be present.[205] Certainly, *England*'s language allows more, since it stressed a desire to avoid "'questions of [federal] constitutionality on the basis of

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[197] *See, e.g.*, DLX, Inc. v. Kentucky, 381 F.3d 511, 523–24 (6th Cir. 2004); Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 130 (2d Cir. 2003); *Fields*, 953 F.2d at 1305–06. *See generally supra* notes 66–72 and accompanying text.

[198] *San Remo IV*, 125 S. Ct. at 2501–02.

[199] *See id.* at 2502 ("'[t]ypical' *England* cases generally involve federal constitutional challenges to a state statute that can be avoided if a state court construes the statute in a particular manner." (citing *England*, 375 U.S. at 420)).

[200] *See id.*

[201] *See id.*

[202] *See Dodd I*, 59 F.3d 852, 860 (9th Cir. 1995).

[203] *See id.* at 860–61.

[204] *See id.* at 860.

[205] *See Fields*, 953 F.2d at 1304–05. But Meacham has argued that *England* is not applicable to takings claims because "[a]n *England* reservation works where the state court is deciding the applicability of a statute, as distinguished from the constitutionality of the statute." Meacham, *supra* note 3, at 250.

preliminary guesses regarding local law,'"[206] which can be fairly construed to include local constitutional provisions as well as statutes.[207]

The *San Remo IV* Court bolsters its emphasis on a state statute—and its corresponding disregard for state constitutional provisions—by declaring that the federal issues sought to be reserved under *England* must be "distinct" from the state law issues referred to the state court.[208] Yet, the basis for requiring that the state law issue be distinct from the reserved federal issue is also unclear.[209] Perhaps the idea is consistent with the *England* facts;[210] but in crafting the *England* reservation, the Court never said that the reservation depended on a manifest difference between the state and federal issues.[211]

Morever, there is no apparent logical basis for imputing a requirement that litigated state court issues be distinct from reserved federal issues in order to warrant *England* protection. Perhaps one can see such a requirement as a proxy test for whether the federal issues were effectively litigated as part of the prior state court questions. Under this view, if the reserved federal issues are distinct from the state court issues, then it can be presumed that the federal issues were not previously litigated and issue preclusion would not apply. But this amounts to a rule that the *England* reservation applies when issue preclusion does not. As such, it assumes that *England* is onlv available for claim preclusion, an assertion not found in *San Remo IV*. [212]

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[206] *England*, 375 U.S. 411, 416 n.7 (1964) (quoting Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944)).

[207] *See Fields*, 953 F.2d at 1304–05.

[208] *San Remo IV*, 125 S. Ct. 2491, 2502 (2005).

[209] *See id.*; *England*, 375 U.S. at 413–15.

[210] *See England*, 375 U.S. at 413–14. The distinctness of issues is not clearly evident in the facts. Although the *England* plaintiffs had a state statutory issue in state court—whether the statute applied to them—that was distinct from their federal due process and equal protection issues, the state and federal issues were not litigated separately. *Id.* "They did not restrict those [state court] proceedings to the question whether the Medical Practice Act applied to chiropractors. They unreservedly submitted for decision, and briefed and argued, their contention that the Act, if applicable to chiropractors, violated the Fourteenth Amendment." *Id.* at 413.

[211] *See id.* at 413–15 (implying a distinctness of issues).

[212] Some language in the opinion can be read to suggest that the Court views *England* as potentially available only to neutralize claim preclusion. *See, e.g.*, *San Remo IV*, 125 S. Ct. at 2503 ("our [*England*] opinion made it perfectly clear that the effective reservation of a federal *claim* was dependent on the condition that plaintiffs take no action to broaden the scope of the state court's review beyond decision of the antecedent state-law issue.") (emphasis added). This would make sense given the Court's emphasis on the necessity of distinct federal and state issues, but it is hard to square with *England* where the Court offered the reservation to plaintiffs who actually raised federal issues in state court, and would

If the *England* reservation provides a shield against both issue and claim preclusion, as *England* indicates,[213] then it makes no sense to require distinct state court and reserved issues—to require an absence of issue preclusion—as a prerequisite for the *England* reservation. As an exception to issue preclusion, the *England* reservation is necessarily designed to apply when the state court and federal issues are *not* distinct.[214] So, to say that the state court issues must be distinct from the reserved federal issues, as the Supreme Court's *San Remo IV* opinion does, is tantamount to saying that the *England* exception is available only when it is not necessary in the first place.

In sum, until *San Remo IV*, the exact factual and procedural circumstances in *England* did not seem necessary to the *England* reservation.[215] Instead, what seemed necessary was involuntary state court litigation that was designed to moot a federal constitutional concern, but which might have the unintended effect of unfairly precluding plaintiffs from litigating their claims in federal court.[216] Under this view, it was reasonable to conclude that the procedural circumstances in *England* were sufficient to trigger the reservation because they implicated the Court's underlying concerns—fundamental fairness—not because they contained some talismanic force in themselves.[217] When *England* is viewed in this light, federal takings litigants compelled by *Williamson County* to seek compensation in state courts under state law theories, for purposes of mooting a federal claim to compensation, had reason to invoke the *England* reservation.[218]

C. *The Court Could Have Recognized an Exception to Preclusion for Takings Claimants*

Even if the Court is correct that the *England* framework is not broad enough to include ripe takings claims, the Court could have created a general "*San Remo*" exception to preclusion to effectuate *Williamson County*'s promise that ripe takings claimants may be heard

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therefore be subject to issue preclusion, except for the fact that the issues were litigated involuntarily. *See England*, 375 U.S. at 417–22.

[213] *See supra* text accompanying note 50; *see also England*, 375 U.S. at 421–22 ("When the reservation has been made, [the involuntary state court litigant's] right to return [to federal court] will *in all events* be preserved." (emphasis added)).

[214] *See England*, 375 U.S. at 413–22.

[215] *See supra* Part II.B.1.

[216] *See supra* Part I.A.3.

[217] *See England*, 375 U.S. at 413–22; *Fields*, 953 F.2d at 1305–06.

[218] *See id.*

in federal court.[219] In refusing this course, the Court claimed that it had no power to craft an exception to the Full Faith and Credit Act without express authorization from Congress.[220] This is extremely puzzling because, even under *San Remo IV*'s crabbed view of *England*, it is difficult to conceive of the *England* reservation as anything but a Court-crafted exception to the Full Faith and Credit Act.[221] even under the *San Remo IV* Court's crabbed view of *England*.[222]

As we have seen, the *San Remo IV* Court considered *England* relevant only when plaintiffs with federal constitutional claims and state statutory claims properly invoke a federal court's jurisdiction, and the court invokes abstention for purposes of allowing a state court to litigate a state law issue that may moot the federal claims.[223] Even in this situation, a strict application of the Full Faith and Credit Act should preclude the plaintiffs from rearguing their federal claims because claim preclusion bars litigation of any claims that "could have been raised" in a prior judicial proceeding, as well as those that are actually raised.[224] Because *San Remo IV*'s prototypical *England* plaintiff could raise his federal constitutional claims in the court-mandated state proceeding, an uncompromising application of preclusion—the application approved of in *San Remo IV*—should bar the return to federal court.[225] *San Remo IV* acknowledges, however, that the *England* Court created a reservation approach that is at least capable of neutralizing preclusion in this situation.[226]

Since the Court created a preclusion exception in *England* without express Congressional authorization, it is hard to understand why it is powerless to do so in the takings context. This attitude cannot be

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[219] *See supra* notes 66–72 and accompanying text (discussing the Eleventh Circuit Court of Appeal's recognition of an *England*-style reservation exception in *Fields v. Sarasota Manatee Airport Authority*); *supra* Part I.B.2 (discussing the Second Circuit Court of Appeals's creation of a "*Santini*" reservation in *Santini v. Connecticut Hazardous Waste Management Service*).

[220] *San Remo IV*, 125 S. Ct. 2491, 2505–06 (2005).

[221] *See San Remo IV*, 125 S. Ct. at 2501–03; *England*, 375 U.S. at 423, 429–30 (Douglas, J., concurring) (describing the *England* reservation as a "judge-made rule").

[222] *See San Remo IV*, 125 S. Ct. at 2501–03.

[223] *See supra* notes 133–40 and accompanying text.

[224] *See San Remo IV*, 125 S. Ct. at 2500 n.16 (quoting Allen v. McCurry, 449 U.S. 90, 94 (1980)).

[225] Propper v. Clark, 337 U.S. 472, 491–92 (1949) (noting that by "sending a fragment of the litigation to a state court, the federal court might find itself blocked by *res judicata*, with the result that the entire federal controversy would be ousted from the federal courts, where it was placed by Congress."); *see also San Remo IV*, 125 S. Ct. at 2502–03, 2507.

[226] *See San Remo IV*, 125 S. Ct. at 2503 (noting that San Remo might have effectively reserved its facial federal claims while litigating a state statutory issue).

plausibly explained by the presence of abstention in *England* since "[a]bstention is [also] a judge-fashioned vehicle . . . ."[227] Nor can strict deference to Congress in the takings context and no deference in the *England* context be adequately explained by the inability of takings claimants to properly invoke federal jurisdiction in the first instance, for this disability was also created by the Court.[228] One is faced then with the real possibility that the Court refused to recognize a preclusion exception for takings claimants because it did not want to, rather than because it was powerless to do so under *England* or without Congressional authorization.[229]

Indeed, an argument can be made that the Court was not only able, but obligated to recognize a preclusion exception for federal just compensation claimants. After all, *Williamson County*'s state procedures requirement purports to be a "constitutionally-grounded" ripeness rule that permits a federal claim for compensation to proceed in federal court after state litigation.[230] On the other hand, as Justice Douglas stated in his concurring *England* opinion, "*res judicata* is *not* a constitutional principle . . . ."[231] Therefore, one might have expected that the nonconstitutional preclusion doctrine must bow to *Williamson County*'s constitutional ripeness doctrine, permitting ripe takings claims in federal court. The *San Remo IV* Court's opposite decision is confusing because it appears to elevate a statutory principle over a constitutional one.[232]

Even if one ignores the allegedly constitutional character of *Williamson County*'s state procedures rule—as the *San Remo IV* majority did—it does not follow that deference to Congress requires strict enforcement of the Full Faith and Credit Act. Congress has expressed an intention that federal courts should have jurisdiction to hear all federal questions.[233] Congress gave federal courts power to hear federal constitutional questions in part because "federal judges appointed for life are more likely to enforce the constitutional rights of unpopular minorities

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[227] *See* England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 415 (1964) (emphasis added). Because abstention is judicially created, saying that abstention gives the Court power to create a preclusion exception without Congressional blessing is tantamount to saying that the Court gives itself the power.

[228] *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194–95 (1985).

[229] *See England*, 375 U.S. at 411.

[230] *See Williamson County*, 473 U.S. at 194–95.

[231] *England*, 375 U.S. at 429 (Douglas, J., concurring) (second emphasis added).

[232] *See generally San Remo IV*, 125 S. Ct. 2491 (2005).

[233] 28 U.S.C. § 1331 (2000).

than elected state judges."[234] Issues arising under the Takings Clause of the Fifth Amendment have always been considered federal questions, and the *San Remo IV* Court makes no contrary representations.[235] Therefore, if the *San Remo IV* Court wanted to proceed by way of deference to Congress, it might have done so by securing federal jurisdiction over federal just compensation questions, not by rigidly applying preclusion.[236] The Court would have effected Congress's intent to protect individuals—including property owners—from potential state court bias in favor of the local majority.[237]

By turning away from authority and principles that could have justified an *England*-type exception for takings claimants, the *San Remo IV* Court has singled out property owners as second-class constitutional claimants.[238] By closing the federal courthouse door, the Court has not only branded takings claims as the only claims unworthy of federal protection, but also has effectively nullified the claimants' Seventh Amendment right to a jury trial in federal court.[239] Furthermore, by predicating *England* on the jurisdictional posture of the case rather than on the involuntariness of state litigation, the Court has branded takings claims as the only constitutional claims to which the *England* reservation does not apply.[240]

Although the Supreme Court has admirably declared that the federal takings clause is not a "poor relation" in the constitutional hi-

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[234] *England*, 375 U.S. at 427 (Douglas, J., concurring).

[235] *See San Remo IV*, 125 S. Ct. at 2506–07.

[236] *See id.* at 2505.

[237] *See* STEVEN J. EAGLE, REGULATORY TAKINGS § 13.5(d), at 1069 (2d ed. 2001) ("The fact that there are . . . more competing interests in their districts also makes [federal judges] more disposed to vindicate the exercises of property rights that do not benefit immediate neighbors.").

[238] Berger & Kanner, *supra* note 3, at 690 ("That property owners have been singled out [for relegation to state courts] is clear."); Delaney & Desiderio, *supra* note 3, at 196 ("the ripeness and abstention doctrines have uniquely denied property owners, unlike the bearers of other constitutional rights, access to the federal courts on their federal claims").

[239] *See San Remo IV*, 125 S. Ct. at 2501–03.

[240] As one federal district court put it:

> [I]t defies logic and common sense to say that all federal Constitutional issues (save taking ones) which are coupled with significant State court questions which are not automatically precluded as unripe, may be preserved by a reservation for a return visit to a federal court, but so-coupled federal taking claims may not because they (unlike the others) are precluded from being brought in the first instance in a federal court. The reason for this court-made distinction . . . . just makes no sense.

W.J.F. Realty Corp. v. Town of Southhampton, 220 F. Supp. 2d 140, 148 n.5 (E.D.N.Y. 2002).

erarchy,[241] the Court's failure in *San Remo IV* to bend preclusion to ensure that takings claims are given as much federal attention as other claims makes a mockery of this sentiment.[242]

IV. *San Remo*'s Relegation of Claims to State Courts Rests on *Williamson County*'s Bankrupt State Procedures Requirement

Although the Court's application of the Full Faith and Credit Act is deserving of criticism, it cannot be blamed for *San Remo IV*'s startling conclusion that "a significant number of plaintiffs will necessarily litigate their federal takings claims in state courts."[243] Preclusion is, after all, wholly dependent on prior litigation,[244] and there is only one reason that such prior litigation routinely occurs in the takings context: *Williamson County v. Hamilton Bank*.[245] Therefore, no matter how strongly the Court interprets the Full Faith and Credit Act or how narrowly it construes *England v. Louisiana State Board of Medical Examiners*, it cannot be said that this causes takings claims to be relegated to the state courts.[246] That distinction goes entirely to *Williamson County*: if not for the state procedures requirement, few just compensation claimants would confront preclusion because they would simply avoid state courts.[247]

Consequently, by accepting that federal just compensation claims must be litigated in state courts, the *San Remo IV* majority appears to affirm that *Williamson County* requires takings claimants to initially file just compensation claims in state court,[248] while disavowing the idea

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[241] Dolan v. City of Tigard, 512 U.S. 374, 392 (1994).

[242] *See* James W. Ely Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 Cato Sup. Ct. Rev. 39–69.

[243] *San Remo IV*, 125 S. Ct. 125 S. Ct. 2491, 2506 (2005).

[244] *Id.* at 2501 ("The general rule implemented by the full faith and credit statute [is that the] parties should not be permitted to relitigate issues that have been resolved by courts of competent jurisdiction . . . .").

[245] 473 U.S. 172, 195 (1985).

[246] *San Remo IV*, 125 S. Ct. at 2501–03, 2505–06. Applying tort terminology, one might say that the *San Remo IV* Court's strict construction of preclusion may supply a "but-for" cause for the relegation of federal just compensation claims, but *Williamson County*'s state procedures rule is the proximate cause. *See id.* at 2501; *Williamson County*, 473 U.S. at 195.

[247] The prevalence of pre-*Williamson County* federal court takings litigation attests to this proposition. For specific examples of such litigation, see *infra* note 283 and accompanying text.

[248] Hoagland v. Town of Clear Lake, 415 F.3d 693, 699 (7th Cir. 2005) (stating that *San Remo IV* affirmed that "plaintiffs must take their case for compensation to the state courts" under *Williamson County*); Starr v. Shucet, No. 1:05CV00026, 2005 WL 1657102, at *3 n.2 (W.D. Va. July 15, 2005) (stating that *San Remo* "left the holding in *Williamson* [*County*]

that compliance with this rule ripens claims for federal adjudication. After all, if state court litigants complying with *Williamson County* cannot mature their claims for federal review, as *San Remo IV* dictates, then the state procedures requirement is not the ripeness prerequisite presented by *Williamson County*; it is simply a "litigate in state court" rule.[249]

And yet, the majority never directly expresses these views.[250] The opinion fails to explain how a ban on federal review can be reconciled with *Williamson County*'s premise that state court litigation ripens federal review.[251] The majority also does not acknowledge or address the deep conceptual problems with the state procedures requirement it affirms.[252] Instead of acknowledging the *Williamson County* rule driving its opinion, the majority supports the relegation of claims to state courts with factual propositions about superior state court takings experience.[253] These propositions are demonstrably incorrect, but to the extent they have any validity, they merely reinforce the need to directly address *Williamson County*'s state procedures requirement.[254]

A. *All of* San Remo IV*'s Roads Lead to* Williamson County

1. *Williamson County*'s Ripeness Doctrine Gave Plaintiffs a Belief They Had a Right to a Federal Forum

The majority's first basis for approving the relegation of just compensation claims to state courts is a rejection of the notion that just compensation claimants like San Remo have a right to a federal forum.[255] In criticizing this idea, the majority acts as if it is dealing with a miscalculation about preclusion.[256] This is a straw-man. *San Remo IV* and other federal takings claimants have been entirely cognizant of po-

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undisturbed."); Stardust Mobile Estates LLC v. City of San Buenaventura, No. 03-1793207, 2005 WL 1793207, at *1 (9th Cir. July 29, 2005) (stating that *San Remo IV* "declin[ed] to reconsider the *Williamson County* ripeness requirements").

[249] *See San Remo IV*, 125 S. Ct. at 2505–06.

[250] *See id.* at 2503–07.

[251] *See id.*

[252] *See id.* at 2509 (Rehnquist, C.J., concurring).

[253] *See id.* at 2506–07.

[254] *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985).

[255] *San Remo IV*, 125 S. Ct. at 2504.

[256] *Id.* ("We have repeatedly held, to the contrary, that issues actually decided in valid state-court judgments may well deprive plaintiffs of the 'right' to have their federal claims relitigated in federal court.").

tential preclusion barriers to later federal review when they engage in mandated state court litigation.[257] They have nevertheless believed that they had a right to federal review because *Williamson County* seems to promise it, as a matter of constitutional ripeness, following state court litigation.[258] The *Williamson County* Court consistently and repeatedly presented the state procedures requirement as a ripeness barrier—a preliminary step toward obtaining federal review.[259] As the Sixth Circuit Court of Appeals acknowledged shortly before *San Remo IV*, *Williamson County*'s ripeness language creates an "expectation . . . that an unsuccessful state plaintiff will then return to federal court."[260]

A strict application of preclusion that bars takings claims litigated in accordance with *Williamson County* is inconsistent with the ripeness premises and the promises of the state procedures requirement, as well as the jurisdictional expectations it engenders. Nothing in *Williamson County* indicated that preclusion would trump ripeness under the state procedures rule, stranding claimants in state court.[261] Such a result was "clearly not contemplated by the Court in *Williamson County* . . . ."[262] Therefore, it was entirely reasonable for San Remo and other federal just compensation claimants to conclude that they had a right to a federal forum after losing in state court notwithstanding the preclusion doctrine.[263]

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[257] *See* DLX, Inc. v. Kentucky, 381 F.3d 511, 518 n.3 (6th Cir. 2004).

[258] *See id.* (stating that *Williamson County* "clearly contemplates that a takings plaintiff who loses her claim in state court will have a day in federal court"); *see also* Berger, *supra* note 3, at 104 (explaining that the *Williamson County* Court repeatedly used language indicating that "land use cases *can* be ripened and *then* litigated in federal court.").

[259] *See Dodd I*, 59 F.3d 852, 860 (9th Cir. 1995) ("We deem it extremely significant that the [*Williamson County*] Court characterized the compensation element as an issue of ripeness. The central concern of ripeness is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.").

[260] *DLX*, 381 F.3d at 521; *see also* Meacham, *supra* note 3, at 239 ("When the Supreme Court established the ripeness requirement in *Williamson*, it did so in language that suggested that, eventually, a litigant's taking claim would be heard in federal court."); Roberts, *Ripeness*, *supra* note 3, at 39 ("the ripeness label applied to prong two is misleading for it suggests that a claim may be heard in federal court after a state court denies compensation"); Roberts, *Procedural Implications*, *supra* note 3, at 10,356 ("the *Williamson County* opinion suggested that once the landowner sought compensation in the state court and lost on the merits or was awarded an amount of compensation deemed inadequate, it would then be timely to bring suit in federal court").

[261] *See Dodd I*, 59 F.3d at 861 ("We disagree . . . with the suggestion that *Williamson County* is a thinly-veiled attempt by the Court to eliminate the federal forum for Fifth Amendment taking plaintiffs . . . .").

[262] *DLX*, 381 F.3d at 523 n.9.

[263] Daniel Mandelker et al., Federal Land Use Law 4A-23 (2004).

However, in chastising San Remo for asserting a right to a federal forum, the *San Remo IV* majority ignores *Williamson County*'s role in creating an expectation of a federal forum.[264] This is remarkable because the ripeness promises in *Williamson County*—followed by lower courts—formed the heart of San Remo's case.[265] San Remo did not simply argue that issue preclusion did not apply, as the majority opinion implies; it contended that *Williamson County*'s ripening effect trumped preclusion.[266] San Remo's first argument in its brief on the merits was that "*Williamson County* was not intended to bar takings claims from the federal courts"[267] because under that decision, "takings plaintiffs may ripen their federal takings claims and then pursue them in federal court."[268] The majority's refusal to address these ripeness arguments seems highly unfair. Furthermore, in the absence of such consideration, the Court's denial of San Remo's asserted right to a federal forum is incomplete and unpersuasive.

2. *Williamson County* Has Given State Courts Control of Takings Litigation for Two Decades

The *San Remo IV* majority seeks to support its permanent ban on federal review of just compensation claims with other non-*Williamson County* justifications.[269] Most significantly, it asserts that takings claims have been traditionally heard in state courts due to a pre-*Williamson County* "final decision" ripeness rule:

> It was settled well before *Williamson County* that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a *final decision* regarding the application of the regulations to the property at issue." *As a consequence, there is scant precedent*

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[264] *See San Remo IV*, 125 S. Ct. 2491, 2506 (2005).

[265] *See* Brief for Petitioner, *supra* note 174, at 10–14. San Remo lists all the instances in *Williamson County* in which the Court stated that the property owner's federal takings claim in that case was merely premature or not ripe for failure to exhaust state compensation procedures. *Id.* at 11.

[266] *See id.* at 12 ("Nothing in the *Williamson County* opinion even suggests that the outcome of state compensation procedures could preclude a federal takings claim . . . . [T]hat result would be inconsistent with this Court's opinion in *Williamson County*.").

[267] *Id.* at 10 (capitalization removed).

[268] *Id.* at 10–11.

[269] *See San Remo IV*, 125 S. Ct. 2491, 2504–07 (2005). *See generally* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

> *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. To the contrary, most of the cases in our takings jurisprudence, including nearly all of the cases on which petitioners rely, came to us on writs of certiorari from state courts of last resort.[270]

Both the premises and conclusions of this reasoning are demonstrably false.

First, contrary to the majority opinion, the "final decision" ripeness rule has nothing to do with the modern—post-1985—decline of federal courts in takings litigation.[271] Unlike the state procedures requirement, the final decision rule does not require litigation in state court,[272] or exhaustion of local administrative remedies; it only requires an administrative land use decision that renders takings issues fit for review.[273] Therefore, a final decision cannot trigger application of preclusion doctrines. Rather, assuming a final decision is the only ripeness barrier, a claimant satisfying that requirement may sue immediately in either state or federal court.[274]

Even putting aside the majority's reliance on the final decision rule, its conclusion that there is "scant precedent" for federal litigation is patently false as an empirical matter.[275] Between June 26, 1978—the date the Court decided *Penn Central Transportation Co. v. New York City* [276] which provided the modern regulatory takings test—and June 28,

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[270] *San Remo IV*, 125 S. Ct. at 2506 (emphasis added) (internal citations omitted).

[271] *See id.* (stating final decision rule).

[272] Palazzolo v. Rhode Island, 533 U.S. 606, 620 (2001) (finding under the final decision ripeness rule that "once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened . . . . [A] landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation.").

[273] *See Williamson County*, 473 U.S. at 192–93 (explaining that the final decision requirement is different from and does not require exhaustion of administrative remedies that "result in a[n administrative] judgment whether the [agency's] actions violated any of [the property owner's] rights.").

[274] *See, e.g.*, Corn v. City of Lauderdale Lakes, 816 F.2d 1514, 1516 (11th Cir. 1987) (holding that case was easily ripe for federal court review under final decision prong and focusing on ripeness under state compensation procedures requirement).

[275] *San Remo IV*, 125 S. Ct. 2491, 2506 (2005).

[276] 438 U.S. 104 (1978). In *Penn Central*, the Court articulated this modern regulatory takings balancing test: "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action." *See id.* at 124 (citation omitted). For general discussion of the scope of

1985—the date the Court issued *Williamson County*—there were approximately 141 federal district court cases involving federal takings claims against regulation.[277] By contrast, there were just 109 similar state court cases.[278] Federal courts were also central in pre-1978 regulatory takings jurisprudence. In the period between 1922—the year *Pennsylvania Coal v. Mahon*[279] was decided—and 1978, there were approximately 174[280] more instances of "litigation in federal district court of claims that a state agency has taken property in violation of the Fifth Amendment's takings clause."[281]

The majority does no better with its conclusion that "most" Supreme Court takings cases have arisen from state courts;[282] since *Penn Central*, the majority of the Court's certiorari grants in takings cases have been to federal courts. In fact, the Court has taken nineteen major takings cases arising from federal district courts since 1978,[283] but

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Penn Central's test, see J. David Breemer & R. S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After* Palazzolo *and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-*Palazzolo *Muck*, 34 Sw. U. L. Rev. 351 (2005).

[277] These cases were collated through a Westlaw search of ("just compensation" & taking & "fifth Amendment" & regulat!) in the federal district court opinion, DCT, database.

[278] These cases were identified running the search ("just compensation" & taking & "fifth Amendment" & regulat!) in the Westlaw ALLSTATES database.

[279] Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

[280] This number was arrived at by running the following search (da(aft 12/11/1922 & bef 6/26/1978) & "just compensation" & taking & "fifth amendment" & regulat!) in the Westlaw DCT database.

[281] *San Remo IV*, 125 S. Ct. 2491, 2506 (2005).

[282] To emphasize its erroneous point that Supreme Court takings cases arise from state court litigation, the majority singles out *Mahon*, "which spawned our regulatory takings jurisprudence," as an example of an important takings case coming from state courts. *San Remo IV*, 125 S. Ct. at 2506 n.26. A different majority may have better served the reader—and takings history—by singling out *Williamson County* itself, a case originally litigated in federal district court for the Middle District Court of Tennessee. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

[283] The federal cases include: *San Remo IV*, 125 S. Ct. 2491; Lingle v. Chevron U.S.A. Inc., 125 S. Ct. 2074 (2005); Brown v. Legal Found. of Washington, 538 U.S. 216 (2003); Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999); E. Enters. v. Apfel, 524 U.S. 498 (1998); Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997); Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602 (1993); Preseault v. Interstate Commerce Comm'n, 494 U.S. 1 (1990); Hodel v. Irving, 481 U.S. 704 (1987); Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470 (1987); FCC v. Fla. Power Corp., 480 U.S. 245 (1987); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986); *Williamson County*, 473 U.S. 172; Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); Hodel v. Va. Surface Mining & Reclamation Assn, 452 U.S. 264 (1981); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Andrus v. Allard, 444 U.S. 51 (1979).

only fourteen from state courts.[284] Even after *Williamson County*, certiorari grants in taking cases from federal courts exceed those from state courts.[285] To the extent that the Court has recently considered proportionately fewer takings cases from federal courts and more from state courts, this is hardly a result of some natural order in takings litigation; it results from the reality that *Williamson County*'s state procedures rule forces takings claims into the state court system.[286] The same reality explains why state courts may currently have "more experience" than federal courts in tackling takings claims.[287] Certainly, *San Remo IV*'s and other takings litigants' protracted and desperate attempts to secure federal review belies any notion that state court experience results from plaintiffs' preference for such courts.

Therefore, the *San Remo IV* majority's attempt to support the relegation of just compensation claims on non-*Williamson County* grounds fails miserably. The argument fails not only because the premises and conclusions are easily disproved, but also because the proof of their fallacy magnifies the centrality of *Williamson County*. The historical distribution of federal just compensation claims between state courts and federal courts simply cannot be discussed without considering *Williamson County*'s state procedures requirement; the majority, however, strives to do so to the point of positing transparently false reasoning.[288]

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[284] The state court cases include: Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Yee v. City of Escondido, 503 U.S. 519 (1992); Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989); Pennell v. City of San Jose, 485 U.S. 1 (1988); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986); Lorretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980); Agins v. City of Tiburon, 447 U.S. 255 (1980); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

[285] Based on the lists provided in notes 283 and 284, it appears that since 1985 the Supreme Court has granted certiorari to seventeen major takings cases from federal courts and only nine from state courts. These lists do not include cases challenging government acts as a violation of the public use requirement of the Takings Clause. *See, e.g.*, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

[286] *See Williamson County*, 473 U.S. at 194.

[287] *San Remo IV*, 125 S. Ct. at 2507.

[288] *See id.*

3. Reliance on *Fair Assessment* Highlights the Effect of *Williamson County*

As a final basis for closing the federal court house door to just compensation claims, the *San Remo IV* majority analogizes to the *Fair Assessment in Real Estate Ass'n v. McNary* tax case.[289] In *Fair Assessment*, the Supreme Court held that taxpayers are barred by the principle of comity from asserting that claims for money damages under 28 U.S.C. § 1983 arising from an allegedly unconstitutional administration of a state tax scheme must be heard in state courts.[290]

This holding was grounded in precedent—dating back to 1871—recognizing that comity principles prevent federal courts from interfering with state taxation systems by hearing federally-based lawsuits.[291] Much of the recent precedent was itself undergirded, if not directly justified, by the 1937 Tax Injunction Act that explicitly barred federal courts from enjoining, suspending, or restraining any state tax where "'a plain. speedy and efficient remedy may be had in the courts of such State.'"[292]

While *Fair Assessment* and its comity principles might support a decision barring federal court takings suits against state taxation schemes, it does not support the total abdication of federal review of just compensation claims. As the *San Remo IV* concurrence explained, "[t]he Court today makes no claim that any such 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."[293] 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 in adjudicating just compensation claims.[294] *Williamson County* itself never recognized a comity or

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[289] *See San Remo IV*, 125 S. Ct. at 2507; Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 116 (1981).

[290] *Fair Assessment*, 454 U.S. at 116.

> [W]e hold that taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts. Such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this Court.

Id. (citations omitted).

[291] *See id.* at 102 (quoting Dows v. Chicago, 78 U.S. (11 Wall.) 108, 110 (1871)).

[292] *Id.* at 103 (quoting 28 U.S.C. § 1341 (Supp IV 1980)).

[293] *San Remo IV*, 125 S. Ct. at 2508–09 (Rehnquist, C.J., concurring).

[294] *See supra* note 277 (discussing frequency of federal court litigation of takings claims pre-*Williamson County*).

federalism principle warranting the relegation of just compensation claims to state court.[295]

As a general matter, comity considerations no more warrant the complete denial of federal review of just compensation claims against state and local governments than they justify the denial of federal review of free speech claims against such entities.[296] One could say that states are most familiar with the complexities and realities of local restraints on free expression and other official time, place, and manner restrictions, and that adjudication of related conflicts should be left to the states. However, no one has seriously proposed this course of action, likely because it would undermine the incorporation of the First Amendment against the states through the Fourteenth Amendment, and the federal courts' important role in providing a fair and unbiased forum—insulated from local majoritarian pressure and elected state court judges.[297] The same reasons counsel against divesting federal courts of their ability to hear Fifth Amendment just compensation claims against local and state governments.[298]

The federal courts' role in takings law has decreased relative to state courts in the last two decades, making the relegation of just compensation claims to these courts perhaps less sudden than relegation of free speech.[299] But again, the basis for the federal decline is

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[295] *See generally* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

[296] The *San Remo IV* concurrence makes a similar point. *See San Remo IV*, 125 S. Ct. at 2508 (Rehnquist, C.J., concurring).

[297] *See* EAGLE, *supra* note 237, § 13-5(d), at 1069 ("Local judges generally are elected by local voters and tend to associate with the well being of the local electorate. . . . Federal judges tend to have broader outlooks than local judges constrained by ethos and electorate of their communities"); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1115–30 (1977) (arguing that federal courts are superior in enforcing federal constitutional rights).

[298] *See* Brian 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, 74 (1988) (arguing for federal forum for takings claims raised against actions taken under color of state law because of state courts' "inherent potential for bias" against claimants in such cases (internal quotation marks omitted)); EAGLE, *supra* note 237, § 13-5(d), at 1069 ("The fact that there are apt to be more competing interests in their districts also makes [federal judges] more disposed to vindicate the exercises of property rights that do not benefit immediate neighbors."); 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, 92–93 (1994) (arguing that "[i]t is extremely important that property owners have access to federal courts" because "[a]n almost certain prejudice is created by having an elected or appointed state judge, sitting in the same local area as the alleged taking, decide the case.").

[299] *See supra* notes 271–88 and accompanying text.

Williamson County.[300] Therefore, if *Fair Assessment*'s comity principles support granting state courts exclusive control of federal just compensation claims, it is only because *Williamson County*'s state procedures rule has created a de facto and unintentional comity framework favoring those courts.

B. Williamson County *Was a Dead End from the Start*

As the foregoing shows, the majority runs, but it cannot hide from the reality that its relegation of federal just compensation claims to state courts ultimately rests on and assumes the validity of *Williamson County*'s state procedures requirement.[301] It is important, then, to briefly reexamine that rule. According to the *Williamson County* Court, the requirement that federal just compensation litigants sue in state courts arises from: (1) the text of the Takings Clause, specifically the just compensation portion; (2) *Ruckelshaus v. Monsanto Co.*;[302] and (3) *Parratt v. Taylor*.[303] A basic examination of these premises shows that they do not have the effect imagined in *Williamson County* and that they are an entirely insupportable basis for relegating takings claims to state courts.[304]

1. Three Reasons, Three Strikes

a. *Strike One: The Claim to Federal Just Compensation Accrues at the Time of the Taking*

The first and most important basis for the state procedures requirement was the Court's understanding that the Takings Clause can be violated only after a state court denies compensation.[305] The fundamental principle underlying this conclusion—that an action for a taking exists only if the challenged invasion of private property occurs "without just compensation"—is not controversial, but the conclusion that compensation can be deemed lacking only after state court litigation is dubious.[306]

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[300] *See Williamson County*, 473 U.S. 172.

[301] *See San Remo IV*, 125 S. Ct. at 2508 (Rehnquist, C.J., concurring).

[302] *See generally* 467 U.S. 986 (1984).

[303] *See generally* 451 U.S. 527 (1981).

[304] *See Williamson County*, 473 U.S. at 194–97.

[305] *See id.* at 194.

[306] *See* Berger & Kanner, *supra* note 3, at 694 ("There is nothing in either logic or the language of the Fifth Amendment that requires municipal nonpayment [of compensation] to be certified by a state court before it is complete."); Buchsbaum, *supra* note 39, at 473–

Certainly, nothing in the text of the Takings Clause requires one to interpret "without just compensation" to mean "without a state court ordering compensation."[307] Indeed, it is just as plausible to find compensation lacking when the responsible local entity fails to pay at the time of the alleged taking.[308]

In fact, the Supreme Court has repeatedly recognized over many years that the right to compensation, as well as the government's duty to pay, accrues at the time of the challenged taking.[309] For instance, in *United States v. Dickinson*, the Court declared: "the land was taken when it was taken and an obligation to pay for it then arose."[310] Then, in 1980, the Court in *United States v. Clarke* repeated that "the usual rule is that the time of the invasion constitutes the act of taking, and '[i]t is that event which gives rise to the claim for compensation . . . .'"[311] In *First English Evangelical Lutheran Church v. County of Los Angeles*, the Court established that the same principles applied in the regulatory takings context.[312]

The text of the Takings Clause is, therefore, at least as amenable to the theory that a property owner is "without just compensation" at the moment the government invades property without a guarantee of compensation, as it is to *Williamson County*'s idea that compensation is absent only after a state court affirms the lack of compensation.[313] However, if just compensation can be said to be constitutionally absent at the time of the alleged taking, then a federal claim should be

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74 (arguing that the suggestion that the government has not acted "illegally until you ask for compensation and then it is denied," is false); Roberts, *Ripeness*, *supra* note 3, at 72 ("The language of the Fifth Amendment does not dictate this [state procedures] rule.").

[307] Buchsbaum, *supra* note 39, at 473; Berger & Kanner, *supra* note 3, at 695–96 (The Fifth Amendment "does not say 'nor shall private property be taken for public use without just compensation *as finally determined by suing the municipal defendant in state court.*'").

[308] Brief Amici Curiae Elizabeth J. Neumont in Support of Petitioners at 8, *San Remo IV*, 125 S. Ct. 2491 (2005) (No. 04-340); Kassouni, *supra* note 3, at 43 ("[I]t makes little sense to require property owners to seek just compensation from the *courts*, as opposed to the governmental entity which imposed the regulation.").

[309] *See, e.g.*, United States v. Dickinson, 331 U.S. 745, 751 (1947).

[310] *Dickinson*, 331 U.S. at 751.

[311] 445 U.S. 253, 258 (1980) (alteration in original) (quoting United States v. Dow, 357 U.S. 17, 22 (1958)).

[312] 482 U.S. 304, 315 (1987) (holding that the constitutional right to just compensation accrues as soon as private property has been taken).

[313] U.S. Const. amend. V; Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 195 (1985).

ripe at that time and *Williamson County* is wrong in requiring state court litigation.[314]

The notion that a state court must deny compensation before a claimant can be said to be "without just compensation" is not only unnecessary under the Takings Clause and inconsistent with the Court's traditional concept for the timing of a just compensation obligation, but is also illogical. After all, the local government, not the state, is sued for compensation in a typical § 1983 takings action.[315] This reality reaffirms the correctness of the pre-*Williamson County* understanding that a claim for compensation accrues when the local government engages in an uncompensated taking, not after a state court subsequently denies compensation.[316]

Ultimately, there is no textual reason for construing the Just Compensation Clause to mandate state court litigation as a condition for federal ripeness. Furthermore, the state court litigation requirement cannot be recast as an exhaustion of local remedies principle.[317] The requirement simply exists without any plausible doctrinal basis.

b. *Strike Two:* Monsanto*'s Holding Does Not Support a Ripeness Rule Requiring State Court Litigation*

The *Williamson County* Court attempted to shore up the state procedures requirement with an analogy to *Monsanto*.[318] This basis, however, is no sounder than the court's reliance on the text of the Takings Clause.

The *Williamson County* Court declared that *Monsanto* established that "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking."[319] In the opinion of the *Williamson County*

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[314] Brief Amici Curiae, *supra* note 308, at 8 ("In asserting that a property owner's monetary claim under the Just Compensation Clause does not accrue 'until just compensation has been denied' by the state judicial system,' *Williamson County* deviated sharply from the traditional understanding of that Clause." (quoting *Williamson County*, 473 U.S. at 195 n.13)).

[315] *See* Berger & Kanner, *supra* note 3, at 695.

[316] *See First English*, 482 U.S. at 315; Clarke, 445 U.S. at 258.

[317] *See* Patsy v. Bd. of Regents, 457 U.S. 496, 516 (1982) (holding that § 1983 claimants are not required to exhaust state remedies to sue in federal court).

[318] *See Williamson County*, 473 U.S. at 194–95; Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

[319] *Williamson County*, 473 U.S. at 194–95 (second alteration in original) (quoting *Monsanto*, 467 U.S. at 1013, 1018 n.21).

Court, *Monsanto* applied the foregoing principle to hold that "takings claims against the Federal Government are premature until the property owner has availed itself of the process [for seeking compensation] provided by the Tucker Act."[320] Analogizing to these premises, *Williamson County* concluded that "if 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."[321]

If one accepts *Williamson County*'s interpretation of *Monsanto*, that case may seem to support the state procedures requirement. However, *Monsanto* does not stand for the propositions that the *Williamson County* Court claims and, consequently, cannot justify the state litigation requirement.[322]

Unlike *Williamson County*, *Monsanto* did not involve a federal claim for just compensation; it involved a claim for injunctive and declaratory relief.[323] *Monsanto* held that, regardless of whether or not the challenged acts caused a taking, the plaintiff was not entitled to injunctive relief.[324] *Monsanto*'s rejection of injunctive relief is inapposite to the *Williamson County* issue of whether federal just compensation claims are premature and unripe in federal court prior to state court litigation: "[T]he [Monsanto] company's request for equitable relief . . . was not merely *premature*, it was *not available* at all. In other words, there was nothing the company could do to 'ripen' its claim for equitable relief; that claim simply had no merit, period."[325]

The problems with *Williamson County*'s reliance on *Monsanto* are even more troubling because *Monsanto* merely held that takings claims against the federal government must be raised as just compensation claims under the Tucker Act.[326] This Tucker Act requirement is nothing like requiring takings claimants to file just compensation claims in state court before going to federal court.[327] A claim under the Tucker Act is the assertion of a mature federal claim for compensation, not a ripeness prerequisite designed to ready the claim for a later tribunal. Accordingly:

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[320] *Id.* at 195 (citing *Monsanto*, 467 U.S. at 1016–20).
[321] *Id.*
[322] *See Williamson County*, 473 U.S. at 194–95 (interpreting *Monsanto*).
[323] *See id.*; *Monsanto*, 467 U.S. 986.
[324] *See* 467 U.S. at 1020.
[325] Brief Amici Curiae, *supra* note 308, at 12.
[326] *See Williamson County*, 473 U.S. at 195; *Monsanto*, 467 U.S. at 1020.
[327] *See Monsanto*, 467 U.S. at 1020.

> [I]f Williamson County were correct that [under *Monsanto*] a property owner must "avail[] itself of the process provided by the Tucker Act" *before* pursuing its claim for just compensation, then it would be the rule that a property owner must essentially bring a Tucker Act suit before bringing a Tucker Act suit. In other words, an owner's Tucker Act suit . . . would be "premature" until the property owner had brought a Tucker Act suit for just compensation. Obviously, this *reductio ad absurdum* deserves no respect . . . .[328]

Therefore, the *Williamson County* Court's reliance on *Monsanto* was unfortunate and entirely unjustified.

c. *Strike Three: The Limited Postdeprivation Remedy Available in the Procedural Due Process Context Has No Application to Takings Claims*

Williamson County's final basis for the state procedures requirement is *Parratt*,[329] a 1981 procedural due process decision. This justification fares no better than the analogy to *Monsanto*.

In *Parratt*, the Court determined that a prisoner's complaint alleging the negligent loss by prison officials of a hobby kit constituted an actionable "deprivation" of property under 42 U.S.C. § 1983.[330] The Court also concluded that there was no constitutional due process violation until the plaintiff took advantage of an adequate postdeprivation remedy provided by Nebraska's tort claims statute.[331]

The *Parratt* Court declared that a "state's action is not complete [in causing a constitutional injury] unless or until the state fails to provide an adequate postdeprivation remedy for the property loss."[332] In *Williamson County*, the Court extended this reasoning to just compensation claims to support the state procedures prerequisite.[333] There is no logical basis for doing so. *Parratt*'s holding—that no procedural due process violation occurs until the plaintiff utilizes a postdeprivation process—applies only in the context of "a random and unauthorized act by a state employee."[334] Such a random act makes a

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[328] Brief for Amici Curiae, *supra* note 308, at 12 (third alteration in original) (quoting *Williamson County*, 473 U.S. at 195).

[329] *See Williamson County*, 473 U.S. at 195; Parratt v. Taylor, 451 U.S. 527 (1981).

[330] *Parratt*, 451 U.S. at 544.

[331] *Id.* at 544–45.

[332] Hudson v. Palmer, 468 U.S. 517, 532 n.12 (1984) (citing *Parratt*, 451 U.S. at 541–42).

[333] *Williamson County*, 473 U.S. at 195.

[334] *Parratt*, 451 U.S. at 541, 543–44; Logan v. Zimmerman Brush Co., 455 U.S. 422, 435–36 (1982).

predeprivation hearing "impossible or impracticable."[335] *Parratt*'s postdeprivation remedy requirement is not intended to apply where "deprivation of property is effected pursuant to an established state policy or procedure, [since here] the State could provide predeprivation process."[336]

The "established policy" exception to *Parratt* renders it irrelevant in the takings context because a regulatory taking of private property is always effected pursuant to an established policy or procedure.[337] If interference with private property occurs by a government agent's random act and without the blessing of established policy, it is a "tort, not a taking."[338]

Since a taking always flows from an established policy, predeprivation process is always possible; it therefore makes no sense to apply *Parratt*'s postdeprivation remedial requirement to takings.[339] Not only is predeprivation process possible, it routinely occurs before most regulatory takings. A local regulatory agency typically conducts hearings resulting in findings and a decision arguably depriving a property owner of a protected property interest and definitely making no provision for compensation.[340] Therefore, applying *Parratt*'s postdeprivation remedial analysis to takings claims is not just inconsistent with *Parratt*'s premise that predeprivation process must be impossible; it also puts federal takings claimants into the unparalleled position of having to go through both a predeprivation and postdeprivation process to prosecute their claim.[341] Nothing in *Parratt* requires this.[342] In fact, if there is

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[335] *Williamson County*, 473 U.S. at 195.

[336] *Id.* at 195 n.14; *see also* Evers v. County of Custer, 745 F.2d 1196, 1202 n.6 (9th Cir. 1984) ("*Parratt* . . . does not apply to cases in which the deprivation of property is effected pursuant to a state procedure and the government is therefore in a position to provide for predeprivation process." (citing *Hudson*, 468 U.S. 517)).

[337] *See* Ridge Line, Inc. v. United States, 346 F.3d 1346, 1355 (Fed. Cir. 2003) ("[A] property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the 'direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action.'" (quoting Columbia Basin Orchard v. United States, 538 F.2d 865, 870 (1976))).

[338] Brief for Amici Curiae, *supra* note 308, at 13 n.7.

[339] *See, e.g, Parratt*, 451 U.S. at 541; LaSalle Nat'l Bank v. County of Lake, 579 F. Supp. 8, 10–11 (N.D. Ill. 1984) (rejecting a postdeprivation remedy defense to government's refusal to provide sewer service to prospective developers because of established policy exception).

[340] *See, e.g., San Remo IV*, 125 S. Ct. 2491, 2496 (2005).

[341] *See Parratt*, 451 U.S. at 541.

[342] *See generally id.*

adequate predeprivation process, procedural due process doctrine is inapplicable.[343]

If a property owner has a complaint after predeprivation process, it is one of a substantive nature.[344] *Parratt*'s procedural due process, postdeprivation remedy is also inapplicable in this situation.[345] Since takings claimants can and do receive predeprivation process, but allege the loss of a property right despite such process, *Parratt* should be inapplicable to takings claims whether one looks at the just compensation element through a procedural or substantive lens.[346]

2. The Court Didn't "Understand This Case" and Wouldn't Ask for Help

There is a simple, but startling explanation for the lack of any foundation for *Williamson County*'s state procedures requirement: the author of the opinion did not understand the dispositive issues at the time they were being decided and the Court signed onto the opinion without adequate briefing.[347] The revelation as to the late Justice Blackmun's lack of understanding about the issues in *Williamson County* are found in his recently released *Williamson County* notes. In the margin of one paper, Justice Blackmun has inscribed in handwriting: "*I am not sure I fully understand this case.*"[348] The notes further indicate that his confusion extended to the critical issue of the timing of a violation of the Just Compensation Clause.[349] Justice Blackmun was apparently

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[343] *See* Lee v. W. Reserve Psychiatric Habilitation Ctr., 747 F.2d 1062, 1069 (6th Cir. 1984) (dismissing procedural due process claim because of adequate predeprivation process).

[344] *See Parratt*, 451 U.S. at 546; Augustine v. Doe, 740 F.2d 322, 327 (5th Cir. 1984) ("[W]hen a plaintiff alleges that state action has violated an independent substantive right, he asserts that the action itself is unconstitutional. If so, his rights are violated no matter what process precedes, accompanies, or follows the unconstitutional action.").

[345] Smith v. City of Fontana, 818 F.2d 1411, 1415 (9th Cir. 1987) ("Actions which violate . . . specific substantive protections of the Bill of Rights lie outside the scope of *Parratt* because the constitutional violation is complete at the moment the action or deprivation occurs, rather than at the time the state fails to provide requisite procedural safeguards surrounding the action.").

[346] *See Parratt*, 451 U.S. at 541; Tomkins v. Vill. of Tinley Park, 566 F. Supp. 70, 77 (N.D. Ill. 1983) (holding Parratt inapplicable to a takings claim because plaintiff was asserting a "*substantive* constitutional guarantee: the right not to have her property seized with the active participation of the government and without just compensation.").

[347] *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank 473 U.S. 172, 194–95 (1985) (discussing state procedures requirement).

[348] Box 69, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C.

[349] *Id.*

struggling with the question of whether the Just Compensation Clause was violated either at the time of the taking, which would mean an action accrued at that point, or after a court denies a claim for monetary damages—as *Williamson County* ultimately held.[350]

Briefing on the pertinent issues would have likely clarified the critical issue for Justice Blackmun and the rest of the Court. However, in *Williamson County*, there was almost no briefing by the parties on the merits of a state procedures requirement or the premises underlying the rule.[351] The only question presented was whether the government "must pay money damages to a landowner whose property allegedly has been 'taken' temporarily by the application of government regulations."[352] Given this question, the parties and amici curiae focused their briefing almost entirely on whether the Constitution required damages for temporary regulatory takings.[353] In the *Williamson County* opinion, the Court twice acknowledged that the parties' briefing extended only to the issue of compensation for temporary takings.[354]

Only the Solicitor General of the United States argued that ripeness barriers might defeat Hamilton Bank's claim.[355] Rightly believing that such issues were not before the Court, Hamilton Bank responded with a few sentences.[356] In short, the Court concocted and adopted the state procedures ripeness requirement "out of the blue" without a full understanding of their correctness and without seeking or receiving adequate briefing.[357]

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[350] *Id.*

[351] *Williamson County*, 473 U.S. at 175, 185.

[352] *Id.* at 185.

[353] *See id.* at 174. The attorneys general of nineteen states and territories, together with the National Association of Counties, the City of New York, and the City of St. Petersburg, Florida joined the petitioner in urging the Court to reverse the judgment rendered in favor of the property owner "on the ground that a temporary regulatory interference with an investor's profit expectation does not constitute a 'taking' . . . or, alternatively, on the ground that even if [it] does . . . , the Just Compensation Clause does not require money damages as recompense." *Id.* at 174–75. On the other side, four professional and public-interest organizations filed amicus curiae briefs urging the Court to affirm the temporary takings judgment to establish that regulation which effectively wipes out a property's value is a taking for public use, requiring money damages under the Just Compensation Clause. *See id.* at 174 n.*.

[354] *Id.* at 175, 185.

[355] *See* Brief for Amici Curiae, *supra* note 308, at 1; Brief for the United States as Amicus Curiae Supporting Petitioners at 10, *Williamson County*, 473 U.S. 172 (No. 84-4); Kanner, *supra* note 27, at 330.

[356] Kanner, *supra* note 27, at 327.

[357] *Id.*

In any event, the state procedures portion of *Williamson County* was not even necessary to the result in that case.[358] The *Williamson County* Court had already held that the property owners' claim was unripe for lack of a final decision; it could have decided the case on this basis alone.[359] However, in what might be considered the most influential dicta in all of takings law, the Court posited that ripeness also required the filing of a just compensation claim in state court.[360] The result was predictable: a constitutional rule—that federal claims for just compensation ripen by state court litigation—that lacks the authority of precedent or logic, that is at odds with other doctrines, such as preclusion and *Rooker-Feldman*, and which has accordingly generated a federal jurisdictional mess of titanic proportions.[361] Now, thanks to *San Remo IV*, the irredeemably flawed and unnecessary state procedures requirement has conspired with preclusion to make federal claims for just compensation federally homeless.

3. Why the Silence?

What is particularly jarring about *San Remo IV*'s revolutionary outcome is that the majority refused to expressly clarify its position on the nature or role of the state procedures requirement underlying that outcome.[362] The majority never acknowledges or counters the concurrence's criticism of the requirement.[363] Indeed, the opinion never even directly states that *Williamson County* requires state court litigation or mentions that the state procedures requirement was crafted as a ripeness rule.[364] The majority breaks its silence on *Williamson County* only once, to clarify that a federal takings claim may be raised in state court as an initial matter without prior state court litigation.[365] While this clarifies some confusion about what is allowed in a state court action, it does not address why the claimants are in state court to begin with and why they cannot go to federal court afterwards.

Why is the majority so reticent on these fundamental *Williamson County* questions? Given the extent to which its decision hinges on the operation of *Williamson County*, one expects some confirmation or dis-

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[358] *See Williamson County*, 473 U.S. at 194–95.
[359] *See id.* at 192–93.
[360] *Id.* at 194–95.
[361] *See id.*
[362] *See generally San Remo IV*, 125 S. Ct. 2491 (2005).
[363] *See id.* at 2508 (Rehnquist, C.J., concurring).
[364] *See generally id.*
[365] *Id.* at 2506 (majority opinion).

cussion of that decision and is unsettled at its absence.[366] The obvious and most plausible explanation for the silence is that the majority—or some of its members—considered *Williamson County* to be beyond the scope of the question presented.[367] Indeed, the question presented by San Remo's petition did not directly challenge *Williamson County*'s state procedures requirement.[368] At oral argument, San Remo's counsel reiterated that the hotel had not asked the Court to reconsider *Williamson County*, to which Justice O'Connor replied: "Maybe you should have."[369]

Nevertheless, the Court's desire to stay within, or close to,[370] the boundaries of the issue preclusion question is not a fully satisfying answer to its silence on *Williamson County* because the majority could have discussed its understanding of the origin, parameters, and effects of the state procedures rule without actually deciding its correctness. This would have maintained fidelity to the question presented and imbued the decision with more legitimacy. A more complete blackout on *Williamson County* makes sense only if one or more of the majority justices thought the state procedures ripeness requirement was incorrect, but also believed that the preclusion question at hand did not permit even a restrained discussion of that rule. A justice in this position might logically seek to avoid any commentary that could be construed as approving *Williamson County*, or as impliedly rejecting the concurrence's views on the shortcomings of the case. Such a justice would accept the unavoidable affirmative effects on *Williamson County* arising from enforcement of preclusion, as long they were wholly im-

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[366] *See id. See generally* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

[367] *See San Remo IV*, 125 S. Ct. at 2501 n.18 ("We did not grant certiorari on many of the issues discussed by the parties and *amici*."); *id.* at 2510 (Rehnquist, C.J., concurring) ("[N]o court below has addressed the correctness of *Williamson County*, neither party has asked us to reconsider it, and resolving the issue could not benefit petitioners.").

[368] *See Williamson County*, 473 U.S. at 194–97. With respect to preclusion, San Remo's petition for certiorari asked whether "a Fifth Amendment Takings claim [is] barred by issue preclusion based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal Takings claim?" Brief for Petitioner, *supra* note 174, at i.

[369] Transcript of Oral Argument at 6: 3–7, *San Remo IV*, 125 S. Ct. 2491 (No. 04-340).

[370] The sole question on which the Court granted certiorari concerned the applicability of issue preclusion to San Remo's takings claims. *See San Remo IV*, 125 S. Ct. at 2501. But in deciding the case, the Court reframed the issue as "whether we should create an [*England*-type] exception to the full faith and credit statute," which includes issue and claim preclusion. *Id.* at 2500, 2501; 28 U.S.C. § 1738 (2000). Therefore, in answering its own question in the negative, the Court affirmed both types of preclusion in the takings context, and went beyond the scope of the question presented.

plicit and bereft of any supporting discussion that might make it more difficult for a future court to overturn *Williamson County*.[371]

However, if such a hypothetical majority justice does not exist—if all majority justices were satisfied with *Williamson County*—as the majority decision implies, then the majority's refusal to discuss the state procedures requirement and its role in the *San Remo IV* result is truly troubling. In this case, the majority may be viewed as the judicial equivalent of a referee who hides the ball because he knows it won't bounce. That is, one might easily conclude that the majority purposefully ignored *Williamson County* and its ripeness aspect because to engage these concepts is to recognize, as the concurrence did, that they are both doctrinally unsound and incapable of legitimately relegating takings claims to state court. If this is the case, then *San Remo IV* is the worst sort of result-oriented decisionmaking.[372]

C. *Federal Takings Litigation After* San Remo IV

Whatever its purpose, the majority's silence on *Williamson County* leaves the state procedures requirement intact to the extent it requires takings claimants to seek just compensation in state court.[373] Because the Court recognizes that federal just compensation claims can be immediately raised in the mandated state court action, and because claim preclusion bars all claims that could have been raised in prior litigation, the denial of an *England*-type exception for takings claimants ensures that many will never have recourse in federal court.[374]

However, it would be a mistake to conclude that *San Remo IV* closes the federal courthouse door to all federal takings claims. *Williamson County* arose from, and focuses on, a takings claim seeking the remedy of monetary compensation.[375] In crafting the state proce-

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[371] Of the justices in the majority, Justice Scalia seems the most likely candidate for the described role. The problem is that, at oral argument, Justice Scalia did not seem disturbed by the possibility that state courts would serve as the exclusive forum for just compensation claims provided the claimants could resort to the Supreme Court. *See* Transcript, *supra* note 369, at 24:21–25 (stating that it was "perfectly fine" and not "strange" to leave "it to the State court to make these decisions," but expressing concern that the claimants might be barred from the Supreme Court).

[372] This very charge has been leveled at *Williamson County* itself. *See* Kanner, *supra* note 27, at 331 ("[O]ne . . . gets the unshakable impression that the *Williamson County* opinion was a manifestation of a syndrome known to appellate lawyers as 'Have opinion; need case.'").

[373] *See supra* text accompanying note 360.

[374] *See San Remo IV*, 125 S. Ct. at 2501–06.

[375] *Williamson County*, 473 U.S. at 182–83.

dures rule, the *Williamson County* Court was concerned only with ripening claims for just compensation: "if 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*."[376] Therefore, when the *Williamson County* Court states that "The nature of the constitutional right . . . requires that a property owner utilize procedures for obtaining compensation,"[377] the right the Court may be referring to is the right to monetary compensation. In *First English*, the Court stated that "one seeking *compensation*" must follow *Williamson County*'s state procedures requirement.[378] Accordingly, it is reasonable to conclude that the state procedures requirement applies only when the relief sought is compensatory.[379] In *San Remo IV*, the majority expressly approved this reading in concluding that San Remo's facial claims could be brought directly in federal court, avoiding preclusion, because they "requested relief distinct from the provision of 'just compensation' . . . ."[380]

Under *Lingle v. Chevron U.S.A. Inc.*,[381] takings claimants can no longer invoke the same facial noncompensation claims raised by *San Remo IV* for purposes of securing federal jurisdiction or otherwise.[382] Those claims related to whether the challenged regulation caused takings by failing to substantially advance a legitimate state interest,[383] and the *Lingle* Court rejected this substantial advancement test as a takings standard two weeks prior to *San Remo IV*. [384] Takings claimants, however, may seek noncompensatory relief under other takings theories and, in this way, secure direct federal review of their claims.[385] There is no reason to believe that such actions must arise from facial

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[376] *Id.* at 195 (emphasis added).

[377] *Id.* at 195, n.13.

[378] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 312 n.6 (1987) (emphasis added).

[379] *See, e.g.*, *San Remo IV*, 125 S. Ct. at 2506 (noting that San Remo's facial claims were ripe in federal court without compliance with the state procedures rule because those claims did not seek monetary compensation); *First English*, 482 U.S. at 312.

[380] *San Remo IV*, 125 S. Ct. at 2506.

[381] 125 S. Ct. 2074 (2005).

[382] *See San Remo IV*, 125 S. Ct. at 2506 n.25.

[383] *See id.* at 2506. For discussion of the history and scope of the substantially advances test, see R.S. Radford, *Of Course a Land Use Regulation that Fails to Substantially Advance Legitimate State Interests Results in a Regulatory Taking*, 15 Fordham Envtl. L. Rev. 353 (2004).

[384] *See Lingle*, 125 S. Ct. at 2085–86.

[385] *See* Abraham, *supra* note 3, at 125–26 (noting that the state procedures ripeness rule may not apply when a property owner seeks "damages or restoration of property " rather than just compensation).

challenges. In noting that San Remo's failure to substantially advance claims would have been cognizable in federal court, the *San Remo IV* Court focused on the nature of the relief requested, not their facial quality.[386] Moreover, the Court has acknowledged that a declaratory relief action in an as-applied challenge is "no different in substance from a facial challenge to an allegedly unconstitutional statute or zoning ordinance—which we would assuredly not require to be brought in state courts."[387]

Claims for noncompensatory relief are most likelv to be accepted where compensation cannot be practically provided,[388] or where the taking is prospective.[389] However, these circumstances might include relatively common exaction cases where the government proposes to take money or real property as a condition of a permit. When a property restriction, "'rather than burdening real or physical property, requires a direct transfer of funds'" declaratory relief is a proper remedy.[390] Property owners challenging a monetary exaction may be able to seek declaratory relief and thus obtain a federal forum.

More generally, as long as a property owner challenges an exaction prior to accepting the permit—prior to the taking—declaratory relief should be an available remedy, regardless of the character of the exaction. In *Nollan v. California Coastal Commission*, the leading exaction takings case, the plaintiffs sought[391]—and the Court provided—the equivalent of declaratory relief in holding that permit conditions

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[386] *See San Remo IV*, 125 S. Ct. at 2506.

[387] New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 372 (1989) (citing Wooley v. Maynard, 430 U.S. 705, 711 (1977)).

[388] E. Enters. v. Apfel, 524 U.S. 498, 520–22 (1998) (holding that injunctive and declaratory relief was available where monetary compensation was unavailable as a practical matter); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 71 n.15 (1978) (stating that the Declaratory Judgment Act "allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained.").

[389] *See, e.g.*, Bd. of Managers of Soho Int'l Arts Condo. v. City of New York, 75 USPQ.2d 1025, 1037 (S.D. N.Y. 2005) (declaring that a contemplated future act would be a taking requiring just compensation, and that only the issue of compensatory damages was not ripe because the taking had not occurred).

[390] *See, e.g.*, *E. Enters.*, 524 U.S. at 521 (quoting *In re* Chateaugay Corp., 53 F.3d 478, 493 (2d Cir. 1995)).

[391] 483 U.S. 825 (1987). The Nollans prosecuted their takings claim by filing a petition for writ of administrative mandamus, which only provides invalidation as a remedy. *See id.* at 829.

affected a taking.[392] Since such relief is "distinct from the provision of 'just compensation,'" exaction litigants may be able to sue in federal court after *San Remo IV*.[393] Even litigants with facial *Penn Central* or *Lucas v. South Carolina Coastal Council* claims may be able to secure federal jurisdiction by seeking declaratory relief.[394] No Supreme Court precedent directly forecloses this proposal.[395]

However, even if some takings claims make it into federal court under a noncompensatory relief exception or otherwise, the reality is that after *San Remo IV*, many as-applied claimants suffering the most severe restrictions on their property rights will not be able to seek the federal constitutional compensatory remedy in federal court. The Court did not have to leave these claimants in this position.[396] Confronted with *Williamson County*'s patent misconceptions and intent to ripen claims, the Court could have loosened the state procedures requirement to put just compensation claims on equal footing with noncompensatory takings claims and other constitutional guarantees when it comes to the availability of a federal forum. For instance, the Court might have concluded that the San Remo Hotel plaintiffs misinterpreted the state procedures requirement to mandate state court procedures, when all it actually required was an administrative request

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[392] *See id.* at 841–42 (reversing the California courts' denial of the writ of administrative mandamus and declaring "if it wants an easement across the Nollans' property, it must pay for it.").

[393] *See* 125 S. Ct. at 2506.

[394] *Cf.* Hodel v. Irving, 481 U.S. 704, 716–17 (1987) (invalidating a statute requiring small parcels of inherited land to escheat to the government). *See generally* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1978); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

[395] Although *First English* held that states must provide a compensatory remedy for regulatory takings that have occurred, it did not hold that plaintiffs are barred from seeking other forms of relief. *See First English*, 482 U.S. 304, 321 (1987). *Monsanto* held that plaintiffs raising takings claims against the United States must seek compensatory relief under the Tucker Act and therefore cannot sue for injunctive or declaratory relief, but said nothing about the propriety of non-compensatory takings claims against a local or state agency. *See Monsanto*, 467 U.S. 986, 1016–19 (1984). Moreover, the Court has never rejected the concept that "regulation that goes so far that it has the same effect as a taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause of the Fourteenth Amendment." Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 197 (1985) ("The remedy . . . under [this] theory, is not 'just compensation,' but invalidation of the regulation, and if authorized and appropriate, actual damages.").

[396] *See* Michael C. Dorf, *The Case of the Half-Million Dollar Typo: The Supreme Court Traps Property Owners in a Catch-22*, FindLaw Legal Commentary, June 22, 2005, http://writ.news.findlaw.com/dorf/20050622.html ("[H]aving fashioned the *Williamson County* requirement in the first place, the Court could also, if it so chose, weaken it . . . .").

for compensation.[397] Or, the Court may have found some other way to relax the state procedures rule.[398] The majority, however, remained silent and implicitly converted the state procedures ripeness prerequisite into a permanent barrier to federal court review.

Thanks to *San Remo IV* and *Williamson County*, the Court has gone far toward making the Just Compensation Clause the first provision to be effectively unincorporated from the Fourteenth Amendment. This is surely an ironic and ill-suited end for the first constitutional provision to be enforced against the states.[399] Even more disappointing than the abdication of a federal role in securing property rights against overzealous state action is the fact that it was accomplished by indirection. The Fifth Amendment deserves more respect.[400]

Conclusion

Williamson County v. Hamilton Bank was a mistake from the start. Although that decision said "go to state court first, but if you lose, you are welcome in federal courts," it did not explain how that rule interacted with a federal preclusion doctrine that said "if you've been in state court, you must stay there." Because *Williamson County* did not intend to preclude takings claims from federal court, the rigid application of well-known preclusion rules to bar ripe takings claims seems unnecessary. The lower courts deserve credit for accepting the *England v. Louisiana State Board of Medical Examiners* reservation as a vehicle for allowing takings claims to proceed in federal court after the state court litigation, as envisioned by *Williamson County*. The final expression of that compromise in *Santini v. Connecticut Hazardous Waste Management Service* was a plausible and fair, even if inefficient, way to

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[397] This possibility was suggested by the late Chief Justice Rehnquist at oral argument in *San Remo IV*. *See* Transcript, *supra* note 369, at 23:14–17 ("Do you think *Williamson County* by its terms spoke of going to State court and—rather than just a State administrative proceeding?").

[398] *See* Dorf, *supra* note 396.

> The Court might have weakened *Williamson County* by saying . . . [a] federal court defendant may demand that a plaintiff bringing an as-applied Takings Claim first provide the state authorities with an opportunity to pay just compensation. But a defendant who so demands thereby waives the ability to use the state court judgment later to preclude litigation of the federal issue in federal court.

Id.

[399] *See* Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 234 (1897).

[400] *See generally* Ely, *supra* note 242.

reconcile preclusion with *Williamson County*'s promise of eventual federal review for federal just compensation claimants.

In refusing to recognize an *England*-type exception to preclusion in the takings context, the *San Remo IV* Court elevated the Full Faith and Credit Act over *Williamson County*'s constitutionally-grounded ripeness promise that just compensation claims are proper in federal court after state court litigation. In effect, *San Remo IV* affirmed the state procedures requirement as requiring completion of state court compensation procedures—and the unsupportable basis for that requirement—while ignoring the fundamental ripening purpose of the rule. Therefore, despite the majority's contrary assurances,[401] *San Remo IV* is "radical" for both its result—divesting federal courts of their ability to hear just compensation claims arising under the Fifth Amendment—and for its refusal to address *Williamson County* or its ripeness premises.

San Remo IV may not have gone as far in closing off the federal forum as it may first appear,[402] but damage has been done. Federal just compensation claimants, unlike other constitutional litigants, have been reduced to lurking around the federal courthouse doors, hat in hand, hoping for some judge to take pity on them by accepting their declaratory relief claims or by finding state remedies inadequate.[403] They are in such straits not because of some legitimate constitutional anomaly, but mostly because the Court engaged in shoddy jurisprudence in *Williamson County* and then failed to summon the courage to

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[401] *See San Remo*, 125 S. Ct. 2491, 2506 (2005) ("It is hardly a radical notion to recognize that, as a practical matter, a significant number of plaintiffs will necessarily litigate their federal takings claims in state courts.").

[402] *See supra* notes 378–95 and accompanying text.

[403] As Professor Kanner has put it:

> Judges would do well to understand that landowners seeking relief in their courts are not some sort of enemy, but rather their fellow American citizens invoking the protection of the Bill of Rights. They are entitled to better treatment than the back-of-the-hand dismissal of their vital interests that they have had to endure thus far in so many of these cases. If nothing else, they are entitled to be told plainly and as expeditiously as any other litigants whether they won or lost on the merits, without having to run a decade-long administrative and litigational obstacle course, menaced throughout by the likelihood that eventually, through a process of judicial nitpicking (in which with the benefit of hindsight, little if anything seems to satisfy the judges), they may be told at the end that the run was for naught and they must start all over again.

Kanner, *supra* note 27, at 352.

clean up its own mess in *San Remo IV*.[404] The Court has provided no acceptable justification for maintaining this situation. Therefore, it should overturn *Williamson County*'s state procedures requirement at the first opportunity. If it will not act, then Congress should amend the Full Faith and Credit Act to create an exception to the takings preclusion trap laid by *Williamson County*.

[404] *See supra* Part IV.B.