Florida State University Journal of Land Use and Environmental Law

Volume 18
Number 2 *Spring 2003*

Article 1

April 2018

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Cover Page Footnote
A previous version of this paper was presented during the Tenth Annual Advanced ALI-ABA Course of Study, Inverse Condemnation and Related Government Liability, held in Chicago, Illinois, September 26-28, 2002.

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

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I. INTRODUCTION

In the 1985 case of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,[1] the United States Supreme Court held that a property owner must satisfy two procedural requirements before invoking federal jurisdiction over a claim that local or state regulatory action has effected a taking of private property in violation of the Fifth Amendment to the United States Constitution. The landowner must first establish that a final decision has been made with respect to the allowable use of property in question.[2] Second, the takings claimant must show that she has utilized state procedures for obtaining just compensation for an alleged taking of property prior to filing suit in federal court.[3] A takings claim is "ripe" for federal adjudication only when both of these steps are completed, and compensation is either denied, or is shown to be unavailable under state processes.[4]

As commentators have long noted, the ripeness prongs established in *Williamson County* create powerful barriers to landowners seeking to have their takings claims heard on the merits in federal court.[5] When combined with preclusion doctrines,[6] the state procedures requirement is particularly pernicious.[7] In

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1. 473 U.S. 172 (1985).
2. *Id.* at 186.
3. *Id.* at 194-95.
4. *Id.* at 186.
5. *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) ("*Williamson County* is regarded as posing formidable hurdles because of its two-part ripeness requirement, finality and compensation, that ultimately may block takings claims."); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U. J.L. & POL'Y 99, 102 (2000) ("In *Williamson County*, ... the Court expanded on the doctrine of ripeness in regulatory takings cases transforming the ripeness doctrine from a minor anomaly into a procedural monster."); Max Kidalov & Richard Seamon, *The Missing Pieces of the Debate Over Federal Property Rights Litigation*, 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."); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings*, 11 J. LAND USE & ENVTL. L. 37, 37 (1995) [hereinafter *Ripeness and Forum Selection*] (noting that *Lucas* and *Dolan* "have only a modest effect on the ... ripeness [requirements] and [on] forum selection [imposed by *Williamson County*], which remain formidable hurdles in land use litigation.").
6. The applicable preclusion doctrines include res judicata, otherwise known as "claim preclusion," and collateral estoppel, often called "issue preclusion." This Article will use the terms "claim" and "issue" preclusion. Claim preclusion prevents litigation of any claim that was or could have been litigated in an earlier action involving the same parties. *See Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d129, 1307-08 (11th Cir. 1992). Issue preclusion prevents litigation of any issue that was actually litigated in a prior action. *See* RESTATEMENT (SECOND) OF JUDGMENTS 27 (1982).
7. For a general discussion of the effect of the combination of the state procedures requirement and the doctrines of res judicata and collateral estoppel, see Berger, *supra* note

many cases, it has been applied to close the federal courthouse door to attempts to vindicate federal rights under the Takings Clause,[8] a situation that cannot be reconciled with the Court's opinion in *Williamson County* or with the well-established role of federal courts in enforcing federal constitutional law.

Still, despite intense pleas for reform from commentators on all sides of the takings issue,[9] federal courts have so far failed to provide a coherent solution to the injustices wrought by the state procedures requirement. The Supreme Court, while softening the final decision requirement in the recent case of *Palazzolo v. Rhode Island*,[10] has failed to elaborate on the meaning of the state procedures prong and how it relates to doctrines of preclusion.

This article examines this important and unique ripeness requirement and criticizes its adoption by the Court and application in the lower courts. Part II reviews the facts and litigation in *Williamson County*. Part III looks closely at the purported foundations of the state procedures requirement and concludes that it is doctrinally unsound as a rule required by the text of the Takings Clause, or as either a ripeness or exhaustion standard.

5; Thomas E. Roberts, *Fifth Amendment Taking Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 URB. LAW. 479, 483 (1992).

8. *See, e.g.*, Berger, *supra* note 5, 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 state court litigation, far from *ripening* the federal cause of action, instead has *extinguished* it."); Kidalov & Seamon, *supra* note 5, 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...."); 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, 18 (1999) ("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.").

9. *See generally* Michael M. Berger & Gideon Kanner, *The Need for Takings Law Reform: A View from the Trenches — A Response to* Taking Stock of the Takings Debate, 38 SANTA CLARA L. REV. 837, 874-75 (1998); 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 (1988); 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 (1999) (arguing that Congress should pass legislation easing the rules for jurisdiction of takings claims); Daniel R. Mandelker & Michael M. Berger, *A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings*, 42 LAND USE L. & ZONING DIG. 3 (1990) (arguing federal takings questions should be resolved in federal courts); Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far the Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91 (1994).

10. 533 U.S. 606 (2001); *see also* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 739 (1997) (concluding that where an agency lacks discretion over a landowner's right to use land, "no occasion exists for applying *Williamson County's* requirement that a landowner take steps to obtain a final decision about the use that will be permitted on a particular parcel.").

This section also reviews the interpretation of the requirement in federal courts and illustrates the fundamental unfairness, and error, of applications of the rule that allow claim and issue preclusion to relegate properly ripened claims to the state courts. Part IV explores several generally applicable exceptions to the state procedures requirement that are consistent with *Williamson County* and that should allow many as-applied takings claimants to raise their federal constitutional claims in federal court.

II. THE ORIGINS OF THE STATE PROCEDURES REQUIREMENT

A. Facts and Lower Court Rulings in Williamson County

At the center of the decision in *Williamson County* is a residential cluster subdivision located outside Nashville, Tennessee.[11] In 1973, the Williamson County Regional Planning Commission approved a preliminary plat for development of Temple Hills Country Club Estates (Temple Hills), a subdivision covering 676 acres, 260 of which were reserved for open space purposes, including a golf course positioned in the center of the development.[12] Around the golf course, on the steeper acreage, were to be 736 houses[13] ("later reduced to 688 because of a subsequent condemnation of 18.5 acres for the Natchez Trace Parkway").[14] On the plat, lot lines were drawn for only 469 of these residences. It was understood that the Commission would decide on the specific placement of the remaining units as the development proceeded.[15]

Between 1973 and 1979, the landowner encountered few problems developing the property, and managing to build and sell 212 houses,[16] and spending between three and five million dollars improving the golf course and other infrastructure.[17] Although the county enacted more restrictive zoning and subdivision ordinances during the same period,[18] it refrained from applying them to the property. This policy was premised on an informal understanding, a clause in the subdivision regulations that appeared to keep the

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11. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 176-77 (1985); Gus Bauman, Hamilton Bank – *Supreme Court Says: Don't Make a Federal Case Out of Zoning Compensation*, 8 ZONING & PLAN. L. REP. 137, 138 (1985).

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

13. *Id.*

14. Bauman, *supra* note 11, at 138.

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

16. Hamilton Bank of Johnson County v. Williamson County Reg'l Planning Comm'n, 729 F.2d 402, 406 n.5 (6th Cir. 1984), *rev'd and remanded*, 473 U.S. 172 (1985).

17. Respondent's Brief at 7, Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) (No. 84-4) [hereinafter Respondent's Brief]; Bauman, *supra* note 11, at 138.

18. *Williamson County*, 473 U.S. at 178.

development within the 1973 zoning scheme, and the fact that the county legislature conferred nonconforming zoning status on the property.[19] However, in 1979, the Commission suddenly decided that all plats would be reviewed under existing regulations.[20] (Trial testimony suggested that the county executive, for political reasons, had ordered that county officials hinder the approval or re-approval of development in order to prevent more people from moving into the county.)[21] Thus, in 1980, "the Commission asked the developer to submit a revised preliminary plat before it sought final approval."[22] Relying on the latest zoning regulations, the Commission subsequently found the plat inadequate because it was inconsistent with lowered density requirements and limitations on lots placed on slopes in excess of twenty-five percent, among other reasons.[23]

Based on a belief that the 1980 plat should have been reviewed under earlier zoning regulations, the developer appealed to the County Board of Zoning Appeals.[24] Though the Board ultimately agreed, it was too late for the developer. The developer went bankrupt and Hamilton Bank, which had been in on the project from the start, acquired the remaining undeveloped tract of 258 acres through foreclosure.[25] After working with the planning staff, the Bank submitted two revised preliminary plats, the 1973 plat that had been approved several times, and a plat for the 258-acre parcel with lots indicated for the final 476 units.[26] The Board of Zoning Appeals' decision notwithstanding, the Commission applied the 1979 zoning regulations and concluded that all of the plats were inadequate under the more restrictive land use scheme.[27] In the end, the Bank was granted permission to develop sixty-seven more units on the property, a decision that foreclosed any possibility of economic gain from the development, and, in fact, was likely to result in a one million loss on the entire project.[28]

The Bank subsequently inquired about another appeal to the Board of Zoning Appeals, but was told by the county attorney that

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19. *Id.*; *see also* Respondent's Brief, *supra* note 17, at 7-8.
20. *Williamson County*, 473 U.S. at 178-79.
21. Respondent's Brief, *supra* note 17, at 8 n.5.
22. *Williamson County*, 473 U.S. at 179.
23. *Id.* at 179-80.
24. *Id.* at 180.
25. *Id.* at 181.
26. *Id.*
27. *Id.* at 181-82. The Commission cited problems with density, slope grades, road grades, the length of two cul-de-sacs, a perceived lack of adequate fire protection, disrepair of the main access road, and insufficient road frontage for the lots. *Id.* at 181.
28. *Id.* at 182.

such action would be futile.[29] It therefore initiated a suit under 42 U.S.C. § 1983 in federal district court, alleging, among other things, that the County had deprived it of its rights under the Takings Clause of the Fifth Amendment to the United States Constitution.[30] After a three-week trial, a jury found that state law prevented the Commission from applying post-1973 regulations to the Temple Hills development.[31] It then awarded $350,000 in just compensation for the temporary taking of the Bank's land during the period between the 1980 plat rejection and the jury's finding that the county's actions were illegal.[32] However, the trial judge granted the county a judgment notwithstanding the verdict on the takings issue, reasoning that the Bank "was unable to derive economic benefit from its property on a temporary basis only, and ... such a temporary deprivation, as a matter of law, cannot constitute a taking."[33] On appeal, the Sixth Circuit relied on Justice Brennan's dissenting opinion in *San Diego Gas & Electric v. San Diego*,[34] in concluding that "[t]he jury was correctly instructed on the question of damages under the theory of a temporary taking."[35] It therefore reinstated the $350,000 compensatory award, prompting the Commission to turn to the United States Supreme Court.[36]

B. The Supreme Court Opinion

The Supreme Court has often pointed out the folly of addressing questions that were not presented, briefed, or addressed by the courts below. Yet this is precisely what it did in *Williamson County*.[37] On certiorari, the only issue before the Court was "whether Federal, State, and local Governments must pay money damages to a landowner whose property allegedly has been 'taken' temporarily by the application of government regulations."[38]

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29. Respondent's Brief, *supra* note 17, at 9.

30. *Williamson County*, 473 U.S. at 182, 182 n.4.

31. *Id.* at 182-83. The jury also found that the Bank was not denied procedural due process, and the judge ruled for the Commission on the substantive due process and equal protection claims. *Id.* at 182 n.4.

32. *Id.* at 183.

33. *Id.*

34. 450 U.S. 621, 636 (1981).

35. *Id.*

36. Hamilton Bank of Johnson City v. Williamson County Reg'l Planning Comm'n, 729 F. 2d 402, 408-09 (1984).

37. Bauman, *supra* note 11, 138.

38. *Williamson County*, 473 U.S. at 185. The Commission argued that Justice Brennan's four-justice dissenting opinion in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 636 (1981), which, when coupled with Justice Rehnquist's concurring *San Diego* opinion, suggested that just compensation is required for temporary deprivations of all use of

Accordingly, the attorneys general of no fewer than 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 '... or, alternatively, on the ground that even if [it does],... the Just Compensation Clause does not require money damages as recompense."[39] On the other side, four professional and public-interest organizations filed amicus curiae briefs urging the Court to affirm the temporary takings judgment so as to establish that regulation that effectively wipes out a property's value is a taking for public use, requiring money damages under the Just Compensation Clause.[40] These were the identical constitutional arguments put to the Court in *Agins v. City of Tiburon*[41] and *San Diego Gas & Electric.*

Only the United States Solicitor General advanced the unique argument that *Williamson County* raised, the issue of a premature compensation claim.[42] "Quietly distancing itself from what it had asserted in its *amicus* briefs filed in *Agins* and *San Diego*, the government in its Hamilton Bank brief never argued that a regulation cannot be a taking,"[43] but rather, that *Hodel v. Virginia Surface Mining & Reclamation Association*,[44] required a party to exhaust administrative remedies and to seek judicial review before

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property, should not be followed as the Court's holding. *See generally*, Bauman, *supra* note 11, at 138.

39. *Williamson County*, 473 U.S. at 174-75.

40. *Id.* at 174.

41. 447 U.S. 255 (1980).

42. Bauman, *supra* note 11, at 140. In his discussion Bauman notes that:

> The government's strategy was to maintain that the taking issue was not ripe for decision in this instance, thereby sidestepping discussion of what many in the land use field anticipated after the three *San Diego* opinions and other recent High Court takings opinions — that the Court would rule as Brennan had suggested if it ever confronted the compensation issue directly.

Id. On the other hand:

> [t]he question of whether the Bank's attempt to secure compensation was premature was injected into the appeal by the United States Solicitor General who filed an amicus brief in support of the Commission's effort to reverse the decision of the Sixth Circuit. [In fact], [m]uch of the Solicitor General's brief was devoted to the argument that the litigation was premature.

R. Marlin Smith, *The* Hamilton Bank *Decision: Regulatory Inverse Condemnation Claims Encounter Some New Obstacles*, 29 WASH. U. J. URB. & CONTEMP. L. 3, 8 (1985).

43. Bauman, *supra* note 11, at 140.

44. 452 U.S. 264 (1981).

pursuing just compensation for a taking.[45] At oral argument, the Solicitor General briefly explained:

> As an initial matter, as we point out in our brief, it doesn't appear that Respondents have ever alleged or proven that any taking that occurred in this case was without just compensation, because they haven't shown that a compensation remedy would be unavailable under state law. To ignore this *essential element of a Fifth Amendment claim* would be in effect to convert the Federal District Courts into claims courts for the states by permitting them to entertain inverse condemnations in any case, even though the state might also provide an inverse condemnation remedy.[46]

Although the Solicitor General seemed less than sure about this argument when pressed by the Court,[47] the Court's opinion clearly adopted and applied the essence of the proposed rule.

Writing for the majority, Justice Blackmun initially declared that a takings claim is premature unless the "government entity charged with implementing the regulations has reached a final

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45. *Williamson County*, 473 U.S. at 186; *see* Brief of Amicus Curiae United States, Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, at 12, 473 U.S. 172 (1984) (No. 84-4).

46. Transcript of Oral Argument, Williamson County Reg'l Planning Comm'n, et al., v. Hamilton Bank of Johnson City, at *17-18, 1985 U.S. TRANS LEXIS 76 (emphasis added). The Solicitor General did not indicate how the state judicial exhaustion requirement, which had never before been enunciated by the Supreme Court, had become an "essential element" of a takings claim, but no one on the Court questioned him on this point. *Id.*

47. Surprisingly, when addressing the merits of the Bank's takings claim, the Solicitor General stated that "the submission of the United States in this case does not relate to the without just compensation aspect of the cause of action...." *Id.* at *18. When pressed for clarification about the applicability of its state exhaustion argument, the Solicitor General refused to say whether Hamilton Bank should have been required to pursue its remedies in state court:

> QUESTION: Mr. Kneedler, do you take the position that a property owner would have to follow judicial review remedies as well for it to ripen into a taking?
> MR. KNEEDLER: I think that would depend on the particular statutory scheme. I think under the federal system Congress could prescribe that APA review would have to be sought for the denial of a permit, and that's particularly so where the agency was not authorized to engage in conduct that would constitute a taking.
> QUESTION: Well, do you think that's true in this case?
> MR. KNEEDLER: I think that's less clear. I think it tends to blend in with the question of whether there should be abstention on the state law question of whether the commission had properly applied state law.

Id. at *25-26.

decision regarding the application of the regulations to the property at issue."[48] This "final decision" requirement rested, he explained, on the fact that courts cannot determine whether the application of land use regulations to a claimant's property have gone "too far"[49] and caused a taking without a concrete idea of just what the government will and will not permit.[50] Observing that the Board of Zoning Appeals was empowered to grant variances with respect to at least five of the eight objections that the Commission raised to the proposed subdivision, and that the Bank had failed to apply for these variances, Blackmun reasoned that it was unclear whether the Commission would refuse to permit either the development that was sought by the Bank or any other economically viable use of the property. Consequently, the Bank's claim was unripe due to a failure to comply with the final decision requirement.[51]

Though the Court could have stopped at this point, Justice Blackmun drew from the Solicitor General's argument to posit a second reason why the Bank's taking claim was not yet ripe for review. Blackmun observed that a taking of private property is unconstitutional only when it occurs *without just compensation*.[52] Citing to the *Regional Rail Reorganization Act Cases*,[53] and

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48. Williamson County, 473 U.S. at 186.

49. In the seminal regulatory takings case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), the Court declared that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation *goes too far* it will be recognized as a taking." (emphasis added).

50. *See Williamson County*, 473 U.S. at 190-91.

51. *See id.* at 194. 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.

Id. at 199-200.

Earlier, the Court suggested that the final decision requirement was necessary to determine if "respondent [property owner] will be denied all reasonable beneficial use of its property." *Id.* at 194. This language foreshadows the decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992), which said that a taking automatically occurs where a regulation effects a denial of all economically beneficial use.

52. *Williamson County*, 473 U.S. at 194-95, n.13.

53. 419 U.S. 102 (1974).

Ruckelshaus v. Monsanto Co.,[54] cases where the Court denied injunctive relief for a taking because the claimants did not seek compensation in the Court of Federal Claims, Blackmun read this portion of the Takings Clause to mean that there can be no takings violation when an adequate post-deprivation remedy exists.[55] More specifically, the Just Compensation Clause precluded a federal takings claim if the claimant has successfully utilized the state's "reasonable and adequate provision for obtaining compensation."[56] This line of thinking led directly to the rule that a federal claimant must first seek compensation through an adequate state process before filing for a taking in federal court.[57] After observing that the newly-minted state procedures rule followed in the tradition of *Parratt v. Taylor*,[58] a case holding that a post-deprivation process is an adequate procedural due process remedy,[59] the Court applied the requirement against the Bank and dismissed its claims without ever reaching the temporary takings issue upon which certiorari was granted.[60]

III. THE SHAKY BASIS FOR THE STATE PROCEDURES RULE AND ITS EVEN MORE TROUBLING APPLICATION IN THE FEDERAL COURTS

Following the Court's decision in *Williamson County*, lower federal courts eagerly applied the state procedures rule to send takings cases to the state courts.[61] However, as discussed more fully below, upon the claimants later return, the same courts refused to invoke federal jurisdiction under *Williamson County*.[62] Many courts and commentators have questioned this outcome,[63] but

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54. 467 U.S. 986 (1984).

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

56. *Id.* at 195.

57. *See id.*

58. 451 U.S. 527 (1981), *overruled by* Daniels v. Williams, 474 U.S. 327 (1986).

59. *See Williamson County*, 473 U.S. at 195.

60. *See id.* at 199-200. The Court applied the state procedures rule against the Bank because it had not taken advantage of an inverse condemnation procedure available under Tennessee law prior to asserting its federal takings claim, nor shown that the procedure was "unavailable or inadequate." *Id.* at 196-97.

61. *See* Kovacs, *supra* note 8, at 10 n.49 (listing cases). A few courts have also applied the state procedures requirement in land use cases that implicate other constitutional protections. *See generally*, Abraham, *supra* note 5, at 111-25 (discussing the application of *Williamson County* to substantive and procedural due process claims and equal protection claims). For criticism of the application of the state procedures rule to due process and equal protection claims in the land use context, see Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1, 44-47 (1992).

62. *See infra* Section III C.

63. *See, e.g.*, Blaesser, *supra* note 9; Joel Block, *Takings Claims: Are the Federal Courts*

few have stopped to consider in any depth the legitimacy of the core of the problem — the state procedures rule. This may have been understandable immediately following the Court's decision, since it suggested that utilization of state procedures was simply a temporary hurdle for federal review. But the subsequent pernicious application of the state procedures rule in lower federal courts has negated this consolation and placed the second *Williamson County* ripeness requirement in an unexpected position of tremendous importance. In this context, it is worth returning to the purported foundations for the state procedures requirement.

A. *Critical Flaw: The Just Compensation Clause Requires a Post-Deprivation Remedy*

1. *The Traditional Understanding of the Just Compensation* Clause

The heart of the state procedures requirement is the assumption that the Just Compensation Clause merely acts as a remedial provision that affords a takings claimant a right to post-taking damages. Once this proposition is accepted, it is a relatively easy step to the conclusion that a takings violation occurs only after the claimant unsuccessfully seek damages. But there are strong reasons to doubt these initial premises.[64] To begin, the text of the Takings Clause does not require such an interpretation; the mandate that there shall be no taking "without just compensation" is more easily read to mean that compensation must accompany the taking, than it is to mean that the claimant shall have the opportunity to ask for the compensation remedy in a post-taking court action.[65] After all, it is the first interpretation, and not the

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Truly Open?, 8 MO. ENVTL. L. & POL'Y REV. 74, 82-83 (2001) (discussing a Second Circuit case that illustrates the "injustice" the of intersection of preclusion doctrines and *Williamson County*'s state procedures requirement); Delaney & Desiderio, *supra* note 9; Overstreet, *supra* note 9.

64. *See* Peter A. Buchsbaum, *Should Land Use Be Different? Reflections on* Williamson County Regional Planning Board v. Hamilton Bank, in TAKINGS SIDES ON TAKINGS ISSUES, 471, 473-74 (Thomas E. Roberts, ed. 2002) ("This underlying premise [that the government has not acted illegally until you ask for compensation and then it is denied] is, of course, untrue."); *Ripeness and Forum Selection*, 11 J. LAND USE & ENVTL. L. 37, 72 (1995) ("The language of the Fifth Amendment does not dictate this [state procedures] rule.").

65. *See* Buchsbaum, *supra* note 64, at 473; Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 113 (1999) ("Just compensation clauses were framed as limitations – 'private property shall not be taken for public use without just compensation' – rather than as remedial grants – 'whenever the state takes property, it will have an obligation to pay just compensation.'").

second (*Williamson County* rule), that is in accord with the orthodox understanding of the timing of a constitutional violation:

> [A]ssuming that you have sought to make use of your land and have been told no, then, from the moment you receive that denial, you have been deprived of your right to compensation. The result is in concept no different from the policeman bopping you over the head. After he is done, and assuming he is not repeating the attack, then the only issue is compensation for the violation of your right not to have your body attacked by an official. Yet, you do not have to ask for money before suing.
>
> The same should be true, one would think, where the government tells you you can't do something to or with your land; at that point the right to compensation should vest, just as your right to equal protection of the laws would vest where the denial of use is discriminatory, or your right to substantive due process of law would vest if the denial were arbitrary and capricious.[66]

Historically, federal and state courts adhered to this common sense construction by applying the "just compensation" requirement as a necessary condition for exercises of eminent domain, rather than as a post-deprivation damages remedy.[67] During the century following the ratification of the Bill of Rights and parallel state provisions, courts held that compensation must be provided at the time of the act, usually engaged in pursuant to statutory authority, alleged to be a taking.[68] If legislative authorization for the taking

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66. Buchsbaum, *supra* note 64, at 473.

67. *See* Brauneis, *supra* note 65, at 60 ("The truth, however, is that for most of the nineteenth century, just compensation clauses were *generally* understood not to create remedial duties, but to impose legislative disabilities.") (emphasis added).

68. *See, e.g.*, Scott v. City of Toledo, 36 F. 385, 401-02 (C.C.N.D. Ohio Cir. 1888) (stating that the city may "appropriate complainants' property to the purpose of a public street ... *upon making or providing* just compensation") (emphasis added); United States v. Oregon Ry. & Nav. Co., 16 F. 524, 530 (C.C.D. Or. 1883) ("It has been held to be sufficient if adequate provision for compensation is contained in the act."); *see also* Baring v. Erdman, 2 F. Cas. 784, 791 (C.C.E.D. Pa. 1834) (No. 981). In *Baring*, the court stated:

> If the complaint of this bill was the want of any provision for compensation [in the legislative act], or of its actual payment before taking actual possession of the premises, or applying the water to public use, and the prayer had been to order a suspension of all proceeding till it had been done, there might have been strong grounds for our interference; the obligation upon the state to make compensation is

did not make compensation available as a practical matter, the act was considered void.[69] In many cases, the aggrieved property owner then had a right to claim damages sustained as a result of its operation.[70]

The rule, implied in some early cases, that compensation must be paid in *advance* of the taking[71] did give way to the understanding that all that is necessary is a "reasonable, certain and adequate

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undoubtedly co-extensive with their power to take ... private property.

Id.; Baltimore & O.R. Co. v. Van Ness, 2 F. Cas. 574, 576 (C.C. D.C. 1835) (No. 830) ("Upon making just compensation, to be ascertained by a jury, we cannot say that the provisions of the act, which authorize the condemnation of land . . . are void, as being unconstitutional."); Eaton v. B. C. & M. R.R. Aiken, 51 N.H. 504, 510 (N.H. 1872) (stating that the legislature did not have power to statutorily authorize taking by the railroad without also authorizing just compensation).

69. *See* Brauneis, *supra* note 65, at 60-61. Brauneis explains:

> An antebellum court did not ask whether a legislatively authorized act amounted to a taking of private property, and enter a judgment for just compensation if it did. Rather, the court asked whether the act purportedly authorized by the legislation amounted to a taking, and if so, whether the legislation itself provided for just compensation. If not, the legislation was void: the legislature had exceeded its competence, which the Constitution limited to the authorization of 'takings-with-just compensation.' Although the qualification in that limitation happened to involve the payment of money, the legal effect of exceeding the limitation was, in theory, no different than exceeding a constitutional limitation incorporating a non-monetary qualification, such as the Fourth Amendment's limitation of warrants to those that were 'issued ... upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

70. *See, e.g.*, Thacher v. Dartmouth Bridge Co., 35 Mass. 501, 502 (Mass. 1836).

> [S]upposing that the act could be so construed, as to confer a power on the corporation to take private property for public use, without providing for an equitable assessment, and for the payment of an adequate indemnity, the act would, in this respect, be in contravention of the constitution of this Commonwealth, and in this respect void.... The consequence would be, that the party damaged would be remitted to his [damages] remedy at common law.

Id.; *see also* 2 PHILIP NICHOLS, THE LAW OF EMINENT DOMAIN 1276-77 (2d ed. 1917). It has also been stated that:

> If the plaintiff's [takings] argument prevailed, the court declared the legislation void, and the defendant's justification failed. Once the defendant was stripped of his justification, the plaintiff could recover the retrospective damages normally allowed under his common law action, and could obtain prospective relief by means of an action of ejectment or a suit in equity seeking an injunction.

Brauneis, *supra* note 65, at 65.

71. *See, e.g*, Postal Tel. Cable Co. v. S. Ry. Co., 89 F. 190, 191 (C.C.W.D. N.C. 1898) ("No act of congress can give the right of taking private property for public purposes without first paying just compensation."); *see also* The Md. & Wash. Ry. Co. v. Hiller, 8 App. D.C. 289, 294 (C.C.D.C. 1896) ("It is said by a learned author that, 'as an original question, it seems clear that the proper interpretation of the Constitution requires that the owner should receive his just compensation before entry upon his property.'").

provision for obtaining compensation before his occupancy is disturbed."[72] But even under this formulation, the constitutionality of a taking hinged upon whether the legislative authorization ensured just compensation at the time of the taking.[73] If not, the government lacked the power to interfere with private property as intended.

It was only at the end of the nineteenth century that federal courts began to view a post-taking compensation suit as a "reasonable provision" for obtaining just compensation from the federal government.[74] Passage of the Tucker Act, which allowed for monetary claims against the United States in the newly-created Court of Claims, was a major catalyst in the theoretical reorientation of the Just Compensation Clause.[75] After its enactment, courts began to refuse to enjoin an act that effected a taking without providing a means of compensation; instead, the aggrieved property owner was expected to go to the Court of Claims in an effort to obtain prospective compensation.[76] *Hurley v. Kincaid,*[77] a case in which a landowner alleged that a taking arose

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72. Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641, 659 (1890); *cf. The Md. & Wash. Ry. Co.*, 8 App. D.C. at 294 ("We think that interpretation [requiring compensation in advance] is the true one ... with a probable exception in the case of the Federal and State governments, in whose favor the certainty of payment from the public revenues is considered.").

73. Id.

74. *See* Dashiell v. Grosvenor, 66 F. 334, 337 (4th Cir. 1895) (noting that plaintiffs alleging patent infringement "can recover just compensation for such use and infringement from the government by suit in the court of claims"); *In re* Rugheimer, 36 F. 369, 372 (E.D.S.C. 1888).

> In the act of 1888 congress has empowered certain public officials ... to put in operation the right of eminent domain. It requires this right to be exercised by judicial proceedings in the district or circuit courts of the United States. These courts, in directing and conducting these proceedings, mindful of their constitutional obligations, must see to it that the process of condemnation be not awarded unless full compensation be provided. The act of 1888 must be read *in pari materia* with the constitution. The term 'condemnation,' used in that act, must be construed to mean condemnation with just compensation. The machinery of the courts is employed to ascertain and secure such compensation. In my opinion the act is not in conflict with the constitution..

Id.

75. The Tucker Act grants jurisdiction to the Court of Federal Claims to adjudicate "any claim against the United States founded . . . upon the Constitution." 28 U.S.C. § 1491(a)(1) (2002); *see also* 28 U.S.C. § 1346 (a)(2) (2002) (granting the district courts concurrent jurisdiction over such claims "not exceeding $10,000 in amount"). It is this jurisdictional grant that authorizes the Court of Federal Claims to hear and determine monetary claims against the United States for just compensation. *See, e.g.*, United States v. Causby, 328 U.S. 256, 267 (1946) ("If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine.").

76. *See Dashiell*, 66 F. at 337.

77. 285 U.S. 95 (1932).

from a federal flood control act, accurately describes the still-applicable framework:

> If that which has been done, or is contemplated, does constitute such a taking, the complainant can recover just compensation under the Tucker Act in action at law as upon an implied contract, since the validity of the Act and the authority of the defendants are conceded. The compensation which he may obtain in such a proceeding will be the same as that which he might have been awarded had the defendants instituted the condemnation proceedings which it is contended the statute requires. Nor is it material to inquire now whether the statute does so require. For even if the defendants are acting illegally, under the Act, in threatening to proceed without first acquiring flowage rights over the complainant's lands, the illegality, on complainants' own contention, is confined to the failure to compensate him for the taking, and affords no basis for an injunction if such compensation may be procured in an action at law.[78]

The judicial conception of just compensation exemplified in *Hurley* did not, however, immediately spill over into cases where the takings claim targeted a state or local action, rather than the federal government. While a few nineteenth century state courts flirted with the idea that the Just Compensation Clause is a remedial provision granting a distinct cause of action,[79] they exhibited great uncertainty in this regard[80] and failed to convince

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78. *Id.* at 104 (citations omitted).

79. *See, e.g.*, City of Elgin v. Eaton, 83 Ill. 535, 536 (Ill. 1876) ("The right to recover damages was given by the constitution; and inasmuch as the city failed to have them assessed as they might have been under the Eminent Domain Law, then in force, the action will lie for their recovery."); Johnson v. City of Parkersburg, 16 W. Va. 402, 425 (W. Va. 1880). Other cases considered just compensation clauses to provide a right to damages and not an injunction only when the claim arose under a state takings clause that prohibited "damages" as well as takings of private property. *See* Moore v. City of Atlanta, 70 Ga. 611, 614-15 (Ga. 1883) (denying request for injunction to halt street improvement that damaged abutting property, but stating that owner could "recover damages for such injury to his freehold ... measured by the decrease in the actual value of his property"); Stetson v. Chi. & Evanston R.R. Co., 75 Ill. 74, 78 (Ill. 1874) ("What [consequential] injury, if any, he has sustained, may be compensated by damages recoverable by an action at law."). In light of these and other similar cases, Professor Brauneis argues that the states' 19th Century rush to include damages provisions in traditional takings clauses paved the way for courts to re-conceptualize the phrase "without just compensation" as a remedial, rather than a power-limiting, provision. *See* Brauneis, *supra* note 65, at 115-35.

80. *See, e.g., City of Elgin*, 83 Ill. at 536-38 (suggesting that Illinois' just compensation

other contemporary courts to abandon the conception of the Clause as a provision conditioning the government's power.[81] Accordingly, many early twentieth century courts continued to operate under the understanding that a landowner was entitled to an injunction (or an order of ejectment) and retrospective damages when a state legislature acted to take property without ensuring that just compensation was available.[82] Indeed, this view controlled at the time of the High Court's decision in *Pennsylvania Coal Co. v. Mahon*,[83] which initiated the modern regulatory takings doctrine.[84]

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clause authorized a damages suit, but also stating that: "[t]he failure to have the damages ascertained, if there were any, and provide the means to pay the same, was an omission of duty ...").

81. *See* Cribbs v. Benedict, 44 S.W. 707, 709 (Ark. 1897) ("If it be conceded that compensation ... is not provided in the act, that fact would not render it void, but only ineffectual to take the land in *invitum*."); Minn. v. Chicago, Milwaukee & St. Paul Ry. Co., 31 N.W. 365, 366 (Minn. 1887) ("So far as the section [of a legislative act] requires railroad companies to let other persons into possession of any portion of their land without the compensation required by the constitution, it is invalid."); *In re* App. for Drainage of Lands between Lower Chatham and Little Falls, 35 N.J.L. 497 (N.J. 1872) (stating that just compensation is satisfied where act authorizing taking provided for means to deduce and disburse compensation).

82. *See* City of Birmingham v. Ala. Home Bldg. & Loan Ass'n, 165 So. 817, 818-19 (Ala. 1936) ("Our Constitution requires just compensation to be paid before the taking," but if this right is waived, "suit for just compensation may be brought in equity, and, if necessary to obtain just compensation, injunctive relief [to halt taking without compensation] may be had."); Hays v. Ingham-Burnett Lumber Co., 116 So. 689, 693 (Ala. 1928) (quoting favorably an earlier case for proposition that "[j]ust compensation for the land at the time of its taking, paid before or concurrently with its appropriation, was the right of the appellant"); McCandless v. City of Los Angeles, 4 P.2d 139, 140-41 (Cal. 1931) ("In proper cases injunction relief should be granted until damages were paid where the public improvement substantially interfered with the right of access to land."); Peirce v. City of Bangor, 74 A. 1039, 1044 (Me. 1909).

> A full compliance with the method of giving just compensation prescribed by statute must be regarded as a condition precedent to the right of a municipality to assert legal ownership. It should be noticed upon this phase of the case that it is not incumbent upon the private owner to begin any kind of a proceeding to obtain just compensation. It is the bounden duty of the taker to make it before he can acquire title.

Id.; *see also* Hendershott v. Rogers, 211 N.W. 905, 906 (Mich. 1927) (noting the state just compensation clause had been amended in 1908 to provide that no taking shall occur unless "just compensation therefor ... [is] first made or secured in such manner as shall be prescribed by law."); Bragg v. Yeargin, 238 S.W. 78 (Tenn. 1922) (holding an act taking private property for a school invalid because it did not include an adequate provision for just compensation); Decker v. State, 62 P.2d 35, 37 (Wash. 1936) (noting the property owner had two remedies when the state acted to take property without providing compensation, "[o]ne to enjoin, and the other to permit the work to go on and claim damages").

83. 260 U.S. 393 (1922).

84. *Id.* at 413 ("The greatest weight is given to the judgment of the legislature but it always is open to interested parties to contend that the legislature has *gone beyond its constitutional power*" [in enacting a law that takes property without proving compensation.]) (emphasis added); *see also* Agins v. City of Tiburon, 598 P.2d 25, 29 (1979). In *Agins*, the court stated that:

> It is clear both from context and from the disposition in *Mahon*, however,

In more modern times, state courts adhered to power-conditioning view of the "just compensation" requirement by holding invalidation the exclusive regulatory takings remedy.[85] Under this now-defunct[86] invalidation rule, a takings violation occurred when it was clear that there was no compensation *at the time* of the excessive governmental action; it was this absence that called for the remedy of invalidation. As one prominent commentator explained at the height of the invalidation construct:

> Not only is an actual physical appropriation, under an attempted exercise of the police power, in practical effect an exercise of the power of eminent domain, but if regulative legislation is so unreasonable or arbitrary as virtually to deprive a person of the complete use and enjoyment of his property, it comes within the purview of the law of eminent domain. Such legislation is an invalid exercise of the police power since it is clearly unreasonable and arbitrary [italics omitted]. *It is invalid as an exercise of the power of eminent domain since no provision is made for compensation.*[87]

One result of this view was that a claimant against the state could initiate his takings suit in any appropriate state *or* federal court once the state had indicated its intent to unreasonably restrict private property without making any attempt to provide just compensation.[88]

> that the term 'taking' was used solely to indicate the limit by which the acknowledged social goal of land control could be achieved by regulation rather than by eminent domain. The high court set aside the injunctive relief which had been granted by the Pennsylvania courts and declared void the exercise of police power which had limited the company's right to mine its land.

Id.

85. *See* Davis v. Pima County, 121 Ariz. 343, 345 (Ariz. Ct. App. 1978), *overruled by* Corrigan v. City of Scottsdale, 149 Ariz. 538 (1986); *Agins*, 598 P.2d at 28-29; HFH, Ltd. v. Superior Court, 15 Cal. 3d 508 (1975); Mountain Med., Inc. v. City of Colo. Springs, 43 Colo. App. 391, 393-94 (1979); Mailman Dev. Corp. v. City of Hollywood, 286 So. 2d 614, 615 (Fla. 4th DCA 1973). *See also* Eck v. City of Bismarck, 283 N.W. 2d 193, 198-200 (N.D. 1979).

86. The United States Supreme Court rejected invalidation as the proper regulatory takings remedy two years after *Williamson County* in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987). There, the Court held that the Constitution requires compensation for a regulatory taking, regardless of whether it is permanent or temporary. *Id.* at 321.

87. *Agins*, 598 P.2d 25, 28 (quoting 1 NICHOLS, EMINENT DOMAIN, § 1.4291 (3d rev. ed. 1978)) (italics added by the court).

88. *See* Berger, *supra* note 56, at 194, n.18 (listing pre-*Williamson County* takings cases prosecuted in federal courts). The Supreme Court has affirmed the basic principle

2. Monsanto and Parrat: Questionable Precedential Basis for the State Procedures Rule

The *Williamson County* Court relied on two cases to depart from the traditional, power-limiting understanding of the Just Compensation Clause and its logical enforcement in federal courts.[89] Most importantly, the Court analogized to the 1984 case of *Ruckelshaus v. Monsanto Co.*[90] In *Monsanto*, a chemical company sought injunctive and declaratory relief in alleging that the government's disclosure of trade secrets provided in compliance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) amounted to an unconstitutional taking.[91] After determining that some of the disclosures did in fact take *Monsanto*'s property, the Court considered whether such a determination afforded a basis for granting the particular relief sought. The Court concluded that "[*e*]*quitable relief* is not available to enjoin an alleged taking of private property for a public use ... when a suit for compensation can be brought against the sovereign subsequent to the taking."[92] It held that a takings plaintiff may not pursue injunctive relief against the United States in a district court (at least not until after it has sought just compensation in the Court of Claims).[93]

In *Williamson County*, the Court relied on *Monsanto* for the following critical conclusions:

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underlying the traditional formulation – that the need for compensation arises at the same time of the taking – on many occasions and in many different ways. *See, e.g.*, San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 654 (1991) (Brennan, J., dissenting) (stating that the government's duty to pay just compensation is triggered "[a]s soon as private property has been taken."); United States v. Dow, 357 U.S. 17, 22 (1958) (stating that the event of a taking "gives rise to the claim for compensation"); Soriano v. United States, 352 U.S. 270, 275 (1957) (notng that the claim for just compensation "accrued at the time of the taking.); United States v. Dickinson, 331 U.S. 745,751 (1947) (noting that "an obligation to pay for the land then arose"); Danforth v. United States, 308 U.S. 271, 284 (1939) (noting that "compensation is due at the time of taking."). Indeed, as early as 1913, the Supreme Court essentially rejected the notion, later adopted in *Williamson County*, that a state's actions may be attacked in federal court as a taking only after the state courts have had a chance to strike it down. See *Home Telephone and Telegraph Co. v. City of Los Angeles*, 227 U.S. 278, 295-96 (1913).

89. *See, e.g.*, Ruckelshaus v. Monsonto Co., 467 U.S. 986 (1984); Parratt v. Taylor, 451 U.S. 527 (1981), *overruled by* Daniels v. Williams, 474 U.S. 327 (1986).

90. 467 U.S. at 1016-20.

91. *Id.* at 998-99 (alleging that "all of the challenged provisions effected a 'taking' of property without just compensation, in violation of the Fifth Amendment").

92. *Id.* at 1016 (emphasis added); *see also id.* at 1017-19 (concluding that such a suit could indeed be brought pursuant to the Tucker Act).

93. *See id.* at 1016-20.

> If 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. Thus we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act. Similarly, 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.[94]

It is difficult to see how this line of thinking comes from *Monsanto*.[95] That decision simply fails to address claims for money damages for a completed taking, let alone declare them "premature" until after the property owner has sued under the Tucker Act. And unlike the Bank's claim, *Monsanto*'s claim for injunctive relief was not just unripe; it was unavailable. For *Monsanto* to support the state procedures rule, it would have to have held that a Tucker Act suit in the Court of Federal Claims is a *prerequisite* to asserting a *monetary* claim against the government for just compensation for a taking of property. But this it does not do. On the contrary, the decision confirms that a Tucker Act suit *is* the assertion of a claim for just compensation: "whatever taking may occur is one for a public use, and a Tucker Act remedy is available to provide Monsanto with just compensation."[96]

Monsanto made clear that a federal takings claimant must seek compensation in the Claims Court before challenging the validity of the underlying action, regardless of whether the claim is based on a regulatory or physical interference with property. As a result, *Williamson County*'s analogy to Monsanto logically suggests that the Court viewed state courts as a local Claims Court for the federal courts. The reasoning is simple: just as a claimant against the federal government must go to the Claims Court before litigating up the federal judicial ladder, so must a claimant against a local or state government go to a state court before raising a

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94. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194-95 (1985) (citations omitted) (alterations in original).

95. *See generally* Thomas E. Roberts, *Procedural Implications of* Williamson County/First English *in Regulatory Takings Litigation: Reservations, Removal, Diversity, Supplemental Jurisdiction, Rooker-Feldman, and Res Judicata*, 31 ELR 10,353, 10,356 (2001) [hereinafter *Procedural Implications of* Williamson County].

96. *Ruckelshaus*, 467 U.S. at 1020.

takings claim in a federal court.[97] Ironically, this reasoning avoids turning federal courts into claims courts for the states at the price of placing federal district courts in the dubious position of courts of error for "lower" state tribunals, at least when it comes to takings claims.[98]

The *Williamson County* Court followed its creative reading of *Monsanto* with another implausible analogy; this time to the 1981 due process case of *Parratt v. Taylor*.[99]. In *Parratt*, the Supreme Court determined that a prisoner's complaint, alleging that prison officials negligently lost a hobby kit, constituted an actionable "deprivation" of property under 42 U.S.C. Section 1983.[100] But *Parratt* also concluded that there was no constitutional due process violation until the plaintiff sought the adequate post-deprivation remedy provided by Nebraska's tort claims statute.[101] The *Williamson County* Court forced the resulting proposition: that a "state's action is not complete [in the sense of causing a constitutional injury] unless or until the state fails to provide an adequate postdeprivation remedy for the property loss,"[102] upon the takings framework, thus providing support for its Claims Court-type prerequisite at the state level.[103]

The Court's analogy to *Parratt* may be even more flawed than its refuge in *Monsanto*. To start, it is generally recognized that the

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97. *Cf. Procedural Implications of* Williamson County, *supra* note 96, at 10,356 (noting that *Williamson County's* ripeness rule was derived from cases where the Court said that "property owners could bring [the takings] suit [in the Court of Federal Claims] under the Tucker Act").

98. The implicit suggestion that federal courts have a supervisory role over state compensation decisions runs head on with the *Rooker-Feldman* abstention doctrine.

> Rooker-Feldman precludes a federal action if the relief requested in the federal action would effectively reverse the state decision or void its ruling.... If the relief requested in the federal action requires determining that the state court's decision is wrong or would void the state court's ruling, then the issues are inextricably intertwined and the district court has no subject matter jurisdiction to hear the suit.

Gulla v. North Stabane Township, 146 F.3d 168, 171 (3d Cir. 1998). Although *Williamson County* makes no mention of *Rooker-Feldman*, and seems to preclude its application by mandating that state-litigated taking claims are ripe for federal review, several courts have relied on the doctrine to bar taking claims fully litigated in the state court system. *See, e.g.*, Adams Outdoor Advertising v. City of E. Lansing, 2001 U.S. Dist. LEXIS 5549 (Apr. 16, 2001) (granting summary judgment). Thus, the Court's suggestion that state courts are like claims courts for the federal judiciary ironically tempts federal courts to use the *Rooker-Feldman* doctrine to negate the ultimate purpose of this suggestion: the limitation of federal review to taking claims that the state has refused to compensate.

99. 451 U.S. 527 (1981).

100. *Id.* at 544.

101. *Id.* at 543.

102. Hudson v. Palmer, 468 U.S. 517, 532 n.12 (1984) (citation omitted).

103. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 195 (1985).

Parratt decision wrongly substituted a procedural due process analysis for what was in reality a substantive due process claim.[104] More important, however, is that *Parratt* rested on "a random and unauthorized act by a state employee."[105] This circumstance made provision of a pre-deprivation hearing "impossible or impracticable" and led to the conclusion that resort to a state's post-deprivation remedial process was sufficient and necessary.[106]

An important consequence of the "random act" predicate is that *Parratt* has no applicability to situations "in which the deprivation of property is effected pursuant to an established state policy or procedure, [since here] *the state could provide predeprivation process.*"[107] Because a taking of private property is always affected pursuant to an established policy or procedure – a

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104. *See* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 100 (1984).

> The Court's characterization of *Parratt* as a procedural due process case is erroneous. The essence of the constitutional deprivation in the context of procedural due process is the loss of a protected interest absent adequate procedure. It is incorrect to suggest that the end result of a negligent loss of a prisoner's property is rendered legitimate and appropriate – like revocation of welfare benefits – by the provision of proper procedures.

Id.; *see also* Frederic S. Schwartz, *The Post Deprivation Remedy of* Parratt v. Taylor *and Its Application to Cases of Land Use Regulation*, 21 GA. L. REV. 601, 605 n.19 (1987).

> It is not at all clear ... that one can sensibly discuss procedural due process when the deprivation was caused by negligent conduct. First, even though procedural due process may have been satisfied in *Parratt* by postdeprivation process, surely substantive due process could not have been, because there cannot be a legitimate reason for negligently losing a prisoner's property.

Id.

105. Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-36 (1982); *Parratt*, 451 U.S. at 541.

106. *Williamson County*, 473 U.S. at 195.

107. *Williamson County*, 473 U.S. at 195 n.14 (emphasis added); *see also* Evers v. Custer County, 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."). *See* Schwartz, *supra* note 104, at 650-55. Schwartz explains:

> The postdeprivation remedy doctrine of *Parratt* provides that there is no violation of procedural due process when the failure to give process before the deprivation is due to the impracticality of doing so, as long as a postdeprivation remedy is given. In *Parratt* and *Hudson*, predeprivation process was impractical because the deprivation was unpredictable. Why courts in the land-use cases ignore that simple concept and instead rely on the subordinate notion of 'established state procedure,' which the Supreme Court viewed as a reliable indicator of predictability, is something of a mystery. The importance of an 'established state procedure' is justified when a state government employee effects the deprivation, as in *Parratt* and *Hudson*, or when an employee of a local government does so. But that criterion serves no purpose when a local government is the actor, as in almost all land-use cases.

truly random and unauthorized act by a government employee is a tort and not a taking – one would expect the "random act" exception to preclude application of *Parratt*'s post-deprivation process rule in the takings arena.[108] But the *Williamson County* Court did not see it this way, reasoning that the exception is inapplicable to the Just Compensation Clause, unlike the Due Process Clause, because the Just Compensation Clause has never required, and is not served by, "pretaking process or compensation."[109] The Court elaborated:

> Under the Due Process Clause, on the other hand, the Court has recognized that predeprivation process is of 'obvious value in reaching an accurate decision,' that the 'only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the [deprivation] takes effect,' and that predeprivation process may serve the purpose of making an individual feel that the government has dealt with him fairly. Thus, despite the [established policy exception], *Parratt*'s reasoning applies here by analogy because of the special nature of the Just Compensation Clause.[110]

This attempt to avoid the otherwise applicable *Parratt* exception is unacceptable on almost every level. Like *Parratt* itself, the rationalization implies that a substantive property deprivation is "a function of the point in time at which the state can reasonably provide corrective process[,]"[111] when in fact it depends on the arbitrary or otherwise illegal nature of the deprivation itself, not the procedural means by which it is effected.[112] Moreover, the

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108. *See* LaSalle Nat'l Bank v. Lake County, 579 F. Supp. 8, 10-11 (N.D. Ill. 1984) (rejecting a postdeprivation remedy defense to government's refusal provide sewer service to prospective developers because of "established policy" exception).

109. *Williamson County*, 473 U.S. at 195 n.14.

110. *Id.* (citation omitted) (alteration in original).

111. Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979, 989 (1986).

112. *See* Smith v. City of Fontana, 818 F.2d 1411, 1415 (9th Cir. 1987), *overruled by* Hodgers-Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999) (stating that a substantive "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"). Additionally, in *Augustine v. Doe*, it is stated that:

> when 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. The availability of notice and a hearing is therefore irrelevant; *Parratt*'s concern with the feasability of predeprivation process has no place in this context.

Court's justification fails on its own terms. As we have seen, courts have interpreted the Just Compensation Clause to require pre-taking compensation.[113] And with its final decision requirement, *Williamson County* mandates pre-taking process as an essential element of a claim for just compensation.[114] While this process is required to ripen a claim, it also serves many of the same fairness concerns that the Court identifies with procedural due process.[115]

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740 F.2d 322, 326 (5th Cir. 1984). Further, Professor Redish aptly illustrates the folly in concluding that procedure determines substance:

> If one were to accept Justice Rehnquist's assumption [in *Parratt*] that a constitutional defect in the conduct of state officers may be cured by the provision of a state compensatory tort remedy, even the most egregious and intentional violation of constitutional rights by state officers could be transformed into a 'procedural' due process case. Take for example the unjustified police disruption of a political rally and the beating of demonstrators solely because of distaste for the political views expressed. While the officers' conduct may be thought to violate the First Amendment, it is only through the Fourteenth Amendment's due process clause that such state action gives rise to a constitutional violation. However, if the violation of First Amendment rights could be compensated subsequently by state tort remedies, no constitutional violation would have taken place. Once the Court extends the concept of 'procedural' due process to include the provision of state compensatory 'procedures' for conduct that reaches unconstitutional results, no state action can logically be deemed to violate the due process clause unless and until available state tort remedies have been pursued.

Redish, *supra* note 104, at 101.

113. *See, e.g*, Postal Tel. Cable Co. v. S. Ry. Co., 89 F. 190, 191 (C.C.W.D. N.C. 1898) ("No act of congress can give the right of taking private property for public purposes without first paying just compensation."); *see also* The Md. & Wash. Ry. Co. v. Hiller, 8 App. D.C. 289, 294 (C.C.D.C. 1896) ("It is said by a learned author that, 'as an original question, it seems clear that the proper interpretation of the Constitution requires that the owner should receive his just compensation before entry upon his property.'").

114. *See Williamson County*, 473 U.S. at 186-90 (explaining that the case lacked a final decision, and thus ripeness, because while Hamilton Bank submitted a development plan in accordance with regulations, it "did not seek variances from either the Board or the Commission"). *Williamson County* relied heavily on *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, which even more clearly shows how the final decision requirement mandates elaborate predeprivation process:

> There is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance . . . or a waiver from the surface mining restrictions [in the Act]. If appellees were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions. The potential for such administrative solutions confirms the conclusion that the taking issue decided by the District Court simply is not ripe for judicial resolution.

452 U.S. at 264, 297 (1981).

115. *Williamson County*, 473 U.S. at 172 n.14. As in the due process context, this process is valuable for ensuring that the decision maker understands the effects and potential constitutional consequences of its action and thus for making a fair and wise decision. It also provides the "only meaningful opportunity [for the property owner] to invoke the discretion

In any case, as a practical matter, the typical takings claim arises, unlike the deprivation in *Parratt*, only after extensive pre-deprivation process involving the application of an established land use policy. A planning commission or rent board conducts full, formal hearings resulting in formal findings and a decision (arguably) depriving a property owner of a protected property interest and (definitely) making no provision for compensation. Applying *Parratt* under these circumstances forces takings claimants to go through both a pre-deprivation *and* post-deprivation process prior to raising their substantive federal constitutional violation in federal court.[116]

There is absolutely nothing in *Parratt* or due process doctrine generally that requires such contortions. When predeprivation process is available, the plaintiff is normally *barred* from bringing a procedural due process complaint.[117] Completion of an available predeprivation process converts any remaining complaint into a *substantive* constitutional claim.[118] Like availability of pre-deprivation process, the substantive nature of a claim precludes application of a *Parratt*-typepost-deprivation remedial solution.[119]

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of the decisionmaker" and to feel as if she has a role in a decision effecting here private property rights. *Id.* (quoting Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543 (1985)). A post-taking suit for compensation is concerned only with whether the government's decision triggers a damages remedy, not with whether the decision is valid, and therefore does not serve these concerns as well as the final decision process.

116. *Cf.* Tompkins v. Vill. of Tinley Park, 566 F.Supp. 70 (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") (emphasis in original).

117. *See* Lee v. W. Reserve Psychiatric Habilitation Ctr. 747 F.2d 1062 (6th Cir. 1984) (dismissing procedural due process claim due to adequacy of utilized predeprivation process); Toteff v. Vill. of Oxford, 562 F. Supp. 989, 995 (E.D. Mich. 1983) (dismissing plaintiff's procedural due process claim in part because plaintiff was provided with predeprivation notice and hearings); *see also* Oberlander v. Perales, 1983 WL 29, *936 (S.D.N.Y. Dec. 2, 1983) (dismissing due process action because predeprivation process was available).

118. Augustine v. Doe, 740 F.2d 322, 326 (5th Cir. 1984) ("When 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.").

119. Courts have consistently held that *Parratt* cannot be extended to substantive due process claims. *See, e.g.*, Gaut v. Sunn, 792 F.2d 874, 876 (9th Cir. 1986), *opinion recalled by* 810 F.2d 923 (9th Cir. 1987); Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986); Williams v. City of St. Louis, 783 F.2d 114, 118 (8th Cir. 1986); Mann v. City of Tuscon , 782 F.2d 790, 792 (9th Cir. 1986); *Augustine*, 740 F.2d 322. Decisions to the contrary simply misconstrue *Parratt*, and more fundamentally, the distinction between substantive and procedural due process. *See generally* Schwartz, *supra* note 105, at 642-50. Indeed, in *Parratt*, Justice Rehnquist implied that the postdeprivation analysis would not apply to cases involving violations of the first eight amendments to the Constitution. *Parratt*, 451 U.S. at 536. Justice Powell's concurring opinion similarly noted that the *Parratt* Court "fails altogether to discuss the possibility that the kind of state action alleged here constitutes a violation of the substantive guarantees of the Due Process Clause." *Id.* at 553 (Powell, J.,

Therefore, *Parratt* simply should not apply in the context of a takings claim or any other substantive claim.[120]. Nevertheless, it is from a dubious application of *Parratt* and *Monsanto* that the *Williamson County* Court created the rule that takings claimants must resort to state compensation procedures before suing in federal court. Though the *Williamson County* Court cast the state procedures rule as a ripeness requirement, rather than as a procedural due process rule, this characterization does not supply the legitimacy that cannot be found in its reliance on Monsanto and Parratt.[121]

B. The State Procedures Requirement as a Manifestation of Ripeness

Generally speaking, ripeness is a jurisdictional doctrine that permits a court to dismiss a variety of claims that are considered inappropriate for review upon their initial presentation. Dismissal due to lack of ripeness typically occurs in disputes that involve "uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all."[122] Thus, a central premise of the ripeness doctrine is that a case may become ready for adjudication at a later time even though it is premature upon initial presentation.

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concurring). Later, the Court more explicitly excluded substantive due process claims from *Parratt*'s reach. *See* Zinermon v. Burch, 494 U.S. 113, 125 (1990); *see generally*, Rosalie Berger Levison, *Due Process Challenges to Government Actions: The Meaning of* Parratt *and* Hudson, 18 URB. LAW. 189, 206 (1986).

120. Smith v. City of Fontana, 818 F.2d 1411, 1415 (9th Cir. 1987), *overruled on other grounds by* Hodgers-Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999). The court explained:

> It was stated that such actions violated the substantive protections of the Constitution and *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. Hence, *Parratt is inapplicable to alleged violations of one of the substantive provisions of the Bill of Rights. Id.* (emphasis added).

121. *Williamson County*, 473 U.S. at 194 ("A second reason the taking claim is not yet *ripe* is that respondent did not seek compensation through the procedures the State has provided for doing so.") (emphasis added); *see* Gregory M. Stein, *Regulatory Takings & Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 22 (1995) ("The state compensation portion of [*Williamson County*] finds no parallel in the ripeness cases from other areas of law.").

122. CHARLES ALAN WRIGHT, ARTHUR MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3532 (2d ed. 1984); *see* Stein, *supra* note 121, at 11-14. Ripeness is similar to other justiciability doctrines, such as those relating to standing and mootness, that prevent courts from intervening in hypothetical disputes. However, in ripeness cases, the focus is on the need for court action rather than upon the interest of the party bringing the action, as in standing or upon the sense that the need for adjudication has already passed as in mootness. *See* Navegar, Inc. v. United States, 103 F.3d 994, 998 (D.C. Cir. 1997).

The sources of the ripeness doctrine are Article III of the United States Constitution, which limits the exercise of judicial power to "cases" or "controversies," and prudential concerns about federal jurisdiction.[123] The constitutional source causes courts to invoke the doctrine when a dispute has not yet generated an injury or other facts significant enough to create a live controversy, thus avoiding entanglement in an "abstract disagreement" that cannot satisfy the requirements of Article III.[124] Yet, even if the plaintiffs demonstrate a sufficiently concrete injury, non-constitutional prudential concerns may trigger application of ripeness. These concerns most often involve the desire to preserve judicial economy,[125] to ensure the development of a factual record adequate to decide the case,[126] and to promote "the salutary objective of ensuring that only those individuals who cannot resolve their disputes without judicial intervention wind up in court."[127] Occasionally, federalism[128] and the importance of the substantive constitutional right under scrutiny, compared to other constitutional rights, may inform the application of ripeness.[129]

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123. There is debate among courts and commentators as to whether the ripeness doctrine is grounded in the case or controversy requirement of Article III or is better characterized as a prudential limitation on federal jurisdiction. *See* Taylor Inv., Ltd. v. Upper Darby Township, 983 F.2d 1285, 1289-90 & n.6 (3d Cir. 1993) (citing cases); Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153 (1987) (emphasizing prudential nature of ripeness and protesting attempts by Burger Court to constitutionalize the doctrine).

124. Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967), *abrogated by* 430 U.S. 99 (overruling recognized). As Professor Nichol explains, "[t]he 'basic rationale' of the ripeness requirement is 'to prevent courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements' with other organs of government." Nichol, *supra* note 123, at 161 (quoting *Abbott Labs.*, 387 U.S. at 148).

125. *Abbott Labs.*, 387 U.S. at 148. For the efficiency aspects of the ripeness doctrine, see WRIGHT ET AL., *supra* note 122, § 3532.3; Stein, *supra* note 121, at 11.

126. *See Navegar*, 103 F.3d at 998; WRIGHT ET AL., *supra* note 122, § 3532.3; Nichol, *supra* note 123, at 177-78.

127. Madsen v. Boise State Univ., 976 F.2d 1219, 1221 (9th Cir. 1992); *see also* Hendrix v. Poonai, 662 F.2d 719, 722 (11th Cir. 1981) ("Furnishing such guidance prior to the making of the decision, however, is the role of counsel, not of the courts."). One writer has commented:

> As to the parties themselves, courts should not undertake the role of helpful counselors, since refusal to decide may itself be a healthy spur to inventive private or public planning that alters the course of possible conduct so as to achieve the desired ends in less troubling or more desirable fashion.

WRIGHT ET. AL., *supra* note 122, § 3532.1.

128. *See* WRIGHT ET AL., *supra* note 122, § 3532.1 ("Concern for the relationships between federal courts and state institutions may weigh in the ripeness balance"); Nichol, *supra* note 123, at 178 & n.154 (citing Toilet Goods Assn. v. Gardner, 387 U.S. 158, 200 (1967) (Fortas, J., concurring and dissenting)).

129. *See* Nichol, *supra* note 123, at 170 (noting that a court "hones and adjusts its exercise of substantive [judicial] review" by applying a more burdensome ripeness requirement to less important statutory or constitutional causes of action); *see also id.* at 167 (stating that "the 'court actually does make a decision on the merits when it purports to choose the context in

In *Abbott Laboratories v. Gardner*,[130] the Supreme Court instructed courts considering application of ripeness "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[131] The two prongs of this test roughly track the constitutional and prudential foundations of the ripeness doctrine. The "fitness of the issues" consideration requires courts to weigh "the difficulty and sensitivity of the issues presented, and ... the need for further factual development to aid decision."[132] Purely legal issues, final agency actions, and cases that will not benefit from further delay are deemed fit for review and typically satisfy the requirements of Article III.[133] On the other hand, courts gauge the necessity of deciding the case or "hardship to the parties" by the risk and severity of injury that may result from a refusal to exercise jurisdiction.[134] In this way, the hardship determination limits and focuses the court's reliance on prudential concerns when it considers the postponement of judicial review.[135]

1. The State Procedures Requirement and Constitutional Standards of Ripeness

Where there has been final land use decision, a takings claim should be fit for review within the meaning of Article III ripeness

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which the decision will be made'") (quoting G. Joseph Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L REV. 1443, 1522 (1971)); *cf.* WRIGHT, ET AL., *supra* note 122, § 3532.3 (suggesting that because ripeness analysis "may be complicated... by the fact that some rights are more jealously protected than others," courts employ a lower ripeness threshold for claims implicating First Amendment rights, interests in privacy, and statutory rights "affected with particular public interests," such as those in patent litigation). Although Professor Nichol seems to recognize the awkwardness of using what is supposed to be a justiciability doctrine for substantive review, he does not "argue that this use of the doctrine is illegitimate." Nichol, *supra* note 123, at 169.

130. 387 U.S. 136 (1967).

131. *Id.* at 149; *see also Thomas*, 473 U.S. at 581; *Navegar*, 103 F.3d at 998; Armstrong World Indus. Inc. v. Adams, 961 F.2d 405, 411 (3d Cir. 1992).

132. WRIGHT ET. AL., *supra* note 122, § 3532.1, at 115.

133. *See Thomas*, 473 U.S. at 581; Action Alliance of Senior Citizens v. Heckler, 789 F.2d 931, 940 (D.C. Cir. 1986).

134. *See* WRIGHT ET. AL., *supra* note 122, § 3532.1, at 115.

135. *See Abbott Labs.*, 387 U.S. at 149; *see also* David S. Mendel, Note, *Determining Ripeness of Substantive Due Process Claims Brought by Landowners Against Local Governments*, 95 MICH. L. REV. 492, 501 (1996). Mendel notes:

> Courts may not consider the institutional benefits of postponing judicial review in isolation from the actual harm that may be suffered by the complainant. *Id.* To the extent a court considers the *type* of alleged injury in assessing the hardship to the parties of withholding judicial review, the two prudential policies outlined above — one relating to the court's view of the underlying cause of action, and one relating to role of the court as a decisionmaker [sic] — merge.

Id. at n.34.

because no further factual development is required to resolve the dispute. Regardless of whether the state has provided just compensation, the final decision causes sufficient injury to the landowner's interests to satisfy standing[136] and traditional case or controversy requirements:[137]

> If the claimant challenges an actual government appropriation of the claimant's property, the injury occurs when the appropriation occurs, regardless whether the claimant later receives just compensation for the taking. Similarly, if the claimant challenges a regulatory restriction on the use of property, the injury occurs as soon as the restriction takes effect, regardless of later compensation. In each situation, the claimant suffers an 'invasion of a legally protected interest' in the use of his or her property. As the Court noted in *First English*, 'Though ... an illegitimate taking might not occur until the government refuses to pay, the interference that effects a taking might begin much earlier.' In short, it is the taking, rather than the denial of just compensation, that inflicts the hardship — *i.e.*, the injury in fact — required by Article III, even though the taking itself [arguably] does not violate the Constitution.[138]

The claimant will continue to suffer the injury caused by the taking if the federal court withholds review, reinforcing the sense that there is a live case or controversy. Moreover, as the earlier review of the traditional view of the Just Compensation Clause suggests,[139] the fact that this injury will occur without just compensation should render the issues purely legal and the case ready for resolution; the only controversy is whether the action has gone so far as to cause a taking of property.[140] This is undoubtedly

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136. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1012 (1992) (noting that regulation of property owner's land is sufficient to satisfy Article III standing requirements).

137. *See* Andrus v. Allard, 444 U.S. 51, 64, n.21 (1979) (observing that "[b]ecause the regulation [the owners] challenge restricts their ability to dispose of their property, [the owners] have a personal, concrete, live interest in the controversy").

138. Kidalov & Seamon, *supra* note 5, at 29.

139. *See supra* notes 64-68 and accompanying text.

140. *See* Buchsbaum, *supra* note 64, at 478 ("The constitutional violation, even if cast as failure to provide compensation, exists and is ongoing upon application of the regulation and the refusal by a responsible officer to pay.").

a difficult determination, but it is not so for lack of Article III certainty.

2. Is the State Procedures Requirement a Prudential Rule?

Some commentators have suggested that the state procedures requirement is really a prudential ripeness rule in the guise of a constitutional rule.[141] There is no evidence of this in the *Williamson County* opinion. However, in *Suitum v. Tahoe Regional Planning Agency*,[142] the Court suggested in dicta that both of *Williamson County's* ripeness rules were "prudential."[143]

One can imagine that the state procedures rule serves several prudential concerns, chief among them being conservation of federal judicial resources.[144] It is possible, for instance, that the state procedures requirement reflects an unstated balancing of this concern with the hardship consideration that accompanies application of the prudential ripeness doctrine. As some commentators suggest, the requirement might reflect the sense that there is only enough 'hardship' to overcome the federal judiciary's need to conserve judicial resources when state compensation has been denied.[145] The problem with this conception is that it amounts to a declaration that there is no Article III "injury" standing until compensation is denied, a notion that cannot stand up to scrutiny[146] Moreover, it misconstrues the balancing that leads to application of prudential ripeness; the question is not whether that action is justified by a perceived lack of injury (standing) arising from the underlying complaint, it is whether invocation of ripeness to decline adjudicating a claim would result in additional or continuing hardship on the parties.[147]

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141. Kidalov & Seamon, *supra* note 5, at 56 ("The [*Williamson County*] exhaustion requirement is not dictated by Article III. It is, instead, a rule of prudence that, like the prudential rules of justiciability associated with Article III, conserves federal-court resources.").

142. 520 U.S. 725, 734 (1997).

143. *Id.*

144. Kidalov & Seamon, *supra* note 5, at 55.

145. *Id.* at 28 ("Before exhaustion ... the property owner has not suffered a 'hardship' forbidden by the Constitution.").

146. *See supra* notes 134-38 and accompanying text.

147. *See* Robert C. Power, *Help is Sometimes Close at Hand: The Exhaustion Problem and the Ripeness Solution*, 1987 U. ILL. L. REV. 547, 610 (1987). Mr. Power states that:

> The hardship aspect necessarily involves balancing. Unless the plaintiff is injured in some respect by the agency's action, he or she has no standing and the court has no need to consider ripeness. Once the standing threshold is crossed, the hardship of denying review is not a simple 'yes or no' question, but is necessarily a question of 'how much' hardship will result.

Id.

The standard *Abbot Laboratories* test for applying prudential ripeness confirms that the typical takings claim is not normally subject to that doctrine Following a final land use decision, the issues in a takings case are purely legal, revolving around whether a taking has actually occurred.[148] They are therefore fit for review. This alone may be enough to override prudential judicial efficiency concerns.[149] However, the traditional "hardship" prong, which requires a plaintiff to show that "the challenged action creates a 'direct and immediate' dilemma for the parties"[150] will also militate against applying prudential ripeness to taking claims.[151] This is because, takings cases, federal delay creates a significant "dilemma" in prolonging costly and disruptive property restrictions throughout the course of potentially duplicative state litigation.[152] This form of hardship weighs against applying the prudential ripeness doctrine.[153] Consequently, the state procedures rule is as tenuously linked to prudential ripeness as it is to Article III ripeness.[154]

The rule is, however, strikingly similar to the exhaustion of state remedies doctrine.[155] Like the state procedures requirement,

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148. *See* Buchsbaum, *supra* note 64, at 473.

149. *See Ernst & Young*, 45 F.3d at 530, 535 ("There may be some sort of sliding scale under which, say, a very powerful exhibition of immediate hardship might compensate for questionable fitness ... or vice versa."); Laurence H. Tribe, American Constitutional Law section 3-10, at 80 (2d ed. 1987). *But see* Cedars-Sinai Medical Ctr. v. Watkins, 11 F.3d 1573, 1581 (Fed. Cir. 1993) (stating that a plaintiff must meet both prongs of ripeness test).

150. W.R. Grace & Co. v. EPA, 959 F.2d 360, 364 (1st Cir. 1992) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 152-53 (1967), *abrogated by* 430 U.S. 99 (overruling recognized); Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3190).

151. *See* Kassouni, *supra* note 61, at 6-7.

152. *See* Berger, *supra* note 5, at 103 ("Ripeness rules are used as an offensive weapon to delay litigation, increase both fiscal and emotional costs to the property owner, and convince potential plaintiffs that they should not even try to 'fight city hall.'"); Stein, *supra* note 121, at 98 (noting that government has an incentive to use ripeness to cause a litigation delay because delay will often result in a functional defeat the plaintiff's claim).

153. Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 744 (1997), ("To the extent that *Abbott Laboratories* is in any sense instructive ... it cuts directly against the agency: Suitum is just as definitively barred from taking any affirmative steps to develop her land as the drug companies [in *Abbott Labs.*] were bound to take affirmative step[sic] to change their labels"); Pacific Gas & Electric Co. v. State Energy Resources Commission, 461 U.S. 190, 201 (1983) (finding sufficient hardship to avoid ripeness where the a moratorium on construction interfered with significant planning expenditures); *see also Abbott Labs.*, 387 U.S. at 154 (stating that the case is ripe in part because "the regulation ... requires [the plaintiff] to make significant changes in their everyday business practices; if they fail to observe the Commissioner's rule they are quite clearly exposed to the imposition of strong sanctions").

154. On the other hand, there is some agreement that *Williamson County*'s first ripeness prong, the "final decision" requirement, is a prudential rule. Mendel, *supra* note 135, at 504-05 ("Commentators accurately describe the creation of this [finality] requirement as motivated by prudential concerns.").

155. Redish, *supra* note 104 , at 101 (noting that application of *Parratt* to a substantive constitutional claim "distorts the concept of procedural due process into a thinly-veiled

the exhaustion doctrine requires plaintiffs to resort to "administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate."[156] However, the similarities end when one recognizes that a plaintiff is normally not required to satisfy any exhaustion rule before bringing a constitutional claim under section 1983.[157] Only two allegations are necessary for such a claim: that a person has denied the plaintiff a federal right and that the violation was accomplished under color of state law.[158] These allegations suffice because the purposes of section 1983 are to "override certain kinds of state laws, to provide a remedy where state law was inadequate, 'to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice,' and *to provide a remedy supplementary to any remedy the state might have.*"[159] In short, a section 1983 claim is an independent remedy and must be litigated on the merits notwithstanding the availability of any state remedies: "[t]hese [section 1983] causes of action ... exist independent of any other legal or administrative relief that may be available as a matter of federal or state law. *They are judicially enforceable in the first instance.*"[160]

Yet, according to the *Williamson County* Court, the state procedures/exhaustion prerequisite applies to 1983 takings claimants because "no constitutional violation occurs until just compensation has been denied."[161] This premise is certainly true on its face, but it begs the question of when and where a court is to look in determining whether just compensation "has been denied." It is only because the Court recasts the Just Compensation Clause as a post-deprivation remedy, rather than as a precondition of governmental decision-making, that it can say that exhaustion of state compensation procedures is required by the clause's terms. As

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creation of a state judicial exhaustion requirement").

156. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 193 (1985). For a discussion of the exhaustion and ripeness doctrines, and their similarities, see Power, *supra* note 147.

157. *See* MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 346 (1986); Patsy v. Florida Board of Regents, 457 U.S. 496, 501 (1982); McNeese v. Board of Educ., 373 U.S. 668, 671-76 (1963).

158. Gomez v. Toledo, 446 U.S. 635, 640 (1980).

159. McNeese v. Bd. of Educ., 373 U.S. 668, 671-72 (1963) (quoting Monroe v. Pape, 365 U.S. 167, 174 (1961)) (emphasis added).

160. Felder v. Casey, 487 U.S. 131, 148 (1988) (quoting Burnett v. Grattan, 468 U.S. 42, 50 (1984)) (emphasis added).

161. *Williamson County*, 473 U.S. at 194, n.13. For judicial criticism of the state procedures rule as an insupportable exhaustion rule, see L & J Corp. v. City of Dallas, 1998 U.S. Dist. LEXIS 8934, at *8-14 (N.D. Tex. June 8, 1998).

we have seen, this is a highly questionable foundational proposition.[162]

C. How Federal Courts Have Turned the State Procedures Rule into a Complete Jurisdictional Bar

Despite its doctrinal inconsistencies, the state procedures rule seems to ensure federal review for those takings claimants that can afford to continue litigation following a failed state court action. However theoretically erroneous, , the Court's description of the state procedures rule as a means to "ripen" a claim plainly suggests that the Court intended the rule to cause some delay in federal jurisdiction.[163] Unfortunately, following *Williamson County*, many federal courts have converted the state procedures rule into a permanent jurisdictional bar by applying state rules of claim[164] and issue preclusion.[165] *Wilkinson v. Pitkin County*,[166] a case out of the Tenth Circuit, aptly illustrates how preclusion doctrines intersect with the state procedures rule to relegate takings claims to the state court system.

In *Wilkinson*, a landowner sought to engage in limited multi-unit development of 184 acres of land that were originally patented as 29 separate mining claims in the 1890's.[167] To avoid having to compete with other prospective developers for a finite number of available "building rights," the owner submitted his applications under a special subdivision procedure that exempted "low impact" developments from the lottery process.[168] The county rejected the original development applications, but subsequently permitted the landowner to submit scaled back plans that contemplated a single residence on 71 acres and three units on the remaining 113 acres, a proposal designed to fall squarely within the low impact regulations.[169] This too was rejected, prompting the owner to file

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162. *See supra,* Section II A (1).

163. *See* Nichol, *supra* note 123, at 169 ("The ripeness formula at least suggests that the legal shortcoming is one of timing or factual development. It implies to the shunned litigant that she may eventually have a cognizable claim.").

164. *See infra* notes 166-81 and accompanying text. The similarity of claims is usually determined upon comparison of the parties, facts and issues in the first action with those in the second proceeding, although the factors may vary slightly from state to state.

165. Federal application of state preclusion doctrines arises from the Full Faith and Credit Act. *See* Allen v. McCurry, 449 U.S. 90, 105 (1980) (holding that the Full Faith and Credit Act requires federal courts to apply preclusion rules to 1983 actions that could have been raised in state court action).

166. 142 F. 3d 1319 (1998) [hereinafter *Wilkinson II*].

167. *See* Wilkinson v. Pitkin County, 872 P.2d 1269, 1272 (Co. Ct. App. 1993).

168. *Id.* at 1272-73.

169. *Id.* at 1272.

suit in Colorado state court alleging, among other things, that the County had engaged in a regulatory taking.[170]

Following the state courts' denial of just compensation, the landowner asserted his takings claims in federal court in accordance with *Williamson County*.[171] Soon after, the district court held that the claims were barred on grounds of claim and issue preclusion due to the prior state court proceedings.[172] On appeal to the Tenth Circuit, the court recognized that "it is difficult to reconcile the ripeness requirement of *Williamson* [sic] with the laws of res judicata and collateral estoppel,"[173] but nevertheless rejected the argument that *Williamson County* [sic] was an exception to those laws:

> 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.[174]

The court therefore held that the landowner's takings claims were extinguished under Colorado's version of claim preclusion.[175]

The Sixth and Third Circuits have also strictly applied preclusion doctrines to destroy federal takings claims ostensibly ripened under *Williamson County*. In *Rainey Brothers Construction, Inc. v. Memphis & Shelby County Board of Adjustment*, for instance, a construction company sued the city in state court after it suddenly revoked building permits and changed the elevation requirements applicable to a partially completed apartment development.[176] As a result of the city's actions, the company was required to dismantle foundations and other preliminary improvements at its own expense.[177] The trial court

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170. *Id.* at 1272-73.
171. *See Wilkinson II*, 142 F. 3d at 1321.
172. *See id.* at 1320.
173. *Id.* at 1325, n.4.
174. *Id.* at 1324.
175. *Id.* at 1325.
176. *See* Rainey Bros. Constr. Co., Inc. v. Memphis & Shelby County Bd. of Adjustment, 967 F.Supp. 989, 1000-01 (W.D. Tenn. 1997).
177. *Id.* at 1001.

concluded that such treatment violated constitutional norms, but refused to award any compensation on the erroneous ground that the state tort claims act shielded the local government from monetary damages arising out of constitutional violations.[178]

After its appeals failed, *Rainey Brothers* renewed its claims in federal district court in accordance with *Williamson County*. As in *Wilkinson*, the major issue was whether the court should refrain from applying the doctrines of claim and issue preclusion because *Williamson County* forced the company to raise its claims first in state court.[179] Noting that several other courts have found that "the interaction between *Williamson County* and the Full Faith and Credit Act requires that a plaintiff landowner assert his federal claims in the state courts,"[180] the court concluded that there was no reason to ignore Tennessee preclusion principles. It therefore dismissed the suit on preclusion grounds, a decision later upheld by the Sixth Circuit.[181]

Thus, cases like *Wilkinson* and *Rainey*[182] have converted the state procedures requirement into a procedural snare that swallows the careful takings claimant as well as the unwary. Whether the landowner goes to federal court first or faithfully raises his claim in state court in accordance with *Williamson County*, in the end he will most likely discover that his action is completely precluded from federal review.[183] It is impossible to reconcile this outcome

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178. *Id.* at 1006.

179. *Id.* at 1003-06.

180. *Id.* at 1004 (citing Peduto v. City of North Wildwood, 878 F.2d 725 (3d Cir. 1989) & Palomar Mobile Home Park v. City of San Marcos, 989 F.2d 362, 364-65 (9th Cir. 1993)).

181. *Id.*

182. *See Peduto*, 878 F.2d 725; *Palomar Mobile Home Park*, 989 F.2d 362.

183. *See generally* Fields v. Sarosota Manatee Airport Authority, 953 F.2d 1299, 1302-03 (11th Cir. 1992). The *Fields* court explained:

> On the one hand, *Williamson County* requires potential federal court plaintiffs to pursue any available state court remedies that might lead to just compensation before bringing suit in federal court under section 1983 for claims arising under the Fourteenth and Fifth Amendments for the taking of property without just compensation. Citing *Williamson County*, 473 U.S.194 (1985). 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 law claims with the state claims, on the 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.

with the opinion in *Williamson County*.[184] Every statement in that decision about the need to resort to a state compensation procedure indicates that the Court was articulating a hurdle, rather than a bar, to federal review.[185] The Court's general decision to portray the state procedures requirement as a means to "mature" a federal claim especially reinforces this conclusion.[186]

Nor can one justify the ultimate result — relegation of takings claims to state courts — as an insignificant anomaly. Federal courts and federal civil rights law were established for the purpose of providing constitutional claimants with a judicial forum free from local politics and biases.[187] In the takings context, too:

> Federal judges tend to have broader outlooks than local judges constrained by ethos and electorate of their communities. The fact that there are apt to be more competing interests in their districts also makes them more disposed to vindicate the exercises of property rights that do not benefit immediate neighbors.[188]

But, under the strict interpretation of the state procedures rule and preclusion doctrines, one class of constitutional claimant – those seeking to maintain the value of their property or to put it to some productive use – must plead their case before state court judges more predisposed to favor the local "public interest" over the individual. A long term result of the relegation of federal takings

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Id. (citation omitted).

184. *See* DANIEL MANDELKER ET. AL., FEDERAL LAND USE LAW § 4A-23 (1999) ("The Supreme Court could hardly have intended the ripeness rules to become a trap for federal litigants.").

185. *See, e.g.*, Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194, n.13 (1985) ("A property owner [must] utilize procedures for obtaining compensation *before* bringing a [section] 1983 action.") (emphasis added).

186. *See* Berger, *supra* note 6, at 104. Berger notes that:

> The Court's analytical discussion begins with the announced conclusion that 'respondent's claim is *premature*.' Notably the Court chose to use the term '*premature*,' rather than 'moribund;' the Court did not say there was no valid claim. To an English-speaking person, prematurity necessarily means that something is yet to be done to make the matter mature, or jurisprudentially ripe.

Id.

187. Monroe v. Pape, 365 U.S. 167, 180-83 (1961). Here, the Court states that:

> one reason [that Section 1983] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of . . . the Fourteenth Amendment might be denied by state agencies.

Id. at 180.

188. Steven J. Eagle, Regulatory Takings, § 13-5(d), at 1069 (2d ed. 2001).

claims to the state system is that "state courts then get to define the contours of federal law and are *de facto* free to trump the federal courts' interpretation of federal law,"[189] a possibility that is utterly inconsistent with the Supreme Court's interpretation of the role of federal and state courts in the constitutional system.[190]

IV. SOLVING THE STATE PROCEDURES PROBLEM

In light of the weak theoretical basis for the state procedures requirement, and its unfair consequences, the Supreme Court should reconsider the requirement's role in the takings framework at the first opportunity. However, while direct intervention by the High Court may be necessary[191] to significantly modify or overturn the requirement, it is not required to reconstruct it as a limited jurisdictional hurdle. Lower federal courts can return the state procedures rule to its intended role by recognizing several exceptions that allow federal takings claimants to avoid claim and issue preclusion or the state procedures rule altogether.[192]

A. The "England" Reservation Exception

The 1964 decision of *England v. Louisiana State Board of Medical Examiners*,[193] supplies the most promising method for ensuring that a takings claimant will eventually have the

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189. Berger, *supra* note 5 at 128. The decisions of the California Supreme Court in the takings context provide a prime example of how the state procedures rule allows state courts to define federal takings law in a manner that seems inconsistent with the rules originally articulated in federal courts. *See* infra, Section III C. The United States Supreme Court does not accept enough cases each year to plausibly suggest that review by that Court is sufficient to maintain federal control over federal takings law. *See* Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 OKLA. L. REV. 727, 729 (2001); *see also Statistical Recap of Supreme Court's Workload During Last Three Terms*, 68 U.S. L.WK. 3069 (1999) (noting that in the October 1998 term, the Court granted certiorari in approximately 1.7% of the cases brought before it).

190. *See* Felder v. Casey, 487 U.S. 131, 144 (1988) ("Congress ... surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action.").

191. Although legislation intended to repeal the state procedures requirement was introduced to Congress in 1997, it is questionable whether that body may take such a step. *Compare* Kovacs, *supra* note 8, at n.48 ("Since *Williamson County* is based upon the Supreme Court's interpretation of the text of the Fifth Amendment rather than prudential considerations, it is beyond Congress' authority to override that decision....") with Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 171-74 (1997) (discussing the historical basis for Congress' authority to interpret the Constitution and judicial deference thereto).

192. Other exceptions may apply in particular circumstances, such as when the parties are jurisdictionally diverse, when the plaintiff has meritorious non-taking federal claims and can raise a supplemental state law takings claim, or when the complaint raises a facial takings claim. *See generally, Procedural Implications of* Williamson County, *supra* note 97.

193. 375 U.S. 411 (1964).

opportunity to litigate in federal court. In *England*, the Supreme Court held that a plaintiff may reserve the right to litigate a constitutional claim in federal court when involuntarily forced to litigate first in state court. Although there is some question as to the scope of *England*, the predicate for allowing reservation of claims in that case is also present in the takings context. Therefore, takings claimants should be able to invoke *England* to prevent claim preclusion from barring a federal action.

1. A Brief Review of England

In *England*, the state of Louisiana applied a state law to deny several would-be chiropractors a license to practice medicine.[194] This action prompted the chiropractors to challenge the law in federal district court on due process grounds.[195] Upon reviewing the complaint, the Court invoked *Pullman* abstention, deciding that it would be injudicious to consider the constitutional claim until state courts had a chance to definitively resolve the issue of whether the statute applied to the chiropractors.[196] After the state courts held that the statute was indeed properly applied, the chiropractors attempted to reassert their Fourteenth Amendment claims in federal court. The district court held that their claims were barred because the chiropractors' due process concerns were raised and litigated in the prior state court proceedings.[197]

On certiorari, the United States Supreme Court reversed, concluding that the lower court had erroneously refused to exercise jurisdiction. The Court initially declared that a later federal action is precluded when "a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there...."[198] However, acknowledging that one of its previous decision seemed to require federal claims to be raised in an initial state court, the Court declared that a plaintiff may ensure the involuntary nature of his state court litigation, and thus preserve federal claims for federal review, by making an express, on the record, reservation to resolution of the federal claims in state court.[199] In the case at hand, the Court refused to apply the new rule against the chiropractors, sending the case back to federal court for review of their constitutional claims.[200]

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194. *Id.* at 412-13.
195. *Id.* at 413.
196. *Id.*
197. *Id.* at 414.
198. *Id.* at 419.
199. *Id.* at 428.
200. *Id.* at 420.

2. *Using England to Ripen Federal Takings Claims*

The *England* reservation provides a vehicle for federal takings claimants to truly "ripen" a claim for federal review in accordance with Williamson County. To utilize the *England* reservation for this purpose, a would-be federal takings claimant must still seek compensation from the state as an initial matter. But, in so doing, the claimant may expressly reserve his federal claims, while asserting the required claim for compensation under state law.[201]

The reservation avoids later application of claim preclusion on the ground that the claimant "could have" raised the federal claim in state court.[202] Seeking compensation under state law allows the claimant to comply with the state procedures requirement while avoiding an application of claim preclusion on the ground that the claimant *actually* litigated the federal claims. A purely state law-based compensation claim satisfies *Williamson County* because that case does *not* hold that claimants must raise any federal, takings claim in state court to ripen a federal suit.[203] It simply requires

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201. Front Royal & Warren County Indus. Park v. Town of Front Royal, 135 F.3d 275, 283 (4th Cir. 1998) ("It would thus be meet [sic] for the district court to advise the parties [claiming a taking] that they may wish to make an *England*-type reservation of their right to return to federal court, if need be, when they first appear in state court.") (emphasis added); Fields v. Sarasota Manatee Airport Authority, 953 F.2d 1299, 1309, n.10 (11th Cir. 1992) ("If a state court litigant with a takings clause claim has any wish to preserve access to a federal forum, then he must make a ... reservation at the time he files his state law claims...").

202. *See* supra, note 7.

203. *See Front Royal*, 135 F.3d at 283 ("*Williamson County* does not require that the federal takings claim actually be litigated in state court."); Dodd v. Hood River County, 59 F.3d 852, 859 (9th Cir. 1995) [hereinafter *Dodd I*] ("The [*Williamson County*] Court made no reference to the pursuit of the Fifth Amendment claim in state court."); Popp v. City of Aurora, 2000 U.S. Dist. LEXIS 7160, at * 9-10 (N.D. Ill. 2000) ("*Williamson* held only that a plaintiff claiming a taking must exhaust state court just compensation remedies before bringing his federal claim, not that the state court's resolution of that issue is the final word, barring any federal claim."). *But see Procedural Implications of* Williamson County, *supra,* note 97 (arguing that *Williamson County* requires a takings claimant to raise a Fifth Amendment cause of action when resorting to the mandatory state compensation procedure). Professor Roberts asserts that "[t]he state controls the [compensation] process and may additionally provide its own substantive protection, but the just compensation" claim, as *First English* says, 'is grounded in the Fifth Amendment.'" *Id.* at 10,355. In his view, "it is beside the point" that "the state may have its own similar constitutional guarantee and may have a statutory cause of action, as well.... *Id.* at n.27. It is not clear why this is so. While it is "*unnecessary*" for a claimant to rely on state law to establish a denial of just compensation, the more important question is whether it is *sufficient* for meeting the requirements of *Williamson County*. Here, it is important to remember that the point of the state procedures requirement is to establish that the state will not provide fair money damages for an action effecting private property. The cause of action is of importance only to the extent that it is useful for establishing that the state will or will not compensate the landowner; pertinent state causes of action are very much to the point when it comes to determining what the landowner must do in state court to create a federal takings claim. *See Dodd I*, 59 F.3d at 860 ("The compensation element [required by *Williamson County*] is satisfied if remedies

claimants to establish that the state will not provide just compensation for a particular action effecting private property.[204] As long as the state has a constitutional or statutory provision that grants a compensation remedy for damage to or confiscation of private property, a claim arising solely under such a provision will serve the purposes of the state procedures requirement and allow the claimant to avoid litigating any federal takings claims in state court.[205] When combined with a timely reservation, this framework allows the claimant to avoid all aspects of the claim preclusion trap.

In many cases, it would be wise for the plaintiff making an *England* reservation to file a takings suit in federal court, prior to or at the same time as the state suit, along with a motion asking the federal court to abstain (under *Pullman*) from reviewing the case pending resolution of the state action.[206] Though not without

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under state law have been pursued.").

It is true that *Williamson County* can be read to completely preclude a federal cause of action in state court until after the state has denied compensation under state law. *Williamson County*, 473 U.S. at 172 ("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.") (emphasis added). This view would resolve the claim preclusion problem since that doctrine is only relevant to claims that *could* have been raised in a prior proceeding. But this is an unreasonable position since it contradicts the thrust of *First English*, which requires that state courts recognize a compensation remedy for a federal takings violation, and eviscerates the well-established role of state courts in hearing federal constitutional cases, something the Court surely did not intend. *See Fields*, 953 F.2d at 1307 ("The real [*Williamson County*] question is not whether the state courts are unable to enforce the takings clause – *they most assuredly are* – rather the question is whether the citizens of this country are to be barred from ever [sic] vindicating a federal constitutional right through the *federal court* system.") (emphasis added); Guetersloh v. State of Texas, 930 S.W. 2d 284, 288 (Tex. Ct. App. 1996) (rejecting argument that claimant could not bring federal takings claim with state law claim in state court because "state courts clearly have jurisdiction to resolve takings claims based on federal law.") Therefore, given *Williamson County*'s emphasis on utilization of a state remedial "procedure," rather than any particular action or provision, the most reasonable answer to the cause of action debate is that a takings claimant may raise *any* state or federal cause of action as long as it will trigger the state compensation procedure.

204. *See Fields*, 953 F.2d at 1305 (noting that for purposes of federal jurisdiction, "a takings clause claim is not ripe until the litigant has exhausted any potential means of obtaining compensation from the state....").

205. *See* Macri v. King County, 126 F.3d 1125, 1130 (9th Cir. 1997) (stating that the "failure of plaintiff to raise federal takings claim in state" proceeding does not bar subsequent federal action); *Dodd I*, 59 F.3d at 860 ("Under the teachings of *Williamson County* and decisions of this court in the context of ripeness, the compensation element is satisfied if remedies available under state law have been pursued.").

206. *See, e.g,* Ganz v. City of Belvedere, 739 F. Supp. 507, 509 (N.D. Ca. 1990) (explaining that plaintiff could retain federal jurisdiction of section 1983 takings claims by filing first in federal court, securing *Pullman* abstention, raising state claims in state court and making an *England* reservation). Additionally, it was stated in *Hallco Texas, Inc. v. McMullen County* 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

its own pitfalls,[207] this tactic may fit the claim more squarely within the *England* facts and avoid statute of limitations problems. It may also minimize the danger of the federal court wrongly invoking *Younger* abstention,[208] which would result in dismissal of the case with prejudice.[209] Assuming the state court accepts the reservation,[210] and no federal claims are actually litigated, the claimant should be permitted to revive the federal takings suit after the state court denies compensation without offending the doctrine of claim preclusion.[211]

> 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.

2002 Tex. App. LEXIS 8175, at *9 (November 20, 2002).

207. *See* Berger, *supra* note 5, at 114-15 (noting that asking for *Pullman* abstention after first filing a takings complaint in federal court "flaunts *Williamson County* [state procedures rule] risking an angry reaction from a district court judge, and an order of dismissal rather than abstention").

208. *Younger* abstention precludes federal judicial interference in certain ongoing state actions. Younger v. Harris, 401 U.S. 37, 43 (1971).

209. Although the *Younger* abstention is *generally* limited to cases where a criminal *defendant* in state court attempts to file a complaint in federal court, a few misguided decisions have applied it to prevent a state court takings plaintiff from filing a federal complaint. *See, e.g.*, Columbia Basin Apt. Assoc. v. City of Pasco, 268 F.3d 791 (9th Cir. 2001) (suggesting filing of state court takings complaint will trigger *Younger* at the federal level); Mission Oaks Mobile Home Park v. City of Hollister, 989 F.2d 359 (9th Cir. 1993). Under this rule, federal litigation of a takings claim is impossible once the state case begins. This application of *Younger* cannot be reconciled with *Williamson County* and has, therefore, been subsequently and repeatedly rejected by the Ninth Circuit. *See* Montclair Parkowners Assoc. v. City of Montclair, 264 F.3d 829, 831 (9th Cir. 2001) (holding that the *Younger* abstention is not applicable to federal takings claim where claimant filed first in federal court and reserved federal claims in subsequent state court complaint); Green v. City of Tucson, 255 F.3d 1086, 1097 (9th Cir. 2001) (en banc) (stating that the *Younger* abstention is appropriate only "when the relief sought in federal court would in some manner directly 'interfere' with ongoing state judicial proceedings" and "such interference is not present merely because a plaintiff chooses to instigate parallel affirmative litigation in both state and federal court") (citations omitted); *see also* Berger, *supra* note 5, at 114-15.

210. *See, e.g., Dodd I*, 59 F.3d at 862; *see also* Pascoag Reservoir & Dam, L.L.C. v. Rhode Island, 217 F. Supp. 2d 206, 213 (D.R.I. 2002) ("Claim preclusion does not apply when a court reserves a party's right to maintain a second action, as happens when a court dismisses a claim without prejudice.").

211. *See Montclair Parkowners Assoc.*, 264 F.3d at 831, n.1; Saboff v. St. John's River Water Management Dist., 200 F.3d 1356 (11th Cir. 2000); Greenspring Raquet Club v. Baltimore County, 2000 U.S. App. LEXIS 2720, at *11, n.1 (4th Cir. 2000) (recognizing reservation of federal claims approach effective to avoid claim preclusion); Macri v. King County, 126 F.3d 1125, 1130, 1130 n.6 (9th Cir. 1997); United Parcel Serv., Inc. v. California Public Util. Comm'n, 77 F.3d 1178, 1185-87 (9th Cir. 1996); Fields v. Sarasota Manatee Airport Authority, 953 F.2d 1299 (11th Cir. 1992); *Dodd I*, 59 F.3d at 862-63; *Ganz*, 739 F. Supp at 509; see *also W.J.F. Realty*, 2002 U.S. Dist. LEXIS 16820 at *22-24; Popp v. City of Aurora, 2000 U.S. Dist. LEXIS 7160 at * 9 (N.D. Ill. 2000) (noting that, in allowing claimants' federal claims to proceed, the plaintiffs "expressly reserved in the state court their right to bring an independent federal claim, and it appears that the City's request to strike this reservation was denied by the state court"); *Wilkinson II*, 142 F.3d at 1324 (refusing to decide if a

The fact that the *England* reservation arose from a case involving an initial grant of federal jurisdiction does not undermine its applicability to takings cases, which may not arise in the same manner.[212] The *England* reservation was a response to the murky relationship between *England's* stated rule – that voluntary litigation of a federal claim in state court precludes later federal jurisdiction – and the Court's earlier decision in *Government Employees v. Windsor*.[213] *Windsor* had been interpreted to *require* plaintiffs to argue their federal claims in state courts when also asserting related state law claims. If such a reading was correct, many plaintiffs would be forced to litigate their federal claims in state court, an action that might later be viewed as a voluntary election of the state forum and, thus, a waiver of federal review.[214]

To resolve the dilemma posed by *Windsor*, the *England* Court interpreted that case to mean only that plaintiffs must inform state courts of the nature of their federal claims, not actually litigate them. ".[215] Still, the Court recognized that the line between raising federal claims for review on the merits or for background information (and thus, the line between having the claims decided in state court voluntarily or involuntarily) would often be unclear.[216] The Court turned to federal claim reservation to enable federal courts to quickly and clearly determine whether a plaintiff had raised federal claims in state court on a voluntary basis or strictly for compliance with Windsor. A reserving litigant's "right to return to [federal court] ... will in all events be preserved" precisely

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reservation exception was available in the Tenth Circuit, and if so "what must be done to reserve such a claim," but citing cases supporting the *England* approach); Bass v. City of Dallas, 1998 U.S. Dist. LEXIS 11263 at *11 (N.D. Tex. 1998) ("Texas courts have recognized a procedure whereby a party can reserve the right to have this federal [takings] claim litigated in federal court.") Guetersloh v. State of Texas, 930 S.W. 2d 284, 289-90 (Ct. App. Tex 1996) (holding that plaintiff "could, with the exercise of diligence, have preserved his right to return to federal court to litigate his federal law-claim" with an *England* reservation).

212. *See, e.g.*, Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194, n.13 (1985) ("A property owner [must] utilize procedures for obtaining compensation *before* bringing a [section] 1983 action") (emphasis added). *But see* Peduto v. City of North Wildwood, 878 F.2d 725, 729, n.5 (3d Cir. 1989) ("As 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 generally* 17A CHARLES ALAN WRIGHT, ARTHUR MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 4243, at 7 (2d ed. Supp 2002) ("The *England* procedure strictly speaking is only applicable if a case was begun in federal court.").

213. 353 U.S. 364.

214. *See England*, 375 U.S. at 420-21.

215. *Id.* at 420.

216. *Id.* at 420-21.

because in these circumstances it is clear that the plaintiff *did not* intend to have her federal claims resolved in a state court.[217] In short, the core of the reservation approach is the involuntariness of state court litigation, not the specific procedural basis that forced the plaintiffs into the state court proceeding.[218]

The Court's subsequent opinion in *Migra v. Warren City School Disrict Board of Education* confirms that the *England* reservation hinges on the involuntary nature of state court litigation.[219] In *Migra*, the question was simply whether preclusion doctrines barred a federal suit where the plaintiff initially sued on state law claims in state court and where state law required merger of any federal claims with the state claims.[220] Abstention was not an issue. The Court held that preclusion rules prevented the subsequent federal court proceeding, but only because the litigant had proceeded *voluntarily* to state court.[221] Accordingly, it carefully limited its holding to similar cases of voluntarily state court litigation and referred to *England* in emphasizing that the situation would be different where federal claims are raised in state court involuntarily.[222]

In light of the rationale underlying the *England* reservation, the approach should be applicable in any case where a federal constitutional claimant is forced to involuntarily litigate federal claims in state courts. This includes modern takings litigation, for as a practical matter, the intersection of the state procedures requirement and claim preclusion doctrines force takings claimants to raise federal claims in state court just as surely as the intersection of *Pullman* and *Windsor*.[223] Finally, as a federal district court recently explained:

> [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

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217. *Id.*

218. *See, e.g.*, Schuster v. Martin, 861 F.2d 1369, 1373-74 (5th Cir. 1988); Jennings v. Caddo Parish Sch. Bd., 531 F.2d 1331, 1332 (5th Cir. 1976).

219. Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 85 n.7 (1984).

220. *Id.* at 77.

221. *Id.* at 84-85.

222. *Id.* at 85 n.7.

223. *See* Guetersloh v. State, 930 S.W. 2d 284, 290 (Tex. App. 1996), *cert. denied*, 522 U.S. 1110 (1998) (noting that a takings plaintiff was "involuntarily in state court, because he was fulfilling the *Williamson County* requirements").

> 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.[224]

For these reasons, a takings litigant who prefers federal jurisdiction should be permitted to reserve federal claims in an initial state court proceeding[225] and to raise them later in federal court.[226] This result, not the application of claim preclusion, effectuates the intent of *Williamson County*.[227]

3. The Problem of Issue Preclusion

It is important to recognize that a proper *England* reservation does not prevent a federal court from relying on issue preclusion to refuse adjudicating a takings claim[228] and cannot guarantee federal jurisdiction for this reason. The Ninth Circuit's decision in *Dodd v. Hood River County* illustrates the interplay between a reserved federal takings claim and issue preclusion.[229] *Dodd* involved 40 acres of land in an Oregon Forest Use zone, upon which the Dodds intended to construct a single dwelling.[230] After initially indicating that the property was suitable for the desired residence, the County adopted an ordinance that prohibited all dwellings in the Forest Zone unless necessary to forest use.[231] When the Dodds applied for

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

225. *See* Fields v. Sarasota Manatee Airport Auth., 953 F. 2d 1299 (Fla. 1992).

226. *See supra* notes 201-16.

227. *See* Berger, *supra* note 5, 121 ("The Supreme Court could hardly have intended the ripeness rules to become a trap for federal litigants.") (quoting DANIEL MANDELKER, ET. AL., FEDERAL LAND USE LAW 4A-23 (1998)). *England*'s consistency with the intent of *Williamson County* should overcome any remaining uncertainty about the scope of the reservation approach. It should be remembered that the state procedures requirement itself is characterized by great doctrinal uncertainty, and its current role in state takings cases is the result of a questionable interpretation of *Williamson County*. The extrapolation needed to create the current state procedures doctrine is far more questionable than that required to condition that doctrine with the *England* reservation, particularly since an analogy in favor of extending *England* to the takings context is consistent with the traditional rule allowing takings claimants access (at least at some point) to the federal courts, while the former runs counter to decades of precedent and effectively transfers primary responsibility for enforcing an important federal right to the state courts.

228. Palomar Mobile Home Park Ass'n v. San Marcos, 989 F.2d 362, 365 (Cal. 1993) (discussing issue preclusion rules); *see generally* Madeline J. Meacham, *The* Williamson *Trap*, 32 URB. LAW. 239, 250 (2000).

229. *Dodd I*, 59 F.3d 852, 852 (9th Cir. 1995).

230. *Id.* at 855.

231. *Id.* at 856.

the necessary building permits, the County relied on the new zoning ordinance to deny the requested residential use.[232]

After exhausting all available administrative remedies, the Dodds filed a takings claim in state court, challenging the County's actions primarily as an impermissible denial of all economic use of property.[233] In so doing, they relied only upon the Oregon Constitution's takings provision, and expressly reserved their federal claims for later adjudication in federal court.[234] Honoring the reservation, the state courts considered only the Dodds' state claims, which were ultimately rejected by the Oregon Supreme Court.[235] Yet, even before the state high court reached its decision, the Dodds brought a federal takings suit in federal district court.[236] This court promptly dismissed the claims on ripeness grounds in light of the lack of a final decision from the Oregon Supreme Court.[237]

When the state law claims were finally decided against the Dodds, the Ninth Circuit addressed the issue of whether the federal claims were still unripe due to the Dodds' failure to raise the federal claims in the state proceedings. Reviewing *Williamson County*, the court declared:

> Reduced to its essence, to hold that a taking plaintiff must first present a Fifth Amendment claim to the state court system as a condition precedent to seeking relief in a federal court would be to deny a federal forum to every takings claimant. We are satisfied that *Williamson County* may not be interpreted to command such a revolutionary concept and draconian result.[238]

The court held that, in light of the state courts' consent to the Dodds' reservation of the federal claims, their failure to obtain just compensation in state courts under state law was sufficient to satisfy the state procedures requirement articulated in Williamson.[239] While implicitly affirming the viability of the *England* reservation, *Dodd I* also thrust issue preclusion forward

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232. *Id.*
233. *See* Dodd v. Hood River County, 136 F.3d 1219, 1223-24 (9th Cir. 1998), *cert. denied*, 525 U.S. 923 (1998) [hereinafter *Dodd II*].
234. *See Dodd I*, 59 F.3d at 857.
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.* at 860-61.
239. *Id.* at 862.

as a potential hindrance to meaningful use of the reservation technique, remanding the case to the district court for a determination of whether collateral estoppel barred the Dodds' federal claims.[240]

In *Dodd II,* the Ninth Circuit returned to the issue after the district court held that the Dodds' federal suit was indeed barred because of the similarity of the adjudicated state takings claims and the asserted federal claims.[241] Explicitly noting that the Dodds' reservation was irrelevant to the propriety of issue preclusion,[242] the court upheld the lower court's application of issue preclusion to that portion of the Dodds' federal claim that rested on the allegation that they had been denied all economic use of their property since a sufficiently identical issue was considered and rejected by the Oregon courts.[243] On the other hand, the court concluded that the portion of the Dodds' federal claim premised on a denial of less than all use of property was not barred by issue preclusion because Oregon takings standards, upon which the state litigation proceeded, did not recognize such a claim.[244]

B. Methods to Avoid Issue Preclusion

Dodd II shows that issue preclusion will not apply to render an *England* reservation meaningless as long as state takings law fails to incorporate one of the takings tests articulated under the Fifth Amendment to the United States Constitution. There are, however, additional avenues for avoiding issue preclusion at least with respect to the legal issues significant to resolving takings claims. [245] One method derives from the observation that, under

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240. *Id.* at 863.

241. *See Dodd II,* 136 F.3d at 1224.

242. The *Dodd II* court stated:

> 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. at 1227.

243. *Id.* at 1225.

244. *See also* Evans v. Washington County, No. CV-99-1356-ST, 1999 U.S. Dist. LEXIS 20036, at *14-15 (D. Or. Dec. 10, 1999) (explaining that state and federal takings claims are "identical except that the United States Constitution allows aggrieved citizens to recover for 'investment-backed expectations,' whereas the analysis under the Oregon Constitution does not take those expectations into consideration").

245. The doctrine of issue preclusion generally bars relitigation of both factual and legal issues. *See generally* 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."). For a general

federal law, a landowner can state a valid takings claim under many different theories, each of which is a *separate legal issue* for purposes of issue preclusion.[246] For instance, as the Supreme Court's recent decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning* Agency[247] reaffirms, a landowner challenging application of a regulation restricting property use can claim the action causes a taking by (1) requiring the owner to "sacrifice *all* economically beneficial uses ... that is, to leave his property economically idle";[248] (2) failing to meet *Penn Central*'s multi-factor test, in particular, by interfering with the owner's "distinct investment-backed expectations;"[249] or by (3) failing to "substantially advance legitimate state interests,"[250] which may or

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discussion on the interplay between issue preclusion and the state procedures doctrine, see Trail Enters Inc. v. City of Houston, 907 F. Supp. 250, 251-52 (S.D. Tex. 1995). It is more difficult to avoid application of factual issue preclusion. *See Dodd II*, 136 F.3d at 1225 (holding that the issue of whether a regulatory action denied the property owners all economic use of their property was precluded). *But see* Cumberland Farms, Inc. v. Town of Groton, 808 A. 2d 1107, 1115-16 n.14 (Conn. 2002) (allowing litigation of factual issues relevant to a takings claim despite prior judicial consideration of such issues in a separate action because "none of the factual issues raised by the plaintiff in its inverse condemnation claim actually was litigated and decided in the administrative appeal...").

246. The determination of whether the second proceeding involves the same issue(s) as the first will depend on whether the issue involves facts different from those central in the first proceeding or the application of a different rule law. *See Dodd II*, 136 F.3d at 1225 ("Under Oregon law, issues are not identical for preclusion when 'the underlying facts relevant to the determination of [the issue] are not the same.'"); RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. c (1982). The elements of a federal takings claim are different rules of law that require different facts for proper application. For example, the facts necessary to show that a regulation is a taking because it does not substantially advance a legitimate state interest, as applied to a particular piece of property, will often be different from those necessary to satisfy the distinct rule of law that a taking may occur due to adverse economic impact or frustration of investment-backed expectations.

247. 535 U.S. 302 (2002). For in depth treatment of the *Tahoe-Sierra* decision, see J. David Breemer, *Temporary Insanity: The Long Tale of Tahoe-Sierra Preservation Council and Its Quiet Ending in the United States Supreme Court*, 71 FORDHAM L. REV. 1 (2002).

248. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992) (emphasis in original); *see also Tahoe-Sierra*, 535 U.S. at 1491 ("The categorical rule that we applied in *Lucas* states that compensation is required when a regulation deprives an owner of 'all economically beneficial uses' of his land.").

249. Penn. Cent. Transp. Co. v. New York, 438 U.S. 104, 105 (1978); *see* Palazzolo v. Rhode Island, 533 U.S. 606, 616 (remanding case involving denial of less than all beneficial use for "*Penn Central* analysis"); *Tahoe-Sierra*, 535 U.S. 1485 ("If petitioners had challenged the application of the moratoria to their individual parcels, instead of making a facial challenge, some of them might have prevailed under a *Penn Central* analysis."). "The *Penn Central* analysis involves 'a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.'" *Id.* at 1475 n.10. (citation omitted). For an extended discussion of the nature of the "investment-backed expectations" prong, see R. S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in regulatory Takings Law?*, 9 N.Y.U. ENVTL L.J. 449 (2001).

250. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (stating that a regulation causes a

may not include an allegation of (4) a lack of good faith on the part of the government during the permitting/regulatory process.[251] When the government asks for property in return for development permission, the landowner may also assert that the demands cause a taking because they are not "roughly proportional" to the impact of the development.[252] As a result, a state court's general conclusion that there is no taking should not bar federal takings litigation unless the state court fully considered the state equivalent, if there is one, of each raised federal takings theory or issue.[253]

Therefore, as *Dodd II* indicates, the total lack of "investment-backed expectations," (or any other federal theory) in state law means that the state decision does not preclude later federal adjudication of the claim, at least under the absent theory or issue.[254] However, even if state law *does* recognize an analog to each federal takings theory or issue, issue preclusion does not bar further litigation of these issues unless they are *actually* resolved in the state action and such determination is *essential* to the final judgment.[255] In this regard, it is important to recognize that state

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taking when it "does not substantially advance legitimate state interests . . . *or* denies an *owner economically viable use of his land.*") (citations omitted) (emphasis added); *see also Tahoe-Sierra*, 535 U.S. at 1485 (noting that the landowners challenging building moratoria that prevented all use of property also could have "argued that the moratoria did not substantially advance a legitimate state interest").

251. *See, e.g., Tahoe-Sierra*, 535 U.S. at 1485 (citing *Del Monte Dunes* in suggesting that the landowners could have challenged regulation on a bad faith theory); Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 698 (1999).

252. Dolan v. Tigard, 512 U.S. 374, 391 (1994) (stating that the government must make "some sort of individualized determination" that an exaction of property is "related both in nature and extent to the impact of the proposed development."); *see generally* J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go From Here*, 59 WASH. & LEE L. REV. 373 (2002).

253. *See* Avenal v. Louisiana, 757 So. 2d 1, 10-11 (Ct. App. 2000) (noting that "the question central to our [issue preclusion] analysis of this case is whether the standard for a taking is the same under Louisiana law as it is under federal law . . ." and that issue preclusion would be inappropriate if the law asserted in connection with the second takings proceeding was broader than that applicable to the first takings claim); W.J.F. Realty Corp. v. Town of Southhampton, 220 F. Supp. 2d 140, 149 (E.D.N.Y. 2002) (holding issue preclusion did not bar litigation of federal takings claim in federal court, despite earlier state law litigation, in part because the state court opinion "contains no analysis under federal taking law articulated in [*Penn Central*] which delineated factors for a regulatory taking when a regulation ... does not eliminate all economically beneficial use").

254. *See Dodd II*, 136 F.3d at 1227-28; RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. j (1982) ("The appropriate question, then, is whether the issue was actually recognized by the parties as important and by the trier as necessary to the first judgment.").

255. *See* RESTATEMENT (SECOND) OF JUDGMENTS §27 cmt. e (1982) ("A judgment is not conclusive in a subsequent action as to issues which *might have been but were not* litigated and determined in the prior action.") (emphasis added); New Port Largo, Inc. v. Monroe County, 95 F.3d 1084, 1089-90 & n.6 (11th Cir. 1996) (holding the takings claim was not barred by issue preclusion in part because state court's discussion of economically viable uses not necessary to judgment and discussion failed to explain "what is an economically viable

courts often render a generalized judgment of no taking that appears to flow from consideration of a single takings theory. In such a case, the federal court should open the door for litigation of all of the federal issues not necessary to this judgment.[256]

Issue preclusion also does not apply where "[t]he party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the [legal] issue in the initial action than in the subsequent action...."[257] This is clearly illustrated in the takings context by *W.J.F. Realty v. Town of South Hampton*.[258] There, a potential residential developer litigated a takings claims against the town in state court, alleging the claim only under state law and reserving its federal claim under *England*.[259] Upon losing in state court, W.J.F. Realty raised the federal claim in federal district court, and the town moved to dismiss on grounds of claim and issue preclusion.[260] The court rejected the preclusion argument. Concluding that the *England* reservation preserved the federal claim,[261] it then held that issue preclusion was no bar, in part because the state court did not apply the federal takings factors set out in Penn Central[262] and in part because New York requires takings claimants to prove their claim "beyond a reasonable doubt," a different and heavier burden of persuasion than that which applies to federal takings claims.[263]

W.J.F. Realty shows that even when a state court fully applies the equivalent of federal takings tests, its legal conclusions under these tests are not preclusive if they result from a level of scrutiny more deferential to the government than that which controls in federal courts.[264] Significantly, the United States Supreme Court has repeatedly indicated that federal takings claims are reviewed

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use for takings purposes"); W.J.F. Realty Corp., 220 F. Supp. 2d at 148.

256. *See, e.g., New Port Largo*, 95 F.3d at 1090 n.6 ("[A] federal court will not confer preclusive effect on a state court order where it is unclear what the state court actually decided."); Pascoag Reservoir & Dam, L.L.C. v. Rhode Island, 217 F. Supp. 2d 206, 214 (D.R.I. 2002) (refusing to apply issue preclusion because "statements made by the Rhode Island Supreme Court about the takings claim ... are not part of a final judgment and are not essential to that Court's judgment"); W.J.F. Realty, 220 F. Supp. 2d at 148.

257. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28 (4) (1982).

258. 220 F. Supp. 2d 140 (E.D.N.Y. 2002).

259. *Id.* at 141.

260. *Id.* at 141-42.

261. *Id.* at 146-149.

262. *Id.* at 149.

263. *Id.* at 150.

264. *See also* Triomphe Investors v. City of Northwood, 49 F.3d 198, 202 (6th Cir. 1995) (observing that the state court's review of a zoning decision under Ohio law was broader than that required for a federal substantive due process claim and therefore collateral estoppel did not apply).

under a heightened level of scrutiny[265] and proven by a preponderance of evidence.[266] On the other hand, as *W.J.F. Realty* shows, many state courts continue to apply a standard of review and persuasion that is much more deferential to the government.[267] These differences should overcome issue preclusion both because they trigger the "burden of persuasion" exception and because they preclude takings claimants from having a "full and fair" opportunity to litigate their federal takings claims in state court. Thus, while issue preclusion may often depend on the specifics of state law, in many cases, the traditionally higher standard of review in the federal courts should provide a basis for federal jurisdiction and for avoiding the potentially thorny problem of collateral estoppel.[268]

C. The Inadequacy Exception and a Case Study of California Takings Law

In some instances, state takings law may diverge so significantly from the letter and intent of federal takings precedent that pursuing a state claim must be considered futile as a means to vindicate the just compensation remedy. If so, the plaintiff may be able to avoid the state compensation procedures rule altogether under the auspices of *Williamson County's* exception for "inadequate" state procedures.[269] The *Williamson County* Court conditioned the state procedures requirement upon both the availability *and* adequacy of the state's process. Since "the mere existence of some compensation mechanism does not necessarily render those procedures adequate,"[270] the inadequacy condition

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265. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994); Nolan v. California Coastal Comm'n, 483 U.S. 825 (1987); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (explaining that a regulation "effects a taking if [it] . . . does not *substantially advance* legitimate state interests").

266. *See* City of Monterey v. Del Monte Dunes Ltd., 526 U.S. 687, 722-23 (1999) (affirming jury decision finding a taking based upon preponderance of evidence standard).

267. *See, e.g.*, Landgate, Inc. v. California Coastal Comm'n, 953 P.2d 1188, 1198-99 (Cal. 1998) (holding that a substantial evidence standard, not heightened scrutiny or de novo review, applies to challenges to land use permit denials in California); *see also* Breneric Assoc. v. City of Del Mar, 81 Cal. Rptr. 2d 324, 330 (Cal. Ct. App. 1998).

268. *But see* Peduto v. City of North Wildwood, 878 F.2d 725, 729 (3d Cir. 1989).

269. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 195 (1985) ("If the government has provided an *adequate* process for obtaining compensation, and if resort to that process 'yields just compensation,' then the property owner 'has no claim against the Government' for a taking.'") (emphasis added); *id.* at 196-97 ("Respondent has not shown that the inverse condemnation procedure is *unavailable or inadequate*....") (italics added).

270. Samaad v. City of Dallas, 940 F.2d 925, 934 (5th Cir. 1991) ("There is merit to the [*Williamson County*] Court's implicit conclusion that the mere existence of *some* compensation mechanism does not necessarily render those procedures adequate.").

remains independent of the question of availability.[271] In requiring states to make a compensation remedy available without addressing the method of effectuating the remedy, *First English* did nothing to undermine the viability of the conceptually distinct inadequacy exception.[272]

1. A General Rule for the Inadequacy Exception

The difficult question is when the inadequacy exception should apply. Several courts have indicated that it is relevant where there is a high degree of certainty that state courts will refuse to award just compensation[273] and that it definitely applies where the takings claim is on all fours with previous state decisions that deny compensation.[274] A logical generalization from these decisions is

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271. *Williamson County*, 473 U.S. at 195 ("If a state provides an *adequate* procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause [in the federal courts] until it has used the procedure and been denied just compensation.") (emphasis added); *id.* (explaining that the Constitution is "satisfied by a reasonable and adequate provision for obtaining compensation...."); Daniels v. Area Plan Comm'n, 306 F.3d 445, 456 (7th Cir. 2002) (stressing that "a plaintiff may be excused from the exhaustion requirement if he demonstrates that 'the inverse condemnation procedure is unavailable or inadequate' and considering whether "Indiana's inverse condemnation procedure while 'available' is nevertheless inadequate'"); *Samaad*, 940 F.2d at 934.

272. *Procedural Implications of* Williamson County, *supra* note 97, at 10,355 ("[I]f the state does not provide a remedy *or* uses unfair procedures, an action lies in federal court.") (emphasis added).

273. *See* Rolf v. City of San Antonio, 77 F.3d 823, 826 (5th Cir. 1996); *Samaad*, 940 F.2d at 934 (citing cases reviewing inadequacy issue and stating "[T]hese cases indicate that 'inadequate' procedures are those that *almost certainly* will not justly compensate the claimant."); Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 463 (7th Cir. 1988) (stating that a compensation suit is ripe if it is apparent "the state does not intend to pay compensation"); Belvedere Military Corp. v. County of Palm Beach, 845 F. Supp. 877, 879 (S.D. Fla. 1994); Munoz Arill v. Maiz, 992 F. Supp. 112, 121 (D. P.R. 1998) (refusing to dismiss takings claim because state remedies were uncertain).

274. *See* Azul Pacifico, Inc. v. City of Los Angeles, 948 F.2d 575 (9th Cir. 1991) (holding a challenge to rent control ordinance was ripe because state law did not recognize that such an ordinance may cause a taking); Corn v. City of Lauderdale Lakes, 816 F.2d 1514 (11th Cir. 1987) (holding a takings claim arising from zoning was ripe because Florida law did not recognize a claim for confiscatory zoning);Pascoag Reservoir & Dam, L.L.C. v. Rhode Island, 217 F. Supp. 2d 206, 216-17 (D.R.I. 2002) (applying inadequacy exception to hear takings claim because the state supreme court has "intimated" that the "owner has no cognizable takings claim"); Naegele Outdoor Advertising, Inc. v. City of Durham, 803 F. Supp. 1068 (M.D.N.C. 1992), *aff'd*, 19 F.3d 11 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994) (holding a challenge to a billboard amortization ordinance was ripe because state courts had already rejected compensation in identical circumstances). *But see* Rockler v. Minneapolis Cmnty. Dev. Agency, 866 F. Supp. 415, 417-18 (D. Minn. 1994).

A separate line of decisions seems to hold that the inadequacy exception allows avoidance of state compensation procedures when there is no pecuniary loss or where it is clear that the state procedures are not designed to address the loss. *See Daniels*, 306 F.3d at 456; Washington Legal Found. v. Texas Equal Access to Justice Found., 94 F. 3d 996 (5th Cir. 1996). These cases conclude that, in limited circumstances, the claimant can immediately seek an injunction in federal court. This result raises several troubling issues.

that the exception should at least apply where the claimant shows, through an analysis of state law and judicial outcomes, that a resort to state procedures is highly likely to be futile;[275] i.e., where courts construct takings law to virtually foreclose vindication of a particular takings claim and where it is empirically clear that the state process rarely, if ever, results in an award of damages. This proposition sets a relatively high bar for inadequacy, while recognizing that the exception exists after *First English*.

The inadequacy exception supported here takes account of the fact that none of the Court's decisions address the procedural means by which a state is to offer the required compensation remedy[276] and that such means can be readily utilized to make an "available" compensation remedy meaningless. A state might burden an action in inverse condemnation with short statute of limitations, standards of evidence that are deferential to the government, and unique and costly exhaustion requirements. California, for instance, has accomplished all this and more by requiring a takings claimant to sue in administrative mandamus or for declaratory relief before seeking just compensation.[277] As the following discussion illustrates, this procedural hurdle has been applied to frustrate almost all claims for compensation.

Most important, for purposes of this paper, is the problem of reconciling federal equitable relief with the Supreme Court's declarations that compensatory relief (which must be sought from the state) is *the* constitutionally mandated remedy for a taking. *See* First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 314 (1987) ("[The Fifth Amendment] is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking") (emphasis in original). The Court has an opportunity to resolve the apparent tension in *Washington Legal Foundation v. Legal Foundation of Washington*, a pending takings cases that raises the issue of when, if ever, injunctive relief may be sought for a taking.

275. *Coniston Corp.*, 844 F.2d at 463 (noting that federal jurisdiction is appropriate if it is "apparent that the state does not intend to pay compensation"); Austin v. City of Honolulu, 840 F.2d 678, 680 (9th Cir. 1988) (noting that the claimant bears the burden of proving state procedures inadequate); *cf.* Maria L Marcus, *Wanted: A Federal Standard for Evaluating the Adequate State Forum*, 50 MD. L. REV. 131, 207-08 (1991) (arguing that a federal civil rights "plaintiff would be entitled to a federal forum if he could demonstrate that [his] claims would probably not be considered by state tribunals.... [He would bear] the burden of proving by a preponderance of the evidence that [the] procedure is too uncertain to be adequate.").

276. *See* Rossco Holdings, Inc. v. Cal. Coastal Comm'n, 260 Cal. Rptr. 736, 743 (Cal. 1989) ("*First English* ... did not address the *procedural means* by which a [state] claim for inverse condemnation is asserted.").

277. *See generally* Sharon L. Browne, *Administrative Mandamus as a Prerequisite to Inverse Condemnation: "Healing" California's Confused Takings Law*, 22 PEPP. L. REV. 99 (1994).

2. *Regulatory Takings in California: Procedural Barriers,* Invalidation and Remedial Inadequacy

In *Hensler v. City of Glendale*,[278] the California Supreme Court held that an as-applied takings claimant must seek to have a regulatory action invalidated by way of administrative mandamus,[279] while the claimant raising a facial regulatory takings claim must seek the same relief by way of an action for declaratory relief, before asking for compensation.[280] In mandating these hurdles, *Hensler* required the as-applied takings claimants to satisfy onerous pleading and evidentiary rules, including a 90 day (or shorter) statute of limitations, with judicial review substantially limited to the administrative record (as developed by the agency) under a substantial evidence standard,[281] none of which normally apply to inverse condemnation.[282] Unprecedented outside California,[283] the requirement that a takings claimant defer a

278. 876 P.2d 1043 (1994).

279. Administrative mandamus is solely designed to "attack, review, set aside, void or annul" adjudicatory decision of state of local agencies. CAL. CIV. PROC. CODE § 1094.5 (West 1980 Supp. 2003); *see also* Youngblood v. Board of Supervisors, 586 P.2d 556, 559 n.2 (Cal. 1974).

280. *Hensler*, 876 P.2d at 1051; *see* CAL. CIV. PROC. CODE § 1094.5 (f) (West 1980 Supp 2003) ("The court [in an administrative mandate proceeding] shall enter judgment either commanding respondent to *set aside* the [administrative] order or decision, or denying the writ.") (emphasis added).

281. Under the substantial evidence standard, the agency's decision will be invalidated as an abuse of discretion only if its findings are not supported by "substantial evidence in light of the whole record," and where all doubts are resolved in favor of the agency's decision. *See* Topanga Ass'n for a Scenic Cmty. v. County of Los Angeles, 522 P.2d 12, 14 (Cal. 1974); Paoli v. California Coastal Comm'n. 223 Cal. Rptr. 792, 795 (Cal. Ct. App. 1986).

282. A proceeding in administrative mandamus must be brought within a maximum of 90 days. The time limit is reduced to 60 days if the challenge is directed at the California Coastal Commission. CAL. PUB. RES. CODE § 30801 (West 2002). In both a petition for administrative mandamus and an action seeking declaratory, invalidation is sought under the abuse of discretion standard. *See* CAL. CIV. PROC. CODE § 1094.5 (b) (West 1980 Supp 2003); 3 WITKIN, CALIFORNIA PROCEDURE § 18 (1954); C.J.L. Construction, Inc. v. Universal Plumbing, 22 Cal. Rptr. 2d 360, 364 (Cal. Ct. App. 1993). The same standard applies in a due process case. *See, e.g.*, Kensington Univ. v. Council for Private Postsecondary and Vocational Educ., 62 Cal. Rptr. 2d 582, 592 n.4 (Cal. Ct. App. 1997). On the other hand, a five-year statute of limitations applies to actions in inverse condemnation. And "questions of abusing discretion, exceeding jurisdiction and complying with state law do not arise ... because they have been perceived as irrelevant to the inquiry of whether compensation is due." Browne, *supra* note 277, at 106-07.

283. *See* Brown, *supra* note 277, at 125 ("The [California Supreme Court's] Hensler opinion was [unclear] on why injured property owners should be forced to seek an invalidation remedy ... when *legitimacy* of the regulation may be conceded by the owner form the outset ... Until now, it has not been suggested that a writ of administrative mandamus is required to remedy *permissible* governmental actions."); *cf.* Corn v. City of Lauderdale Lakes, 816 F.2d 1514, 1518 (11th Cir. 1987) (noting that in Florida, "a separate action in inverse condemnation for an uncompensated, although valid, permit decision amounting to a taking, will lie"); *see also* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1009, 1019 (1992) Lucas "did not take issue with the validity of the Act," but only argued (successfully) that

compensation claim until he has sought to have the offending regulation invalidated[284] amounts to a rule that takings plaintiffs must pursue a *due process* remedy before raising a claim for just compensation.[285]

In 1997, California's high court revealed that the state's due process "prerequisite" is actually a *substitute* for just compensation that shields the government from any damages for a taking. The court made this clear by holding that a takings claimant, who succeeded in having a challenged regulation invalidated as unconstitutionally confiscatory, had *no right* to seek compensation through inverse condemnation for the regulation's effective period.[286] The court candidly explained: "a remedy for [a] due process violation, if available and adequate, *obviates a finding of a taking*."[287] Because takings claimants must seek the due process remedy of invalidation in a mandamus or declaratory relief action, and because this relief necessarily precludes compensation,

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application of the valid Act to his land would cause a taking if it denied all economically beneficial use of property.

284. *Hensler*, 876 P.2d at 1061. Incredibly, if the plaintiff fails to obtain a judgment in a mandamus proceeding, the administrative decision may be res judicata, and the takings claim deemed waived. Mola Dev. Corp. v. City of Seal Beach, 67 Cal. Rptr. 2d 103, 107 (Cal. Ct. App. 1997); Briggs v. City of Rolling Hills Estates, 47 Cal. Rptr. 29, 32-33 (Cal. Ct. App. 1995). This rule can apply even if the administrative decision was reached without affording the aggrieved property owner a chance to subpeona or cross-examine witnesses and even if the owner raises federal rights under section 1983. *See Mola*, 67 Ca. Rptr. 2d. at 107-09.

285. Invalidation or recision of a governmental decision is universally recognized as a due process remedy. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 197 (1985).

286. Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851, 867 (Cal. 1997). *See also* Santa Monica Beach, Ltd. v. Superior Court, 968 P. 2d 993, 1000-04 (Cal. 1998) (converting a takings challenge to a rent control law into a due process claim); *id.* at 1036 (Chin, J., dissenting) ("The [Santa Monica] majority ... inappropriately conflates takings jurisprudence with due process jurisprudence...."). *Id.*at 1014 (Baxter, J., dissenting) ("[T]he majority address [sic] the wrong question and give [sic] the wrong answer. The takings clause has different and more stringent criteria than those applied under the majority's attempt to morph the deferential due process rational basis test into a takings clause test."); Tensor Group v. City of Glendale, 17 Cal. Rptr. 2d 639, 640-42 (Cal. Ct. App. 1993) (stating that a finding of invalidity precludes damages if no damages introduced during proceeding to determine validity).

287. *Kavanau*, 941 P.2d at 867. Several appellate court decisions have also inexplicably indicated that permanent takings damages simply are not available in California for similar reasons. In particular, in *Mola Development Corp. v. City of Seal Beach*, 67 Ca. Rptr. 2d 103, 107-08 (Cal. Ct. App. 1997), the court suggested in dicta that a claimant can only seek takings damages after having a regulation judicially invalidated. If this were the rule, the claimant would be limited to compensation for the time the invalid regulation was in effect; *i.e.*, for a temporary taking. But the California Supreme Court later appeared to close even this potential avenue for compensation, holding in *Landgate Inc. v. California Coastal Commission* that the period in which an invalidated regulation is judicially challenged is a non-compensable "normal delay." 953 P.2d 1188, 1197 (Cal. 1998).

compensation for a permanent taking appears to be barred as a matter of law in California.[288]

California's preclusive remedial framework extends even to per se and temporary regulatory takings. In *Landgate v. California Coastal Commission.*,[289] the Coastal Commission issued a final decision which had the effect of denying a property owner all beneficial use of a residential lot. The owner initiated a mandamus action as required and, almost two years later, was rewarded with a trial court decision invalidating the Commission's actions and allowing the plaintiff to go forward with residential construction. Then, when the owner sought compensation for the two year denial of all beneficial use of property, the trial court granted $156,000 for the temporary taking.[290]

Faced with the prospect of actually having to subject a governmental entity to the discipline of the Just Compensation Clause, the California Supreme Court chose to set aside the damages award, ruling that *Landgate*'s sole remedy was invalidation of the Coastal Commission's initial decision. Any hardship flowing from the Commission's actions and the resulting period of litigation were simply a normal "development delay," which could "be imposed on the developer rather than the general taxpayer without violating the United States Constitution."[291]

Therefore, *First English*'s command, that states provide a damages remedy for a taking, has not taken hold in California.[292]

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288. The only exception (in theory) would be where the government persists in the application of its regulations after a court declared them invalid.

289. 953 P.2d 1188, 1197 (Cal. 1998).

290. *Id.* at 1193.

291. *Id.* at 1197. For a similar decision at the California appellate court level, see Buckley v. California Coastal Comm'n, 80 Cal. Rptr. 2d 562 (Cal. Ct. App. 1998).

292. Some state courts are surprisingly candid about their disdain for federal takings precedent. *See* Gilbert v. State of California, 266 Cal. Rptr. 891 (Cal. Ct. App. 1990). There, the court agreed to consider federal takings precedent as *"persuasive"* authority. *Id.* at 902-03. In the same case, the trial court made this remarkable statement:

> [T]he United States Supreme Court has made some rather startling pronouncement[s] in this field of law that may cause our courts to rethink our courts to rethink that [compensation is not a constitutionally available remedy for property owners denied use of their land].... [However] we should be reminded [that] a *trial court is to enforce the law of the state of California.*

Gilbert v. State, No. 636481-0, slip. op. at 4 (Alameda Sup. Ct. June 28, 1988), *aff'd*, 266 Cal. Rptr. 891 (Cal. Ct. App. 1990) (emphasis added), *cited in* Michael M. Berger, *Silence at the Court: the Curious Absence of Regulatory Takings Cases from California Supreme Court Jurisprudence*, 26 LOY. L.A. L. REV. 1133, 1141 n.38. *See also* Bullock v. City of San Francisco, 271 Cal. Rptr. 44 (Cal. Ct. App. 1990). In *Bullock*, a California appellate court limited its analysis of a takings claim to the following statement: "In California there is an extensive body of precedent rejecting such claims and displaying a *generally* tolerant attitude to municipal ordinances in this area." *Id.* at 53 (emphasis added).

The numbers clearly illustrate: since the 1987 decision in *First English*, only *one* California state court decision has awarded monetary damages in compliance with the "self-executing" nature of the Just Compensation Clause.[293] The only real difference between the law now and the law in place before *First English* is that today's takings claimant cannot pursue a claim in federal court.

Williamson County rejected the Solicitor General's argument that a mandamus petition is required to achieve a final decision, but when imposed as a compensation "prerequisite" under the state procedures ripeness prong, the same requirement has made California's "available" just compensation remedy non-existent as a practical and theoretical matter. Ironically, the state Supreme Court sometimes seems to recognize the unfairness of its procedural scheme, but refuses to jettison it or rein it in.[294] It is precisely when states retain unfair procedural devices, and then engage in a systematic and empirically verifiable watering down of takings law, to the extent that compensatory relief simply does not happen, that the inadequacy exception should provide for immediate federal jurisdiction.[295]

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293. *See* Ali v. City of Los Angeles, 91 Cal. Rptr. 2d 458 (Cal. Ct. App. 1999). Unfortunately, the compensation award granted in Ali must be considered the result of a peculiar set of facts and circumstances. In the case, a landowner challenged the city's refusal to grant a demolition permit that would facilitate reconstruction of a hotel destroyed by fire. In a mandamus proceeding, the trial court held that the denial was invalid under state law. In a simultaneous proceeding, another trial court held that the developer was entitled to damages for the temporary denial of all use of property affected by the permit denial. On appeal, the city did "not even acknowledge [the trial court's] findings [that the permit denial prevented all beneficial use of property] and [made] no attempt to satisfy its burden as an appellant to demonstrate that there is *no substantial evidence* to support those findings." *Id.* at 463. The court therefore accepted as "an established fact" that the city's actions prevented the landowner from making any economically beneficial use of land. It then took great pains to distinguish Landgate, holding that just compensation was proper only because the permit was denied for no other reason than to delay development and was therefore arbitrary. *Id.* at 464-65. Amazingly, the California Supreme Court denied review, for the first time allowing a compensation decision going the landowner's way to stand.

294. *See* Hensler v. City of Glendate, 876 P. 2d 1043, 1052 (Cal. 1994) (noting that "in many cases, administrative mandate proceedings are *not* an adequate forum in which to try a takings claim," but then claiming that any deficiency was remedied by the landowner's ability to join an inverse condemnation proceeding with the mandamus action) (emphasis added).

295. *See* San Remo Hotel v. City of San Francisco, 145 F.3d 1095, 1102 (9th Cir. 1998) (recognizing that a takings claimant would not have to "resort to the California state courts" under an *Agins* regime because "it would have been futile"); Kruse v. Village of Chagrin Falls, 74 F.3d 694, 700 (6th Cir. 1996) (holding that Ohio's writ of mandamus procedure was not adequate for the purposes of seeking just compensation because it attempts "to obtain wholly equitable relief for an injury already afflicted"); Corn v. City of Lauderdale Lakes, 816 F.2d 1514, 1517-19 (11th Cir. 1987) (reviewing Florida law and concluding that it did not provide an adequate procedure for compensation for "injuries sustained as a result of an unreasonable zoning ordinance later declared invalid.").

V. CONCLUSION

It is clear to observers on both sides of the takings issue that the state procedures requirement is a deceptive and unjust procedural rule, one that tricks landowners into filing in state court on the belief that this will prepare their claim for federal review only to eviscerate the federal claims for the very same reason.[296] What is apparently less clear, but nonetheless true, is that the state procedures requirement itself, and its application in federal courts, rests on extremely precarious foundations. The Court rests the requirement on ripeness concerns, and claims that it emanates specifically from the nature of the Just Compensation Clause, but in fact, the requirement has little in common with either of these concepts. It is simply a unique procedural hurdle for one class of constitutional claimant. Unfortunately, federal courts have even failed to apply the rule as constructed - as a *temporary* bar to federal jurisdiction - by strictly adhering to the doctrines of claim and issue preclusion.

Established jurisdictional doctrines provide several immediate solutions to the courts' distortion of *Williamson County* and its forcible relegation of federal takings claimants to the state court system. First, *Williamson County* carved out a blanket exception to the state procedures rule when the relevant state procedure is inadequate. This exception remains viable and should apply in states, like California, that design procedures so that takings damages are a virtual impossibility. Second, the Supreme Court and many federal courts now recognize that a plaintiff with a federal claim cannot be forced to involuntarily litigate that claim in state courts when his preferred forum is the federal court. The Court has provided, and lower courts have adopted, the *England* reservation as a means for plaintiffs to preserve their federal claims for federal review.

The takings plaintiff that carefully registers a reservation of federal claims at the state court level and endures the state court process should be permitted to raise the federal takings claims in the federal court without offending the doctrine of claim preclusion. Issue preclusion remains problematic, but it is not as large a barrier

296. *See Ripeness and Forum Selection, supra* note 6, at 71 (explaining that, while he is not opposed in principle to the state procedures requirement or its preclusive effect, "one understandable reaction to the prong two requirement of *Hamilton Bank* 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.'").

as some have suggested.[297] It applies to totally preclude the reserved federal claims only if (1) state law recognizes all federal takings standards, which is likely in most, but not all, states, [298] and (2) the state court considers those standards and the claim as a whole under standards of proof and scrutiny equivalent to federal levels, a much less certain eventuality. In any other circumstance, issue preclusion fades and the takings claimant will finally have her day in federal court in accordance with the established role of the federal judiciary. The post-*Williamson County* Court has made clear that the Takings Clause is not a "poor relation" in the constitutional hierarchy;[299] its time for federal courts to treat takings claimants accordingly when considering issues of jurisdiction.

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297. *See* Meacham, *supra* note 228, at 251 (arguing that issue preclusion is virtually insurmountable because most state takings law is coextensive with federal takings law). This position ignores the differences in burden and scrutiny between federal and state law and that a state court's neglect of federal elements is ground for avoiding preclusion of those issues. *See supra* notes 244-63 and accompanying text.

298. For instance, like Oregon, it appears that Virginia and Louisiana takings laws do not recognize a regulatory taking where less than all use of property, and the owner's investment-backed expectations, are destroyed.

> Property is considered taken for [state] constitutional purposes if the government's action deprives the property of all economic use. As we have previously discussed, the [county's actions] did not eliminate all economic uses of [the property]. Therefore, the County's action did not constitute a taking of Omni's property under [Article I, section 11 of the state constitution].

Bd. of Supervisors of Prince William County v. Omni Homes, Inc. 481 S.E.2d 460, 467 (Va. 1997).

See also Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 935 (Tex. 1998) (stating that where less than all use of property is destroyed, the court considers "the economic impact of the regulation and the extent to which the regulation interferes with distinct investment-backed expectations"); Avenal v. Louisiana, 757 So. 2d 1, 12 (Ct. App. 2000) ("The 'distinct investment-backed expectations' of *Penn Central* [citation omitted] is irrelevant to the question of whether a taking has occurred under Louisiana law.") While in Texas, it is unclear whether the "character of the governmental action" takings test is a part of state takings law.

299. *See Dolan*, 512 U.S. at 392.