10-2006

The Demise of Federal Takings Litigation

Stewart E. Sterk

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ABSTRACT

For more than twenty years the Supreme Court has held that a federal takings claim is not ripe until the claimant seeks compensation in state court. The Court's recent opinion in San Remo Hotel, L.P. v. City & County of San Francisco *establishes that the federal full faith and credit statute applies to federal takings claims. The Court itself recognized that its decision limits the availability of a federal forum for takings claims. In fact, however, claim preclusion doctrine—not considered or discussed by the Court—may result in more stringent limits on federal court review of takings claims than the Court's opinion anticipates. The counterintuitive result—that federal takings claims must be litigated in state court—plays a critical role in the Supreme Court's emerging takings jurisprudence, which largely delegates to state courts the primary responsibility for policing land use regulation.*

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INTRODUCTION

Although the Supreme Court decided three takings cases in 2005, public attention focused almost exclusively on one, *Kelo v. City of New London*,[1] in which the Court sustained the city's use of its eminent domain power to take private land to stimulate economic development. The second of the three cases, *Lingle v. Chevron U.S.A., Inc.*,[2] repudiated doctrinal statements that a takings claim would lie when a landowner established that a regulation "does not substantially advance legitimate state interests"—statements that had never formed the basis of a Supreme Court holding.[3] From the perspective of land use lawyers, the third case—*San Remo Hotel, L.P. v. City & County of San Francisco*—is in many ways the most significant, because its combination of ripeness and preclusion doctrines appears to bar the door to federal court for virtually all federal takings claims.[4]

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, the Supreme Court held that because the Takings Clause[5] does not bar the states from taking property, but instead prohibits the states from taking property without just compensation, a federal takings claim is not ripe until the aggrieved landowner has unsuccessfully sought just compensation through available state procedures.[6] *Williamson County*'s ripeness requirement, then, requires a landowner to proceed—at least initially—in state court.

In *San Remo*, however, the Court held that the full faith and credit statute[7] applies to state adjudications necessary to "ripen" a

1. 125 S. Ct. 2655 (2005).

2. 125 S. Ct. 2074 (2005).

3. *Id.* at 2077 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)); *see id.* at 2082-83.

4. San Remo Hotel, L.P. v. City & County of San Francisco, 125 S. Ct. 2491, 2507 (2005).

5. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

6. 473 U.S. 172, 194-95 (1985).

7. 28 U.S.C. § 1738 (2000) (requiring that acts and judicial proceedings in any state "shall have the same full faith and credit in every court within the United States and its Territories and Possessions").

landowner's federal takings claim.[8] The Court emphasized that the statute includes no exception that guarantees a federal forum to takings claimants who have been denied compensation in state court.[9] The Court therefore affirmed a Ninth Circuit decision holding that California issue preclusion doctrine barred a landowner from bringing a federal takings claim in federal court after the dispositive issues had been resolved in a state court proceeding.[10] As a result of *San Remo*, a state court denial of compensation can act simultaneously to ripen, and to bar, any federal court takings claim. Although the *San Remo* decision was unanimous, the decision's implications left four concurring Justices discomfited by the principle that "federal takings claims in particular should be singled out to be confined to state court."[11] Because these Justices fully endorsed—and contributed to the development of—the preclusion principles that led to the *San Remo* result, they called for reconsideration of the *Williamson County* ripeness doctrine.[12]

Closer analysis reveals, however, that applying the full faith and credit statute's preclusion principles to takings claims is more complex than the Court's opinion suggests. The issues resolved by a state court in the course of denying compensation to a landowner will sometimes be different from the issues to be resolved in a federal takings claim. As a result, issue preclusion doctrine, relied on explicitly by the Ninth Circuit in *San Remo* and implicitly by the Supreme Court, would leave many federal takings claims open to federal litigation even after the state courts have finally rejected state takings claims. But the gaps left open by issue preclusion doctrine will quickly be closed by claim preclusion principles—not relied on by the city and not discussed by the Court. The result will be a nearly complete bar on duplicative federal litigation of takings claims.

That result leads to an evaluation of the plea by the concurring Justices for reconsideration of *Williamson County*'s ripeness requirement. That requirement has provoked consternation in two

8. *San Remo*, 125 S. Ct. at 2507.

9. *Id.* at 2501.

10. San Remo Hotel, L.P. v. San Francisco City & County, 364 F.3d 1088, 1096, 1098-99 (9th Cir. 2004).

11. *San Remo*, 125 S. Ct. at 2509 (Rehnquist, C.J., concurring in the judgment).

12. *Id.* at 2510.

separate legal communities. Land use lawyers, particularly those who represent landowner interests, regard the decision as an unwarranted obstacle to vindication of their clients' constitutional rights.[13] Federal courts scholars treat *Williamson County* as a puzzling exception to the ordinary principles governing federal jurisdiction.[14] Especially in light of *San Remo*, then, *Williamson County* is indeed "ripe" for reconsideration.

Reconsideration of the ripeness requirement, however, reveals that it is not merely a barren formality, but instead an essential pillar of the Court's emerging and unarticulated takings jurisprudence, which recognizes the primacy of background state law in takings doctrine, and delegates to state courts the primary responsibility for developing and enforcing limits on takings by state and local governments.[15]

I. TAKINGS CHALLENGES IN FEDERAL COURT: THE LEGAL LANDSCAPE

The Federal Constitution's Fifth Amendment prohibits takings without just compensation.[16] Section 1983 of the United States Code

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13. *See, e.g.*, Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U. J.L. & POL'Y 99, 102 (2000) (describing how the ripeness requirement lays an "insidious trap" for a landowner); J. David Breemer, *Overcoming* Williamson County's *Troubling State Procedures Rule: How the* England *Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. LAND USE & ENVTL. L. 209, 210-11 (2003) (characterizing the effect of issue and claim preclusion doctrine as pernicious, and complaining of injustice); Thomas E. Roberts, *Ripeness and Forum Selection in Land-Use Litigation*, *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 46, 67 (David L. Callies ed., 1996) (explaining how *Williamson County* "perpetrates a fraud or hoax on landowners").

14. *See, e.g.*, Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1264 (2004) (characterizing *Williamson County* as a "stray" decision, possibly inconsistent with general principles of federal jurisdiction); Henry Paul Monaghan, Comment, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979, 989 (1986) ("No authority supports use of ripeness doctrine to bar federal judicial consideration of an otherwise sufficiently focused controversy simply because corrective state judicial process had not been invoked.").

15. *See generally* Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 237-56 (2004).

16. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

imposes liability on persons—including, by judicial construction, municipalities and other state agencies—who, acting under color of state law, deprive others of rights secured by the Constitution and federal laws.[17] Taken together, these provisions make clear that a municipality's alleged taking of private property raises a federal question, which confers jurisdiction on the federal courts.[18]

The Supreme Court, however, has significantly limited landowner access to the federal courts in takings cases. First, in *Williamson County*, the Court developed a "ripeness" doctrine that prevented most landowner-plaintiffs from proceeding to federal court without first objecting to municipal action in state court.[19] In response to *Williamson County*, a number of landowners invoked an obscure procedure first developed in *England v. Louisiana State Board of Medical Examiners*[20] to preserve their right to litigate federal takings claims in federal court. Although that procedure persuaded a number of federal courts, including the Second Circuit,[21] the Supreme Court all but barred the door on "*England* reservations" in its recent *San Remo* opinion.[22]

A. Williamson County

In the *Williamson County* case, the Court held that a Tennessee landowner's federal takings claim is unripe until the landowner has unsuccessfully sought just compensation through the procedures made available by the state.[23] *Williamson County* involved a landowner's claim in federal district court for money damages suffered when the planning commission allegedly took the land-

17. 42 U.S.C. § 1983 (2000).

18. U.S. CONST. art. III, § 2; 28 U.S.C. § 1331 (2000).

19. Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194-95 (1985).

20. 375 U.S. 411, 421-22 (1964).

21. Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 130 (2d Cir. 2003) (allowing parties to "reserve their federal takings claims [if they inform all relevant] parties that they intend to bring a federal takings claim in federal court once the litigation of the state-law claim has been completed").

22. San Remo Hotel, L.P. v. City & County of San Francisco, 125 S. Ct. 2491, 2506 (2005) ("The purpose of the *England* reservation is not to grant plaintiffs a second bite at the apple in their forum of choice.").

23. *Williamson County*, 473 U.S. at 195, 200.

owner's property in the course of applying local land use regulations to the landowner's land.[24] The Sixth Circuit upheld a jury award of money damages to the landowner,[25] and the Supreme Court granted certiorari to consider whether governments must pay money damages to landowners who have suffered a temporary taking.[26]

The Court never reached the damages issue. Instead, in an opinion by Justice Blackmun, the Court held the landowner's claim unripe on two separate grounds. First, the Court held that a takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."[27] Because the landowner had not sought variances that might have been available under state law, it could not conclusively demonstrate that the commission would deny it all reasonable beneficial use of its property, and could not, therefore, sustain a takings claim.[28] This requirement that the landowner seek and obtain a "final decision" before pursuing a takings claim applies equally whether it proceeds in state or federal court.[29]

But the Court also advanced a second ground for its conclusion that the claim was unripe: the landowner had not availed itself of Tennessee's procedures for obtaining just compensation. Tennessee authorized landowners to bring "inverse condemnation" actions to obtain just compensation for alleged takings affected by restrictive zoning laws or development restrictions.[30] The Court held that the landowner "cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."[31] This second prong of the Court's ripeness requirement

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24. *Id.* at 175.

25. Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 729 F.2d 402, 409 (6th Cir. 1984).

26. Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 469 U.S. 815 (1984).

27. *Williamson County*, 473 U.S. at 186.

28. *Id.* at 191.

29. *See, e.g.*, Murphy v. New Milford Zoning Comm'n, 402 F.3d 342, 352 (2d Cir. 2005) (federal); Patel v. City of Chicago, 383 F.3d 569, 574 (7th Cir. 2004) (federal); Port Clinton Assocs. v. Bd. of Selectmen, 587 A.2d 126, 138 (Conn. 1991) (state); Iowa Coal Mining Co. v. Monroe County, 555 N.W.2d 418, 445 (Iowa 1996) (state).

30. *Williamson County*, 473 U.S. at 196.

31. *Id.* at 195.

meant that, subject to limited exceptions,[32] the landowner could not prevail on a takings claim in federal court until it had failed in its effort to obtain compensation through the state courts. But consider the position of a landowner who brought an action in state court to ripen its federal constitutional takings claim. Would the state court's adverse determination preclude the landowner from raising the same or similar claims in federal court, thus eliminating entirely the landowner's access to federal court?[33] The Court's opinion in *Williamson County* never directly addressed that issue.

Williamson County's ripeness doctrine was developed, in large measure, to avoid a hot controversy that was then brewing in the land use community: were money damages available to landowners when a municipality enacted what later proved to be an unconstitutional land use regulation?[34] A number of state courts, including those in California and New York, had held that money damages were not available,[35] and the Supreme Court had sidestepped the issue twice in the five years before it decided *Williamson County*.[36] Had the Court concluded that the landowner's claim was ripe, it would have been forced to decide the issue. By holding the claim unripe, the Court postponed any decision on that issue. Two years later in *First English Evangelical Lutheran Church v. County of Los*

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32. Of course, if the federal government committed the alleged taking, the plaintiff would not have to proceed in state court. *See, e.g.*, Hodel v. Irving, 481 U.S. 704, 711 (1987). And until the Supreme Court decided, in *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2082-85 (2005), that a claim that a regulation does not advance a legitimate state interest is not cognizable under the Takings Clause, such "facial" takings claims were not subject to the ripeness requirement. In *Lingle*, the Court held that a claim that a regulation does not substantially advance a legitimate state interest is not cognizable under the Takings Clause and that such "facial" takings claims were not subject to the ripeness requirement.

33. For general discussion, see Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1 (1995).

34. *See, e.g.*, Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 570-601 (1984); Daniel R. Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491, 491 (1981); Stewart E. Sterk, *Government Liability for Unconstitutional Land Use Regulation*, 60 IND. L.J. 113, 113, 115 (1984); Robert I. McMurray, Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 UCLA L. REV. 711, 713-15 (1981).

35. Agins v. City of Tiburon, 598 P.2d 25 (Cal. 1979), *aff'd* 447 U.S. 255, 263 (1980); Fred F. French Investing Co. v. City of New York, 350 N.E.2d 381, 389 (N.Y. 1976).

36. *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 633 (1981); Agins v. City of Tiburon, 447 U.S. 255, 263 (1980).

Angeles, the Court held that money damages were indeed available to an aggrieved landowner.[37] After *First English*, the ripeness doctrine was no longer a critical mechanism for avoiding a controversial issue, but the doctrine nevertheless endured. Although the *Williamson County* decision never mentioned preclusion, municipalities began to combine the ripeness requirement with preclusion doctrine to eliminate federal takings litigation from federal court.

B. England *Reservations*

Williamson County's ripeness doctrine led thoughtful landowner lawyers to develop strategies for preserving the right to litigate takings claims in federal court. In a number of cases lawyers sought to obtain preapproval from a state or federal court to reserve the right to litigate federal takings claims after state court determinations of all claims necessary to make those federal takings claims ripe.[38] The legal basis for this strategy was grounded in the Supreme Court's opinion in *England v. Louisiana State Board of Medical Examiners*.[39]

In *England*, the Court held that a plaintiff who initially raises a federal claim in federal court, but is met with an abstention doctrine that requires litigation of some issues in state court, may reserve the right to litigate federal issues in federal court, even if the state court has already determined those issues.[40] *England* involved no land use issues. Graduates of chiropractic schools had brought a federal court action against the Louisiana State Board of Medical Examiners, seeking a declaration that a Louisiana statute governing medical practice, as applied to chiropractors, violated the

37. 482 U.S. 304, 322 (1987).

38. *See, e.g.*, Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 123-24 (2d Cir. 2003) (noting that the landowner believed his state law claims had to be unsuccessful before he could initiate a federal takings claim); Peduto v. City of North Wildwood, 878 F.2d 725, 727 (3d Cir. 1989) (stating that applicants thought "they were required to bring an inverse condemnation action in New Jersey state court"); Milliken v. Town of Addison, No. 3:02-CV-1164-D, 2002 U.S. Dist. LEXIS 17237, at *2 (N.D. Tex. Sept. 13, 2002) (holding "that plaintiff must pursue an inverse condemnation action in state court and be deprived of just compensation before" bringing a federal takings claim).

39. 375 U.S. 411, 421-22 (1964).

40. *Id.* at 418, 421-22.

Federal Constitution's Fourteenth Amendment.[41] At the time the plaintiffs brought the action, the Louisiana statute did not clearly apply to chiropractors. As a result, the federal district court, sua sponte, invoked the *Pullman* abstention doctrine and stayed the federal proceeding, noting that the state court could end the controversy by determining that chiropractors are not governed by the statute.[42]

The *England* plaintiffs then brought an action in Louisiana state court, raising two contentions: (1) the statutory question about the scope of the Louisiana statute, and (2) the constitutional question they had previously raised in federal district court.[43] The Louisiana courts resolved both questions against the plaintiffs, who then returned to federal district court.[44] That court dismissed the complaint, holding that "the courts of Louisiana ha[d] passed on all issues raised," and that the plaintiffs' failure to seek review of the Louisiana determinations in the U.S. Supreme Court barred the plaintiffs from any relief in federal court.[45]

The U.S. Supreme Court reversed and directed the district court to consider the merits of the plaintiffs' federal constitutional claims.[46] The Court emphasized that the plaintiffs had initially chosen a federal forum, and wrote that "[t]here are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims."[47] The Court indicated that when the application of abstention doctrine requires a federal plaintiff to litigate in state court, the plaintiff "may inform the state courts that he is exposing his federal claims" in state court only to enable the state court to resolve state law issues in light of the federal claims, and that the plaintiff "intends, should the state courts hold against

41. *Id.* at 412-13.

42. R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941); England v. La. State Bd. of Med. Exam'rs, 194 F. Supp. 521, 522 (E.D. La. 1961) (per curiam).

43. *England*, 194 F. Supp. at 521.

44. *Id.*

45. *Id.* at 522.

46. *England*, 375 U.S. at 422-23.

47. *Id.* at 415.

him on the question of state law, to return to the [federal] District Court for disposition of ... federal" claims.[48] Although the plaintiffs in *England* itself had made no such reservation and had fully raised the federal claims in state court, the Court held that, in light of preexisting confusion about the steps necessary to preserve the right to federal court review, the plaintiffs' actions should not foreclose them from obtaining a federal district court adjudication on the merits of their federal constitutional claim.[49]

Landowners seeking federal court adjudication of takings claims, faced with the twin obstacles of ripeness and preclusion, turned to "*England* reservations" as a mechanism for preserving the right to federal court review. Of course, landowners had little reason to proceed first in federal court, where their claims would immediately be dismissed as unripe.[50] Instead, a number of landowners advanced state statutory or constitutional challenges in state court, explicitly indicating that they had chosen to reserve the right to litigate federal claims in federal court.[51] In other cases, a landowner would proceed to state court without making any explicit reservation, but when the municipality defendant removed to federal court the landowner-plaintiff requested that the federal court abstain.[52] In these cases, the plaintiffs combined the abstention motion with a reservation of the right to litigate federal claims in federal court after the state court had resolved all state law questions.[53]

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48. *Id.* at 421 (citing Gov't & Civic Employees Org. Comm. v. Windsor, 353 U.S. 364 (1957)). The Court emphasized that the plaintiff might have to raise federal claims in state court in order to enable the state courts to construe state statutes in light of those claims. *Id.*

49. *Id.* at 422-23.

50. *But see* Kottschade v. City of Rochester, 319 F.3d 1038, 1040 (8th Cir. 2003) (declining plaintiff's request to determine the effect of state court litigation on a future federal proceeding); Bass v. City of Dallas, No. 3-97-CV-2327-BD, 1998 U.S. Dist. LEXIS 11263, at *11 n.5 (N.D. Tex. July 21, 1998) (dismissing plaintiff's federal claim on ripeness grounds, and noting that plaintiff may proceed in state court while reserving litigation of federal claims for a subsequent federal court proceeding).

51. *See, e.g.*, Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 123 (2d Cir. 2003); Peduto v. City of North Wildwood, 878 F.2d 725, 727-28 (3d Cir. 1989); Fry v. Bd. of County Comm'rs, 837 F. Supp. 330, 333 (D. Colo. 1991).

52. *See, e.g.*, Milliken v. Town of Addison, No. 3:02-CV-1164-D, 2002 U.S. Dist. LEXIS 17237, at **4-5 (N.D. Tex. Sept. 13, 2002); Adams Outdoor Adver. v. City of Lansing, No. 5:98-CV-109, 1998 U.S. Dist. LEXIS 19058, at *2 (W.D. Mich. Oct. 15, 1998).

53. *See supra* note 52.

Judicial response to these *England* reservations was mixed. Some courts—most notably the Second Circuit in *Santini v. Connecticut Hazardous Waste Management Service*—enthusiastically endorsed the use of the *England* procedure in takings cases.[54] But other courts held that *England* reservations were limited to abstention cases, and not available when the plaintiff's initial litigation was brought in state court.[55] Still other courts concluded that *England* reservations did not bar preclusion of issues actually determined in state proceedings.[56] This divergence in views culminated in the Supreme Court's review of the issue in the *San Remo* case.

C. San Remo

The litigation in *San Remo* had its genesis in a mistake the San Remo Hotel made in filling out a city-mandated form.[57] Concerned about a shortage of residential housing, the City of San Francisco instituted a moratorium on the conversion of residential hotel units into tourist hotel units.[58] To enforce this provision, the city required hotels to fill out reports listing the "number of residential and tourist units in the hotel[] as of September 23, 1979."[59] In filling out the report, the San Remo Hotel erroneously reported that all of its units were residential. That error led the city to zone the hotel as a "residential hotel," which in turn required the hotel to obtain a conditional use permit to do business as a "tourist hotel."[60] The hotel's owners discovered the mistake in 1983 and protested the residential use classification in 1987, but by then the period for appealing the classification had expired.[61] In 1990, the city strengthened its Hotel Conversion Ordinance, eliminating exceptions and

54. 342 F.3d at 128, 130; *see also* W.J.F. Realty Corp. v. Town of Southampton, 220 F. Supp. 2d 140, 147 (E.D.N.Y. 2002); *Fry*, 837 F. Supp. at 334.

55. *See, e.g.*, *Peduto*, 878 F.2d at 729 n.5.

56. *See, e.g.*, Dodd v. Hood River County, 136 F.3d 1219, 1227-28 (9th Cir. 1998).

57. San Remo Hotel, L.P. v. City & County of San Francisco, 125 S. Ct. 2491, 2496 (2005).

58. *Id.* at 2495 (citing S.F., CAL., RESIDENTIAL HOTEL UNIT CONVERSION AND DEMOLITION ORDINANCE, § 41.3(a)-(g)).

59. *Id.* at 2496 (quoting S.F., CAL., RESIDENTIAL HOTEL UNIT CONVERSION AND DEMOLITION ORDINANCE, § 41.6(b)(1)).

60. *Id.*

61. *Id.* at 2496 n.2.

increasing the size of the "in lieu" fee required of owners who applied to convert residential units.[62]

When the San Remo's owners applied for a conditional use permit to convert all the hotel's rooms into tourist rooms, the City Planning Commission, pursuant to the 1990 ordinance, required the hotel to pay an "in lieu" fee of $567,000.[63] The hotel brought an action in federal court, alleging Takings Clause violations.[64] The court dismissed the takings claim on ripeness grounds, and on appeal the hotel's owners asked the Ninth Circuit to abstain from deciding their federal claims because a return to state court might moot those claims. The Ninth Circuit agreed to abstain on the owners' facial challenge, which the court concluded was ripe as soon as the 1990 ordinance was enacted, but it dismissed the "as applied" claims as unripe under *Williamson County*.[65] In a footnote, the Ninth Circuit indicated that if the hotel's owners wanted to retain a right to return to federal court for adjudication of their federal claim, the hotel owners "must make an appropriate reservation in state court."[66]

The San Remo's owners then proceeded to state court, where they made the appropriate reservation.[67] In the state court litigation, however, the owners framed their claims as state constitutional claims but used language that tracked federal constitutional standards.[68] Thus, they argued that imposition of a fee failed to advance a legitimate government interest and that the amount of the fee was not roughly proportional to the impact of the hotel's proposed tourist use.[69] The case ultimately reached the California Supreme Court, which chose to "analyze [the] takings claim under

62. *Id.*

63. *Id.*

64. *Id.* at 2497. The hotel's owners also advanced due process and equal protection claims. San Remo Hotel v. City & County of San Francisco, 145 F.3d 1095, 1102-04 (9th Cir. 1998). The due process claims were not heard on appeal and the Ninth Circuit invoked *Younger* abstention doctrine with respect to the equal protection claim. *Id.* (citing Younger v. Harris, 401 U.S. 37 (1971)).

65. *San Remo*, 145 F.3d at 1102.

66. *Id.* at 1106 n.7.

67. San Remo Hotel, L.P. v. City & County of San Francisco, 83 Cal. App. 4th 239, 242 (Cal. App. 2000).

68. San Remo Hotel, L.P. v. San Francisco City & County, 364 F.3d 1088, 1093 (9th Cir. 2004).

69. *Id.*

the relevant decisions of both this court and the United States Supreme Court," while simultaneously noting that "no federal question has been presented or decided in this case."[70] That court found no violation of the state constitution.[71] The hotel's owners then returned to federal court. The district court dismissed their claims, and the Ninth Circuit affirmed, holding that California takings law is coextensive with federal takings law and that issue preclusion prevented the plaintiffs from relitigating takings claims in federal court.[72] The U.S. Supreme Court granted certiorari to resolve the conflict with the Second Circuit's decision in the *Santini* case.[73]

In affirming, the Court held that federal courts are not free to disregard the full faith and credit statute in order to guarantee takings plaintiffs a day in federal court.[74] The Court observed that the full faith and credit statute, as the Court has construed it in a number of cases, often requires that state court determinations preclude reconsideration of issues essential to adjudication of federal claims.[75] As the Court put it, "[t]he relevant question ... is not whether the plaintiff has been afforded access to a federal forum; rather, the question is whether the state court actually decided an issue of fact or law that was necessary to its judgment."[76]

The Court also held that *England* did not support the owners' expectation that their reservation would negate the preclusive effect of a state court judgment. The Court emphasized first that in *England* the "state issue requiring abstention was distinct from the reserved federal issue."[77] The *England* doctrine was designed to facilitate *Pullman* abstention, the purpose of which was "not to afford state courts an opportunity to adjudicate an issue that is functionally identical to the federal question," but rather to permit state courts to make a state law determination that would moot any

70. San Remo Hotel v. City & County of San Francisco, 27 Cal. 4th 643, 649 n.1, 664 (Cal. 2002).

71. *Id.* at 679.

72. *San Remo*, 364 F.3d at 1098-99.

73. San Remo Hotel v. City & County of San Francisco, 543 U.S. 1032 (2004).

74. San Remo Hotel v. City & County of San Francisco, 125 S. Ct. 2491, 2507 (2005) (Rehnquist, C.J., concurring in the judgment).

75. *Id.* at 2505 (majority opinion).

76. *Id.* at 2504.

77. *Id.* at 2502 (emphasis omitted).

federal question.[78] Finally, the Court noted that *England* itself made the reservation of rights to litigate federal issues in federal court available only to those plaintiffs who took no steps "to broaden the scope of the state court's review beyond decision of the antecedent state-law issue."[79] By contrast, in *San Remo* the landowners "effectively asked the state court to resolve the same federal issues they asked it to reserve."[80]

The Court concluded by acknowledging that "a significant number of plaintiffs will necessarily litigate their federal takings claims in state courts."[81] To the plaintiffs' concern that giving preclusive effect to state court proceedings that are required to ripen federal takings claims is unfair, the Court responded: "Whatever the merits of that concern may be, we are not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum."[82]

Chief Justice Rehnquist concurred in a separate opinion joined by Justices O'Connor, Kennedy, and Thomas. The concurring Justices took no issue with the majority's treatment of the preclusion issue.[83] Instead, they suggested that the Court reconsider the *Williamson County* ripeness requirement, questioning "why federal takings claims in particular should be singled out to be confined to state court, in the absence of any asserted justification or congressional directive."[84]

II. WHAT IS LEFT OF FEDERAL TAKINGS JURISDICTION?

Although the Court's opinion in *San Remo* emphatically rejected the notion that takings plaintiffs have a right to federal adjudication, *San Remo* did not explicitly sound the death knell for all federal takings claims. The Court did not close the doors to takings claims that are ripe without state adjudication: claims of facial invalidity.[85] Moreover, even with respect to "as applied" challenges,

78. *Id.*
79. *Id.* at 2502-03.
80. *Id.* at 2503.
81. *Id.* at 2506.
82. *Id.* at 2507.
83. *Id.* at 2509 (Rehnquist, C.J., concurring in the judgment).
84. *Id.*
85. *Id.* at 2503 (majority opinion).

the Court's opinion leaves open a number of questions about the source and scope of preclusion principles that would apply. This Part examines those issues.

A. Facial Challenges

1. The Demise of the "Substantially Advances" Challenge

In their original federal court action, the San Remo's owners contended that the city ordinance constituted a facially unconstitutional taking because the ordinance "fail[ed] to substantially advance legitimate government interests."[86] In *Yee v. City of Escondido*,[87] the Court had held that such facial takings challenges were not subject to *Williamson County*'s ripeness rules because the claims do "not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated."[88] The Court reaffirmed that principle in *San Remo*.[89]

Unfortunately for landowners, the Court decided another case last term—*Lingle v. Chevron U.S.A., Inc.*—in which the Court held that such claims, however ripe, are not cognizable under the Takings Clause.[90] In *Lingle*, the Court emphasized that it had never held an ordinance invalid as a taking for failure to substantially advance legitimate government interests,[91] and concluded that language in earlier cases suggesting that such a takings claim could

86. *Id.* at 2497 n.4.

87. 503 U.S. 519 (1992).

88. *Id.* at 534.

89. *San Remo*, 125 S. Ct. at 2503.

90. 125 S. Ct. 2074, 2087 (2005).

91. *Id.* at 2082-83. As the Court noted in *Lingle*, the troublesome language originated in the Court's opinion in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), and was quoted in subsequent decisions, largely in dicta. *Id.* at 2083. Courts of appeals, however, have relied on the language to invalidate land use measures as unconstitutional takings. *See, e.g.*, Cashman v. City of Cotati, 374 F.3d 887, 905-06 (9th Cir. 2004) ("[T]he mere 'possibility' that a tenant could capture part of the premium from a rent control ordinance is enough to render the ordinance unconstitutional."); Beacon Hill Farm Assocs. II Ltd. P'ship v. Loudon County Bd. of Supervisors, 875 F.2d 1081, 1084-85 (4th Cir. 1989) (noting that "the claim is not premature merely because it is brought before a final determination of the extent of the ordinance's application to a specific piece of property").

succeed was mistaken.[92] The Court emphasized that a "'substantially advances' inquiry ... does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property," and hence "is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause."[93]

The result, then, is that challenges based on an ordinance's failure to advance legitimate government interests can properly be brought in federal court—but the federal court must then dismiss them on the merits.

2. Taking Challenges Based on Per Se Rules

Unlike the "substantially advances" challenge rejected in *Lingle*, most takings claims do require courts to assess the effect of the government's action on the value of a landowner's land. The *Penn Central* opinion,[94] which the Court continues to treat as the talisman for regulatory takings claims,[95] lists "[t]he economic impact of the regulation on the claimant" first among the factors relevant to determining whether a taking has occurred.[96] If the economic impact on a landowner's land is relevant to the takings inquiry, the challenge is necessarily an "as applied" challenge subject to

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92. *Lingle*, 125 S. Ct. at 2086. For commentary suggesting that the Court had mistakenly transplanted a substantive due process concept into the law of takings, see Thomas E. Roberts, *Facial Takings Claims Under* Agins-Nectow*: A Procedural Loose End*, 24 U. HAW. L. REV. 623, 640-41 (2002).

93. *Lingle*, 125 S. Ct. at 2084. The Court explained these conclusions by noting that "the 'substantially advances' inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners." *Id.* As a result, a landowner who contends that a regulation fails to substantially advance legitimate governmental interests is limited to a substantive due process challenge. *Id.* at 2082-85.

94. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

95. *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331, 342 (2002) (noting that, unless there has been a total taking of the entire parcel, "*Penn Central* was the proper framework" for takings analysis, and concluding that with respect to moratorium the "interest in 'fairness and justice' [would] be best served by relying on the familiar *Penn Central* approach"); Palazzolo v. Rhode Island, 533 U.S. 606, 616 (2001) (remanding "for further consideration of the claim under the principles set forth in *Penn Central*").

96. *Penn Central*, 438 U.S. at 124.

Williamson County's ripeness requirements. The Court, however, has identified several circumstances in which the economic impact of the government's action on a landowner's land is—at least formally—irrelevant to the merits of a landowner's takings claim. In these circumstances, the Court has developed per se categorical rules that require the government to compensate the affected landowner, however trivial the economic impact of the government's action.[97] First, if the government's action constitutes a "permanent physical occupation" of the landowner's land, the government has effected a taking and must pay compensation, no matter how little financial damage the taking actually causes.[98] Second, if the government's action denies the landowner all economic use of its land, the landowner is entitled to compensation regardless of the initial value of its land.[99] Third, if the government conditions development approval on the landowner's conveyance of property, the government's action amounts to a taking whenever an inadequate nexus exists between the condition and the reasons that entitle the government to require approval.[100]

When a landowner advances a takings challenge in each of these circumstances, the challenge is, in one sense, a "facial" challenge to the government's action: the success of the challenge does not depend on the economic impact visited on the particular landowner. To the extent these challenges are "facial," are they subject to *Williamson County*'s ripeness requirements?

Such challenges should not be subject to the first of *Williamson County*'s ripeness requirements—that "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."[101] In articulating that requirement, the Court, in *Williamson County* itself, emphasized the importance of the

97. For recent discussion of these per se rules, see, for example, Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609, 617-21 (2004); Stewart E. Sterk, *The Inevitable Failure of Nuisance-Based Theories of the Takings Clause: A Reply to Professor Claeys*, 99 NW. U. L. REV. 231, 239-44 (2004).

98. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982).

99. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992).

100. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

101. Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985).

challenged action's economic impact and the "extent to which it interferes with reasonable investment-backed expectations."[102] The Court went on to conclude that "[t]hose factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."[103] In cases where the landowner's takings challenge can succeed even if the government demonstrates that the economic effect on the landowner will be minimal, the Court's articulated reason for the first ripeness requirement is simply absent.[104]

The Court's second ripeness requirement—that landowners seek compensation through the procedures provided by the state—raises more significant issues. For a period following *Williamson County*, it appeared as if the federal courts would hold that these "facial" challenges, or at least those based on alleged "physical takings," were exempt from the obligation to seek compensation through state procedures.[105] More recently, however, federal courts have generally held that physical takings are subject to *Williamson County*'s second ripeness requirement.[106] *Southern Pacific Transportation Co. v. City*

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102. *Id.* at 191.

103. *Id.*

104. For this reason, a number of courts have held that the ripeness requirement does not apply to physical takings cases. *See, e.g.*, McKenzie v. City of White Hall, 112 F.3d 313, 317 (8th Cir. 1997) ("A physical taking is by definition a final decision for the purpose of satisfying *Williamson*'s first requirement."); Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1402 (9th Cir. 1989)("A physical taking, such as the one at issue here, is by definition a final decision, and thereby satisfies *Williamson County*'s first exhaustion requirement.").

105. In *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), the Ninth Circuit reached the merits of a challenge to a rent control ordinance. The court treated the case as a physical invasion case, and Judge Kozinski rejected the municipality's ripeness challenge, noting that *Williamson County* was a regulatory taking case, not a physical invasion case. *Id.* at 1281 n.28. The opinion failed to distinguish between *Williamson County*'s two ripeness requirements. *See id.*; *see also* Southview Assocs., Ltd. v. Bongartz, 980 F.2d 84, 92-100 (2d Cir. 1992) (evaluating, and rejecting, the merits of a physical takings challenge, and then rejecting, on ripeness grounds, a regulatory takings challenge to the same action).

106. *See* Pascoag Reservoir & Dam, LLC v. Rhode Island, 337 F.3d 87, 91-92 (1st Cir. 2003) (subjecting physical takings claim to second ripeness requirement); Daniel v. County of Santa Barbara, 288 F.3d 375, 382 (9th Cir. 2002) (same); McKenzie v. City of White Hall, 112 F.3d 313, 317 (8th Cir. 1997) (same); Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 380 (2d Cir. 1995) (subjecting physical takings claim and *Nollan* exaction claim to second ripeness requirement, and emphasizing that *Southview Associates* did not reach the issue).

of Los Angeles[107] contains the earliest and most extensive justification for this position:

> The question we face here is whether the zoning ordinance effect[s] an unconstitutional, uncompensated taking. To make this determination, we must first decide whether compensation is available. If such be the case, it would be "unnecessary" to resolve the taking claims for "[w]here the action ... is a taking ... the availability of a suit for compensation ... will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment."[108]

Judge Nelson's treatment of the issue in *Southern Pacific* is certainly consistent with—although perhaps not compelled by—the Supreme Court's language in subsequent cases, but the Court has never addressed the issue directly. Whether takings challenges that rest on the Court's per se rules satisfy the *Williamson County* ripeness requirements should ultimately be determined by reference to the purposes of those requirements—an issue that serves as the focus of Part III.

B. "As Applied" Challenges

Most takings challenges are "as applied" challenges—challenges that focus, at least in part, on the impact of a government regulation on the value of landowner's parcel. If a landowner were to contend in state court that the regulation constitutes a taking in violation of the Federal Constitution, a state court determination sustaining the regulation would clearly preclude relitigation of the takings issue in federal court. But suppose the landowner does not advance a federal takings challenge, instead contending only that the regulation violates the state constitution's takings clause or some other statutory or constitutional proscription. What impact does an adverse state court determination have on the landowner's subsequent right to advance a takings challenge in federal court?

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107. 922 F.2d 498 (9th Cir. 1990).

108. *Id.* at 506 (second alteration in original; citation and emphasis omitted).

1. The Impact of State Preclusion Law

The federal full faith and credit statute provides that state acts, records, and judicial proceedings "shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State."[109] The statute's language dictates that the preclusive effect of a state court judgment is to be determined by the "law or usage" of the rendering state, at least in the absence of some other federal statute that might qualify the impact of § 1738.[110]

In a series of cases decided over the last twenty-five years, the Supreme Court has construed § 1738 broadly, holding that state court determinations can have both issue and claim preclusive effect on subsequent federal claims in federal courts—even as to issues on which the federal courts have exclusive federal jurisdiction. The Court first held, in *Allen v. McCurry*, that a state criminal court determination that police officers had not violated a defendant's constitutional rights would preclude the erstwhile defendant from maintaining a federal § 1983 claim for violation of those same constitutional rights.[111] *Allen* itself involved issue preclusion, but in a series of subsequent cases, the Court held that a state court's disposition of a state claim—if state preclusion rules so provided—could prevent a plaintiff from maintaining a federal statutory claim in federal court.[112] Thus, in *Migra v. Warren City School District*

109. 28 U.S.C. § 1738 (2000). The statute implements the Constitution's Full Faith and Credit Clause, which provides that

> [f]ull Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. CONST. art. IV, § 1. Thus, the Constitution gave Congress some power to prescribe the effect of state judgments, and Congress, by statute, acted to require that those judgments be given the effect they have by law or usage in the state where rendered.

110. 28 U.S.C. § 1738.

111. 449 U.S. 90, 91, 105 (1980).

112. In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 485 (1982), the Court held that a state court determination that an employee's discharge was not based on national origin or religion precluded the employee from litigating the same issue in a federal action premised on Title VII. Two years later, in *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 83-84 (1984), the Court established that a state court proceeding could preclude a federal claim as well as litigation of a federal issue. For general discussion, see Graham C. Lilly, *The Symmetry of Preclusion*, 54 OHIO ST. L.J. 289 (1993) (approving the

Board of Education,[113] the Court held that a state court determination in a breach of contract action brought by a school district employee could preclude the employee from bringing a federal action under § 1983—even though the employee never raised § 1983 claims in state court—because the employee could have raised the claims with the state contract action in the original state court proceeding.[114] Indeed, the Court applied these principles to hold that a state proceeding can bar a federal securities claim or a federal antitrust claim even if the claim was never litigated in state court.[115]

Taken together, these cases leave little room for federal preclusion doctrine. The impact of a state determination on a subsequent federal claim is to be determined by state preclusion law.[116]

2. Takings Claims and Issue Preclusion

The Supreme Court's opinion in *San Remo* did not expressly determine whether the hotel's effort to litigate its federal takings claim in federal court was foreclosed by the doctrine of claim preclusion or by the doctrine of issue preclusion.[117] Instead, the Court assumed that the Ninth Circuit was correct in determining that California issue preclusion doctrine barred the federal takings

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Court's strict interpretation of the full faith and credit statute).

113. 465 U.S. 75 (1984).

114. *Id.* at 83-84. The Court remanded to determine whether Ohio preclusion doctrine, in fact, would have precluded a subsequent § 1983 action. *Id.* at 87.

115. *See* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 380 (1996) (finding that a settlement agreement approved by a state court precludes a subsequent securities act claim within the exclusive jurisdiction of federal courts); Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 382 (1985) (holding that a state judgment precludes a federal antitrust claim, even though the antitrust claim was within the exclusive jurisdiction of the federal courts). For concerns about the impact of *Matsushita* on class actions litigation, see Marcel Kahan & Linda Silberman, Matsushita *and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219.

116. For criticism of this result in cases where state preclusion law might be hostile to or inconsistent with federal rights, see Stephen B. Burbank, *Interjurisdictional Preclusion and Federal Common Law: Toward a General Approach*, 70 CORNELL L. REV. 625, 639 (1985) (concluding that the Court's approach in *Allen v. McCurry*, 449 U.S. 90 (1980), and *Migra*, "is almost surely wrong"); Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 813, 830-31 (1986) (arguing that state preclusion law should have no effect on federal § 1983 actions).

117. San Remo Hotel, L.P. v. City & County of San Francisco, 125 S. Ct. 2491, 2500 n.14 (2005) ("Our limited review in this case does not include the question whether the Court of Appeals' reading of California preclusion law was in error.").

claim because the issues determined by the state court in rejecting the state takings claim were the same issues that would be determinative of the federal claim.[118] The Court's concern, then, was with a limited issue: are federal takings claims exempt from the mandate of § 1738?[119] To that question, the Court's emphatic answer was no.[120]

Consider, then, the question the Court did not decide: what impact does issue preclusion doctrine have on federal takings claims? In most jurisdictions, issue preclusion doctrine applies to three types of determinations: determinations of evidentiary fact, determinations of law, and determinations of "ultimate fact."[121]

Examine first a determination of evidentiary fact—did the commission require payment of a $567,000 fee as a condition for granting a permit? Of course such a determination can be critical to the shape of a federal takings claim, and holding state determinations of evidentiary fact preclusive in federal proceedings will often narrow the issues left to be resolved in a federal takings challenge.[122] But, according issue-preclusive effect to state court determinations of evidentiary fact will not typically bar a landowner from advancing a federal takings claim in federal court; instead, the state court determination will serve principally to crystallize the issues in the federal adjudication.[123]

Similarly, according issue-preclusive effect to a state court determination of law—the commission's action does not violate the California Constitution's takings clause—will not generally prevent

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118. *Id.* at 2501 n.18.

119. *Id.* at 2495.

120. *Id.* at 2507.

121. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. c (1980). For a brief discussion of the historical development of modern issue preclusion doctrine from earlier principles of "estoppel by record," see Geoffrey C. Hazard, Jr., *Preclusion as to Issues of Law: The Legal System's Interest*, 70 IOWA L. REV. 81, 89-90 (1984). Professor Hazard notes that the First Restatement of Judgments did not apply issue preclusion principles to issues of law. *Id.*

122. *Cf.* England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 416 (1964) ("How the facts are found will often dictate the decision of federal claims.").

123. Moreover, a state court determination on an issue of evidentiary fact will generally have no binding effect in a subsequent federal court proceeding unless the determination was essential to the judgment. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. e (1980). Thus, if a state court were to determine that the commission required payment of a fee, but that the fee was not essential to adjudication of the state law claim, the determination would have no preclusive effect in federal court.

a landowner from mounting a federal takings challenge in federal court. The legal issue in the federal proceeding—the meaning of the federal constitutional provision—was neither actually litigated nor essential to the state court judgment, so long as the state court limited itself to construction of the California Constitution.[124] The same will be true whenever the landowner plaintiff limits itself to a state constitutional challenge and the state court limits itself to deciding whether the municipality's action was consistent with the state constitution.

Issue preclusion presents the greatest threat to federal takings claims when the state court has made a determination of ultimate fact, for instance, a determination that the fee imposed on the hotel's owner was reasonably related to the number of units designated for conversion. When a determination of ultimate fact is critical—as it was in *San Remo*—for both the state and the federal takings claim, issue preclusion doctrine could require, as the Ninth Circuit concluded in *San Remo*, outright dismissal of the federal takings claim.

State court determinations of ultimate fact are most likely to be issue preclusive in federal proceedings in cases like *San Remo*, when the elements of the state takings claim appear identical to the elements of the federal takings claim. In such cases, a state court finding that the landowner has failed to establish one of the elements necessary to support a state takings claim would also establish that the parallel element is missing from a federal takings claim that the landowner would later choose to advance. But those are the very cases in which issue preclusion is most likely to be superfluous, because claim preclusion principles will bar federal litigation of the federal takings claim.[125] On most theories of claim

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124. In most jurisdictions, issue preclusion applies only when the issue in question has actually been litigated and determined in the first proceeding. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980). The California courts, however, appear to have relaxed the actual litigation requirement to compensate for the unusually narrow scope of California claim preclusion doctrine. *See generally* Walter W. Heiser, *California's Confusing Collateral Estoppel (Issue Preclusion) Doctrine*, 35 SAN DIEGO L. REV. 509, 535-46 (1998) [hereinafter *Confusing Collateral Estoppel*] (discussing California cases).

125. In *San Remo* itself, the city never argued that claim preclusion principles were applicable, apparently out of fear that the hotel owners' "*England* reservation" would bar application of the claim preclusion doctrine. San Remo Hotel, L.P. v. San Francisco City & County, 364 F.3d 1088, 1094 (9th Cir. 2004). As the next Part demonstrates, that fear should

preclusion, if two claims require proof of the identical elements, judgment with respect to the first claim will generally be conclusive with respect to the second.[126]

In many states, however, state takings doctrine is a messy amalgam of principles articulated by the U.S. Supreme Court and doctrines indigenous to the particular state.[127] Litigants, other than those seeking to preserve a federal forum, typically advance federal and state constitutional claims in the same proceeding, and judicial opinions do not neatly segregate state and federal claims.[128] But takings claims are often rejected on grounds not articulated in Supreme Court opinions. In New York, for instance, courts hold that a landowner is barred from challenging a restriction that was in place when the landowner purchased the affected parcel.[129] The New

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have been unfounded.

126. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. b (1980) ("Though no single factor is determinative, the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first. If there is a substantial overlap, the second action should ordinarily be held precluded."). Peculiarities of California's claim preclusion doctrine, however, might have prevented application of the doctrine. Professor Heiser has noted that California adheres to a "primary rights" theory of claim preclusion, under which

> a single wrongful act which violates two primary rights gives rise to two causes of action. Moreover, where a plaintiff has more than one cause of action against a defendant, the plaintiff may join them in one lawsuit but is not required to do so either by the rules of joinder or res judicata.

Walter W. Heiser, *California's Unpredictable Res Judicata (Claim Preclusion) Doctrine*, 35 SAN DIEGO L. REV. 559, 566-67 (1998) [hereinafter *Unpredictable Res Judicata*] (emphasis omitted). Professor Heiser has also argued that California's narrow claim preclusion doctrine has led to distortions of California issue preclusion doctrine, so that California courts sometimes hold that issue preclusion applies to issues that the parties could have litigated, but did not litigate, in an earlier proceeding. *Confusing Collateral Estoppel*, *supra* note 124, at 541-42.

127. *See, e.g.*, R & Y, Inc. v. Municipality of Anchorage, 34 P.3d 289, 293 (Alaska 2001) (finding that Alaska's constitutional prohibition on takings is broader than the prohibition of the Federal Constitution, articulating factors derived from an Alaska case, and then concluding that the action constituted an unconstitutional taking without identifying whether the conclusion was based on the federal as well as the state constitution).

128. *See, e.g.*, *id.*; K & K Constr., Inc. v. Dep't of Natural Res., 575 N.W.2d 531, 539-40 (Mich. 1998) (finding a taking after discussing state and federal constitutional provisions and relying on both state and federal cases). The opinion never indicated which constitutional provision had been violated.

129. Anello v. Zoning Bd. of Appeals, 678 N.E.2d 870, 871 (N.Y. 1997); *see also* Planned Investors Corp. v. Village of Massapequa Park, No. 405/02, 2004 N.Y. Misc. LEXIS 17-32 (N.Y. Sup. Ct. Aug. 5, 2004) (applying *Anello* standard after U.S. Supreme Court's decision in *Palazzolo v. Rhode Island*, 533 U.S. 606, 626-30 (2001), in which the Court suggested that

Jersey Supreme Court, though holding that state and federal constitutional protections are coextensive, has also held that no taking can occur, and no financial compensation is available, when a challenged ordinance is held invalid because its application to a landowner's parcel is arbitrary.[130]

If a state court were to reject a state takings claim by relying at least in part on doctrines like these, no determination of ultimate fact made by the state court would have issue-preclusive effect in a subsequent takings challenge brought in federal court, because no such determination would have been "essential" to the state court judgment.[131] The more the state takings doctrine diverges from federal takings doctrine, the smaller the possibility that issue preclusion principles will foreclose federal litigation of federal takings claims.

3. Takings Claims and Claim Preclusion

The Court's focus in *San Remo* was on the identity of issues raised in the state and federal proceedings.[132] And the Ninth Circuit explicitly relied on issue preclusion to bar the hotel's federal takings claim.[133] As the preceding Part demonstrates, however, issue preclusion doctrine will often be inadequate to close the doors of the federal courts to federal takings claims. By contrast, claim preclusion, combined with the *Williamson County* ripeness requirements, provides a nearly insurmountable obstacle for claimants seeking

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acquisition of title with notice of regulation cannot serve as an absolute bar to takings challenges).

130. Pheasant Bridge Corp. v. Twp. of Warren, 777 A.2d 334, 343 (N.J. 2001).

131. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. i (1980) ("If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone.").

132. Thus, the Court noted that "[a]s in *Allen*, we are presently concerned only with issues *actually decided* by the state court that are dispositive of federal claims raised under § 1983." San Remo Hotel, L.P. v. City & County of San Francisco, 125 S. Ct. 2491, 2505 (2005). The Court also emphasized that "[b]y broadening their state action ... to include their 'substantially advances' claims, petitioners effectively asked the state court to resolve the same federal issues they asked it to reserve." *Id.* at 2503.

133. *See* San Remo Hotel, L.P. v. San Francisco City & County, 364 F.3d 1088, 1094-99 (9th Cir. 2004).

federal court litigation of federal takings claims, and effectively insures that takings litigation will be localized in the state courts.

In *San Remo* itself, the city did not contend that claim preclusion doctrine prevented the hotel from litigating its "as applied" challenges in federal court. Apparently, the city had assumed—not unreasonably in light of existing practice—that the hotel owners' "*England* reservation" prevented application of claim preclusion doctrine.[134] The Supreme Court's opinion in *San Remo* undermines the foundation for that assumption.

Analysis of the claim-preclusion issue, like analysis of issue preclusion, begins with the federal full faith and credit statute.[135] On its face, the statute mandates deference to state preclusion law. If a state judgment rejecting a state takings claim does not preclude a subsequent federal takings claim, the failure to preclude must be rooted either in some federal exception to the statutory mandate or in the substance of state preclusion law.[136]

Consider first potential exceptions arising from federal law. In *San Remo*, the U.S. Supreme Court reaffirmed a principle it has consistently applied in a series of cases decided since 1980: exceptions to the § 1738 statutory mandate must be reflected in a subsequent federal statute.[137] The existence of a federal question—even the statutory grant of exclusive federal jurisdiction over particular claims—does not overcome the § 1738 requirement that federal courts defer to state claim preclusion principles.[138]

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134. *Id.* at 1094. Another possibility is that the city had assumed that California's peculiar "primary rights" theory of claim preclusion made the doctrine inapplicable. *See generally Unpredictable Res Judicata*, *supra* note 126 (discussing claim preclusion as the "primary aspect" of California's doctrine of res judicata).

135. 28 U.S.C. § 1738 (2000). As the Supreme Court has emphasized in other contexts, whatever policy concerns underlie preserving federal court review do not "justify a distinction between the issue preclusive and claim preclusive effects of state-court judgments." Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 83 (1984). *See generally* Gene R. Shreve, *Preclusion and Federal Choice of Law*, 64 TEX. L. REV. 1209, 1249 (1986) ("Plaintiff Migra weakened her position when she opted to begin by litigating in state court.").

136. Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 383 (1985) (developing a two-part analytical framework: if state law indicates that a claim or issue would be precluded, a federal court must decide whether an exception to the mandate of § 1738 exists).

137. *See* Shreve, *supra* note 135, at 1220, 1224-25.

138. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 374 (1996); *Marrese*, 470 U.S. at 380. *See generally* Shreve, *supra* note 135, at 1245-47 (explaining the reasoning for state claim preclusion principles).

As a result, the only plausible federal basis for avoiding state claim preclusion rules is the Court's opinion in *England*. In *England*, the Court held that when application of federal abstention doctrine remits a federal plaintiff to state court for resolution of state claims, the federal plaintiff can reserve its right to litigate federal claims in federal court.[139] The Court's language focused on a plaintiff's right to litigate federal claims in a federal forum —language that sounds quaint in light of the Court's subsequent jurisprudence.[140]

Justice Brennan's opinion was written in 1964 in the heyday of the Supreme Court's post-*Erie* infatuation with federal common law.[141] The only statutory foundation the Court offered for its holding was the general grant of federal jurisdiction to adjudicate federal constitutional claims.[142] And, as we have seen, the Court has not in recent years regarded that grant as sufficient to overcome the mandate of § 1738.[143] But in the context of *Pullman*

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139. England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 417 (1964).

140. Thus, in *Allen v. McCurry*, the Court found it "difficult to discern" authority for the "principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court." 449 U.S. 90, 103 (1980). In *McCurry*, the § 1983 plaintiff had been a defendant in a state criminal proceeding, and the holding in the state proceeding nevertheless had preclusive effect on the § 1983 claim. *Id.* at 91, 104.

141. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). Indeed, 1964 brought the publication of Henry J. Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964), in many ways the high-water mark for federal common law. For an account of the rise—and subsequent fall—of the New Federal Common Law, see John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 136-46 (1998).

142. In rejecting the conclusion that a person with federal constitutional claims could be required to accept state court adjudication of those claims, Justice Brennan wrote only that

> [s]uch a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction .... The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied."

England, 375 U.S. at 415 (quoting Willcox v. Consol. Gas Co., 212 U.S. 19, 40 (1909)). The opinion provided no other statutory authority for its conclusion. Compare that language with Justice Thomas's opinion in *Matsushita*: "Absent a partial repeal of the Full Faith and Credit Act, 28 U.S.C. § 1738, by another federal statute, a federal court must give the judgment the same effect that it would have in the courts of the State in which it was rendered." 516 U.S. at 369.

143. Indeed, the Court has not even regarded a specific and explicit grant of exclusive federal jurisdiction as sufficient to supplant the mandate of § 1738. *See, e.g.*, *Matsushita*, 516

abstention,[144] the statutory grant of federal jurisdiction carries more force: here, the conflict is not merely between the statutory grant of federal jurisdiction and the command of § 1738, but rather between the statutory grant of federal jurisdiction and the judge-made abstention doctrine.[145] If federal courts never invoked the abstention doctrine with respect to claims properly brought in federal court, state courts would have no opportunity to render judgments with a preclusive effect on those federal claims, and § 1738 would not come into play. Thus, absent a procedure like the one articulated by the Court in *England*, a federal court's decision to abstain—which rests only on judge-made doctrine—would effectively prevent a litigant who has properly invoked federal statutory jurisdiction from obtaining federal judicial review of federal claims.[146] *England* reservations, therefore, may be necessary to justify federal abstention doctrine.[147]

In light of this problem, the Court in *San Remo* not surprisingly declined to overrule *England*, but instead limited its application to the abstention context. The Court indicated that when a federal court abstains from deciding a landowner's "facial" takings claim, a claim ripe when first advanced in federal court, an *England* reser-

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U.S. at 381 (providing that the grant of exclusive federal jurisdiction over federal securities claims is not sufficient to work partial repeal of § 1738).

144. The traditional justification for the doctrine focuses on the preference for having state rather than federal courts decide state law questions, largely because state courts are thought to be better equipped to decide state law issues. R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 499-500 (1941). Barry Friedman has offered an alternative explanation for *Pullman* abstention: it enables federal courts to avoid deciding difficult federal issues that the federal courts prefer to avoid. *See* Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530, 577-80 (1989).

145. For the argument that *Pullman* abstention constitutes impermissible overruling of congressional statutes conferring jurisdiction on the federal courts, see Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984).

146. A parallel problem arises when federal courts abstain, in diversity cases, to avoid deciding critical questions of state law or to avoid interference with a complex state regulatory scheme. *See* La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 30 (1959); Burford v. Sun Oil Co., 319 U.S. 315, 317-18 (1943). In these cases, federal abstention prevents federal judicial review of claims over which the federal courts have diversity jurisdiction. Presumably, *England* reservations are not available in these cases because there are typically no federal claims to review.

147. Professor Shreve, though arguing that *England* was wrongly decided, nevertheless conceded that "[i]t is probably true that the dispensation *England* grants from section 1738 is necessary for the *Pullman* doctrine to work as intended." Shreve, *supra* note 135, at 1250.

vation could appropriately preserve federal claims for subsequent federal court review.[148] By contrast, landowners' "as applied" takings claims are not ripe until after state court adjudication. As a result, they are not properly in federal court, not properly subject to abstention doctrine, and not properly subject to *England* reservations.[149]

Nothing in the Court's analytical framework distinguishes issue preclusion from claim preclusion. Section 1738 applies equally to claim preclusion and issue preclusion.[150] When a federal court properly invokes the abstention doctrine, a state court judgment rendered after an *England* reservation will have neither issue preclusive effect nor claim preclusive effect in a subsequent federal adjudication of federal claims. But when the federal claim is not ripe, and no ground for abstention exists, *England* reservations are not authorized and can operate to trump neither state issue preclusion doctrine nor state claim preclusion doctrine.

Consider next the impact of state preclusion doctrine on federal takings claims. Suppose a landowner proceeds in state court, and advances only state constitutional and statutory challenges to a land use regulation. Suppose further that the state court decides only state issues, and does not reach out to decide federal issues not raised by the parties. If the landowner now proceeds to federal court, does the state claim preclusion doctrine bar the landowner's federal takings claim?

148. San Remo Hotel, L.P. v. City & County of San Francisco, 125 S. Ct. 2491, 2503 (2005).
149. *Id.*
150. *See* 28 U.S.C. § 1738 (2000).

In general, the answer is yes[151]—unless the state court would permit a landowner-plaintiff to bring two separate actions in state court: one challenging the regulation as a violation of state statutory and constitutional law, and a second challenging the regulation as a violation of the federal Takings Clause. Although an occasional state court might permit a litigant to advance separate challenges,[152] that position would invite the very "piecemeal litigation" modern claim preclusion law is designed to avoid.[153] Permitting a litigant to split federal and state takings claims would impose needless burdens on the state courts, with no commensurate gain.[154]

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151. Section 24 of the Second Restatement of Judgments takes a "transactional" view of claim preclusion rather than one that focuses on the identify of the legal theory advanced in the two proceedings. The Restatement reflects the current trend "to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories ... that may be available to the plaintiff." RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. a. The drafters noted, and rejected, an older view under which the plaintiff, "defeated in an action based on one theory, might be able to maintain another action based on a different theory, even though both actions were grounded upon the defendant's identical act or connected acts forming a single life-situation." *Id.* To make the point more explicit, comment c provides "[t]hat a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims." For application of the transactional approach in the takings context, see *Guetersloh v. State*, 930 S.W.2d 284, 290 (Tex. App. 1996) (holding a federal takings claim barred in state court by prior litigation of a state claim).

Howard Erichson has noted that some states have adhered to a somewhat narrower view of claim preclusion, focusing on "whether the 'same evidence' would suffice to prove [both] claims," or on "whether the same 'primary rights' are involved." Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 974 (1998). Even on those linguistic formulations, determining a state takings claim would operate to preclude a federal takings claim.

152. *Cf.* Hanlon v. Town of Milton, 612 N.W.2d 44, 49-50 (Wis. 2000) (answering a question certified by the Seventh Circuit, and holding that a landowner who had previously challenged denial of a permit pursuant to Wisconsin's certiorari procedures would not be barred from subsequently bringing a § 1983 action alleging that the permit denial violated his equal protection rights). The court emphasized that monetary relief was not available in certiorari proceedings. *Id.*

153. Churchill v. Star Enters., 183 F.3d 184, 194 (3d Cir. 1999); *see also* Mycogen Corp. v. Monsanto Co., 51 P.3d 297, 302 (Cal. 2002) (noting that a stable "res judicata doctrine promotes judicial economy"); Bagley v. Moxley, 555 N.E.2d 229, 232 (Mass. 1990) (discussing the public policy considerations underlying claim preclusion).

154. *Cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 25 cmt. e ("A given claim may find support in theories or grounds arising from both state and federal law. When the plaintiff brings an action on the claim in a court, either state or federal, in which there is no jurisdictional obstacle to his advancing both theories or grounds, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action in

Concerns about judicial economy, then, will inevitably induce most state courts to prohibit the splitting of federal and state takings claims between two separate state court proceedings. A judgment rejecting a state takings claim will have a claim-preclusive effect with respect to a subsequent federal takings claim brought in state court. But suppose a state court were to determine that, although a state court determination on a state takings claim precludes further action in state court, the same judgment should not preclude a subsequent adjudication of a federal takings claim in federal court. That is, suppose a state court were to authorize a state-authorized version of the *England* reservation procedure.[155] Would that procedure remove the claim preclusion obstacle facing a landowner who seeks to litigate its federal takings claim in federal court?

The clear answer is no. First, the full faith and credit statute itself requires both state and federal courts to give judgments the "same full faith and credit ... as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken."[156] That is, the effect of a state judgment is to be measured by the effect that judgment has "in the courts of such State"; if the judgment is preclusive in the courts of state *X*, it is to be preclusive everywhere.[157] Second, the Supreme Court has made crystal clear, in *Thomas v. Washington Gas Light Co.*, that a state court may not provide that one of its judgments should have less effect in other courts than it has in the court where the judgment is rendered.[158] *Thomas* itself involved the effect of a judgment in sister-state courts, not in federal courts;[159] but because the same statute governs in each circumstance, the same analysis applies. In *Thomas*, the Court repudiated its prior holding that a state court's statements about

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which he tenders the other theory or ground.").

155. In *Guetersloh v. State*, 930 S.W.2d at 290, a Texas court appeared to authorize a reservation of federal law claims, although the authorization appeared to reflect the belief that *England* compelled that result. Theoretically, a state court might authorize such a procedure to avoid the need to resolve federal takings claims.

156. 28 U.S.C. § 1738 (2000).

157. *See generally* Lilly, *supra* note 112, at 300-01 (commenting that case law "provide[s] impressive support for the proposition that [any court within the United States] is closely bound by [a state court's] rules of claim and issue preclusion").

158. 448 U.S. 261, 286 (1980) (plurality opinion).

159. *Id.* at 263-64.

the extraterritorial effect of its judgments were determinative for full faith and credit purposes: "[B]y virtue of the full faith and credit obligations of the several States, a State is permitted to determine the extraterritorial effect of its judgments, but it may only do so indirectly, by prescribing the effect of its judgments within the State."[160] A federal policy mandating a uniform effect of judgments across the country, as expressed in the mandate of the full faith and credit statute, prevents an individual state court from prescribing differential effects for its judgments in its own courts and elsewhere. As a result, if a state judgment precludes a subsequent federal takings claim in state court, the same judgment precludes a federal takings claim in federal court.

Claim preclusion, then, operates effectively to eliminate "as applied" takings challenges from the federal courts. The *Williamson County* state-litigation requirement requires plaintiffs to seek compensation in state court in order to "ripen" any federal takings claim. *San Remo* establishes, however, that no federal law authorizes the bifurcation of state and federal takings claims. Hence, if state preclusion doctrine would require a takings plaintiff to join federal takings claims with any request for compensation, that preclusion doctrine would bind the federal courts. And, as this Part has demonstrated, claim preclusion rules applicable in state court are virtually certain to prevent a landowner from splitting state takings claims from federal takings claims. The question, then, is whether this system makes sense—a question Chief Justice Rehnquist raised in his *San Remo* concurrence with his suggestion that the Court rethink the ripeness doctrine developed in *Williamson County*.

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160. *Id.* at 270. The Court continued:

> The *McCartin* rule, however, focusing as it does on the extraterritorial intent of the rendering State, is fundamentally different. It authorizes a State, by drafting or construing its legislation in "unmistakable language," directly to determine the extraterritorial effect of its workmen's compensation awards.... It follows inescapably that the *McCartin* "unmistakable language" rule represents an unwarranted delegation to the States of this Court's responsibility for the final arbitration of full faith and credit questions.

Id. at 270-71 (citations omitted).

III. RETHINKING *WILLIAMSON COUNTY*

A. The Court's Justification and the Rehnquist Critique

Justice Blackmun's opinion in *Williamson County* articulates not one, but two ripeness hurdles that confront a landowner seeking to litigate a takings claim in federal court. The first hurdle—the government entity charged with implementing the regulation must have reached a final decision regarding application of the regulation—has not generated significant controversy.[161] As the Court's opinion observed, evaluating the economic impact of the regulation or its effect on reasonable, investment-backed expectations is impossible until the agency has decided how to apply the regulation to the land in question.[162] Moreover, this first ripeness requirement, by itself, would not bar takings claims from federal court; if this were the only applicable ripeness hurdle, once the landowner received a final determination from the relevant administrative agency, it could choose to advance the takings claim either in federal or state court.

By contrast, the second *Williamson County* ripeness hurdle—that the landowner must seek compensation through available state procedures—does essentially bar takings claims from federal court, and Chief Justice Rehnquist, in his *San Remo* concurrence, questioned the merit of this hurdle.[163] The *Williamson County* opinion itself justified this second requirement primarily in formal terms—because the Fifth Amendment does not proscribe the taking of property except without just compensation, a landowner has no claim against the government if it takes property, but provides an adequate process for obtaining compensation.[164] In *San Remo*,

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161. Commentators who express outrage at the second ripeness hurdle, requiring landowners to seek relief through state procedures, offer little or no criticism of the finality requirement. *See, e.g.*, Breemer, *supra* note 13, at 240 (criticizing federal courts' tendency to use claim preclusion and issue preclusion to create a permanent bar to federal jurisdiction rather than the intended procedural delay).

162. Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 191 (1985).

163. *See* San Remo Hotel, L.P. v. City & County of San Francisco, 125 S. Ct. 2491, 2508 (2005) (Rehnquist, C.J., concurring in the judgment).

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

Justice Stevens's majority opinion added a prudential justification for limiting the right of plaintiffs to press takings claims in federal courts: "[S]tate courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations."[165]

These justifications did not persuade Chief Justice Rehnquist, concurring for himself and Justices Kennedy, O'Connor, and Thomas. The Chief Justice wrote that "[i]t is not obvious that either constitutional or prudential principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim."[166] He questioned the argument that state court familiarity with local land use and zoning regulations makes relegating takings claims to state court proper, noting that the familiarity argument would apply with equal force to First Amendment challenges to zoning regulations—challenges routinely heard by federal courts.[167] Further, though agreeing that the "state courts are competent to enforce federal rights and to adjudicate federal takings claims," the Chief Justice noted that state courts are equally competent to adjudicate other federal claims.[168] The competence of state courts did not, in his view, "explain why federal takings claims in particular should be singled out to be confined to state court."[169]

The Chief Justice did not argue that *Williamson County*'s second ripeness requirement should be abandoned. He argued instead—quite accurately—that the affirmative case for the requirement had not been made.[170] Because Chief Justice Rehnquist and Justice O'Connor were among the four concurring Justices, recent changes in the Court's composition[171] are unlikely to generate a fifth vote for

165. *San Remo*, 125 S. Ct. at 2507.

166. *Id.* at 2508 (Rehnquist, C.J., concurring in the judgment).

167. *Id.* at 2509.

168. *Id.*

169. *Id.* Much of the Chief Justice's concurrence was devoted to distinguishing the state litigation requirement from the principle of comity that bars taxpayers from challenging the validity of state tax systems in federal court. The majority had cited *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), for the proposition that the Court has limited the ability of plaintiffs to press federal claims in federal courts in other areas. *San Remo*, 125 S. Ct. at 2507. The majority's citation of *McNary*, however, was not central to the opinion, and appeared almost as if it were written in response to the Chief Justice's claim that federal takings claims had been singled out for resolution in state court.

170. *San Remo*, 125 S. Ct. at 2509 (Rehnquist, J., concurring) ("In short, the affirmative case for the state-litigation requirement has yet to be made.").

171. In 2005 John Roberts replaced William Rehnquist as Chief Justice, and in 2006

rethinking the state-litigation requirement. But the Chief Justice's call for reconsideration deserves a response. The next two Parts focus on two points. First, because takings jurisprudence depends so heavily on state property law, the Supreme Court has effectively—if implicitly—delegated development of takings doctrine to the state courts. Second, *Williamson County*'s state-litigation requirement is critical to a structure in which state courts bear primary responsibility for policing land use regulations.

B. The Structure of the Supreme Court's Takings Jurisprudence

As Justice Stevens noted in *San Remo*, almost all of the Supreme Court's takings cases have reached the Court from state supreme courts.[172] That result has been inevitable since *Williamson County*, but the pattern was the same even before articulation of the *Williamson County* ripeness requirements.

In deciding those cases, the Court has developed a set of categorical rules for resolving takings controversies. The government may not take action that results in a permanent physical occupation without paying compensation to the affected landowner.[173] Regulation constitutes a taking if it denies the landowner all beneficial use of the land (unless the regulation replicates preexisting nuisance law).[174] The government may not condition development on an exaction from the landowner unless the exaction is related to, and roughly proportional to, the circumstances that entitle the municipality to require approvals in the first place.[175] A state may not bar a federal takings claim solely on the ground that the affected landowner purchased with knowledge of the challenged

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Samuel Alito replaced Sandra O'Connor as an Associate Justice of the U.S. Supreme Court.

172. *San Remo*, 125 S. Ct. at 2506.

173. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

174. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

175. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

regulation.[176] Remedies for a taking must include money damages, and may not be limited to declaratory relief.[177]

For the vast bulk of takings cases that do not fall within the scope of one of these categorical rules, the Court has applied what has come to be called the *Penn Central* balancing test.[178] In fact, however, that "test" is devoid of balancing: when the Court decides the *Penn Central* test is applicable to a state or local regulation, the landowner always loses. The only cases in which the Court has applied the *Penn Central* test to invalidate the government regulation have been cases of federal government action.[179]

The effect, if not the expressed intent, of the Court's *Penn Central* jurisprudence has been to delegate resolution of takings claims to the state supreme courts. *Penn Central* leaves the state legislatures and state courts free to develop more stringent takings rules than those articulated by the Court. The state courts are of course free to construe takings clauses in state constitutions more broadly than the Supreme Court's construction of the federal provision.[180] Moreover, if a state supreme court were to apply the *Penn Central* balancing test to strike down a state or municipal regulation as a taking in violation of the Federal Constitution, the Supreme Court would almost certainly not review that determination; the determi-

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176. Palazzolo v. Rhode Island, 533 U.S. 606, 628 (2001) ("A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken."). Portions of Justice Kennedy's majority opinion in *Palazzolo* appeared to support a broader categorical rule that the purchasers' knowledge of the restriction is not relevant to a takings claim. *Id.* at 627 ("The State's rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself."); *see also id.* at 637 (Scalia, J., concurring) (rejecting the idea that the preexistence of a regulation should factor in the takings analysis). One member of the five-Justice majority was not, however, willing to go so far. *See id.* at 632-36 (O'Connor, J., concurring).

177. First Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304, 306-07 (1987).

178. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); *see, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 317 & n.14 (2002) (describing the "ad hoc balance approach" of *Penn Central*).

179. *See* E. Enterprises v. Apfel, 524 U.S. 498 (1998) (plurality opinion); Hodel v. Irving, 481 U.S. 704 (1987). *See generally* Sterk, *supra* note 15, at 251-56 (discussing the inevitability of the result when the Court applies *Penn Central*'s balancing test).

180. For an example of a state court purporting to apply the takings clause of the state constitution more broadly than the federal constitutional provision, see *R & Y, Inc. v. Municipality of Anchorage*, 34 P.3d 289, 293 (Alaska 2001).

nation would almost inevitably rest on an adequate state ground—the state supreme court's construction of the state constitution—thus insulating the decision from Supreme Court review.[181]

Federalism concerns support this effective delegation of federal takings jurisprudence to state supreme courts. The Takings Clause does not guarantee any particular property rights; instead, it protects against abrupt change in property rights.[182] The baseline against which any regulation is measured is a baseline derived from state law: if background state law did not recognize or create property in the first instance, then a subsequent state action cannot take property.[183] Evaluation of a takings claim, then, requires a thorough grounding in background state law.

In this respect, the Takings Clause differs dramatically from the Equal Protection Clause,[184] the First Amendment, or the vast majority of other federal constitutional provisions. When a plaintiff challenges a state action on equal protection or First Amendment grounds, federal constitutional standards provide the benchmark against which the state action is measured.[185] State law plays little

181. *See* Ann Althouse, *How To Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1491-92 (1987) (noting that when a state court strikes down a state action on state constitutional grounds, the determination escapes Supreme Court review).

182. *See* Robert Brauneis, *"The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal Co. v. Mahon, 106 YALE L.J. 613, 621-31 (1996) (attributing to Holmes's opinion in *Pennsylvania Coal* the recognition that whether an enactment constitutes a taking depends on values owners enjoyed before the enactment).

183. *See* Sterk, *supra* note 15, at 211-14 (discussing the way state law has affected takings doctrine).

184. U.S. CONST. amend. XIV, § 1 ("No State shall ... deny to any person within its jurisdiction the equal protection of the laws.").

185. For instance, when a state cross-burning statute is challenged on First Amendment grounds, the constitutional issue is whether the statute bars speech whose "value as a step to truth" is "outweighed by the social interest in order and morality." Virginia v. Black, 538 U.S. 343, 358-59 (2003) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992)). State law plays no role in that inquiry. Similarly, when the Court evaluates an equal protection claim, the analytical work focuses on classification of the parties and rights involved, not on background state law. When claims are subject to rational basis review, the state statute almost inevitably is upheld. *See, e.g.*, Fitzgerald v. Racing Ass'n, 539 U.S. 103, 110 (2003) (upholding a tax statute providing a lower tax rate for riverboat slot machines than for racetrack slot machines). By contrast, when the claim involves a suspect class or a fundamental right, strict scrutiny almost preordains that the statute will be invalidated. The inquiry, however, is independent of state law. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 374 (1885) (holding that the Fourteenth Amendment was violated when Chinese businessmen

or no role in determining the level of federal constitutional protection.

The unusual dependency of federal takings claims on state law significantly affects the Supreme Court's role in developing takings doctrine. In the more typical constitutional case, the Court's opinions provide guidance to all courts—state and federal—through a combination of hard-edged rules and more malleable standards or balancing tests.[186] Even when the Court's guidance comes in the form of standards, those standards do not depend on the particular state or federal law involved. Hence, the guidance is equally valuable to courts across the country. By contrast, in takings cases the guidance that crosses state boundaries is likely to be so general as to be nearly useless. For instance, consider, among other factors, "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations."[187] The valuable guidance comes not in identifying these broad general factors, but in explaining how they apply to cases that arise against a distinct state law background.

Consider an example of differences in state law property rights: the rights of waterfront landowners. Oregon recognizes customary rights in the public to cross the dry sand area between ordinary high tide and the vegetation line.[188] New Hampshire, by contrast, rejects customary rights altogether.[189] Against that background, suppose a municipality in Oregon were to prohibit construction of any structures within one hundred feet of the mean high-water mark. If

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were denied business permits because of their race).

186. *See generally* Harold J. Krent, *The Supreme Court as an Enforcement Agency*, 55 WASH. & LEE L. REV. 1149, 1149-50 (1998) (emphasizing the Court's need to use its limited resources to control or influence constitutional interpretation by others); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178-79 (1989) (emphasizing the importance of clear Supreme Court rules). For a discussion of different sorts of balancing tests as methods for implementing constitutional values, see Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 77-83 (1997).

187. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

188. State *ex rel.* Thornton v. Hay, 462 P.2d 671, 676-77 (Or. 1969).

189. *See* Purdie v. Att'y Gen., 732 A.2d 442 (N.H. 1999) (holding unconstitutional a legislative effort to redefine a high-water mark); Opinion of the Justices (Public Use of Coastal Beaches), 649 A.2d 604, 608, 611 (N.H. 1994) (holding that waterfront landowners own rights to the high-water mark and that legislative efforts to create a recreational easement over that land would require compensation).

the Supreme Court were to reject a takings challenge to that ordinance, the Court's opinion would provide little guidance with respect to the constitutionality of an identical ordinance enacted by a New Hampshire municipality, because the background property law principles are so different.

Apart from the guidance they provide to state and federal officials, including judges, Supreme Court opinions typically play another critical role in the administration of our constitutional system: they assure uniform enforcement of constitutional rights.[190] Because all courts are subject to review by a single Supreme Court at the apex of the judicial pyramid, the prospect of Court review serves a disciplinary function, deterring departure from the framework developed by the Court. But this function, too, is of limited value in the takings context, in which variation in the content of background state law makes national uniformity impossible.

To the extent that Supreme Court review is a scarce resource, the Court would sensibly conserve that resource for cases that generate more "bang for the buck" in terms both of guidance and uniformity.[191] In addition, however, Supreme Court adjudication of takings cases has the potential to interfere with state primacy in defining property rights. To determine whether a state's alteration of property rights has gone "too far," the Court must ascertain the context of state law both before and after enactment of the challenged regulation. But it is the state supreme courts, not the U.S. Supreme Court, whose judgments are supreme with respect to each of those issues.

Moreover, although the constitutional takings claim is a weapon in the arsenal of landowners seeking to discipline abusive behavior by local regulators, it is hardly the only weapon. State courts

190. *See generally* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 39 (1994) (noting the importance of affording similarly situated litigants equal treatment).

191. Although space on the Supreme Court's shrinking docket is a particularly scarce resource, the federal courts as a whole have limited resources, prompting Professor Althouse to sensibly suggest that federal judicial resources should be preserved for cases in which federal court review would be most valuable. Ann Althouse, *Tapping the State Court Resource*, 44 VAND. L. REV. 953, 960-61 (1991). That insight suggests that many of the same reasons for limiting Supreme Court intervention in takings cases apply to federal judicial intervention more generally.

frequently invalidate local land use regulations based on inadequate statutory authority,[192] state preemption principles,[193] or provisions in state constitutions.[194] In addition, state courts frequently scrutinize local land use decisions to determine whether they are arbitrary, unreasonable, or unsupported by substantial evidence.[195] These doctrinal limitations operate in conjunction with takings claims to police local regulators. State courts are in the optimal position to coordinate these various policing mechanisms. To the extent the Supreme Court views takings doctrine as a force for policing regulators—and the Court's opinions frequently articulate that vision of the Takings Clause[196]—the Court is not in a position

192. *See, e.g.*, Steinbergh v. Rent Control Bd., 546 N.E.2d 169, 172 (Mass. 1989) (invalidating a restriction on sale of condominium units); Premium Standard Farms, Inc. v. Lincoln Twp., 946 S.W.2d 234 (Mo. 1997) (en banc) (invalidating setback and bonding requirements imposed to make it unfeasible for a landowner to operate a hog farm on land purchased for that purpose).

193. *See, e.g.*, Cohen v. Bd. of Appeals, 795 N.E.2d 619, 621 (N.Y. 2003) (holding that a state statute preempts local government freedom to impose variance standards that would make a municipality's denial of variances easier); Isla Verde Int'l Holdings, Inc. v. City of Camas, 49 P.3d 867 (Wash. 2002) (invalidating an open-space regulation as a tax on development inconsistent with a state statute prohibiting municipalities from imposing taxes, fees, or charges on land development).

194. The most prominent example outside of state takings claims came in *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713, 724 (N.J. 1975), in which the New Jersey Supreme Court held that each municipality had a constitutional obligation to bear its fair share of the burden of providing low income housing.

195. Sometimes these decisions are explicitly rooted in constitutional due process concerns. *See, e.g.*, Shemo v. Mayfield Heights, 722 N.E.2d 1018, 1023-24 (Ohio 2000) (invalidating residential classification in an area dominated by retail space); *In re* Realen Valley Forge Greenes Assocs., 838 A.2d 718, 727-32 (Pa. 2003) (invalidating agricultural zoning immediately adjacent to a large shopping complex). In other cases, the basis for invalidating local decisions as arbitrary is less clear. *See, e.g.*, Town of Florence v. Sea Lands, Ltd., 759 So.2d 1221, 1223 (Miss. 2000) (stating that zoning should be upheld unless "arbitrary, capricious, discriminatory, or is illegal, or without a substantial evidentiary basis") (quoting Faircloth v. Lyles, 592 So.2d 941, 943 (Miss. 1991)); Turner v. Bd. of County Supervisors, 559 S.E.2d 683, 686 (Va. 2002) (holding zoning valid so long as "not unreasonable and arbitrary") (quoting Bd. of Supervisors v. Carper, 107 S.E.2d 390, 395 (Va. 1959)).

196. *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 n.5 (1987) (expressing concern "that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals purportedly sought to be served than would result from more lenient (but nontradeable) development restrictions"); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting) ("[L]iability might also encourage municipalities to err on the constitutional side of police power regulations, and to develop internal rules and operating procedures to minimize overzealous regulatory attempts.").

to develop optimal takings rules without accounting for the varying state law frameworks already in place.

These difficulties help explain a pattern in which the Court's action effectively delegates to the state courts the responsibility for policing restrictive land use regulation. The next Part explores the implication of that delegation for *Williamson County*'s second ripeness requirement.

C. Takings Federalism and the Williamson County *Ripeness Requirement*

Federalism concerns provide a basis for the Supreme Court's deference to the state courts in takings cases. Many of the same concerns provide an even stronger basis for concentrating takings litigation in the state courts—the ultimate effect of the second *Williamson County* ripeness requirement.

1. Potential for Intrusion on State Prerogatives

The preceding Part demonstrates that any takings determination made by the U.S. Supreme Court would inevitably depend in large measure on the Court's assessment of the content of background state law. Avoiding such assessments—which ultimately fall within the province of state supreme courts—furnishes one reason for the Court's pattern of deference to state takings determinations.[197] But if the Supreme Court were to assume a more active role in reviewing takings claims, the Court would at least be evaluating those claims after the parties have had an opportunity to make a record in state court.[198] And that record would give the state supreme court

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197. Avoiding federal court assessments of state law issues intertwined with federal constitutional claims has also served as the basis for *Pullman* abstention doctrine. R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941). As Professor Althouse has written:

> When a federal court abstains under *Pullman*, it enlists the state court's help in answering a state law question in the hope that it might thereby avoid the task of deciding a federal constitutional question. The state court thus relieves the federal court ... of a difficult task in an area in which the state court possesses special authority.

Althouse, *supra* note 191, at 979 (footnotes omitted).

198. Gregory Stein has noted that

> [t]he need for concrete facts is acute in land use law, where so much litigation arises out of local ordinances about which there may be little reported case law.

an opportunity to make relevant determinations about the content of state law before the challenged regulation became effective. Moreover, if uncertainty about state law issues remained, the U.S. Supreme Court would be free to remand for determination of open state law issues.[199]

By contrast, if federal district courts were free to hear takings claims in the first instance, their determinations would not have the benefit of any comparable record with respect to state law.[200] Appellate review would pass through the federal courts of appeals, bypassing altogether the state supreme courts, who remain the ultimate expositors of state property law.[201] Of course, theoretically a federal court of appeals could certify questions of state law for resolution by a state supreme court, but certification procedures are typically used in diversity cases.[202] Whether federal courts would be

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> With a wide variety of different municipalities enacting land use laws and with few of these laws ever reaching the courts, those courts that are called upon to construe these statutes and ordinances need as complete a factual record as possible, so as to avoid making overly broad pronouncements.

Stein, *supra* note 33, at 16 (footnotes omitted).

199. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031-32 (1992) (requiring that the state "identify background principles of nuisance and property law" before it can defend itself from a takings claim).

200. Barry Friedman, generally an advocate of narrow preclusion rules and of an expanded role for *England* reservations, recognizes that, in general, "federal courts should not decide novel state law questions if they need not." Friedman, *supra* note 14, at 1237. Professor Friedman notes that when "a case that implicates state interests is allocated to federal court, [state] interests are sacrificed." *Id.* at 1226.

201. *Cf.* Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 395 (1988) (emphasizing the importance of Virginia "law's authoritative construction from the Virginia Supreme Court"); Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) ("This Court ... repeatedly has held that state courts are the ultimate expositors of state law ... and that we are bound by their constructions except in extreme circumstances ....") (citations omitted).

As Professor Althouse has put it, "[s]tate law means what the state supreme court says it means.... It is 'infallible' in the special sense of a court at the top of a hierarchy of interpretation: infallible because it is final." Ann Althouse, *The Authoritative Lawsaying Power of the State Supreme Court and the United States Supreme Court: Conflicts of Judicial Orthodoxy in the Bush-Gore Litigation*, 61 MD. L. REV. 508, 517 (2002); *see also* Althouse, *supra* note 181, at 1512 (noting absence of state court review of erroneous federal decisions about state law); Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1687 (1992) ("When federal judges make state law—and we do, by whatever euphemism one chooses to call it—judges who are not selected under the state's system and who are not answerable to its constituency are undertaking an inherent state court function.").

202. *See generally* Jonathan Remy Nash, *Examining the Power of Federal Courts To Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1682-90 (2003) (tracing growth of

willing to make liberal use of those procedures in federal question cases is unclear.[203]

2. Uniformity

Because of the disparities among the property laws of the several states, national uniformity in takings law is neither attainable nor desirable.[204] But uniformity within the confines of any individual state remains a desirable objective.[205] Abandoning the *Williamson County* ripeness requirement would undermine the uniformity objective.

If federal courts were to hear takings claims in the first instance, they would be unlikely to consider themselves bound by state court decisions on matters of federal constitutional law. Conversely, with respect to claims brought in state court, those courts would not regard themselves as bound by federal circuit or district court decisions, both because the background issues essential to evaluating takings claims are questions of state law, and because federal court of appeals decisions are not binding on state supreme courts, even with respect to questions of federal constitutional law.[206]

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certification as a response to the Supreme Court's holdings that *Pullman* abstention was not available in pure diversity cases).

203. Moreover, not all state courts would be necessarily willing to answer the certified questions. *See* Kremen v. Cohen, 325 F.3d 1035, 1051 (9th Cir. 2003) ("California ... has rejected one-third of the cases [that the Ninth Circuit has] certified to it since the [state certification] rule went into effect."). *See generally* Jonathan Remy Nash, *Resuscitating Deference to Lower Federal Court Judges' Interpretations of State Law*, 77 S. CAL. L. REV. 975, 982 (2004) (citing *Kremen* for the proposition that "some state courts are, for one reason or another, declining a substantial percentage of federal court certification requests").

By contrast, Professor Clark has argued that "federal courts should ... [employ] a presumption in favor of certification whenever they are called upon to resolve an unsettled question of state law that would entail the exercise of significant policymaking discretion more appropriately left to the states." Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1549 (1997).

204. Hence, the takings doctrine differs sharply from other federal law, in which Professor Friedman has argued that uniformity and assuring the supremacy of federal law militate in favor of federal jurisdiction and federal resolution of issues of federal law. *See* Friedman, *supra* note 14, at 1241.

205. *Cf.* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 73-75 (1938) (criticizing the doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), because "[i]n attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State").

206. *See, e.g.*, Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239, 1244 (N.J. 1990) (holding

Potential conflicts between state and federal approaches within a single state present difficulties different in kind from disparities in approaches from one state to another. The state law foundations of property law make disparities across state lines acceptable and expected. The general principle that like litigants should be treated alike would not mandate Supreme Court intervention. By contrast, differences within a state are not consistent with prevailing legal norms,[207] and the Supreme Court is the only institution in a position to resolve those conflicts. Supreme Court intervention, in turn, would involve an expenditure of Supreme Court resources disproportionate to the guidance value Supreme Court decisions would provide. The ripeness doctrine avoids these difficulties.

3. Comparison with Diversity Cases

One response to concerns about preserving state prerogatives and uniformity is that the very same concerns exist with respect to all diversity jurisdiction. When citizens from different states litigate state law issues, they can proceed in federal court, whereas litigants from the same state are limited to state court. The result is that state courts and federal courts decide precisely the same issues, thereby reducing the potential for uniformity. Yet neither Congress nor the Supreme Court has acted to abolish diversity jurisdiction.

Three significant differences, however, weaken the force of any analogy between takings claims and diversity cases. First, in diversity cases, the Rules of Decision Act[208] binds federal courts to

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that lower federal court decisions are not binding on the New Jersey Supreme Court); Flanagan v. Prudential-Bache Sec., Inc., 495 N.E.2d 345, 348 (N.Y. 1986) (holding that Second Circuit decisions on matters of federal law, including federal constitutional law, are not binding on New York Court of Appeals). *See generally* Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use To Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1151-68 (1999) (cataloguing various approaches state courts take to determinations by lower federal courts); Note, *Authority in State Courts of Lower Federal Court Decisions on National Law*, 48 COLUM. L. REV. 943, 946-47 (1948) (arguing that federal court decisions should not be binding on state courts).

207. Thus, in *Salve Regina College v. Russell*, 499 U.S. 225, 234 (1991), the Court held that federal courts of appeal could not engage in deferential appellate review of district court decisions on matters of state law, largely because "deferential appellate review invites divergent development of state law among the federal trial courts even within a single State." *See also* Friedman, *supra* note 14, at 1240-41 (arguing that "there is no reason for federal courts to decide novel state law questions").

208. 28 U.S.C. § 1652 (2000).

apply state law, and decisions of the state supreme court are authoritative.[209] Federal courts cannot assert a right to independent interpretation of state law.[210] By contrast, when issues of federal constitutional law arise, federal and state supreme courts have coequal status as interpreters, equally subject to review by the U.S. Supreme Court. Supreme Court intervention would be the only mechanism for resolving conflicts. At the same time, unlike typical federal question cases, in which the Supreme Court is ultimately likely to step in to resolve significant disputes about the meaning of a federal statute or constitutional provision, in takings cases the Court has signaled an intention not to intervene, and instead to delegate primary responsibility to state courts.[211]

Second, when parties litigate ordinary state law issues, many potential plaintiffs are limited to a single forum: state court. As a result, state precedents will inevitably emerge to provide federal courts with guidance in resolving the issues that arise in diversity cases.[212] By contrast, if the Court were to abandon the *Williamson County* ripeness requirement, plaintiffs in many states—particular-

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209. As Justice Brandeis put it in *Erie*, "whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." *Erie*, 304 U.S. at 78.

210. Indeed, in *Salve Regina*, 499 U.S. at 234, the Supreme Court held that federal courts of appeal must engage in de novo review of district court decisions on state law issues, in part to diminish the likelihood that the substantive rule applied will depend on choice of forum.

Nevertheless, as Professor Althouse has noted, state supreme courts never have the opportunity to review erroneous federal decisions about state law. Althouse, *supra* note 181, at 1512; *see also* Nash, *supra* note 202, at 1679-80 (noting that state courts often do not have the opportunity to review questions of state law brought in federal courts).

211. *See generally* Sterk, *supra* note 15, at 237-54 (discussing the doctrinal implications of Supreme Court review of state court takings cases).

212. Judge Posner has nevertheless noted that diversity jurisdiction limits the opportunity of state courts to fashion state common law. RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 217-19 (1996); *see also* L. Lynn Hogue, *Law in a Parallel Universe: Erie's Betrayal, Diversity Jurisdiction, Georgia Conflict of Laws Questions in Contracts Cases in the Eleventh Circuit, and Certification Reform*, 11 GA. ST. U. L. REV. 531, 532 (1995) (arguing that diversity jurisdiction "siphon[s] away the opportunity to resolve cases at the state level that would enrich and refine the body of state law to which federal and state judges could refer with confidence").

Judge Posner also notes that many federal courts have resorted to deciding state law questions based on federal precedent, leading to separate lines of precedent, each purporting to expound state law. POSNER, *supra*, at 219; *see also* Sloviter, *supra* note 201, at 1681-82 (citing Posner for the proposition that "some evidence suggests that federal courts have shown a preference for citing federal decisions on state law instead of state decisions at rates approaching pre-*Erie* levels").

ly those that define property rights narrowly—would funnel the vast bulk of takings litigation into federal court. That might diminish concerns about uniformity, but would simultaneously exacerbate the intrusion on state prerogatives to define property rights.

Third, when diversity cases present critical unresolved issues of state property law, federal courts may invoke the abstention doctrine to assure state court resolution of those issues. *Louisiana Power & Light Co. v. City of Thibodaux*, in which the Supreme Court sustained a federal district court's decision to abstain from deciding whether the city had authority to exercise condemnation power, is the leading case.[213] The city had instituted state court proceedings to effect a taking, but the landowner removed to federal district court based on diversity of citizenship, and challenged the city's authority, under Louisiana law, to exercise eminent domain power.[214] The federal district judge, confronted with a Louisiana statute appearing to confer that power on cities, and the state attorney general's opinion from another case suggesting that cities lacked such power, stayed the proceeding pending resolution of the issue by the Louisiana Supreme Court.[215] The U.S. Supreme Court upheld the stay:

> The special nature of eminent domain justifies a district judge, when his familiarity with the problems of local law so counsels him, to ascertain the meaning of a disputed state statute from the only tribunal empowered to speak definitively—the courts of the State under whose statute eminent domain is sought to be exercised ....[216]

The Court added, in words that also characterize takings cases, that "[t]he issues normally turn on legislation with much local variation interpreted in local settings."[217] And in a subsequent case—also involving interpretation of state law property rights—the Court emphasized the abstention doctrine's role in assuring "that the

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213. 360 U.S. 25, 27 (1959). For more extensive discussion of the development (and limits) of abstention doctrine, see Clark, *supra* note 203, at 1517-35; Lewis Yewlin, Note, Burford *Abstention in Actions for Damages*, 99 COLUM. L. REV. 1871, 1877-93 (1999).

214. *Louisiana Power*, 360 U.S. at 25.

215. *Id.* at 30.

216. *Id.* at 29.

217. *Id.* at 28.

parties in this case be given the benefit of the same rule of law which will apply to all other businesses and landowners."[218]

The effect of abstention in cases like *Thibodaux* is not merely a stay, but in effect a dismissal, of the federal court action, despite the statutory grant of federal diversity jurisdiction.[219] The abstention doctrine is not, by its terms, available in federal takings cases, because takings cases present a mix of state and federal questions. But the problem of inequitable administration arises in both contexts. The *Williamson County* ripeness doctrine provides a substitute for abstention, assuring that takings claims are resolved in a single forum: state court, the forum best equipped to resolve those claims.

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218. Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593, 594 (1968) (per curiam). *Kaiser Steel* involved the "public use" provision of the New Mexico Constitution. *Id.* at 593-94. The issue was whether a state statute authorizing a trespass over private lands to obtain access to water rights constituted a taking for private use in violation of the constitutional provision. *Id.* The Supreme Court held that the federal district court had properly stayed the complaining landowner's diversity action so that the New Mexico state courts could resolve the issue. *Id.* at 594.

The Court has also developed a parallel abstention doctrine for when the exercise of federal jurisdiction would interfere with a complex state regulatory scheme in which the state courts play an integral role. Thus, in *Burford v. Sun Oil Co.*, 319 U.S. 315, 334 (1943), the Court ordered the federal district court to abstain from hearing an action to enjoin a Texas Railroad Commission order granting a permit to drill four wells in an East Texas oil field. The case turned on construction of an exception to an administrative rule mandating minimum spacing between oil wells. *Id.* at 322. The Texas legislature had centralized review of Commission orders in the state courts of a particular county. *Id.* at 325. The Supreme Court noted that the state courts had power to formulate standards for the Commission's administrative practice, and observed that, "[a]s a practical matter, the federal courts [could] make small contribution to the well organized system of regulation and review which the Texas statutes provide.... Delay, misunderstanding of local law, and needless federal conflict with the state policy, are the inevitable product of this double system of review." *Id.* at 327.

For an argument that the Court has sometimes improperly conflated *Thibodaux* abstention, which rests on the potential for inequitable administration of the laws, with *Burford* abstention, which rests on the need to avoid interference with state regulatory schemes, see Yewlin, *supra* note 213, at 1889-93. *But see* Clark, *supra* note 203, at 1517-23 (rooting both *Burford* abstention and *Thibodaux* abstention in *Erie*'s concern that adjustments in state policy be made by state rather than federal courts).

219. *See* Clark, *supra* note 203, at 1528-29 (noting that stay in cases of *Thibodaux* abstention, unlike *Pullman* abstention stays, "have virtually the same effect as a dismissal" because "there may be little or nothing left for the federal court to do after the state court renders its judgment").

4. The Scope of the Ripeness Doctrine

The *Williamson County* ripeness doctrine rests on the primacy of state law in defining property rights. The argument for barring takings claims from federal court, however, is far less persuasive when the aggrieved landowner contends that the state's action falls afoul of one of the per se rules developed by the Supreme Court. From a formal perspective, of course, takings claims all share the same feature the Court identified in *Williamson County*: no unconstitutional taking has occurred until the state has denied compensation to the landowner. When state or municipal action transgresses one of the Court's per se rules, however, the substantive character of the takings claim differs in one significant aspect: the merits of the claim do not typically depend on the content of state law.

Consider, for instance, the rule that permanent physical occupations always require compensation. Application of the rule requires no investigation of background state law. Similarly, the *Nollan/Dolan* nexus rule requires little understanding of background state law. *Nollan* and *Dolan* require a court to evaluate whether the exaction demanded by the municipality as a condition for development is reasonably related to the justification that entitled the municipality to restrict development in the first place.[220] That evaluation is entirely independent of background state law. In cases like these, the principal reason for channeling takings cases to state courts simply does not exist. As a result, one may reasonably argue for dispensing with the second *Williamson County* ripeness requirement and permitting a landowner to proceed directly to federal court.

There are, however, countervailing considerations. First, at least one of the per se rules—the *Lucas* rule that requires compensation whenever a regulation leaves a landowner with no productive use of the land—does depend, in part, on background state law: the Court built in an exception to the rule in cases where background state law would have precluded productive use of the land.[221] Second, and more important, development of facts is often necessary to determine whether a landowner's claim falls within one of the per

220. *See supra* note 175 and accompanying text.

221. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027-31 (1992).

se rules. Hence, a rule that permitted federal review in claims premised on per se rules would often waste judicial resources: a federal court would have to hear the complaint, only to dismiss on ripeness grounds if it concluded that the claim did not fall within a per se rule. Third, landowners often advance more than one takings claim in the same action.[222] If federal jurisdiction turned on the nature of the takings claim, many takings claims would have to be split into federal and state court components, again requiring duplication of effort.

These countervailing considerations suggest that permitting federal courts to review takings claims founded on violations of per se rules would be unwise in practice, even if, in principle, no reason would prevent federal review. If the Court is to maintain the second *Williamson County* ripeness requirement for other takings claims, the requirement should also bar claims based on per se rules.

CONCLUSION

The Court's opinion in *San Remo* does effectively bar federal takings claims from federal court. Although the Court's opinion, by its terms, determined only that federal takings claims are not exempt from the mandate of the full faith and credit statute, the opinion must be read against a background of state preclusion doctrine. In general, state claim preclusion doctrine—not issue preclusion doctrine—will present the most serious obstacle to federal review of takings claims, and will leave no path for the land use litigator to navigate between the Scylla of ripeness requirements and the Charybdis of preclusion rules.

The counterintuitive conclusion that federal courts may not hear federal constitutional takings claims naturally provokes reexamination of the principles that lead to that conclusion. In light of the Supreme Court's unshakably broad construction of the full faith and credit statute, that reexamination has focused on the wisdom of the Court's ripeness doctrine. But reexamination reveals that the unusual *Williamson County* ripeness doctrine tracks the unusual nature of federal takings claims, which are heavily dependent on the content of background state law. In light of that

222. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 606-07 (2001) (rejecting a *Lucas* claim while remanding for consideration of a *Penn Central* claim).

dependence, the Supreme Court's takings doctrine effectively delegates much enforcement of the Takings Clause to the state courts, and that delegation will be far more effective if takings litigation is confined to one court system rather than two.