

## Chapter 3: Takings Issues

### Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings

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Ten years ago, Dan Mandelker and I co-authored a short piece on ripeness in regulatory takings cases, the title of which clearly tipped our collective hands: *A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings*.<sup>1</sup> The situation was confused then,<sup>2</sup> and it has not improved with age. Dan's passion for correcting the ripeness situation has led to his active involvement in the last two sessions of the United States Congress to seek a legislative solution to a judicially-created morass.<sup>3</sup> Accordingly the ripeness mess in land

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1. Daniel R. Mandelker & Michael M. Berger, 42 LAND USE LAW & ZONING DIGEST, 1, 3 (1990). I was a student and research assistant of Professor Mandelker's at Washington University in 1966 and 1967. Although I have, on more than one occasion, publicly acknowledged my indebtedness to Dan for teaching me issues of constitutional law that were generally ignored in traditional constitutional law classes, we have differed almost uniformly on substantive issues involving the relationship between municipalities and property owners. Compare Daniel R. Mandelker, et al., *The White River Junction Manifesto*, 9 VT. L. REV. 193 (1984) with Michael M. Berger & Gideon Kanner, *Thoughts on The White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A.L. REV. 685 (1986). However, on the ripeness issue, we always have been in harmony; hence, that sole joint effort during our long association.

2. I elaborated on the situation shortly thereafter. See Michael M. Berger, *The "Ripeness" Mess in Federal Land Use Cases, or How the Supreme Court Converted Federal Judges into Fruit Peddlers*, in INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN (1991).

3. See, e.g., John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 URB. LAW. 195, 234 (1999) (attaching a transcript of Dan's testimony on H.R. 1534 before the House Judiciary Committee).

use litigation seems an altogether fitting subject with which to salute his career. This article, therefore, is an unabashed brief in support of Dan's position. The present rules are so stacked in favor of regulatory agencies that they virtually fly on autopilot, employing ever-shifting ruses to block federal court consideration of regulatory takings. The regulatory taking ripeness rules are in need of critical evaluation and overdue reform.

In a nutshell, the problem is that government action taking private property for public use *within the meaning of the Fifth Amendment* is uncontestedly an issue of federal constitutional law. After all, takings law deals with the meaning of a federal constitutional guarantee that is central to the Bill of Rights. As the California Supreme Court once put it:

While acknowledging the power of government to preserve and improve the quality of life for its citizens through the regulation of the use of private land, we cannot countenance the service of this legitimate need through the uncompensated destruction of private property rights. Such Fifth Amendment property rights have been equated by the constitutional draftsmen with the cherished personal protections against self-incrimination, double jeopardy, and the guarantee of due process of law. These rights are protected by the same amendment.<sup>4</sup>

Ostensibly, federal decisional law is the same; federal courts are the guardians of the Constitution and they retain the authority to construe its provisions authoritatively.<sup>5</sup>

Whatever the theory, in practice, the federal courts do not want to litigate the plainly federal issues arising in land use cases. In the old days, judges issued abstention orders when property owners had the temerity to seek federal court application of the federal constitution. Those orders required the owners to repair to state court to see whether resolution of state law issues might moot or, at least, confine the federal issues.<sup>6</sup> This shunted many regulatory taking cases into

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4. *Agins v. City of Tiburon*, 598 P.2d 25 (1979), *aff'd* 447 U.S. 255 (1980).

5. *Marbury v. Madison*, 5 U.S. 137 (1893)

6. *See, e.g., Heritage Farms, Inc. v. Solebury Township*, 671 F.2d 743 (3d Cir. 1982);

state courts.<sup>7</sup>

Then, the Supreme Court got into the act. In 1985, the Court decided *Williamson County Regional Planning Commission v. Hamilton Bank*.<sup>8</sup> The case seemed simple enough. In the process of developing a large subdivision in Nashville Tennessee, a developer ran into a county planning director who imposed new regulations and requirements mid-project, violating the time-honored American tradition against changing the rules in the middle of the game. As a result, the developer went “belly up.” This is why Hamilton Bank (a lender, not a developer) became the plaintiff in constitutional litigation. At trial, the jury awarded Hamilton Bank \$350,000 for the temporary taking, but the judge held that no compensation could be awarded for the taking. An appellate court reinstated the jury’s verdict.<sup>9</sup> That is when “ripeness,” which had been merely a minor problem up to that point, turned into a swampy mess. This article addresses the most recent additions roiling that swamp.

### I. WILLIAMSON COUNTY BAITs THE TRAP

It suffices for now to note that *Williamson County* was simply one in a series of cases in which the Supreme Court ducked the issue of the constitutional remedy for a regulatory taking.<sup>10</sup> As such, the

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Kollsman v. City of Los Angeles, 737 F.2d 830 (9th Cir. 1984); Fralin & Waldron, Inc. v. City of Martinsville, 370 F. Supp. 185 (W.D. Va. 1973), *aff'd* 493 F.2d 481 (4th Cir. 1974); Hill v. City of El Paso, 437 F.2d 352 (5th Cir. 1971).

7. See generally Brian Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 HOFSTRA PROP. L.J. 73 (1988).

8. 473 U.S. 172 (1985). For contemporary commentaries from opposite sides of the counsel table, see R. Marlin Smith, *The Hamilton Bank Decision: Regulatory Inverse Condemnation Claims Encounter Some New Obstacles*, 29 WASH. U.J. URB. & CONTEMP. L. 3 (1985) and Michael M. Berger, *Anarchy Reigns Supreme*, 29 WASH. U.J. URB. & CONTEMP. L. 39 (1985).

9. *Hamilton Bank v. Williamson County Reg. Plan. Commn.*, 729 F.2d 402 (6th Cir. 1984).

10. If you are reading this article, you likely have some understanding of the litigational maelstrom that engulfed regulatory takings cases from 1980 through 1987. If not, read one of the many descriptions of the Supreme Court’s repeated attempts to answer the simple question, “what is the constitutional remedy for a regulatory taking?” My favorites, written immediately before and immediately after the Court finally answered the question in 1987 are: Michael M. Berger, *The Year of the Taking Issue*, 2 BYU J. PUB. L. 261 (1987) and Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-*

decision ordinarily would not warrant more than a passing blip on the radar screen. Each time, the Court decided the case for which it had granted certiorari, and on which the parties and their numerous *amici curiae* had spent enormous effort and expense, was not sufficiently ripe for the court to decide the substantive issue. In *Williamson County*, however, the Court expanded on the doctrine of ripeness in regulatory taking cases transforming the ripeness doctrine from a minor anomaly into a procedural monster. Refinement did not yield clarification; quite the contrary.<sup>11</sup>

In *Williamson County*, the Court held that property owners must leap two hurdles before seeking Fifth Amendment relief on the merits in federal court. First, property owners must obtain a final determination from a regulatory agency about what use the agency will permit on their land. Following that, they must seek just compensation in state court. This article focuses on the latter requirement. In particular, it deals with an insidious trap created by the interplay between *Williamson County*'s state court relief hurdle and general rules of claim and issue preclusion.

*Williamson County* clearly held that a property owner's suit seeking compensation under the Fifth Amendment for a regulatory taking or under the Fourteenth Amendment for deprivation of property without due process of law is premature, and cannot be brought in a United States district court until the owner first seeks, and is denied, compensation in state court.<sup>12</sup> When property owners follow *Williamson County* and first sue in state court, they are met in some federal circuits with the argument that the state court litigation, far from *ripening* the federal cause of action, instead has *extinguished* it. Under these courts' reasoning, the state proceedings are *res judicata*, and thus bar the pursuit of the now-ripened federal action. Thus, the very act of ripening a case also ends it. That bizarre rule cannot be what the *Williamson County* court intended because it is inherently nonsensical and self-stultifying. One distinguished law

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*Use Planning*, 20 URB. LAW. 735 (1988).

11. See Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?* 30 URB. LAW. 307, 327-33 (1998).

12. See *infra* notes 17-23 and accompanying text.

professor put it precisely, if a bit colloquially:

One understandable reaction to the prong two requirement of [*Williamson County*] is that it perpetrates a fraud or hoax on landowners. The courts say, ‘Your suit is not ripe until you seek compensation from the state courts,’ but when the landowner does these things, the court says, ‘Ha ha, now it is too late.’<sup>13</sup>

Obviously, this is only a trap for plaintiff property owners who want to litigate federal claims in federal court. No other species of litigant seeking relief on federal constitutional grounds is subjected to this run-around;<sup>14</sup> but government agencies like the status quo just fine. In fact, government lawyers have learned to play the ripeness game like Perlman on a Stradivarius. Essentially all ripeness rules preclude any court from reviewing the legality of regulatory actions. The *Williamson County* rule prevents aggrieved property owners from, and protects municipalities against, having agency action reviewed by federal courts. So potent are these rules that one commentator aptly concluded that, “the *Williamson County* . . . ripeness requirements have as often been used by localities as a sword rather than as a shield.”<sup>15</sup> Ripeness rules are used as an offensive weapon to delay litigation, increase both fiscal and emotional costs to the property owner, and convince potential plaintiffs that they should not even try to “fight city hall.”<sup>16</sup>

The *Williamson County* Court decided (a) whether a claim was ripe for litigation in federal court and (b) that certain things first must be done in state court before the federal constitutional claims are ripe for federal court litigation.

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13. Thomas Roberts, *Ripeness and Forum Selection in Land-Use Litigation*, in TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS, (ABA, Callies ed., 1996).

14. See *infra* notes 102-13 and accompanying text.

15. STEVEN J. EAGLE, REGULATORY TAKINGS 639 (1996).

16. See Gregory Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 98 (1995) ([M]unicipalities may have an incentive to exacerbate this problem [of the delay inherent in ripening a case], as stalling is often the functional equivalent of winning on the merits); see also JAMES V. DELONG, PROPERTY MATTERS 296-98 (Free Press 1997) (“The name of this game is transaction costs . . . [s]ubstantive legal doctrines mean little if you cannot get into court in the first place.”).

The Court's analytical discussion begins with the announced conclusion that "respondent's claim is *premature*."<sup>17</sup> Notably the Court chose to use the term "premature," rather than "moribund;" the Court did *not* say there was no valid claim.<sup>18</sup> To an English-speaking person, prematurity necessarily means that something is yet to be done to make the matter mature, or jurisprudentially ripe. The *Williamson County* court then states that, because of the lack of a final administrative decision and an attempt to seek compensation in state court, respondent's claim is *not ripe*.<sup>19</sup> The absence of ripeness necessarily means that things need to, and can, be done to make the matter ripe.

Throughout the opinion, the Court returns to these twin concepts, emphasizing and reemphasizing the temporal nature of its holding, repeatedly saying that land use cases *can* be ripened and *then* litigated in federal court. For example, the Court stated, "[a] second reason the taking claim is *not yet ripe* is that respondent did not seek compensation through the procedures the State has provided for doing so."<sup>20</sup> The Court also observed "[s]imilarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause *until* it has used the procedure and been denied just compensation."<sup>21</sup> Finally the Court said, "*until* [plaintiff] has utilized that procedure, its taking claim is *premature*."<sup>22</sup>

Indeed, the plain message of *Williamson County* is that federal claims of a local government agency's violation of property rights protected by the due process and just compensation guarantees of the fifth and fourteenth Amendments do not even arise until after conclusion of the state court litigation.

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17. 473 U.S. at 185 (emphasis added).

18. The court could not state this. Federal courts had dealt with such claim as they routinely deal with other Bill of Rights claims, for years. *See, e.g.,* Nemmers v. City of Dubuque, 764 F.2d 502 8th Cir. 1985); Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141 9th Cir. 1983); Barbian v. Panagis, 694 F.2d 476 (7th Cir. 1982); Fountain v. Metro Atlanta Rapid Transit Auth., 678 F.2d 1038 (11th Cir. 1982); Hernandez v. Lafayette, 643 F.2d 1188 (5th Cir. 1981); Gordon v. City of Warren, 579 F.2d 386 (6th Cir. 1978).

19. 473 U.S. at 186 (emphasis added).

20. *Id.* at 194 (emphasis added).

21. *Id.* at 195 (emphasis added).

22. *Id.* at 197 (emphasis added).

As the Court noted, “a property owner has not suffered a violation of the Just Compensation Clause *until* the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation . . . .”<sup>23</sup>

Thus, *Williamson County* is replete with the twin concepts of “not yet” and “not until.” There simply is no rational way for an English-speaking person to read *Williamson County* other than holding that property owners can satisfy those newly-minted ripeness requirements and thereby render their claim ripe for federal court litigation; but that is not what has happened.

## II. LOWER COURTS PULL THE SWITCH

Lower federal courts either have been unwilling to follow *Williamson County* or have had trouble understanding the Supreme Court’s message.<sup>24</sup> Despite the clarity of the Supreme Court’s

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23. 473 U.S. at 195 emphasis added. In so holding, the Court obviously overlooked 42 U.S.C. § 4651(8), which imposes a duty on government to conduct itself so as to make it unnecessary for property owners to sue in inverse condemnation. *See Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1 (1984). All states have adopted counterpart statutes. *See, e.g.*, CAL. GOV’T. CODE § 7267.6 (West 1999). Candidly, I have always had trouble with the Court’s idea that no federal claim can arise until state courts deny compensation. The Fifth Amendment is a model of clarity; it proclaims: “nor shall private property be taken for public use without just compensation.” Logically and realistically, that guarantee is breached when a government agency takes property and refuses to pay. It does not take a lawsuit to establish the government’s refusal to pay. In any inverse taking case, whether regulatory or not, the refusal is palpable. Indeed, if the government agreed to pay, there would be no lawsuit; it is all rather tautological. Failure to pay is, by itself, a direct violation of the Fifth Amendment’s guarantee. The Fifth Amendment does not provide anything about unsuccessful recourse to state courts as a part of the violation. Indeed, the Court seems to have acknowledged this shortly after *Williamson County*. In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 320 (1987), the Court explained that *Williamson County* held that “an illegitimate taking might not occur *until the government refuses to pay . . .*” (emphasis added), without any reference to whether a state court had refused to order such payment. *See Kanner, Shark, supra note 12*, at 328. “[I]kewise, because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State’s action here is not ‘complete’ *until* the State fails to provide adequate compensation for the taking.” 473 U.S. at 195 (emphasis added). “. . . even if viewed as a question of due process, respondent’s claim is *premature*.” 473 U.S. at 199 (emphasis added). The opinion ends as it began, with this conclusion: “In sum, respondent’s claim is *premature*, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment.” 473 U.S. at 200 (emphasis added).

24. Either that, or they make some sort of attempt to psych out the Court’s true intent. I

language, some courts have concluded that once state court litigation has taken place, standard doctrines of claim and issue preclusion bar any later litigation, regardless of what *Williamson County* may have said.

A particularly egregious illustration appears in the saga of Tom and Doris Dodd of Oregon. The Dodds purchased 40 acres of land in a secluded area on which they intended to build one home in which to live out their retirement, they were prevented from doing so by the local regulators.<sup>25</sup> Complying with *Williamson County*, they sought redress in state court. In their state court pleadings, the Dodds raised only state law issues, and expressly reserved litigation of their federal claims for federal court. The Oregon courts honored that reservation and limited their decisions to issues of state law.<sup>26</sup>

After state courts denied them relief, the Dodds sued in a United States district court, where a judge dismissed their suit based on lack of ripeness for failure to submit the federal, as well as state, issues to the state courts. The Ninth Circuit reversed the district court's decision. In strong language, the Ninth Court rejected the notion that *Williamson County* required the property owners to present their Fifth Amendment claims to the state courts. Recognizing the potential

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actually had a judge at a Ninth Circuit oral argument tell me that the Supreme Court's hidden *Williamson County* message was *really* that the federal courts should not get involved in regulatory taking cases, ever. Why the Court wants to hide such an important message has not been explained. If that was the Court's purpose it could easily have said that directly; but it did not. That Ninth Circuit comment during my oral argument presaged an opinion affirming a district court decision holding that there is *no* way for a property owner *ever* to litigate Fifth Amendment questions in federal court. The court concluded that the upshot of *Williamson County* was that all such litigation must take place in state courts, with recourse to the United States Supreme Court as the only possible access to the federal system. *See* *Hayward Exchange, Inc. v. City of Oakland*, No. 93-2206, 1994 U.S. Dist. LEXIS 1421 (N.D. Cal. 1994), *aff'd* No. 94-15530, 1995 U.S. App. LEXIS 34280 (9th Cir. 1995)). Of course, the Supreme Court had already held to the contrary in stressing that a petition for certiorari is "an inadequate substitute" for trial in a U.S. District Court, because "[h]ow the facts are found will often dictate the decision of federal claims." *England v. Louisiana Medical Examiners*, 375 U.S. 411, 416 (1964).

25. The severity of Oregon's regulatory climate is apparent in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), as well as the omnipresent bumper sticker "Don't Californicate Oregon," a scatological allusion to the Golden State's perceived overdevelopment. Ironically, however, recent press reports indicate that Oregon's land use policies now are causing a replication of Los Angeles' urban patterns and densities in Portland. *See* D. J. Waldie, *Do the Voters Really Hate Sprawl?* N. Y. TIMES, Mar. 3, 2000.

26. *Dodd v. Hood River County*, 59 F.3d 852, 857 (9th Cir. 1995) (Dodd I).



impact of *res judicata*, the court stated:

Reduced to its essence, to hold that a taking plaintiff must first present a Fifth Amendment claim to the state court system as a condition precedent to seeking relief in a federal court would be to deny a federal forum to every takings claimant. We are satisfied that *Williamson County* may not be interpreted to command such a revolutionary concept and draconian result.<sup>27</sup>

After dealing with *res judicata*, or claim preclusion, the court ended on an ominous note by remanding the case to the district court to consider collateral estoppel, or issue preclusion, on the theory that factual issues had been litigated that could apply to the federal claims as well as the state claims.<sup>28</sup>

On remand, the district court seized on that statement and found that all the facts had been litigated in state court.<sup>29</sup> Having baited the Dodds with its first opinion, the Ninth Circuit switched with its second, affirming the district court dismissal.<sup>30</sup>

What happened to the Rainey Brothers Construction Company in Tennessee was even worse than what happened to the Dodds. Rainey Brothers wanted to develop apartments on fourteen acres of vacant land in Memphis, Tennessee. After obtaining permits, Rainey Brothers began construction of 165 apartment units. After the foundations were constructed and much of the wood framing had been completed for the project, the city, without notice, revoked the permits. Worse than that, the city changed the elevation requirements, also without prior notice or hearing, and demanded that Rainey Brothers construct the project five feet higher. The city's new requirement necessitated the removal of all that had been built to date and a massive importation of earth fill to raise the ground level.

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27. *Dodd*, 59 F.3d at 860-61 (Dodd I).

28. *Dodd*, 59 F.3d at 863 (Dodd I).

29. This will always be the case in a Williamson County situation, because there is only a single set of facts by which the local land use regulators either acted arbitrarily toward the land owners or acted in such a way as to take the economically beneficial or productive use of their property.

30. *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998) (Dodd II). Adding insult to injury, the *Dodd II* court lectured the plaintiffs on the asserted impropriety of asking the federal courts to decide issues—even constitutional ones—arising from zoning controversies, overlooking what it plainly said in *Dodd I* (authored by the same judge).

When Rainey Brothers sued in state court, the city decided it had no stomach for trial:

On the first day of the [state court] trial, the City Attorney, representing the City and the Board, stipulated in open court that the Board and the City had acted arbitrarily, capriciously, and illegally . . . [and] [i]n essence, *defendants stipulated that they had violated plaintiff's rights under both the Tennessee and United States Constitutions.*<sup>31</sup>

Notwithstanding this concession of liability, and the state court's consequent finding that the government's actions were "void, capricious, arbitrary and illegal,"<sup>32</sup> the state court refused to award Rainey Brothers *any* compensation because of its erroneous belief that the state's tort claims act immunized the government from any constitutional compensation.<sup>33</sup> The court also refused to order reinstatement of the wrongfully rescinded permits.<sup>34</sup> Thus, the Court upheld their rights with empty words, while denying them any remedy whatsoever.

After unsuccessfully appealing the state court denial of compensation, Rainey Brothers filed suit in United States district court, in accordance with *Williamson County*.<sup>35</sup> The Rainey Brothers sought compensation for the deprivation of its property without due process and the taking of its property without just compensation. The district court dismissed the action on the ground that the Tennessee proceedings, although concededly wrongly decided, were *res judicata*.<sup>36</sup> The Sixth Circuit affirmed.<sup>37</sup> Other cases have reached the same Catch-22 result, disregarding *Williamson County*'s clear

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31. *Rainey Brothers Construction Co., Inc. v. Memphis & Shelby County Bd. of Adjustment*, 967 F. Supp. 998, 1002 (W.D. Tenn. 1997) (emphasis added).

32. *Id.*

33. *Id.*

34. *Id.*

35. 42 U.S.C. § 1983.

36. *Id.* In its Sixth Circuit brief, the City conceded that "the state court *incorrectly* held that no monetary award would be granted because Tenn. Code Ann. § 29-20-205 precluded such an award . . ." Brief for Appellees at 30 (emphasis added), *Rainey Brothers Construction Co., Inc. v. Memphis & Shelby County Bd. of Adjustment*, No. 97-5897, 1990 U.S. App. LEXIS 6396 (6th Cir. Apr. 5, 1999).

37. *Rainey Brothers*, 1999 U.S. App. LEXIS 6396.

instruction that, once a case had been ripened by presenting it to state courts, it could then be litigated in federal court.<sup>38</sup>

### III. A NINTH CIRCUIT SHELL GAME PUTS SOME ENGLISH ON THE CLASSIC BAIT AND SWITCH

The federal judiciary has taken on the persona of the guy in the fancy shirt with the smooth patter who is moving the shells around, casting property owners as the rubes standing in front of the table thinking they know where the pea went. Under the current state of the law, the only meaningful thing a lawyer can tell a property-owning client is that there is no way to know which shell hides the pea; plan on guessing wrong and hope for the best.

If you think the current state of the law is not this bad, read on. A twist on the ripeness issue involves the melding of some concepts developed in the law of abstention. The facts in *Fields v. Sarasota Manatee Airport Authority*<sup>39</sup> set the stage. In *Fields*, neighbors of the Tampa Airport sought compensation for the taking of noise and aviation easements over their properties because of the noxious by-products of the aircraft using the airport.<sup>40</sup> As required by *Williamson*

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38. See, e.g., *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319, 1325 (10th Cir. 1998); *Palomar Mobilehome Park Assn. v. City of San Marcos*, 989 F.2d 362, 364-65 (9th Cir. 1993); *Peduto v. City of North Wildwood*, 878 F.2d 725, 726-29 (3d Cir. 1989). While growing, this disregard of *Williamson County* is not uniform. Other circuits have attempted to give meaning to the Supreme Court's direction by concluding that some mechanism must exist for plaintiffs to modify the normal impact of the doctrines of claim and issue preclusion. For example, in *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488 (11th Cir. 1993), the court held that the federal case could not be time-barred at a time when it was still premature to file because, under *Williamson County*, such federal suits do not ripen until state litigation is concluded. The Fourth and Eleventh Circuits, applying a rule developed in a different context by the Fifth Circuit, concluded that property owners may obtain a trial on the merits in federal court if they file a "reservation" in state court submitting only state law issues to the state court, and reserving federal issues for a later trial in federal court. See *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 284 (4th Cir. 1998); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992); *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331, 1332 (5th Cir. 1976). For further discussion of reservations, see *infra* notes 42-46 and accompanying text.

39. 953 F.2d 1299.

40. *Id.* at 1302. For fuller discussion of such litigation, see Michael Berger, *Nobody Loves an Airport*, 43 S. CAL. L. REV. 631 (1970) and Michael Berger, *Airport Noise in the 1980s: It's Time for Airport Operators To Acknowledge the Injury They Inflict on Neighbors*, in INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN (1987).

*County*, the property owners filed suit in state court seeking compensation under Florida law, but raising no claims under the federal constitution.<sup>41</sup> The property owners did not inform the state court that they intended to raise those federal issues later. The state court erroneously held that no taking had occurred.<sup>42</sup> When the property owners then sued in federal court on what they thought was a ripe claim, the district court granted the airport authority's motion for summary judgment, which was affirmed on appeal.<sup>43</sup>

The property owners thought they had kept their eyes on the pea; where had it gone? That is where the abstention twist comes in. When a suit containing federal issues which can either be eliminated or significantly altered by state court determination of state issues is filed in federal court, then the federal court can abstain from the exercise of its jurisdiction. The federal court, in effect, permits the state court to rule on the state law issues, in the hope that the state court's resolution will moot the federal constitutional issues.<sup>44</sup> The federal case is not dismissed; it is merely deferred. However, in order to preserve the right to return to federal court it is necessary to unambiguously reserve the federal issues for federal court litigation;<sup>45</sup> no rule, statute, or decision provides definitive guidelines on how to do that.<sup>46</sup>

Thus, when suit begins in federal court and the court issues an abstention order, the property owners at least know that there is authority describing their right to return to federal litigation, if they

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41. 953 F.2d at 1302.

42. *Id.* Although the owners sought compensation for the taking of an avigation easement—the typical relief sought in airport noise litigation, see *supra* note 40, the Florida Court of Appeals held that there was no taking because the owners were not deprived of *all* use of their *entire* properties. *Fields v. Sarasota-Manatee Airport Auth.*, 512 So. 2d 961, 965 (Fla. Dist. Ct. App. 1987).

43. 953 F.2d at 1302.

44. This most common form of abstention is generally called *Pullman* abstention. *See Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

45. *See England v. Louisiana State Bd. of Medical Exam*, 375 U.S. 411, 421 (1964).

46. The judiciary has supplied only a series of cases holding that the methods devised by individual plaintiffs were *not* adequate, without ever saying what *would be* adequate. *See, e.g., Lurie v. State*, 633 F.2d 786, 787-88 (9th Cir. 1980); *Cornwell v. Ferguson*, 545 F.2d 1022, 1025-26 (5th Cir. 1977); *Reich v. City of Freeport*, 527 F.2d 666, 671 (7th Cir. 1975); *Lecci v. Cahn*, 493 F.2d 826, 829 (2d Cir. 1974); *Godoy v. Gullota*, 406 F. Supp. 692, 694 (S.D.N.Y. 1975).

follow the correct procedure in state court.<sup>47</sup> In *Fields*, however, the litigation began in state court. And it began there because the United States Supreme Court's decision in *Williamson County* compelled it to begin there.

What is a property owner to do? Easy, said the Eleventh Circuit.<sup>48</sup> When suit is filed in state court, the plaintiff can file the equivalent of an *England* reservation telling the state court that he is filing the state suit under the duress of *Williamson County*, that he is not submitting federal issues for decision, and that he will litigate the federal issues in federal court at the conclusion of the state proceedings.<sup>49</sup>

So what happened to the Fields and their neighbors? They watched the wrong shell. They watched the shell marked exhaust your state court litigational remedies and did not notice the pea slip under the shell marked be sure to file a reservation of federal issues.

In *Palomar Mobilehome Park Association v. City of San Marcos*,<sup>50</sup> a California case involving a mobile home rent control challenge, the property owner filed suit first in state court. According to the Ninth Circuit's opinion, the property owner filed no document reserving federal issues for federal litigation.<sup>51</sup> The state court dealt with the federal claims, finding that no taking had occurred; doom.

*Palomar* involved the same shell switch as in *Fields*, but the property owner's contribution in *Palomar* was more overt; in the process of ripening his federal issues, the property owner over litigated and cooked them. Quoting a decision of the Third Circuit, the court curtly noted:

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47. In candor, however, one ought at least pose the question of what purpose or policy is served by the "reservation" procedure. The courts have never explained, and the procedure seems, at best, an arbitrary hurdle placed in the path of people with legitimate federal questions. In *England* itself, Justice Douglas filed a concurring opinion in which he called for a *sua sponte* reconsideration of the propriety of the entire *Pullman* doctrine. 375 U.S. at 423. Calling it "a legal research luxury" and "an unnecessary price to pay for our federalism," he noted that "[m]any [litigants] can hardly afford one lawsuit, let alone two." *Id.* at 425 (citing *Clay v. Sun Ins. Office*, 363 U.S. 207, 228 (1960) (Douglas, J., dissenting)). Given the realities of modern litigation, those sentiments are even more true now than when uttered thirty-six years ago.

48. *Fields*, 953 F.2 1299.

49. *Id.* at 1304-05. 'How to make a state court judge feel like a law clerk for the federal judiciary' in one easy lesson.

50. 989 F.2d 362.

51. *Id.* at 363.

Appellants have exhausted their state claims, which, under *Williamson*, is a necessary predicate to their federal cause of action; but in doing so, they received a full and fair adjudication of their constitutional claims against the City in state court. Due process guarantees them no less, but entitles them to no more.<sup>52</sup>

Dealing with the ripeness issue as an abstract issue of due process begs the question. The issue is not whether the property owner had the opportunity for a full and fair state court adjudication, although that is plainly open to question in more cases than one is comfortable listing;<sup>53</sup> the issue is whether a property owner can satisfy the *Williamson County* preconditions to federal litigation and then actually litigate the case in federal court. If that is a due process issue, it is of a very particularized kind; the kind that says that courts will not yank the rug out from under you as your reward for following the rules.<sup>54</sup> The message of *Fields* and *Palomar* is that the property owner needs to keep an eye on the shell governing reservations of federal issues and all will be well. Right? Maybe. But, then again, maybe not.<sup>55</sup>

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52. 989 F.2d 364 (citing *Peduto v. City of North Wildwood*, 878 F.2d at 729 (3d Cir. 1989)).

53. See *supra* notes 31-38 and accompanying text. Alternatively, review the situation in California's state courts as virtually every expert who has examined the situation has concluded that the California courts do not treat property owners fairly in land use litigation. See, e.g., WILLIAM FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 226 (1995); DENNIS COYLE, *PROPERTY RIGHTS AND THE CONSTITUTION* 11 (1993); RICHARD BABCOCK & CHARLES SIMON, *THE ZONING GAME REVISITED* 293 (1985); Gus Bauman, *The Supreme Court, Inverse Condemnation, and the Fifth Amendment*, 15 *RUTGERSLJ* 15, 70 (1983); David Callies, *The Taking Issue Revisited*, 37 *LAND USE LAW & ZONING DIG.* 6, 7 (1985); Joseph F. DiMento et al., *Land Development and Environmental Control in the California Supreme Court: The Deferential, the Preservationist, and the Preservationist-Erratic Eras*, 27 *UCLA L. REV.* 859, 872 (1980).

54. The fast shuffle between state and federal courts, with the property owner losing all around, brings to mind Arthur Train's charming stories about a wily New York lawyer named Ephraim Tutt. In one of them, Mr. Tutt displayed his legal acumen by convincing a federal court to dismiss an indictment of his client on the ground that the state courts had jurisdiction of the matter and then, when his client was indicted by state authorities, had the state court dismiss the case on the ground that the federal courts had jurisdiction. See Arthur Train, *Mr. Tutt Plays It Both Ways*, in *MR. TUTT'S CASE BOOK* 413 (1945). The story made for entertaining fiction; however, it makes for a sad commentary on the judicial system when nature imitates such art.

55. Another problem is that not one of the cases recognizing the reservation procedure in ripeness cases has actually permitted a claim to go to trial. This leads one to suspect that

The kicker in this series of cases is *Mission Oaks Mobile Home Park v. City of Hollister*,<sup>56</sup> another rent control caper. After filing an action in state court challenging the validity of rent control ordinance and a mandamus petition challenging the validity of city action under the ordinance, the property owner filed a document entitled “Reservation to Litigate Federal Claims in the United States District Court.”<sup>57</sup> The state court denied a number of motions by both sides.<sup>58</sup> The court denied the property owner’s motion for summary judgment and writ of mandamus and the city’s motion for judgment on the pleadings and motion to strike the reservation of federal issues.<sup>59</sup> The remainder of the case was set for trial. Before the trial date, the property owner filed suit in federal court.<sup>60</sup>

Did filing the reservation help? Not quite; the filing came too late. As the Ninth Circuit emphasized, the property owner did not file until over a year after the state complaint was filed.<sup>61</sup> At this point, the state court had already ruled on many issues. Essentially the court treated the reservation of issues like a peremptory judicial disqualification, that is, one that must be made at the outset, before any action of consequence has taken place.

The deadly twist introduced by *Mission Oaks* was a different branch of the abstention doctrine, the kind defined by *Younger v. Harris*.<sup>62</sup> *Younger* abstention prevents federal disruption of on-going

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perhaps this procedure is simply a conscience-salving device, rather than a real remedy. That my dark suspicions on this score are justified is illustrated by the Ninth Circuit’s acknowledgement of the possible utility of such a reservation procedure in *Dodd I*, 59 F.3d at 862, which it snatched away in *Dodd II*, 136 F.3d at 1227. In between the two *Dodd* decisions, the Ninth Circuit added to the confusion by saying that *Dodd I* “clearly holds that a court can reserve a federal issue so that the issue will not be precluded from further litigation, despite [an] assertion that [a] federal claim will necessarily be precluded by res judicata.” *Macri v. King County*, 126 F.3d 1125, 1130 n.7 (9th Cir. 1997). Without mentioning *Macri*, a different panel reached a contrary conclusion in *Dodd II*, thus rendering the Ninth Circuit in conflict with itself on this critical issue. No *en banc* consideration has ever straightened out this intra-Circuit aspect of the mess.

56. 989 F.2d 359 (9th Cir. 1993).

57. *Id.* at 360.

58. *Id.*

59. 989 F.2d at 360.

60. *Id.*

61. *Id.* at 362.

62. 401 U.S. 37 (1971).

state court proceedings.<sup>63</sup> The *Younger* court invoked abstention to prevent defendants in state court criminal trials from running across the street, filing federal civil rights actions, and throwing a wrench into the expeditious processing of the criminal calendar. But *Younger* abstention appears to be spreading. In *Mission Oaks*, for example, the court used it to prevent the *plaintiff* in the state court suit from interfering with the progress of his own state court proceedings by filing a federal court complaint.<sup>64</sup>

The pernicious thing about *Younger* abstention is that, unlike *Pullman* abstention, it requires dismissal of the federal proceedings. Unlike *Pullman* abstention, *Younger* abstention provides that there can be no return to federal court after state court litigation. *Mission Oaks* held that *Younger* applied because of the state's overriding interest in the enforcement of mobile home rent control laws.<sup>65</sup>

Can that be? How does the Supreme Court's 1971 decision in *Younger* interact with its 1985 decision in *Williamson County*? Under the most literal reading of *Mission Oaks*, once a suit is filed in state court, *Younger* prohibits federal court litigation. *Williamson County*, however, requires state court litigation as a precondition to opening the federal courthouse door. Only three resolutions seem logically possible.

First, a plaintiff who wants to preserve the option of having federal issues tried in federal court must file suit first in federal court. The complaint should include all causes of action, including one seeking just compensation for a taking under state law under the district court's supplementary jurisdiction. Then, the property owner has to hope that the federal court will enter a *Pullman* abstention order permitting suit to be filed in state court about state law issues.<sup>66</sup> This option avoids the *Younger* problem because, at the time the federal complaint is filed, no state court suit will be pending. But, this option flaunts *Williamson County*, risking an angry reaction from a

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63. *Id.* at 43.

64. 989 F.2d at 362.

65. *Id.* at 361.

66. This raises the bizarre spectacle of property owners filing their own motions immediately after filing their federal complaints asking the district judge to enter a *Pullman* abstention order so that they can litigate in state court free of *res judicata* concerns. This is not speculation; I have seen it done.



district court judge, and an order of dismissal rather than abstention; possible sanctions under Rule 11 of the Federal Rules of Civil Procedure are also possible. Additionally, it is needlessly wasteful of the time, effort, and money of both court systems as well as the parties.

Second, *Mission Oaks* is simply wrong.<sup>67</sup> Under its rationale, the 1971 *Younger* rule rendered the 1985 *Williamson County* rule stillborn. In short, there would never be a way to “ripen” a land use case for federal litigation; the mere filing of the state court complaint would invoke the spirit of *Younger*, banishing the matter from federal court forever. If that were the Supreme Court’s intent, *Williamson County* could have said so. Its holding could have been simple and straightforward: all takings litigation must be brought in state courts; federal courts have no jurisdiction to entertain taking cases, even though they involve the application of the federal Constitution. Plainly, the *Williamson County* Court did not have that in mind, and said no such thing. Likewise, none of the lower courts have followed this interpretation. *Younger* abstention has no place in cases governed by *Williamson County*; the two cases are mutually exclusive.

This should be apparent from any reading of *Younger*-type cases. The *Younger* court sensibly designed the rule to prevent criminal defendants in state court from interfering with those prosecutions by becoming civil rights plaintiffs in a complaint filed in federal court. The purpose of the rule was to stop federal courts from enjoining or frustrating pending state court prosecutions.

Since its creation, *Younger* has seen some expansion, but generally only in cases with the same sort of prosecutorial flavor. Courts have applied it in order to prohibit interference with state cases involving temporary removal of a child in the context of child abuse,<sup>68</sup> proceedings for the recovery of fraudulently obtained welfare benefits,<sup>69</sup> state bar disciplinary proceedings,<sup>70</sup> and state nuisance proceedings.<sup>71</sup> Even as expanded, the essence of the

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67. I prefer this is option, because it is the most honest approach to the problem. A little honesty would be useful in this field.

68. *Moore v. Sims*, 442 U.S. 415, 416 (1979).

69. *Trainor v. Hernandez*, 431 U.S. 434, 416 (1977).

70. *Middlesex County Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423 (1981).

71. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975).

*Younger* rule has been to prevent *the defendant* in a state court proceeding from frustrating the state judicial process by jumping to the federal court with a plea to enjoin the state court proceeding.<sup>72</sup> Courts have not before this used it to prevent a state court *plaintiff* from filing parallel federal litigation.<sup>73</sup> Here, again, there seems to be one law for “poor relation” land owners and another law for other litigants.

Indeed, the Supreme Court refused to extend *Younger* abstention to challenges of completed actions by state and local governing bodies, specifically stating that *Younger*’s precepts of comity do not

72. See *Wooley v. Maynard*, 430 U.S. 705, 710-11 (1977).

73. That is true even in the circuit that decided *Mission Oaks*. As another panel of the Ninth Circuit concluded at about the same time:

At first blush, it would seem the district court should have abstained under *Younger*. However, here, the ongoing state proceeding is a civil action. *Civil-Younger abstention has been upheld only where a party seeks to invoke federal jurisdiction for the purpose of “restraining state proceedings or invalidating a state law.”*

*Confederated Salish v. Simonich*, 29 F.3d 1398, 1405-06 (9th Cir. 1994) (citing *United States v. Adair*, 723 F.2d 1394, 1402 n.5 (9th Cir. 1983) (emphasis added).

We are unaware of any decision upholding civil-*Younger* abstention where the plaintiffs sought relief similar to that sought here. The Tribes do not seek by their federal court action to restrain any ongoing state proceeding. Although they assert the Montana Water Use Act cannot be used to regulate their water rights, they do not argue the Act is facially unconstitutional or invalid.

*Id.* Other courts routinely agree with the *Confederated Salish* view; but, of course, none of these cases was a land use case. See, e.g., *Hinrichs v. Whitburn*, 975 F.2d 1329, 1333 (7th Cir. 1992) (“*Younger* is confined to cases in which the federal plaintiff ha[s] engaged in conduct actually or arguably in violation of state law, thereby exposing himself to an enforcement proceeding in state court.”) (citing *Alleghany Corp. v. Haase*, 896 F.2d 1046, 1053 (7th Cir. 1990)); *Kercado-Melendez v. Aponte-Roque*, 829 F.2d 255, 260 (1st Cir. 1987) (“In *Dayton Christian Schools* and the other abstention cases noted above, the federal plaintiffs sought to enjoin a pending state proceeding which they did not initiate, but in which their presence was mandatory. Here, unlike *Dayton Christian Schools*, the administrative proceeding is remedial rather than coercive.”); *Kentucky West Virginia Gas Co. v. Pennsylvania Public Util. Comm’n*, 791 F.2d 1111, 1117 (3d Cir. 1986) (“In the typical *Younger* case, the federal plaintiff is a defendant in ongoing or threatened state court proceedings seeking to enjoin continuation of those state proceedings . . . . In this case, on the other hand, the federal plaintiffs . . . are also the state plaintiffs. Moreover, they are not seeking to enjoin any state judicial proceeding; instead, they simply desire to litigate what is admittedly a federal question in federal court . . . .”); *Crawley v. Hamilton County Comm’rs*, 744 F.2d 28, 30 (6th Cir. 1984) (“In our case, the federal plaintiffs are also plaintiffs in the state court action. In addition, the plaintiffs are not attempting to use the federal courts to shield them from state court enforcement efforts. Accordingly, there is no basis for *Younger* abstention in this case.”).

apply to constitutional challenges to zoning ordinances.<sup>74</sup> In a recent discussion of the rule, the Supreme Court explained that *Younger* precepts do not apply to state proceedings which are remedial in nature; that is, in cases where the plaintiff in the federal case is the party seeking some relief in a state forum. Rather, *Younger* applies to state proceedings which are coercive in nature; that is, in cases where the plaintiff in the federal case is the target of some state enforcement, criminal, or disciplinary process.<sup>75</sup> In refusing a request for *Younger* abstention, the Seventh Circuit explained the necessity for restraining *Younger*'s reach:

In essence the state is asking us to adopt a rule of abstention that whenever parallel state and federal suits are pending, the federal suit must be stayed and the federal claimant remitted to state court. The cases do not support such a rule, and it would be hard to square with 28 U.S.C. § 1331(a), which explicitly grants the federal courts jurisdiction over civil suits arising under the Constitution. In every case that the state has cited the federal claimant had gone ahead and violated state law, thereby bringing into play the state's interest in redressing violations of its laws in its own courts. The message of *Younger* and of the recent cases that have expanded its principle to civil proceedings is that one who decides to violate a state law that he believes to be unconstitutional may find that he has thereby submitted himself to the jurisdiction of the state courts . . . . If the state's position were correct, virtually no federal suit could

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74. *New Orleans Pub. Serv. v. New Orleans*, 491 U.S. 350, 372 (1989) (NOPSI). In *NOPSI*, the Supreme Court dealt with the question of whether to apply *Younger* to parallel state and federal proceedings *initiated by the same party*. The Court decided not to apply *Younger*. Indeed, the High Court reversed the Fifth Circuit's contrary application. *Id.* Despite the pendency of state court judicial proceedings which challenged a local administrative decision, the Supreme Court held that both actions could proceed:

[T]here is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts. Viewed as it should be, as no more than a state-court challenge to completed legislative action, the Louisiana suit comes within none of the exceptions that *Younger* and later cases have established.

*Id.* at 373.

75. *Ohio Civil Rights Comm'n. v. Dayton Christians Schools*, 477 U.S. 619, 627 n.2 (1986).

ever be brought to challenge the constitutionality of a state statute . . . .<sup>76</sup>

Third, if the *Mission Oaks* conclusion is correct, then any application of it must be narrow and must rest on the two limitations present in that case: (1) the subject matter is mobilehome rent control, and (2) the reservation of rights was filed substantially after the complaint. Only such a narrow construction could approach making sense, though it does not quite get there. The *Williamson County* Court plainly did not believe that the general state land use laws before it (typical of laws in all states—many of which are merely variants of standardized model statutes) demonstrated sufficient state interest to oust federal courts of jurisdiction to consider constitutional takings claims. The only compatible reading of *Mission Oaks* is that mobilehome rent control laws may be sufficiently distinct and specific to justify this state interest. No court, however, has said that, and even that feels like a revisionist view of *Williamson County*.

It may make sense to preclude property owners who test the litigation waters in state court from jumping to the federal forum midstream, without stating their intentions to do so previously. The possibilities for gamesmanship and forum shopping are apparent; *Mission Oaks* properly disallowed them. But in so doing, *Mission Oaks* threw out the proverbial baby with the unripe bath water. Slamming the federal courthouse door on a property owner who has filed in state court under compulsion of the Supreme Court's ruling which has been enforced repeatedly by circuit and district courts, does not discourage gamesmanship;<sup>77</sup> especially when the property owner forthrightly informed the state court and the defendants, from the outset, that federal questions are reserved for trial in federal court. However, the warning of *Mission Oaks* is clear: in addition to watching the pea and the shells, property owners need to examine the table. A trap door may exist through which the jurisdictional pea can disappear altogether.

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76. *Illinois v. General Elec. Co.*, 683 F.2d 206, 213 (7th Cir 1982).

77. On the contrary, it encourages gamesmanship by governmental defendants. *See infra* note 84.

IV. A SCREWBALL FROM THE SUPREME COURT: *INTERNATIONAL SURGEONS*

As if things were not confused enough, the Supreme Court threw not just a curve, but a screwball, when it decided *City of Chicago v. International College of Surgeons*.<sup>78</sup> In contrast to the routine regulatory taking case, in which the plaintiff property owners seek federal court review of local action, the city invoked federal jurisdiction in *International Surgeons*—and it succeeded.

The College of Surgeons owned two buildings on Chicago's lakefront that it planned to demolish and redevelop.<sup>79</sup> The city declared them landmarks, which effectively ended that plan. So the Surgeons filed suit. As required by *Williamson County*, they filed their suit in state court. Because the complaint raised the federal constitutional question of whether the city's actions had taken property without compensation, the city removed the case to federal court.<sup>80</sup>

The district court assumed jurisdiction and entered summary judgment for the city. On appeal, however, the Seventh Circuit reversed, holding that the case was not properly subject to removal because the underlying issues involved review of municipal actions that were subject to a deferential standard of review and such administrative proceedings did not fit the definition of a "civil action" that could be removed from state to federal court.<sup>81</sup>

On the city's petition, the Supreme Court granted certiorari and reversed again. To those who have long toiled in this particular legal vineyard, the result was stunning, and the reasoning was even more so. In contrast to all the cases discussed earlier in this article, the Supreme Court airily noted that "a facial challenge to an allegedly unconstitutional zoning ordinance is a claim which we would assuredly not require to be brought in state courts."<sup>82</sup> One is left figuratively, and perhaps literally, gasping for breath. Nowhere in

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78. 522 U.S. 156 (1997).

79. *Id.* at 159-60.

80. *Id.* at 161. See 28 U.S.C. § 1441(a).

81. *International College of Surgeons v. City of Chicago*, 91 F.3d 981, 984 (7th Cir. 1996).

82. 522 U.S. at 159.

either the majority or the dissent is there any mention of *Williamson County* and the ripeness hurdles that ordinarily stand impregnably in the way of such an occurrence. Nowhere in the court's opinion is there a reference to the abstention doctrine that is routinely used to close the federal courthouse door to any property owners who are able to allege ripe claims.<sup>83</sup> Where property owners are routinely ushered to state courts, the City of Chicago was told that the claim made against it was one that the Court "would assuredly not require to be brought in state courts."

After *International Surgeons* the state of the law is that property owners have to file in state court, but regulators have a free hand to remove such cases to federal court at their whim because the owners "assuredly" could have brought the action in federal court to begin with.<sup>84</sup> Alternatively the entire *Williamson County* line of ripeness decisions has been swept aside *sub silencio*. In the argot of today's youth, "Yeah, right!"

#### V. ACADEMICS AND PRACTITIONERS ALIKE AGREE THAT THE INTERFACE BETWEEN *WILLIAMSON COUNTY* AND *RES JUDICATA* IS CONFUSED AND UNJUST

Of all the aspects of regulatory taking law that critics have criticized as confusing, the ripeness doctrine of *Williamson County* has received the most.<sup>85</sup> Further, "[o]ne of the most confusing aspects

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83. For a particularly grotesque example, see *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 405 (9th Cir. 1996), in which the court held that the district court erred when it dismissed the complaint for lack of ripeness because it should have abstained instead. The plaintiff was a Wyoming corporation suing a California municipality under diversity jurisdiction. *Id.* at 407. Notwithstanding diversity jurisdiction's purpose to shield such plaintiffs from the vicissitudes of state court litigation, both federal courts found a way to undercut federal jurisdiction and leave the matter to the state judiciary.

84. This removal game is out-of-hand. In *Reahard v. Lee County*, 30 F.3d 1412, 1414 (11th Cir. 1994), the county removed the case to federal court, preventing the state courts from processing the claim and then convinced the court to dismiss the case as unripe *because it had not been first tried in state court*. *Id.* at 1418. See also *Simi Investment Co. v. Harris County*, 13 F. Supp.2d 603, 605 (S. D. Tex. 1998). If "chutzpah" had not already been amply illustrated, see Gerald Uelmen, *Plain Yiddish For Lawyers*, 71 A.B.A. J. 78, 78-79 (1985), that ploy would do.

85. A recent, albeit pungent, illustration is Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?* 30 URB. LAW. 307 (1998).

of the [*Williamson County*] decision . . .”<sup>86</sup> is the requirement that federal claims be “ripened” in state court before presentation to a federal court. Land use law experts describe the lower court efforts as “riddled with obfuscation and inconsistency,”<sup>87</sup> “unclear and inexact,”<sup>88</sup> a “judicially created quagmire” and a “Kafkaesque maze.”<sup>89</sup>

The primary target of this criticism is the outright deception of litigants wrought when *Williamson County*’s promise of a federal forum is dashed by the application of *res judicata*.<sup>90</sup> That result has been criticized, even by those who think it is appropriate as “anomalous,” “surprising,”<sup>91</sup> “unpleasant,”<sup>92</sup> and “a trap for the unwary.”<sup>93</sup> As Professor Roberts described it: “Certainly an anomaly exists: an unripe suit is barred at the moment it comes into existence. Like a tomato that suffers vine rot, it goes from being green to mushy red overnight. It can never be eaten.”<sup>94</sup>

Part of the problem has been laid at the Supreme Court’s doorstep because of its “incomplete exposition;”<sup>95</sup> the Court has never explained how *Williamson County* and the rules of claim and issue preclusion relate to each other. However, as Professor Mandelker and two of his Washington University colleagues stated: “[t]he Supreme Court could hardly have intended the ripeness rules to become a trap for federal litigants.”<sup>96</sup>

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86. JAN LAITOS, LAW OF PROPERTY RIGHTS PROTECTION 10-20 (1999).

87. The testimony of Professor Daniel R. Mandelker before the House Judiciary Committee is reproduced in full at 31 URB. LAW. 234, 236 (1999).

88. ROBERT MELTZ ET AL., THE TAKINGS ISSUE 67 (1999).

89. Timothy Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W.L. REV. 1, 44, 51 (1992).

90. See Thomas Roberts, *Fifth Amendment Taking Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 URB. LAW. 479, 480 (1992) (“Reliance on the ripeness rationale, unfortunately, suggests to property owners that their complaints will be ripe and heard in the federal courts after their state suits are over.”); See also Laitos, *supra* note 86 (“This unfortunate result has produced an outcry from litigants who incorrectly assumed that compliance with [*Williamson County*] would eventually give them their day in federal court.”)

91. Roberts, *supra* note 13, at 64.

92. Roberts, *supra* note 90, at 480.

93. Meltz, *supra* note 88, at 67.

94. Roberts, *supra* note 13, at 68. *Ripeness and Forum Selection* at 68.

95. Stein, *supra* note 16, at 4.

96. DANIEL MANDELKER ET AL., FEDERAL LAND USE LAW 4A-23 (1998).

Unfortunately, regardless of the Court's intent, a trap is what has become of the rules. Once property owners submit their claims to state courts, their risk of never seeing the inside of a federal courthouse is high. Before Congress, Professor Mandelker testified that his extensive review of the lower federal court decisions showed a "wholesale abdication of federal jurisdiction in law suits where issues are raised concerning the constitutional validity of land use regulation [because] federal judges have distorted the Supreme Court's ripeness precedents to achieve [the] undeserved and unwarranted result [of] avoid[ing] the vast majority of takings cases on their merits."<sup>97</sup>

Even specialized scholars and informed attorneys are confused. Constituting a trap for the unwary, the present rule, or, more accurately, non-rule, "sometimes catches even the most careful and vigilant."<sup>98</sup> Thus, one keen observer concludes that "[t]his bar to the federal courts is almost complete,"<sup>99</sup> while others optimistically opine that "a litigant with a Federal takings claim is not denied access to Federal court, but simply must pursue available State remedies *before* going to Federal court."<sup>100</sup> However, this optimism is unwarranted as at least four circuits take a diametrically opposite view.

If, under *Williamson County*, property owners are the only constitutional claimants who must ripen their federal claims in state courts, concepts of claim and issue preclusion need to be applied in such a way that *Williamson County*'s promise of an eventual federal hearing is preserved. In one of its recent land use cases, the Supreme Court expressed its philosophy towards enforcing the protections of the Bill of Rights as follows: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be

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97. See *supra* note 87.

98. Meltz, *supra* note 88, at 67.

99. Roberts, *supra* note 90, 480.

100. Glenn Sugameli, "Takings" Bills Threaten People, Property, Zoning, and the Environment, 31 URB. LAW. 177, 187 (1999) (emphasis added) (citation omitted). Mr. Sugameli is one of the most vocal defenders of the status quo. Cynics might view his argument as eyewash intended to deceive Congress into believing that the law is working fairly and that there is no need for reform. Statistics collected by others belie his assertion. See, e.g., Delaney, *supra* note 3, at 202.



relegated to the status of a poor relation . . . .”<sup>101</sup>

That philosophy requires additional support to make it real. Until the draconian ripeness rules are revised so that property owners may, like all other citizens, seek immediate federal court protection when their federal constitutional rights are infringed, any protection offered by the Takings Clause of the 5th Amendment will remain a poor relation.

*A. Property Owners Complaining of Fifth and Fourteenth Amendment Violations Are the Only Ones Required to Run a State Court Litigational Gauntlet Before They May Seek Relief From a U.S. District Court. There is No Rational Justification for This Disparity of Treatment*

Presently, property owners’ Fifth Amendment rights *de facto* remain a poor relation as compared to others in the Bill of Rights. People who are prosecuted in state courts may be required to raise their federal constitutional defenses on pain of losing their ability to litigate them later.<sup>102</sup> The same may be true of those who actively seek recompense under the aegis of state law in state courts for violation of their civil rights.<sup>103</sup> No other federally protected rights have the *Williamson County* precondition to federal litigation. All other federally protected rights may be vindicated in federal court without first having to pass through a state court filter, if the plaintiff so chooses. Indeed, the rule seems to be that the more unsavory the litigant, the higher the level of constitutional scrutiny. The protections routinely provided to Nazis and Klansmen is legendary. The same is true with accused felons whose guilt is beyond dispute

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101. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

102. *See, e.g., Allen v. McCurry*, 449 U.S. 90 (1980).

103. *See, e.g., Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 (1984). In *Migra*, the Court held that *res judicata* and collateral estoppel will bar a subsequent federal suit if the would-be federal litigant *voluntarily* filed the state court suit and could have, but did not, raise his federal claims in state court. *Id.* at 85. Absent both halves of that formula, federal litigation is permissible. The *Migra* analysis contained a reference to the earlier decision in *England*. *Id.* at 85 n.7. Thus, when it decided *Migra*, the Supreme Court was conscious of the need to preserve the federal forum for those *forced* into state court against their will, but not necessarily for those who *voluntarily* submit to the state court’s jurisdiction. Because of that recognition, the Court limited the preclusive effect of the full faith and credit clause to those who voluntarily submit to state court jurisdiction.

and has even been duly adjudicated. Property owners seeking only to make productive use of land are at the bottom of the Bill of Rights protection list.<sup>104</sup>

Federal court protection is also routinely provided in land use cases involving other aspects of the Bill of Rights.<sup>105</sup> For example, the validity of local land use ordinances regulating sexually explicit work has been challenged in federal court under the First Amendment.<sup>106</sup> In these cases, there is no requirement of first presenting the issues to state courts, even though they implicate the same zoning policies and ordinances as other land use cases and even though in these cases courts apply “contemporary community standards.”

Similarly, First Amendment cases dealing with the establishment of religion are litigated first in federal courts, without any required stopover in state courts, even when they implicate local land use issues.<sup>107</sup> The same is true of cases dealing with education, where federal courts decide questions of religious involvement without any assistance from state courts.<sup>108</sup> In *Monroe v. Pape*,<sup>109</sup> the federal courts reviewed a petitioner’s claim that the Chicago police had

104. When, for example, has the American Civil Liberties Union appeared as a friend of the court to defend the civil rights of property owners? The answer, regardless of the issue, is never.

105. A personal sore point remains in *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1160 (4th Cir. 1991). This is a case about billboard amortization, in which the company challenged an ordinance on both First and Fifth Amendment grounds. *Id.* Although the court eventually upheld the ordinance against both challenges, the court’s analysis was amazing. The Fifth Amendment claim was dismissed because it was barred by the statute of limitations. *Id.* at 1168. It took the court endless pages of agonizing before it concluded that the claim could not proceed. *Id.* at 1161-68. When the court then turned to the First Amendment, however, the court found no statute of limitations problem: The court addressed the issue on the merits. The court reasoned that, “it is doubtful that an ordinance facially offensive to the First Amendment can be insulated from challenge by a statutory limitations period . . .” *Id.* at 1168. Why should one facial invalidity under the Bill of Rights be shielded by limitations, but not the other? The only explanation is the poor relation status of property rights protection. The Supreme Court, however, denied certiorari in this case. 504 U.S. 931 (1992).

106. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 43 (1986); See also *Young v. American Mini Theatres Inc.*, 427 U.S. 50, 52 (1976).

107. See *City of Boerne v. Flores*, 521 U.S. 507 (1997); *First Assembly of God v. Collier County*, 20 F.3d 419, 420 (11th Cir. 1994); *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116 (1982).

108. See *Wallace v. Jaffree*, 472 U.S. 38 (1985); *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Abingdon School Dist. v. Schemp*, 374 U.S. 203, 205 (1963).

109. 365 U.S. 167, 170-83 (1961)

violated his fourth Amendment rights, and did so without requiring him first to seek relief in state court.<sup>110</sup> This also applies to claims of racial segregation.<sup>111</sup>

The cases cited above deal with parallel features of the Bill of Rights, which are routinely protected in federal court through 42 U.S.C. § 1983. The plaintiffs in § 1983 cases were able to proceed directly to federal district courts to seek redress for alleged violations of their federally protected rights.<sup>112</sup> Why are property owners required to go first to state court in order to ripen their federal taking claims?<sup>113</sup> When viewed in the broader context of federal law, the rationale of *Williamson County* does not survive scrutiny.<sup>114</sup>

If, as the Court told us in *Dolan*, rights protected by the property clauses of the Fifth and Fourteenth Amendments are indeed not to be relegated to the status of a poor relation, then one of two things needs to happen. Either the court must reconsider *Williamson County*, or the court must reconcile the concepts of claim and issue preclusion with *Williamson County* in a manner that preserves the state court ripening process while also preserving the aggrieved citizens' rights. This includes preserving federal court jurisdiction to determine the validity of their federal constitutional claims. By forcing property owners to

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110. *Id.* at 183.

111. *McNeese v. Bd. of Educ.*, 373 U.S. 668 (1963).

112. For example, at the behest of aggrieved citizens, federal courts have involved themselves in the local intricacies of city budget policy, *Berkley v. Common Council*, 63 F.3d 295, 296 (4th Cir. 1995) (*en banc*), county law enforcement policy, *Turner v. Upton County*, 915 F.2d 133, 135 (5th Cir. 1990), municipal policy governing the use of force during arrests, *Beck v. City of Pittsburgh*, 89 F.3d 966, 967 (3d Cir. 1996), county road acquisition policy, *Hammond v. County of Madera*, 859 F.2d 797, 800 (9th Cir. 1988), municipal employment policy, *Richardson v. Leeds Police Dept.*, 71 F.3d 801, 803 (11th Cir. 1995), city medical care policy, *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1049 (3d Cir. 1991), school district sexual abuse policy, *Gonzalez v. Ysleta Indep. School Dist.*, 996 F.2d 745, 746 (5th Cir. 1993), police department sexual harassment policy, *Gares v. Willingboro Twp.*, 90 F.3d 720, 722 (3d Cir. 1996), and even the question whether "extortion of outsiders, businessmen, or developers" was town policy, *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 575-76 (1st Cir. 1996).

113. See *Kassouni*, *supra* note 89, at 2 ("The net result is a special ripeness doctrine applicable only to constitutional property rights claims."). See also William A. Fischel, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 55 (1995); Delaney & Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 *URB. LAW.* 195, 198 (1999); Stein, *supra* note 16, at 13-14; for a discussion of the justification offered by the Court in *Williamson County* and its transparent unsoundness, see *Kanner*, *supra* note 85, at 327-28.

114. See *Kanner*, *supra* note 85, at 327-28.

proceed through a hopeless morass of state court procedures through this misapplication of the doctrine of *res judicata*, those plaintiffs will never see the inside of a federal courthouse. Therefore, the “poor relation” status of their constitutional protection is guaranteed.

*B. Because of the Importance the Supreme Court has Always Placed on the Ability of Constitutional Plaintiffs to Have Access to Federal Courts, A Mechanical Application of Ordinary Precepts of Claim and Issue Preclusion Should Not be Used to Bar the Courthouse Doors After Property Owners Comply with the “Ripeness” Requirements of Williamson County; That Makes the Court’s Holding Self-Stultifying*

Both before and after *Williamson County*, the Supreme Court’s cases have uniformly held that suits seeking redress under 42 U.S.C. § 1983 belong in federal court, regardless of the possibility of obtaining relief in state court, because federal courts are uniquely suited and intended to adjudicate federal issues. Section 1983 was intended to provide “a uniquely federal remedy”<sup>115</sup> with “broad and sweeping . . . protection”<sup>116</sup> so that individuals in a wide variety of factual situations are able to obtain a *federal* remedy when their *federally* protected rights are abridged.<sup>117</sup> While read against the general common law tort background, “[t]he coverage of the statute [§ 1983] is . . . broader,”<sup>118</sup> and courts must broadly and liberally construe it to achieve its goals.<sup>119</sup> “[T]he central purpose of the Reconstruction-Era laws is to provide compensatory relief to those deprived of their federal rights by state actors”<sup>120</sup> by “*interpos[ing] the federal courts between the States and the people, as guardians of the people’s federal rights . . .*”<sup>121</sup> *Williamson County* stands this doctrine on its head by asserting that state courts not only *may* be interposed between the people and the federal vindication of their

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115. *Mitchum v. Foster*, 407 U.S. 225, 239 (1972).

116. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543-44 (1972).

117. *See Burnett v. Grattan*, 468 U.S. 42, 50, 55 (1984).

118. *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997).

119. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989); *Lake Country Estates, Inc. v. Tahoe Reg’l. Plan. Agency*, 440 U.S. 391, 399-400 (1979).

120. *Felder v. Casey*, 487 U.S. 131, 141 (1988).

121. *Mitchum*, 407 U.S. at 242 (emphasis added).

rights against misbehaving land regulatory functionaries, but indeed *must* be interposed.

On several occasions, the Court examined the background of § 1983. The seminal decision in *Monroe*, for example, concluded:

The debates were long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a *federal right in federal courts* because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies. It is no answer that the State has a law which if enforced would give relief. *The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.*<sup>122</sup>

In *Patsy v. Florida Board of Regents*, the Court again examined the Congressional debates preceding the adoption of § 1983, and concluded that Congress intended to “throw open the doors of the United States courts” to those who had been deprived of constitutional rights “and to provide these individuals *immediate access to the federal courts . . .*”<sup>123</sup>

If, as the Court has repeatedly held, Congress intended for § 1983 plaintiffs to have their cases tried in federal courts if they so opted, then some modification of the general standards for claim and issue preclusion seems mandated. Otherwise, the law creates a class of constitutional pariahs who may never litigate their federal constitutional claims in federal court. *Williamson County* segregates this one type of § 1983 litigation and, instead of providing “immediate access to the federal courts,” requires a ripening procedure that absolutely precludes access to the federal courts. As Professor Laitos recently stated: “The combined effect of [*Williamson County*], *res judicata*, collateral estoppel, and the full faith and credit statute is to make a takings claim moot, and

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122. *Monroe*, 365 U.S. at 180-83 (emphasis added). The same theme appears in *McNeese v. Board of Education*, 373 U.S. 668, 671-72 (1963).

123. 457 U.S. 496, 504 (1982) (emphasis added).

precluded, if a property owner takes all the necessary steps to make the claim ripe.”<sup>124</sup> The Congress that sought to “interpose the federal courts between the States and the people, as guardians of the people’s federal rights”<sup>125</sup> could not have intended this result. Moreover, if state court litigation legally precludes these § 1983 plaintiffs from federal court, then not only are constitutional plaintiffs at the mercy of state courts, but also state courts then get to define the contours of federal law and are *de facto* free to trump the federal courts’ interpretation of federal law. This is a rather grotesque result that makes hash out of the federal supremacy clause.<sup>126</sup> Supreme Court jurisprudence, however, forbids that sort of power to the states. After all, this kind of litigation is all about *federal* rights. State courts cannot be granted the power to define federal claims: “‘Congress,’ we have previously noted, ‘surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action.’”<sup>127</sup>

It is one thing for the Court to invoke a rule of prudential ripeness,<sup>128</sup> and ask state courts to determine the extent of the remedies they offer under the circumstances. It is something quite different to overlay doctrines of claim and issue preclusion on the state courts’ answers, and thereby enable states to flatly deny federal constitutional rights to property owners. This difference was dramatically illustrated by the *Rainey Brothers* case. In other words, this misguided approach grants states the power to deny access to federal courts; a consequence that is unseemly when one considers that § 1983 was enacted precisely to avoid that result. By granting preclusive effect to either the entire claim presented to the state court or to discrete issues litigated, the interpretation of *Williamson County* by the Third, Sixth, Ninth, and Tenth Circuits flies in the face of

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124. Laitos, *supra* note 86, at 10-25.

125. Mitchum, 407 U.S. at 243.

126. U.S. CONST., Art. VI, § 2. The result gives rise to a *sub rosa* resuscitation of the interposition doctrine that reared its head briefly in the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954), only to be interred in *Cooper v. Aaron*, 358 U.S. 1 (1958).

127. Felder v. Casey, 487 U.S. 131, 144 (1988) (*quoting* Wilson v. Garcia, 471 U.S. 261 (1985)).

128. *See* Suitum v. Tahoe Reg. Plan. Agency, 520 U.S. 725, 733-34 (1997).

settled § 1983 jurisprudence. In fact, this is contrary to what the Supreme Court has acknowledged in the abstention context. How, and where, a case is tried can be critical, and plaintiffs who desire to try their federal claims in federal court cannot be compelled to accept a state court's factual determinations.

It is true that, after a post-abstention determination and rejection of his federal claims by the state courts, a litigant could seek direct review in this Court. But such review . . . is an *inadequate substitute* for the initial District Court determination . . . to which the litigant is entitled in the federal courts. This is true as to issues of law; it is *especially true as to issues of fact*. Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. *How the facts are found will often dictate the decision of federal claims. It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.*<sup>[129]</sup> There is always in litigation a margin of error, representing error in factfinding. Thus in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, *a litigant may not be unwillingly deprived of that determination*. The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his *right to litigate his federal claims fully in federal courts.*<sup>130</sup>

Thus, as the Court acknowledged in abstention cases, it now seems necessary, as the lowest level of protection affordable to Fifth Amendment property rights, for the Court to acknowledge that in the unique class of land use ripeness cases a trial in state court may be a precondition designed to weed out the cases where relief is granted

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129. Recent law emphasizes this important point. In federal actions brought under 42 U.S.C. § 1983, such factual determinations may be made by a jury. *See City of Monterey v. Del Monte Dunes*, 119 S. Ct. 1624 (1999). Thus, the ripeness doctrine not only strips landowners of their right to litigate their federal claims in a federal forum, but, adding insult to injury, also denies them their Seventh Amendment right to a jury trial as well when they sue under § 1983.

130. *England v. Louisiana Medical Examiners*, 375 U.S. 411, 416-417 (1964) (internal quotations and citations omitted (emphasis added)).

by state law. Obtaining state court relief may moot the federal issue, but unsuccessful state court litigation “may not be substituted, against a party’s wishes, for his right to litigate his federal claims fully in federal courts.”

The Court has extensive experience with the relationship between state and federal courts in a different, yet analogous, field—federal habeas corpus petitions, an area of the law that likewise rejects the notion of preclusion. Habeas petitioners are required to present their federal constitutional issues to state court before seeking federal court relief. This procedure ensures that state courts have the opportunity to correct their own constitutional violations before they are brought before a federal district court.<sup>131</sup> The requirement to repair first to the state courts, and to present all of the state and federal constitutional issues that will eventually be raised in federal court, is not jurisdictional,<sup>132</sup> but it is nonetheless required.<sup>133</sup>

Having presented all of the federal constitutional issues to the state court for adjudication, and having received an unfavorable response, is the habeas corpus petitioner subjected to *res judicata* and full faith and credit arguments upon arriving in federal Court? No. The Supreme Court put it plainly in *Wainwright v. Sykes*: “It is *not res judicata*.”<sup>134</sup> If submitting *federal* constitutional issues to a state court for review does not preclude later federal examination of those *same* issues, then *a fortiori*, the forced submission of *state* constitutional issues to a state court should not, indeed cannot, logically preclude later adjudication of *federal* constitutional issues by a federal court in this Fifth and Fourteenth Amendment context.

No intellectually defensible reason explains why property owners in § 1983 cases should be confronted with the bar of *res judicata* when they seek to enter the federal courthouse doors that were supposedly “throw[n] open” to them by § 1983,<sup>135</sup> so that they would have a federal forum in which to litigate their federal claims.

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131. *Picard v. Connor*, 404 U.S. 270, 275 (1971).

132. *Castille v. Peoples*, 489 U.S. 346, 349 (1989).

133. *O’Sullivan v. Boerckel*, 119 S.Ct. 1728 (1999).

134. 433 U.S. 72, 80 (1977) (emphasis added).

135. *Patsy*, 457 U.S. at 504.



## CONCLUSION

The land use ripeness cases have not been the judiciary's finest hour. Although garbed in intellectual robes and couched in jurisprudential terminology like *res judicata*, collateral estoppel, and due process, the result simply has been unintelligible. The courts have presented a pile of meaningless legalistic verbiage, the sort of thing that gives lawyers and judges a bad name.

That is not said lightly, and it is said more in sadness than in anger. I retain the highest respect for the judiciary as an institution.<sup>136</sup> But no matter how respectable the institution, its handiwork must still pass intellectual muster on its own merits. It is simply impossible to analyze the obtuse intellectual maze of land use ripeness decisions inflicted since the early 1980s and come away doing anything but shaking one's head in dazed wonder.<sup>137</sup> These cases are bewildering.

Set aside, for the moment, the idea that no principled justification exists for making property owners jump extra hurdles to enable them to obtain federal court protection of their federal constitutional rights. If one takes *Williamson County* at face value, there is not a lot of subtlety to it. Either the Supreme Court meant something when it decided *Williamson County*, or it did not. If the latter is true, the Court was merely uttering meaningless rhetoric, with no more purpose than to stave off the day of intellectual reckoning. If, however, the Supreme Court meant what it repeatedly said, that a claim for just compensation for a regulatory taking of property *is* ripe for litigation on the merits in federal district court once a final, unfavorable regulatory decision has been issued by the state courts

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136. I am even on record to that effect. See Michael M. Berger & Richard D. Norton, *An Independent Judiciary: Society's Bulwark*, *Verdict Magazine*, 1998, at 18.

137. There is a huge and unjustified difference between land use ripeness cases and all other ripeness cases. In other fields, the courts have shown a remarkable ability to make sense. For example, the Supreme Court's general rule of ripeness is said to be applied in a "pragmatic way." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). In general, for ripeness to be present there must be "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant" judicial intervention. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). Significantly, outside the land use field, such controversies are ripe for litigation even before regulations are applied, as long as "expected conformity to them causes injury . . ." *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 419 (1942) (emphasis added). Ironically, those requirements are fulfilled in virtually every constitutional land use case that has been dismissed nonetheless for lack of ripeness.

then it is incumbent on the lower federal courts to give meaning to that decision. They *cannot*, with any degree of intellectual honesty, apply by rote the general precepts of claim and issue preclusion without noting the destructive impact on those general rules of the core holding of *Williamson County*. It is axiomatic that, decisions which are either later in time, or specific rather than general, prevail; *Williamson County* was both. Whether by design or blunder, the Supreme Court justices created a system in which they instructed property owners with constitutional claims to litigate the same factual case twice: once, under state law in state court, and then, if they so chose, again in federal court under federal law. It is simply impermissible to say that when the Supreme Court did so, it meant to create a system in which property owners are deliberately duped into giving up their right to federal litigation of federal constitutional issues because they do their best to comply with *Williamson County*'s clear holding. That would be too cruel to contemplate.

Likewise, in *Younger* situations, the mere filing of an earlier suit in state court *automatically* requires dismissal of any duplicative suit filed later in federal court. But, under *Williamson County*, claims are not ripe for litigation in federal district court until relief has been sought and denied in state court. Thus, if *Younger* applies routinely, then the very compliance with the mandate of *Williamson County* automatically triggers *Younger* and prevents the property owner from ever ripening a case in the manner prescribed by *Williamson County*. *Younger* was decided four years before *Williamson County*; surely, the Supreme Court must have been aware of it. Again, it cannot be presumed that the Court thus concocted a procedural morass that is self-stultifying in operation.

The lower federal courts, however, have surely made a hash of things. Their decisions bear all the earmarks of result-orientation run amok. For whatever reason, they simply do not like land use cases, at least when they implicate regulatory takings.<sup>138</sup> As a consequence,

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138. I have lost count of the number of times federal courts have complained about attempts to make them "the grand mufti of planning," or a "super zoning board of appeals," as though there were something less savory about reviewing municipal land use activities than municipal jail conditions or other forms of governmental constitutional misfeasance. See, e.g., *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989); *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988). But miraculously, when they deem the

those courts have *de facto* refused to enforce *Williamson County* as plainly written and have transmogrified it into some sort of all-purpose bar to federal litigation of this one, specific federal constitutional guarantee.

That is why, in frustration, people concerned about the constitutional rights of property owners have turned to Congress and sought to have federal court jurisdictional statutes augmented. People want to make clear that cases involving regulatory excesses of the land use variety can have their federal constitutional aspects litigated before federal judges.

In fairness, and in defense of the integrity of our constitutional system, it is time for the Supreme Court to rethink *Williamson County*. The decision has been on the books for a decade and a half, and it has done nothing but pollute the federal case reports and unjustly bar the victims of municipal overregulation from their day in federal court. Instead of providing orderly adjudication, it has sent them on a jurisdictional search for some sort of Holy Grail that claims most victims by exhaustion, and for those who survive their trip through the gauntlet, by the wooden application of doctrines of preclusion and dismissal.

Where is Justice William O. Douglas now that we really need him? For better or for worse, he left the bench before the binge of land use ripeness cases began. He held forth on the problems of requiring multi-court litigation in the context of abstention, and his thoughts bear repetition—nay, broadcast—today. Twenty years after *Pullman*, he said: “I was a member of the Court that launched *Pullman* and sent it on its way. . . [b]ut if I had realized the creature it was to become, my doubts would have been far deeper than they were.”<sup>139</sup> In words that have since become all too familiar when

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contested land use issues to be “politically correct” federal courts have no trouble acting as “zoning boards of appeals.” See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); *Larkin v. Grendel’s Den*, 459 U.S. 116 (1982); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

139. *England v. Louisiana Medical Examiners*, 375 U.S. 411, 425 (1964). When the Supreme Court decided *Pullman* in 1941, the case was a comparatively straightforward task to litigate in state courts and to get a definitive adjudication of the underlying state law issue. Today, however, with state supreme courts denying discretionary review in the vast majority of

dealing with the ripeness mess, he called abstention “a trap for the unwary,”<sup>140</sup> “something of a Frankenstein,”<sup>141</sup> and “an unnecessary price to pay for our federalism.”<sup>142</sup> Noting that “res judicata is not a constitutional principle,”<sup>143</sup> he railed against any procedure that would penalize litigants whose only sin was to follow the procedures mandated by the Supreme Court: “Any presumption should work the other way—that he who is *required* to go to the state courts and does what we *require* him to do when he gets there, is not there voluntarily and does not forsake his federal suit . . .”<sup>144</sup>

Most of all, Justice Douglas became concerned about the inordinate consumption of time and resources that multi-court litigation demanded, fearing that plaintiffs “will be ground down slowly by the passage of time and the expenditure of money in state proceedings, leaving the ultimate remedy here, at least in many cases, an illusory one.”<sup>145</sup> I can do no better than to conclude by quoting, as did Justice Douglas, an earlier Douglas dissent expressing the fundamental unfairness of the process that abstention, and now land use ripeness, had become:

Shuttling the parties between state and federal tribunals is a sure way of defeating the ends of justice. The pursuit of justice is not an academic exercise. There are no foundations to finance the resolution of nice state law questions involved in federal court litigation. The parties are entitled—absent unique and rare situations—to adjudication of their rights in the tribunals which Congress has empowered to act.<sup>146</sup>

The parties certainly are so entitled; land use cases are no less than any other matter of constitutional import. It is time for the

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cases, and with intermediate state appellate courts deciding most cases by unpublished, and, thus uncitable opinions, a detour through state courts can be, and often is, little more than a waste of time and money that in the end fails to produce the sought-after clarification of state law.

140. *Id.* at 433.

141. *Id.* at 429.

142. *Id.* at 426.

143. *Id.* at 429.

144. 375 U.S. at 429 (emphasis in original).

145. *Id.* at 436-37.

146. *Id.* at 425 (quoting *Clay v. Sun Ins. Office*, 363 U.S. at 228 (Douglas, J., dissenting)).

Supreme Court to reclaim for the federal courts their historic role as defenders of the Constitution, with respect to the last clause of the fifth Amendment as well as its siblings in the Bill of Rights. Then, property owners no longer will be the constitutional poor relations the Court decried in *Dolan*.