MULTIJURISDICTIONALITY AND FEDERALISM: ASSESSING *SAN REMO HOTEL*'S EFFECT ON REGULATORY TAKINGS

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Regulatory takings plaintiffs will increasingly litigate their cases in state court after San Remo Hotel v. City of San Francisco. *Previous U.S. Supreme Court precedent held that in order to ripen federal constitutional takings claims, plaintiffs had to first request just compensation from state courts. In* San Remo Hotel, *the Court held that the federal courts would not make an exception to the rules of preclusion to allow frustrated plaintiffs to litigate their federal claims in federal court after losing on the merits of their state claims in state court. The decision has been characterized as "jurisdiction stripping" and has been widely criticized.*

This Comment defends the outcome of San Remo Hotel *on normative grounds. Although the Court could have crafted an exception to preclusion rules in this case, state courts and policymakers are better situated to adjudicate and adjust property entitlements. Moreover, deference to local decisionmaking, forces of competitive federalism, and political accountability counterbalance concerns for property rights raised by critics of the decision. Although these protective forces are not perfect, they are constitutionally adequate, and are preferable to taxing judicial resources with duplicative litigation. Applying these conclusions, this Comment projects how the federal courts should respond to takings plaintiffs' attempts to circumvent the jurisdictional bar.*

Finally, this Comment offers a multijurisdictional solution to the problems posed by regulatory takings. While opening the doors to the federal courts for regulatory takings plaintiffs makes little sense when considering policy concerns, the potential for unfairness to some plaintiffs is unsatisfying. Accordingly, this Comment draws on concepts from the habeas corpus context to suggest an improvement in the status quo. Allowing some plaintiffs to collaterally attack questionable or meritless state court judgments can ensure that states do not abuse their jurisdictional authority over regulatory takings.

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INTRODUCTION

Imagine your aunt and uncle own a small hotel. Decades ago they bought a neglected vintage building in a quiet neighborhood near the waterfront. After renovating the design and décor, the hotel became popular with tourists. A few residents even lived there semi-permanently, coming during the summer and autumn months to enjoy the surroundings.

The rest of the city was not doing quite as well. School teachers and other public employees, not to mention several middleclass employees of city businesses, were commuting to the city from farther and farther inland because of a systemic housing shortage. In response, the county planning board passed an ordinance to try to protect the dwindling stock of affordable housing in the

region. The county ordinance prevented owners from converting property usage from housing to tourist or commercial uses without a permit. To acquire a permit, the owner would have to maintain the current stock of residential units by building or restoring housing elsewhere, or else would have to pay a massive fee to a county fund established to mitigate the housing shortage.

Due to a paperwork mistake, the county zoned your aunt and uncle's entire property as residential. As a result, under the housing ordinance, they would need to apply for an expensive permit to operate their business. And of course, as is the case with any dispute destined for analysis in a law review comment, the mistake was not noticed until it was too late to appeal. The county's final administrative decision demanded payment of the fee to rezone the property for tourist uses.

Your family sued, arguing that the government's fee was a taking of their property, which is contrary to the federal Constitution,[1] as well as most state constitutions.[2] Although your family initially brought suit in federal district court,[3] the federal courts declined to hear their case, pointing to both justiciability principles[4] and Supreme Court precedent that holds that plaintiffs are required to request just compensation from the state before suing in federal court.[5] In effect, the federal courts told your family to litigate in state court under

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

2. *See, e.g.*, CONN. CONST. art. 1, § 11; PA. CONST. art. 1, § 10; DEL. CONST. art. 1, § 8; CAL. CONST. art. 1, § 19; WASH. CONST. art. 1, § 16.

3. Plaintiffs alleging that state or local government action results in a taking of property without just compensation usually have viable claims under both the U.S. Constitution and applicable state law. The vehicle for protecting the federal constitutional rights is a section 1983 claim. *See* 42 U.S.C. § 1983 (2006) (providing a means for plaintiffs to enforce provisions of the Fourteenth Amendment by alleging a deprivation of constitutional rights under color of state law). Plaintiffs can allege facial and/or as-applied claims. *See infra* Part III.B.4 (discussing facial claims).

In most cases in which a plaintiff has both state and federal claims, the plaintiff may choose to bring suit in either state or federal court, or both. *See* Tafflin v. Levitt, 493 U.S. 455, 458–59 (1990) (stating that courts have "inherent authority" to adjudicate federal claims); THE FEDERALIST No. 82 (Alexander Hamilton) (discussing and supporting concurrent state jurisdiction for federal claims); *see also* 28 U.S.C. § 1367 (2006) (granting federal district courts jurisdiction over state law claims when they are part of the "same case or controversy" as the federal claim, but also permitting the court to dismiss state claims when the federal claims are all dismissed). It is generally in the plaintiff's interest—and the interest of the judicial system as a whole—to try cases arising from similar facts in one lawsuit. *See generally* BLACK'S LAW DICTIONARY 863 (8th ed. 2004) (defining "judicial economy").

Plaintiffs alleging that federal government action has resulted in a taking must sue for just compensation in the Court of Federal Claims. *See* 28 U.S.C. § 1491(a)(1) (2006) (granting exclusive jurisdiction to the Court of Federal Claims for claims under the Constitution against the federal government).

4. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 44 (5th ed. 2007) ("The justiciability doctrines determine which matters federal courts can hear and decide and which must be dismissed."); *id.* at 117–19 (discussing ripeness doctrine).

5. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 195 (1985).

state law, and then return to federal court if the state improperly denied relief.[6] So, your family went to state court but lost on the merits of their state constitutional claims.

When your family returned to federal district court, the court again refused to hear their federal constitutional claims, this time citing preclusion principles: Your family had already litigated their state constitutional takings claim in state court, and state law required that they bring any related claims, state or federal, in that litigation. Otherwise, such claims would be considered waived,[7] and federal courts are required to give "full faith and credit" to the final decisions of state courts.[8] This is the current state of affairs for as-applied regulatory takings claims:[9] Plaintiffs must first litigate in state court, but their state court litigation will generally preclude a federal court from subsequently hearing their federal constitutional claims.[10]

Precluding federal courts from hearing regulatory takings cases is extremely controversial. What if the state in question elects its judges and the government action that results in the taking is very popular? What if the plaintiff alleges that the state court misapplied the federal constitutional standard? What if the state litigation was procedurally unfair—and how unfair must it be to no longer bar federal relitigation? Does the fact that these cases involve property rather than civil rights or civil liberties make us feel differently about the constitutional claims?[11] Do we feel differently because regulatory takings plaintiffs are thought to be wealthier and more politically connected than typical civil rights plaintiffs? And if property rights are enforced inflexibly, does any room remain to rationally and collectively adjust property rights for the public interest?

These are the questions left open by *San Remo Hotel, L.P. v. City of San Francisco*.[12] There, the Court held that under the Full Faith and Credit Statute,[13] issue preclusion bars a plaintiff's as-applied regulatory takings claims from further

6. *See* San Remo Hotel v. City of San Francisco, 145 F.3d 1095, 1106 & n.7 (9th Cir. 1998) (reversing dismissal of facial takings claim with instructions to abstain on remand, and instructing the plaintiff how to preserve the claim for future federal adjudication).

7. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 18 (1982).

8. *See* U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (2006).

9. Regulatory takings are takings pursuant to government action that diminish property value, but do not wipe out all economic value of the property. Takings that result in the total loss of economic benefits are analyzed under different rules and are generally not affected by the jurisdictional issues discussed in this Comment. *See infra* Part I.A.

10. *See infra* Part II.A (discussing the current state of the law).

11. *But cf.* Gideon Kanner, *"[Un]equal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065, 1066 (2007) ("Justice Holmes had earlier likewise admonished that in eminent domain law the Constitution deals with people, not with tracts of land.").

12. 545 U.S. 323 (2005). For a detailed discussion of the case and its holding, see *infra* Part I.C.

13. 28 U.S.C. § 1738 (2006).

federal litigation after state court adjudication. This relatively uncontroversial statement of preclusion principles, however, becomes problematic because prior precedent requires takings plaintiffs to first ripen their as-applied federal claims in state court.[14]

Many have attacked the Court's decision and its implications for takings law.[15] Conversely, only a few have attempted to justify the *San Remo Hotel* decision.[16] Sorting out the various arguments is made more difficult by the complexity of takings doctrine,[17] and the Supreme Court's aversion to discussing the underlying policy arguments.[18] This Comment attempts to clarify the current state of the law, and to assess the arguments for and against barring many regulatory takings plaintiffs and claims from federal courts. Although other academics have written about these issues and questions since *San Remo Hotel* was decided, this Comment balances the arguments that have been made, demonstrates the tradeoffs involved with each side of the debate,[19] and makes a novel attempt to project how undecided issues will fit into the current doctrine.[20]

In this Comment, I argue that conventional attacks on the removal of lower federal court jurisdiction over regulatory takings claims are wrong.[21] Accordingly, this Comment argues that there are federalism, competency, and policy reasons for resolving these claims in state court, and that restricting regulatory takings claims to state court does not systematically or unconstitutionally disfavor property rights.

Although it is necessary to optimally allocate judicial business between state and federal courts,[22] the current delegation to the state courts does seem

14. *See infra* Part I.B.

15. *See infra* Part II.B; *see also* Scott A. Keller, Note, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the* Williamson County *State Litigation Requirement for Regulatory Takings Claims*, 85 TEX. L. REV. 199, 205 n.44 (2006) (collecting sources).

16. *See infra* Part II.B; *see also* Keller, *supra* note 15, at 206 n.45 (collecting sources supporting the result).

17. *Cf.* Rachel A. Rubin, Note, *Taking the Courts: A Brief History of Takings Jurisprudence and the Relationship Between State, Federal, and the United States Supreme Courts*, 35 HASTINGS CONST. L.Q. 897, 897 (2008) (describing takings law as a "confused muddle, intractable, [and an] ambiguous area" of the law) (citations removed).

18. *See infra* notes 122–127, 277–289 and accompanying text.

19. *See infra* Part II.B.

20. *See infra* Part III.B.

21. *See infra* Part II.B.1–II.B.3 (discussing lack of parity between state and federal courts, discrimination or disfavoring of property rights resulting from denial of lower federal court jurisdiction, and the inability of the Supreme Court to protect property rights through certiorari jurisdiction alone).

22. *See* Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1213 (2004) ("It is essential that we achieve a proper jurisdictional balance between the federal and state court systems, assigning to each system those cases most appropriate in light of the basic principles of federalism.") (quoting Chief Justice Earl Warren, Address at the 36th

unfair—or may actually be unfair—in certain narrow circumstances. This Comment therefore proposes a novel framework for limited federal collateral review of the procedural fairness of state court regulatory takings adjudication, importing principles from the habeas corpus context.[23] Limited collateral review safeguards against unfairness to individual litigants without resorting to overbroad proposals to overturn Supreme Court precedent or to disregard preclusion principles altogether, giving plaintiffs two bites at the constitutional apple.[24]

Part I of this Comment explores the case law concerning regulatory takings, with special focus on the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*.[25] It concludes with an in-depth analysis of the *San Remo Hotel* case and with a brief examination of the other landmark takings cases decided by the Court during the 2004 term. Although *Lingle v. Chevron U.S.A., Inc.*,[26] and *Kelo v. City of New London*[27] address different issues than *San Remo Hotel*, together they serve to delegate judicial decisionmaking and policy judgments from federal to state courts. Part II describes the state of the law after *San Remo Hotel*, and goes on to assess the impact of removing lower federal court jurisdiction over regulatory takings cases on all of the institutional actors—plaintiffs, local governments who may wish to regulate land use, state governments that wish to alter the underlying substantive property rules, and both federal and state courts. Part II argues that *San Remo Hotel* averts the disastrous state of affairs that would result from as-of-right relitigation of regulatory takings cases in federal court. Part III projects future development of doctrine in this arena by identifying where flaws in state court adjudication might result in suboptimal protection of constitutional rights. In so doing, I propose an improvement to the current jurisdictional allocation by analogizing arguments of litigants who attempt to subsequently gain access to the lower federal courts to those of habeas claimants. Ultimately, this Comment concludes that the values of federalism outweigh concerns that jurisdiction stripping

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American Law Institute Annual Meeting (May 20, 1959), *in* THE AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 1 (1969)).

23. *See infra* Part III.C.

24. The solutions proposed by critics of this state of the law, whether abrogating prior precedent or crafting a judicial exception, would allow de novo district court litigation even after a decision on the merits in state court. *See, e.g.*, Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118 (2d Cir. 2003), *overruled by* San Remo Hotel, L.P. v. City of San Francisco, 545 U.S. 323 (2005); J. David Breemer, *You Can Check Out but You Can Never Leave: The Story of* San Remo Hotel*—The Supreme Court Relegates Federal Takings Claims to State Courts Under a Rule Intended to Ripen the Claims for Federal Review*, 33 B.C. ENVTL. AFF. L. REV. 247, 287 (2006); Kanner, *supra* note 11, at 1074–78; Keller, *supra* note 15, at 199–202.

25. 473 U.S. 172 (1985).

26. 544 U.S. 528 (2005).

27. 545 U.S. 469 (2005).

equates to rights stripping, but argues that there may be room in judicial administration of regulatory takings for reasonable and targeted collateral review.

I. REGULATORY TAKINGS AND *SAN REMO HOTEL*

This Part describes the legal doctrine that provides the scope and dimensions of regulatory takings law. First, Subpart I.A provides a brief explanation of regulatory takings, distinguishing these claims from other types of claims in the takings arena. Next, Subparts I.B and I.C discuss the primary cases that removed lower federal court jurisdiction over regulatory takings: *Williamson County Regional Planning Commission v. Hamilton Bank*[28] and *San Remo Hotel, L.P. v. City of San Francisco*.[29] Finally, Subpart I.D contextualizes the *San Remo Hotel* decision among the other landmark takings decisions of the Court's 2004 term: *Lingle v. Chevron U.S.A., Inc*.[30] and *Kelo v. City of New London*.[31]

A. Regulatory Takings

"The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[32]

A regulatory taking concerns the effects of government regulation of property ownership, providing some protection by requiring the government to pay just compensation.[33] Just compensation is required for takings—as set forth in the U.S. Constitution[34] and Supreme Court precedent—so that the government may not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[35] But as Justice Holmes pointed out, individuals may only recover just compensation for regulation that goes "too far."[36] After all, "[g]overnment hardly could go on if to some

28. 473 U.S. 172 (1985).
29. 545 U.S. 323 (2005).
30. 544 U.S. 528 (2005).
31. 545 U.S. 469 (2005).
32. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (Holmes, J.).
33. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 536–37 (2005).
34. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").
35. Armstrong v. United States, 364 U.S. 40, 49 (1960).
36. *Pa. Coal*, 260 U.S. at 415.

extent values incident to property could not be diminished without paying for every such change in the general law."[37]

Regulatory takings involve government action that does not wipe out a property's value, but nonetheless diminishes it in some substantial way.[38] Regulatory takings are analytically distinct, however, from the per se takings that occur when the government physically invades property,[39] or when the government regulations completely deprive an owner of "*all* economically beneficial us[e]" of property.[40] Regulatory takings are also analytically distinct from exactions imposed upon developers, though there is some conceptual overlap.[41]

For much of U.S. history, regulatory takings jurisprudence was largely cabined within the category of eminent domain cases.[42] Government regulations that affected private property were justified as an exercise of the "police power[ ] . . . exerted for the protection of the health, morals, and safety of the people."[43] If the government was merely regulating to address a nuisance, the property owner did not have a valid takings claim for the diminished value of her property.[44] In this jurisprudential era, courts would analyze property rights according to the property's ideal value and uses, not in relation to preexisting value or law.[45] Of course, this type of categorical distinction is anathema to modern society, in which property is conceptualized as an overlapping bundle of

37. *Id.* For example, a government agency that zones certain property to prevent any use other than affordable housing may diminish the economic value of that property to the benefit of others. But this sort of zoning is valid and necessary for optimal land use regulation.

38. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123–24 (1978).

39. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

40. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992). Although the per se and regulatory takings cases are analytically distinct, in either instance the government is imposing a functionally similar burden on the property or property owner. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 539 (2005).

41. *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987). Specifically, "[e]xactions require that developers provide, or pay for, some public facility or other amenity as a condition for receiving permission for a land use that the local government could otherwise prohibit." Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 478–79 (1991).

42. *See, e.g.*, Mugler v. Kansas, 123 U.S. 623, 667–68 (1887) (demonstrating the early jurisprudential practice of analyzing regulatory takings as a subset of eminent domain).

43. *Id.* at 668.

44. *See id.* ("'[A]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though these consequences may impair its use,' do not constitute a taking within the meaning of the constitutional provision, or entitle the owner of such property to compensation from the State or its agents, or give him any right of action.") (quoting Transp. Co. v. Chicago, 99 U.S. 642, 642 (1878)).

45. *See* Robert Brauneis, *"The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal Co. v. Mahon, 106 YALE L.J. 613, 628–31 (1996).

sticks, and curtailment or removal of some sticks (i.e. rights) both has real consequences and is often necessary for ordered and efficient coexistence.[46]

Pennsylvania Coal Co. v. Mahon[47] presented a sharp break from this jurisprudence, ushering in the cognizability of takings resulting from exercises of police power regulation. *Pennsylvania Coal* involved a dispute between a coal company, which owned the right to extract coal from a parcel of land, and the actual owners of the land itself. When the company originally conveyed the surface deeds, it had reserved all rights to extract coal, and the surface owners had waived all past and future claims for damages. The coal company then wanted to mine the coal in a manner likely to cause subsidence of the surface structures. The land owners sued, alleging that a Pennsylvania statute passed pursuant to state police powers prohibited extracting coal in a manner that caused surface damage, such that the company should be enjoined from proceeding.

The Supreme Court disagreed. In his opinion for the Court, Justice Holmes rejected governmental claims of blanket authority to affect private property rights through the exercise of otherwise valid police powers.[48] He reasoned that even though the Pennsylvania law in question involved police powers, "mak[ing] it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."[49]

Importantly, *Pennsylvania Coal* places the focus of a regulatory takings claim on the nature of the taking itself and not on the character of the regulatory action taken by the government. Therefore, if the government decides that a certain regulation or course of action is in the public interest, it must remunerate owners for the property rights affected; if the course of action or regulation is not important enough to justify paying the affected property owners, the government should instead choose not to act.[50] Of course, the government is also free to regulate in a manner that does not go too far, though that is not always possible.

Although *Pennsylvania Coal* broke away from a categorical analysis, it did not provide any meaningful way to determine what did and did not go far enough to constitute a regulatory taking. Instead, courts presented with

46. *See* JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY § 1.1.2 (2d ed. 2005) (contrasting the "bundles of rights" approach to property with lay understandings of "absolute" property rights).

47. 260 U.S. 393 (1922).

48. "So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought." *Id.* at 416.

49. *Id.* at 414.

50. *Id.* at 416 ("[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.").

regulatory takings claims performed "ad hoc, factual inquiries."[51] The Court attempted to provide guidance for these cases in *Penn Central Transportation Co. v. City of New York*,[52] a case involving a takings claim by the owners of Grand Central Station after their application to build a high-rise tower above the existing terminal had been denied. In rejecting the plaintiff's takings claim, the Court listed several factors relevant to identifying a regulatory taking: the "economic impact of the regulation"; the affect on "investment-backed expectations"; and the "character of the governmental action."[53] Armed with these (slightly) more predictable factors, both state and federal courts heard increasing numbers of Fifth Amendment regulatory takings claims.[54]

Note that, regardless of the jurisdictional forum chosen for a state or local regulatory takings challenge, interpretation of state law is critically important to resolving regulatory takings cases after *Penn Central*. New state or local governmental regulation must be measured in relation to existing regulation, and the impact of the regulation on property rights must be measured against common law property rights.[55] Existing regulatory structures and common law property rights are specific to the local or state jurisdiction of the property subject to a taking, not some idealized or national standard.[56] This puts a premium on the initial factfinder's command over state property law and the accuracy of

51. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). *Pennsylvania Coal*, as Supreme Court precedent, was binding on both state and federal courts. Although regulatory takings plaintiffs were free to bring cases in either federal or state court, only approximately 174 regulatory takings cases were brought in federal district courts between the decisions in *Pennsylvania Coal* and *Penn Central*. *See* Breemer, *supra* note 24, at 287.

52. 438 U.S. 104.

53. *Id.* at 124. The factors are intended to help the court weigh the taking as a functional physical invasion versus the government's interest in "adjusting the benefits and burdens of economic life to promote the common good." *Id.*

54. *See* Breemer, *supra* note 24, at 286–87 (identifying 141 federal district court cases and 109 state court cases between the *Penn Central* decision in 1978 and the *Williamson County* decision in 1985). It is unclear why the number of regulatory takings cases increased after *Penn Central*; it may simply be a function of increasing population or increasing government regulation, or it may be related to generally rising amounts of litigation in society. Or, by providing some small measure of clarity in this area of law, the Court's decision may have encouraged more litigation and less settlement of these disputes.

55. Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 213–14 (2004).

56. "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . . ." S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting); *see also* Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ."). *But cf.* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980) (holding that Florida had "taken" certain interest income, reasoning that several other states consider the interest income to be property of the claimant, and that even though Florida law did not define the interest income as property, "a State, by *ipse dixit*, may not transform private property into public property without compensation . . . .").

the factual record, both of which are necessary to meaningfully apply the *Penn Central* factors.

B. *Williamson County* and its Aftermath

Although *Penn Central* identified the factors that courts should use when identifying a taking under the U.S. Constitution, the case said little about state or federal jurisdiction to hear such claims. The Court in *Williamson County Regional Planning Commission v. Hamilton Bank*[57] formalized the ripeness requirements[58] for regulatory takings plaintiffs, holding that a property owner's regulatory takings claim is not ripe for federal court review until she has sought both (1) an administrative final decision and (2) just compensation through available state procedures.[59] In *Williamson County* the county planning commission had approved a preliminary plat before the zoning ordinances became more stringent, and the property owner had invested substantial sums of money prior to the zoning change.[60] When the commission then refused to allow the property owner to continue with development, the property owner sued, alleging a regulatory taking through the commission's restrictions on "the 'economically viable' use of its property in violation of the Just Compensation Clause."[61]

A federal jury awarded damages to the property owner, which the district court rejected as a matter of law because it labeled the takings as "temporary."[62] After the Sixth Circuit reversed, the Supreme Court granted certiorari to address the question of whether federal, state, and local governments must pay damages for a temporary regulatory taking. But the Court did not reach the question presented, instead holding that the plaintiff's takings claim was not ripe for adjudication.

The Court identified two distinct reasons to hold the claim unripe. First, the plaintiff had not yet received a final decision from the planning

57. 473 U.S. 172 (1985).

58. *See* CHEMERINSKY, *supra* note 4, at 117 ("[T]he ripeness doctrine seeks to separate matters that are premature for review because the injury is speculative and may never occur, from those cases that are appropriate for federal court action."). Ripeness doctrine avoids deciding cases that can be postponed without great harm, conserves judicial economy, and promotes quality and accuracy by ensuring that the record is fully developed before adjudication. *See id.* at 119.

59. *See Williamson County*, 473 U.S. at 195, 200.

60. *Id.* at 177–79.

61. *Id.* at 182 (quoting Hamilton Bank v. Williamson County Reg'l Planning Comm'n, 729 F.2d 402, 404 (6th Cir. 1984)).

62. *See id.* at 183 (explaining that "temporary deprivation, as a matter of law, cannot constitute a taking").

commission.[63] It was possible that the commission could have granted variances to the developer on a number of the bases for rejecting the plat.[64] Under the *Penn Central* analysis, it would be even more difficult for a state or federal court to determine the "economic impact of the challenged action" or the "interfere[nce] with reasonable investment-backed expectations" without a definitive pre-litigation position by the administrative body as to how the actual state of development would be affected.[65] Subject to a few exceptions, this ripeness requirement has been relatively unchallenged.[66]

Second, and more interestingly, the Court held that the claim was unripe because the plaintiffs had not sought "compensation through the procedures the State has provided for doing so."[67] The Court justified this by pointing out that the Constitution does not prohibit takings, but rather prohibits takings without just compensation. Thus, the Court concluded that "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking."[68] This ripeness requirement presumably represents a recognition that when implementing the *Penn Central* factors, state courts will have to interpret state law and that the Court prefers state courts to evaluate such claims in the first instance.

The second prong of the *Williamson County* ripeness test has been widely criticized. First, many pointed out that after being compelled to bring inverse condemnation actions in state court, plaintiffs' claims would subsequently be

63. *See id.* at 186 ("[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.").

64. *See id.* at 191.

65. *Id.* (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)). The Court rejected the argument that an exhaustion of administrative remedies was not required under a suit predicated on 42 U.S.C. § 1983, differentiating exhaustion requirements from finality requirements. *See id.* at 192–93.

66. *See* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS 241, 243 (3d ed. 2005). A litigant would not be required to fulfill the first *Williamson County* prong if he would be forced to comply with unfair procedures, or if complying with procedures would be futile. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001). The fairness of these measures and the degree that a local government may abuse them has been the subject of some criticism, though not necessarily judicial criticism. *See* ELLICKSON & BEEN, *supra*, at 241–42; *but cf.* Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496 (9th Cir. 1990), *aff'd*, 526 U.S. 687 (1999) (excusing the first *Williamson County* ripeness prong because the local government was abusing the application process by repeatedly denying applications it indicated that it would accept).

67. *Williamson County*, 473 U.S. at 194.

68. *Id.* at 194–95 (quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1013, 1018 n.21 (1984)). As discussed later, this prong does not apply to a claim against the federal government (which could be brought in the Court of Federal Claims immediately without need to resort to state procedures) or facial takings claims. *See infra* Parts II.A, III.A.

barred from a federal forum.[69] Second, the jurisprudential necessity of the prong was questioned; if the *Williamson County* plaintiff's claim was unripe because she had not yet received a final administrative determination, the second holding was unnecessary to the result.[70] Therefore, could the second prong be rejected—or at least disregarded—as mere dicta?[71] This question, as well as the question of how a takings plaintiff with both state and federal claims should properly bring her federal claim in federal district court, would not be squarely addressed by the Court until 2005.[72]

In order to preserve their right to litigate in federal court after *Williamson County*, many plaintiffs attempted to file cases in federal court, explicitly reserve federal claims, litigate in state court to ripen the federal claims, and then return to federal court. This strategy relied on the Court's decision in *England v. Louisiana State Board of Medical Examiners*,[73] which held that plaintiffs could reserve federal claims when forced into state court due to prudential abstention doctrines.[74]

Over time, the circuits split on this issue. In *Dodd v. Hood River County*,[75] the Ninth Circuit "rejected the argument that an *England* reservation immunized the Dodds' complaint from issue preclusion" in addition to claim preclusion.[76] But the Second Circuit held in *Santini v. Connecticut Hazardous Waste Management Service*[77] that plaintiffs involuntarily litigating federal takings claims in state court are permitted to reserve their federal claims for subsequent adjudication in federal court, in part due to the "unique procedural posture of post–*Williamson County* takings claims."[78] Contrary to the Ninth Circuit, *Santini*

69. *See, e.g.*, Kanner, *supra* note 11.

70. *See* Breemer, *supra* note 24, at 298–99.

71. *See* H.R. REP. NO. 106-518, at 11 (2000) (describing the second prong as a sharp break with prior jurisprudence taken "[w]ithout the benefit of briefing"); *cf.* ELLICKSON & BEEN, *supra* note 66, at 243 (collecting scholarship); Keller, *supra* note 15, at 203 n.25 (citing the House Report and other sources in agreement).

72. *See* San Remo Hotel, L.P. v. City of San Francisco, 545 U.S. 323 (2005); *infra* Part I.C.

73. 375 U.S. 411 (1964).

74. *Id.* at 418, 421–22; *see also id.* at 415 ("There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims.").

75. 136 F.3d 1219 (9th Cir. 1998).

76. Breemer, *supra* note 24, at 262 (citing *Dodd*, 136 F.3d at 1227).

77. 342 F.3d 118 (2d Cir. 2003), *overruled by* San Remo Hotel, L.P. v. City of San Francisco, 545 U.S. 323 (2005).

78. *Santini*, 342 F.3d at 126, 130.

upheld the use of an *England* reservation to avoid both issue and claim preclusion, in part because of the involuntary nature of the state court action.[79]

C. *San Remo Hotel*

The Court addressed this circuit split, as well as the question of what claims could be ripened for federal court review, in *San Remo Hotel, L.P. v. City of San Francisco*.[80] The facts of the case are similar to the ones presented in this Comment's Introduction. The hotel's owners purchased the property in question in the early 1970s and restored it from its "dilapidated condition" into a bed and breakfast inn.[81] The city passed an ordinance in 1981, in response to a severe lack of affordable rental housing, that prohibited conversion of residential housing units into tourist units. Despite operating as a tourist hotel for decades,[82] the hotel manager erroneously reported that the hotel was used entirely for "'residential' units" when filing paperwork in compliance with the new ordinance.[83] Because the hotel had initially self-classified as a residential unit and had not challenged their designation for six years—beyond the statute of limitations for an appeal—the city zoned the hotel as residential.[84]

For the hotel to obtain a permit to operate as a tourist hotel under the ordinance, the owners were required to (1) construct new residential units elsewhere in the city; (2) rehabilitate old residential units; or (3) pay an in-lieu fee to the city.[85] In 1990, the hotel owners applied for the permit to convert the hotel to tourist use and requested a conditional use permit.[86] The city planning commission granted the request subject to several requirements, one of which was the payment of a $567,000 in-lieu fee.[87] The hotel owners appealed to the city board of supervisors, claiming that the ordinance was "unconstitutional and otherwise improperly applied to their hotel."[88]

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79. *See id.* at 128–29 (discussing England v. La. Bd. of Med. Exam'rs, 375 U.S. 411 (1964)). The relative importance of involuntariness and procedural posture are discussed in both cases. *See id.*; *England*, 375 U.S. at 422–23.

80. 545 U.S. 323 (2005).

81. *Id.* at 328 (quoting San Remo Hotel v. City of San Francisco, 100 Cal. Rptr. 2d 1, 5 (Ct. App. 2000) (depublished)).

82. The Court noted that the hotel at times operated as a "mixed operation" with tourists and long-term residents using the hotel. *See id.* at 329 n.2.

83. *See id.* at 328–29.

84. *See id.* at 329.

85. *See id.* at 328.

86. *Id.* at 329.

87. *Id.*

88. *Id.*

After initially filing for an administrative mandamus in state court, the parties agreed to stay the action to allow the plaintiffs to bring the case in federal district court.[89] The plaintiffs alleged violations of procedural due process, substantive due process, and both facial and as-applied takings claims, all under the Fourteenth and Fifth Amendments to the U.S. Constitution.[90] The district court granted summary judgment to the city, holding that the plaintiffs' as-applied takings claim was unripe under the second prong of *Williamson County* and that the facial takings claim was barred by the statute of limitations.[91]

On appeal to the Ninth Circuit, the plaintiffs changed their argument, and claimed that the federal courts should employ *Pullman* abstention,[92] allowing litigation of the federal issues in state court, which might moot the federal and constitutional issues. The court abstained from dismissing the facial takings claim[93] and declined to hold whether or not the claim was barred by the statute of limitations. The court did not abstain, however, from affirming the district court's holding that the as-applied takings challenge was unripe under *Williamson County*.[94] But the court did include a footnote in their opinion stating that the plaintiffs would be free to raise their federal takings claims in state court, although if "they wanted to retain their right to return to federal court for adjudication of their federal claim, they must make an appropriate reservation in state court."[95]

The plaintiffs returned to state court, where the city eventually prevailed in the California Supreme Court.[96] And although the plaintiffs had reserved their

89. *See id.* at 330.

90. *Id.*

91. *See id.*

92. *See* R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941). "Federal court abstention is required when state law is uncertain and a state court's clarification of state law might make a federal court's constitutional ruling unnecessary." CHEMERINSKY, *supra* note 4, at 785. Note that it is very unusual for plaintiffs to argue for abstention. As the Ninth Circuit commented:

> Ironically, it is [plaintiff] who urges us to abstain under *Pullman*. Normally, of course, *Pullman* abstention is invoked by the defendant, not only because it is the plaintiff who initially chose the federal forum (and thus presumably wants it), but because *Pullman* abstention tends to delay resolution of the plaintiff's constitutional claims. Unsurprisingly, the City views [plaintiff]'s request for abstention as an outrageous act of chutzpah, and argues that [plaintiff] should be stuck with the federal forum he chose. Although we have some sympathy for the City's position, we agree with [plaintiff] that a plaintiff may raise *Pullman* abstention just as a defendant may, and he may do so for the first time on appeal.

San Remo Hotel v. City of San Francisco, 145 F.3d 1095, 1104–05 (9th Cir. 1998) (internal citations omitted).

93. *San Remo Hotel*, 545 U.S. at 331 ("[T]he propriety of the planning commission's zoning designation [is] the precise subject of the pending state mandamus action.").

94. *See id.*

95. *Id.* at 331 n.6 (citing England v. La. Bd. of Med. Exam'rs, 375 U.S. 411 (1964)). *England* reservations are discussed in text and notes 73–74, *supra*.

96. *See San Remo Hotel*, 545 U.S. at 332.

federal claims at the outset, and had stated their causes of action to foreswear relief under the federal constitution, the California Supreme Court decided to "analyze [the plaintiffs'] takings claim under the relevant decisions of both this court and the United States Supreme Court."[97] The plaintiffs declined to petition for a writ of certiorari—presumably taking the California Supreme Court at face value that their ultimate holding was based entirely upon state law[98]—and instead returned to federal district court to litigate their now-ripened as-applied federal takings claim.

The district court again held that the plaintiffs' facial attack on the city ordinance was barred by the statute of limitations, and further held that it was barred by issue preclusion.[99] The Ninth Circuit affirmed, relying on its precedent in *Dodd v. Hood River County*.[100] The combination of *Dodd*, federal and state preclusion principles, and the coextensive analysis of facial takings in state and federal court had barred the door for an Article III court to hear the plaintiffs' constitutional claim, in spite of the language in the earlier Ninth Circuit opinion regarding reservation. The U.S. Supreme Court apparently took the split among circuits regarding *England* reservations as a signal, or an opportunity, to clarify these issues by granting certiorari.

The question presented to the Court in *San Remo Hotel* centered around "whether federal courts may craft an exception to the Full Faith and Credit Statute, 28 U.S.C. § 1738," for takings claims.[101] The Court, in an opinion by Justice Stevens, rejected the hotel owners' argument that they should be able to avoid the preclusive effect of the California Supreme Court's decision through an *England* reservation, as well as holding that federal courts could not craft an

97. *Id.* at 332–33 (quoting San Remo Hotel, L.P. v. City of San Francisco, 41 P.3d 87, 101 (Cal. 2002)). The California Supreme Court had explicitly noted the reservation, and had construed its holding so that "no federal question has been presented or decided in this case." *San Remo Hotel*, 41 P.3d at 91 n.1.

98. *See* Michigan v. Long, 463 U.S. 1032, 1037–38 (1983) (declining to review final state decisions based on "adequate and independent" state law grounds).

99. *See San Remo Hotel*, 545 U.S. at 334. The district court reasoned that because the state courts had interpreted their state takings jurisprudence coextensively with federal law, the plaintiffs' as-applied claims had already been heard and decided. *Id.* at 334–35.

100. 59 F.3d 852 (9th Cir. 1995). *See supra* notes 75–76.

101. *See San Remo Hotel*, 545 U.S. at 326. The Court spent extensive time discussing issue preclusion issues, as well as whether *England* reservations were appropriate in these cases. The majority opinion does not discuss the underlying *Williamson County* jurisprudence, though, which is surprising. As pointed out by Breemer, *supra* note 24, at 300 n.369, Justice O'Connor appeared ready to discuss *Williamson County*. *See* Transcript of Oral Argument at 6:3–7, *San Remo Hotel*, 545 U.S. 323 (No. 04-340). After all, the second—and perhaps gratuitous—prong of *Williamson County* created the probability of preclusion, and revisiting that holding appears to be a valid alternative to preclusion, or to creating exceptions to preclusion for certain reservations. *See supra* notes 69–74 and accompanying text.

exception to the Full Faith and Credit Statute. Essentially, this holding meant that some takings plaintiffs would never "have their day in federal court."[102]

The majority opinion began with a discussion of preclusion. Article IV, § 1 of the U.S. Constitution commands that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[103] This constitutional command is statutorily encoded at 28 U.S.C. § 1738. The constitutional provision and statute have been interpreted as applying to both claim preclusion and issue preclusion.[104]

Claim preclusion refers to the principle that parties should not be able to relitigate issues that were raised, or that should have been raised, once there is a final judgment.[105] Issue preclusion is the principle that a party to a final judgment should not be able to relitigate definitive factual findings or legal conclusions in subsequent cases, even if under the guise of a new cause of action.[106] The catch-22[107] facing takings plaintiffs is that if they litigate their claims in state court, as required by *Williamson County*, these principles of preclusion would prevent the plaintiff from having her day in federal court.[108]

The Court then moved onto the main issue: whether takings plaintiffs could—or should be able to—reserve their federal constitutional claims for later de novo litigation in federal court under *England*. The Court held that facial challenges can be reserved under *England*—but that the plaintiffs had actually litigated these issues in state court, thus waiving their reservation.[109] Then the Court held that as-applied takings challenges could not be reserved under *England* because a federal court does not yet have proper jurisdiction over a regulatory takings claim to recognize a reservation.[110] This technical rejection ignored the plaintiffs' argument for a judicial carve-out to mirror the catch-22 created by the Court in the first place.[111]

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102. *San Remo Hotel*, 545 U.S. at 338 ("Federal courts . . . are not free to . . . simply . . . guarantee that all takings plaintiffs can have their day in federal court.").

103. U.S. CONST. art. IV, § 1.

104. *See* Allen v. McCurry, 449 U.S. 90, 94–96 (1980). Claim preclusion has traditionally been referred to as res judicata. Issue preclusion has traditionally been referred to as collateral estoppel. *Cf. id.* at 94 n.5.

105. *Id.* at 94.

106. *Id.*

107. *See* JOSEPH HELLER, CATCH-22 (1961).

108. *See* Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 127–30 (2d Cir. 2003) *overruled by* San Remo Hotel, L.P. v. City of San Francisco, 545 U.S. 323 (2005).

109. *San Remo Hotel*, 545 U.S. at 340–41.

110. *See id.* at 341.

111. The principal dispute among scholars is whether the key factor is actual reservation of the claim in a federal court of competent jurisdiction or the involuntariness of state court litigation. *Compare* Breemer, *supra* note 24, at 273–75 (arguing that involuntary state court litigation is more important than properly invoking federal jurisdiction), *with* Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to*

The Court, directly or indirectly, rejected the plaintiffs' contention that they had a right to a federal forum as having no basis in the Constitution, or in federal law.[112] In other types of cases in which plaintiffs would have preferred to litigate their constitutional claims in federal court—for example, search and seizure challenges under the Fourth Amendment—the Court had similarly denied access to relitigate in a federal forum.[113] Moreover, "[t]he purpose of the *England* reservation is not to grant plaintiffs a second bite at the apple in their forum of choice."[114] This is especially true when the plaintiffs "could have raised most of their facial takings challenges" in federal court, unencumbered by *Williamson County*'s ripeness prongs.[115] Or, plaintiffs simply could have litigated all of their federal claims in state court, avoiding preclusion altogether—although still not arguing their case before a federal judge.[116]

In specific response to the plaintiffs' arguments, the Court stated that it could not "fundamental[ly] depart[ ] from traditional rules of preclusion" without a clear statement from Congress.[117] Additionally, the majority opinion cited principles of comity and finality to reject "giving losing litigants access to an additional appellate tribunal."[118] Finally, the majority justified the decision—which was cast as a statutorily compelled result, not a policy choice—by expressing confidence in the competency and experience of state courts to adjudicate "the complex factual, technical, and legal questions related to zoning and land-use regulation."[119]

Although the Court voted unanimously for the result in *San Remo Hotel*, Chief Justice Rehnquist penned a majority that was joined by three other justices. The concurrence took direct aim at *Williamson County*'s second prong,

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State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under Williamson County, 26 ECOLOGY L.Q. 1, 24–26 (1999) (arguing that plaintiffs must actually file cases in federal court to reserve claims, and dismissing the viability of an involuntariness exception).

112. *See San Remo Hotel*, 545 U.S. at 342–44; *see also id.* at 344 ("Unfortunately for petitioners, it is entirely *unclear* why their preference for a federal forum should matter for constitutional or statutory purposes."). *But see infra* Part II.B.

113. *See* Allen v. McCurry, 449 U.S. 90, 103–04 (1980) (holding that the plaintiff was precluded from relitigating an evidence suppression issue under the Fourth and Fourteenth Amendment in a section 1983 damages action after an unsuccessful attempt to suppress evidence in a state criminal trial resulting in conviction). *But see id.* at 103 ("[T]he Constitution . . . leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress.").

114. *San Remo Hotel*, 545 U.S. at 346.

115. *See id.* at 345–46. Facial claims are generally ripe when they are asserted, as in the takings context in which the challenged regulation is a final decision and there are no factual issues to ripen.

116. *See id.* at 346–47.

117. *See id.* at 344.

118. *Id.* at 345.

119. *Id.* at 347.

saying it "may have been mistaken."[120] Pointing out the confusion behind the origins of this prong,[121] the concurrence attacked the preclusion of takings cases from federal court. Specifically, the concurrence challenged the rationale supporting, but not dictating, the majority's approach. The majority did not, after all, present any evidence regarding the expertise of the state bench when handling takings or zoning cases. Why should federal courts single out takings claims to confine in state court?

Contrary to being a mechanical application of law and precedent to reach a required result, I argue that the holding in *San Remo Hotel* was a policy judgment by the Court. First, the result is not constitutionally compelled; although the Constitution commands that "Full Faith and Credit shall be given" to the judicial decisions of other states,[122] the Court had previously indicated that exceptions to preclusion could be recognized from explicit or implicit actions by Congress.[123] Second, the result reached is not even compulsory; the Court could have easily decided that the *England* reservation applied to properly reserved as-applied regulatory takings claims or could have crafted a similar judicial exception.

Instead, the Court made a policy choice. The Court did not make its policy explicit, however, instead focusing its reasoning on a self-imposed rule against abrogating the Full Faith and Credit Statute.[124] However, there are many policy reasons underlying this judgment. Judicial economy is served through the elimination of duplicative litigation. Values of federalism are served by litigating regulatory takings in state courts,[125] and federalism helps prevent widespread discrimination against property rights in the aftermath.[126] And there is no reason to think that state courts are unable to vindicate federal constitutional rights in this area, especially considering their institutional advantages in analyzing and deciding cases intertwined with state property law.[127] Moreover, even though

120. *Id.* at 348 (Rehnquist, C.J., concurring).

121. *See id.* at 349 (noting that *Williamson County* treated the second prong as a requirement of the Fifth Amendment's wording but that it was later characterized as merely prudential (citing Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 733–34 (1997)).

122. U.S. CONST. art. IV, § 1.

123. *See San Remo Hotel*, 545 U.S. at 344–45; *see also* England v. La. Bd. of Med. Exam'rs, 375 U.S. 411 (1964) (circumventing preclusion by judicial action alone).

124. *See San Remo Hotel*, 545 U.S. at 344.

125. Specifically, this shift gives additional authority for land use policy to the states, which are more capable of making delicate policy balances. *See* Kelo v. City of New London, 545 U.S. 469, 482–83 (2005).

126. *See infra* Part II.B.4.

127. *See infra* Parts II.B.1, II.B.5.

these policy considerations go almost unmentioned in *San Remo Hotel*, the decision is, at worst, normatively defensible.[128]

D. Notes on *Lingle* and *Kelo*

The 2004 term was notable for two other decisions involving the Fifth Amendment Takings Clause, particularly *Kelo v. City of New London*.[129] *Kelo* involved New London's use of its eminent domain power to revive and develop an economically depressed area. Several homeowners, who did not wish to sell their land to the city and who had been threatened with seizure of their homes through eminent domain, brought suit to enjoin the city from proceeding with the development. The plaintiffs claimed that this use of the eminent domain power would violate the public use requirement of the Fifth Amendment.[130] The Court, in a 5–4 decision, held that the local government's use of the eminent domain power in this instance was public use,[131] even though the neighborhood in question was not blighted, and even though there was no problem concerning overconcentration of land—the conditions by which Justice O'Connor's dissent distinguished this case from the precedents relied upon by the majority.[132] Under *Kelo*, if a project economically benefits the community at large, it is legitimately for public use.[133]

Also decided during the 2004 term was *Lingle v. Chevron U.S.A., Inc.*[134] *Lingle* rejected the Fifth Amendment regulatory takings test that inquired into whether challenged government regulation "substantially advances" legitimate state interests.[135] Instead of focusing on the character of government action, as is done in substantive Due Process Clause claims,[136] the essential question in a takings case after *Lingle* is the impact of government regulation on the plaintiff's property.[137] More importantly, *Lingle* reinforces the institutional competence of and deference towards state court adjudicators in takings jurisprudence.[138] As a

128. *See infra* Part II.B.
129. 545 U.S. 469 (2005).
130. *See id.* at 477–84 (describing the public use requirement and holding that the requirement was met in this case).
131. *See id.* at 488–90.
132. *See id.* at 494 (O'Connor, J., dissenting).
133. *See id.* at 489–90 (majority opinion).
134. 544 U.S. 528 (2005).
135. *See id.* at 548.
136. *See infra* note 305 and accompanying text (discussing elements of a substantive due process cause of action).
137. Rubin, *supra* note 17, at 914.
138. *See* Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 732 (2007).

result, in many instances "[states] can now regulate land use to their hearts' content."[139] In fact, *Lingle* made many facial takings claims not cognizable altogether, regardless of forum.[140] "After *Lingle*, a regulatory taking will be found under federal law only when the regulation has made the property effectively worthless."[141]

San Remo Hotel was decided in the shadow of these influential takings decisions, all of which shift authority to the states for administering and adjudicating takings disputes.[142] The decisions delegate policy judgments from federal judicial power to state political processes and from federal to state judicial decisionmakers.[143] But despite the importance and extent of the delegation of power to state courts, "[u]nlike *Kelo*, *San Remo Hotel* has gone essentially unremarked in the popular press . . . . In practical terms, however, *San Remo Hotel* may be a far more important case than *Kelo*."[144] After *San Remo Hotel*, *Lingle*, and *Kelo*, takings law is now more procedurally and substantively restrictive on plaintiffs, deferential towards state political judgments, and will in many cases be adjudicated outside of federal courts.

But does this really change the results in individual cases? Even if it does, what are the policy implications? The Court has previously focused on creating categorical rules to adjudicate takings cases and otherwise applying the *Penn Central* balancing test—a test that the state government inevitably wins.[145] There are many competing arguments regarding the propriety, good sense, and effect of *San Remo Hotel*, which I will evaluate in Part II.

II. AN ASSESSMENT OF CURRENT DOCTRINE

What does *San Remo Hotel* teach us? How thoroughly does its holding bar litigants from federal court? What doors does it leave open? This Part attempts

139. William A. Fletcher, Keynote Address, Kelo, Lingle, *and* San Remo Hotel: *Takings Law Now Belongs to the States*, 46 SANTA CLARA L. REV. 767, 772 (2006).

140. *See* Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251, 266 (2006).

141. Fletcher, *supra* note 139, at 778. *But see* Guggenheim v. City of Goleta, 582 F.3d 996 (9th Cir. 2009), *rehearing en banc granted by* 598 F.3d 1061 (9th Cir. 2010) (finding that the rent control statute at issue effectuates a taking even though the rental property was not made effectively worthless).

142. *See* Fletcher, *supra* note 139, at 776.

143. *See* Rubin, *supra* note 17, at 911 (noting that *Lingle* and *San Remo Hotel* deal with state courts and *Kelo* deals with state legislatures). In Judge Fletcher's opinion, the procedural and jurisdictional effect of *San Remo Hotel* would have a larger impact than the substantive changes wrought by *Kelo* and *Lingle*. *See* Fletcher, *supra* note 139, at 779.

144. Fletcher, *supra* note 139, at 779.

145. Sterk, *supra* note 55, at 251.

to answer these questions by analyzing the case and by surveying the scholarship written since the decision.

First, Subpart II.A examines how *San Remo Hotel* affects litigants in practice. It concludes that although the Court extensively analyzed issue preclusion, the doctrine of claim preclusion will in effect bar federal review of many regulatory takings claims. With drastically fewer regulatory takings claims being heard in federal district court, there will also be fewer opportunities for the Supreme Court to revisit this area of the law, and subsequently the Court's review of regulatory takings and preclusion will be limited to grants of certiorari from eligible state court decisions.[146]

More important, however, is the question of whether the Court got it right in *San Remo Hotel*. Is the new status quo unfair, or even unconstitutional? Or did the Court allocate jurisdiction over questions of regulatory takings in a manner that is not only judicially efficient but will also provide the appropriate protection of property rights—at least as appropriately as each state determines that property rights should be protected? To evaluate these competing claims, Subpart II.B examines several issues: First, is there parity between federal and state judges in the specific area of regulatory takings? Second, does removing lower federal court jurisdiction over regulatory takings claims unconstitutionally discriminate against property rights? Even if not, should the Court substitute its policy judgment for Congress's in determining the scope of lower federal court jurisdiction? Third, is the Supreme Court's certiorari jurisdiction sufficient alone, without involving the lower federal courts, to ensure both uniformity in federal law and fair administration of the U.S. Constitution in state courts? Fourth, what allocation of jurisdiction and decisionmaking authority promotes positive values of federalism? Fifth, what allocation of jurisdiction and decisionmaking authority makes the most logical sense in light of ripeness requirements and competency questions to decide issues involving state and local property law? Finally, what other policy concerns should animate the analysis of these claims? Considering all of these strands together, can we draw any normative conclusions?

146. *See* 28 U.S.C. § 1257 (2006) (granting the Supreme Court jurisdiction to review state court judgments through discretionary grants of certiorari); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874) (holding that the Supreme Court may only review state court decisions of federal issues and generally may not review decisions or issues involving state law, except when the state issues are antecedent or closely related to the federal question); *see also infra* note 252 and accompanying text (discussing state court decisions that will not be eligible for Supreme Court review).

A. Certiorari Only: The Res Judicata Bar

Before assessing its impact, it is important to determine exactly how *San Remo Hotel* applies in theory. The place to start is the federal Full Faith and Credit Statute.[147] The statute generally requires preclusive effect for judgments based upon the preclusion rules of the original jurisdiction.[148] If a subsequent claim would be barred in the state where the first case was litigated, then that claim is precluded in all federal courts.[149]

The *San Remo Hotel* decision explicitly discussed issue preclusion.[150] The *England* reservation, which several courts of appeals had held applicable, has been attempted in other circumstances to reserve issues for subsequent federal litigation.[151] But even though claim preclusion was not discussed in the case, *San Remo Hotel* effectively bars all subsequent federal litigation under that doctrine. Any claims arising out of the same facts and related legal theories would be precluded from subsequent state court litigation under *San Remo Hotel*'s treatment of the Full Faith and Credit Statute; therefore it is precluded from subsequent federal court litigation.[152] As Kathryn Kovacs predicted several years before the *San Remo Hotel* decision, "§ 1738, as interpreted in *Allen*[153] and *Migra*,[154] requires

147. 28 U.S.C. § 1738 (2006).

148. Sterk, *supra* note 140, at 271 ("The statute's language dictates that the preclusive effect of a state court judgment is to be determined by the 'law or usage' of the rendering state, at least in the absence of some other federal statute that might qualify the impact" of the statute).

149. An exception to keep in mind is that if the state's takings jurisprudence diverges significantly from the federal standard, it is possible that subsequent federal takings litigation would not be precluded because the federal claims would be distinct and separate. *See id.* at 276.

150. *See* San Remo Hotel, L.P. v. City of San Francisco, 545 U.S. 323, 327 n.1 (2005) (stating that the grant of certiorari was limited to the question of whether "a Fifth Amendment Takings claim [is] barred by *issue preclusion* based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal Takings claim?") (emphasis added).

151. *See, e.g.*, Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 127–30 (2d Cir. 2003), *overruled by* San Remo Hotel, L.P. v. City of San Francisco, 545 U.S. 323 (2005).

152. *See* Fletcher, *supra* note 139, at 775. As one House Report explained:

> This procedural trap operates as follows: Federal courts often dismiss property owners' takings claims because the property owners have not first litigated their claims in State court; when the property owners return to Federal court after litigating the State law claims in State court, the same Federal courts hold that the Federal takings claims are barred because they could have been litigated in the State court proceedings.

H.R. REP. NO. 106-518, at 8 (2000). Even if a plaintiff scrupulously avoids presenting a federal takings claim to a state court, claim preclusion principles would bar subsequent litigation because under state claim preclusion law the plaintiff would have been required to bring related (federal) claims.

153. Allen v. McCurry, 449 U.S. 90 (1980) (holding that the Full Faith and Credit Statute bars litigation of section 1983 claims in federal court that were already decided in state court).

154. Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75 (1984) (holding that when the preclusion rules of the state would preclude subsequent state litigation of those claims, the Full Faith and Credit Statute bars litigation of section 1983 claims in federal court that were not raised in state court proceedings).

federal courts to apply state preclusion rules to section 1983 actions. Combined with *Williamson County*, § 1738 effectively mandates the dismissal of nearly all federal takings claims filed in federal court."[155]

To be clear, the Court was not compelled to reach the holding of *San Remo Hotel*. Even if the Court had rejected *England*, it does have the power to create an exception to the Full Faith and Credit Statute in recognition of the ripeness requirements of *Williamson County*—after all, *England* can be characterized as a similar exception to the statute.[156] But, in light of *San Remo Hotel*'s preclusive effect on regulatory takings cases, the Court is not likely to even have the opportunity to reverse course anytime soon.[157] Future changes in the doctrine would likely come from Congress,[158] where the competing concerns discussed below can be weighed. The Court's holding in *San Remo Hotel* is not dictated by the Constitution, which gives Congress the discretion of abrogating or altering the Court's holding. However, thinking about Congress's freedom to tinker statutorily with the current, post–*San Remo Hotel* state of affairs also raises the question of whether the political branches should have answered this question in the first instance.

There are several easy exceptions to the requirement to litigate in state court. Clearly, claims asserting takings pursuant to federal government action or federal law can be heard in federal court.[159] Facial challenges can also be brought in federal court.[160]

There are harder questions too, such as whether state action pursuant to federal programs that give rise to takings can be heard in federal court.[161] Answering these hard questions requires normatively and legally evaluating the current state of affairs.

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155. Kovacs, *supra* note 111, at 14.

156. Breemer, *supra* note 24, at 278–79.

157. *But see* Guggenheim v. City of Goleta, 582 F.3d 996, 1008 n.5 (9th Cir. 2009), *rehearing en banc granted by* 598 F.3d 1061 (9th Cir. 2010) ("musing" that *Williamson County*'s ripeness rules were incorrect and citing Chief Justice Rehnquist's *San Remo Hotel* concurrence). Judge Bybee indicated that *Williamson County* was binding precedent but went on to hold that the *Williamson County* requirements had been functionally met, reaching the merits of the plaintiff's facial taking claim. *Id.* at 1011.

158. *Cf.* H.R. REP. NO. 106-518, at 10–11 (2000) (proposing to statutorily overrule the second prong of *Williamson County*). Congress could also amend the Full Faith and Credit Statute, 28 U.S.C. § 1738 (2006) to provide an explicit or implicit exception for these cases.

159. *See supra* note 3 (stating that claims against the federal government must be raised in the Court of Federal Claims); *infra* Part III.B.1 (discussing difficult issues raised when state and federal law overlap to effectuate a taking).

160. *See infra* Part III.A; *see also* United States v. Salerno, 481 U.S. 739, 745 (1987) (defining facial challenges as determining if "no set of circumstances exists" where government action "would be valid").

161. *See infra* Part III.B.

B. Is This a Sound State of Affairs?

This Subpart discusses some of the concerns implicated by the current state of regulatory takings jurisprudence. Is the post–*San Remo Hotel* state of affairs constitutionally sound even though it denies a federal forum for certain constitutional rights? Is it prudentially sound given separation of powers and federalism concerns (and benefits)? Is *San Remo Hotel*'s holding good policy? To answer these questions, I explore several issues. First, can—and will—state court judges, who lack the institutional protections of Article III of the Constitution, make unbiased decisions about regulatory takings challenges? Second, how should we approach the Court's jurisdiction-stripping move: As a tool for managing overburdened federal dockets or as discrimination against property rights? Third, can the Supreme Court fulfill its institutional role of promoting uniformity in constitutional standards and ensuring fair adjudication of constitutional issues via certiorari jurisdiction alone? Fourth, how should values of federalism inform a decisionmaker's allocation of jurisdiction over regulatory takings? Fifth, how important is the fact that property law is state law? Sixth, what else should a decisionmaker consider? How do we make sense of it all?

1. Parity Between State and Federal Courts

"Parity is the issue of whether, overall, state courts are equal to federal courts in their ability and willingness to protect federal rights."[162] But is the lack of parity, and its impact upon regulatory takings plaintiffs consigned to state court, actually a valid or pertinent criticism of current regulatory takings jurisprudence? Or are such concerns pretextual, masking a political or results-oriented preference for federal court adjudication of regulatory takings claims?

The Court has historically delivered mixed messages regarding parity, in part because the Constitution provides arguments in both directions. For example, James Madison argued during the Constitutional Convention that state courts could not be relied upon to guard and enforce national interests, regardless of plaintiffs' ability to appeal to the Supreme Court.[163] This view was later echoed by the Court in *Osborn v. Bank of the United States*[164] when it wrote that "[t]here is no unreasonable jealousy of State [courts]; but the constitution itself

162. CHEMERINSKY, *supra* note 4, at 36.

163. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 27–28 (Max Ferrand ed., rev. ed. 1966). *But see* 1 *id.* at 124 (describing the contrary views of John Rutledge on the same subject).

164. 22 U.S. (9 Wheat.) 738 (1824).

supposes that they may not always be worthy of confidence, where the rights and interests of the national government are drawn in question."[165]

But this view has not remained constant over time, and the Court has made conflicting statements regarding parity. Foremost among statements in favor of parity is Justice Powell's opinion in *Stone v. Powell*,[166] in which he stated that "[d]espite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States."[167]

In reaction to *Stone v. Powell*, Burt Neuborne published an influential article that declared parity a "dangerous myth."[168] Neuborne asserted that parity arguments, like those advanced in *Stone*, were possibly nothing more than "a pretext for funneling federal constitutional decisionmaking into state courts precisely because they are less likely to" vigorously enforce federal constitutional rights.[169] Far from neutral decisions regarding judicial administration, Neuborne claimed that shunting claims into state courts should be viewed as "indirect decisions on the merits."[170]

Analyzing the differences between state and federal trial courts may provide several reasons to believe that federal district courts are more technically competent than their state counterparts. First, federal trial courts are arguably better equipped to analyze and persuasively decide complex issues.[171] Second, federal trial courts may be more psychologically disposed towards vindicating federal rights in general, especially when siding with a constitutional claimant means disrupting the local political status quo.[172] Also important is the comparative political insulation of federal courts as opposed to state trial courts. It is difficult for state judges to act in a countermajoritarian fashion—as is often necessary when vindicating constitutional rights—when they are subject to political and/or electoral pressures.[173] "Thus, when arguable grounds supporting

165. *Id.* at 811.
166. 428 U.S. 465 (1976).
167. *Id.* at 493 n.35.
168. *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105 (1977).
169. *Id.* at 1105–06.
170. *Id.* at 1106.
171. *See id.* at 1120–23 (citing the ability to "maintain a high level of quality when appointing a relatively small number" of federal judges, higher federal pay for judges, and the caliber and impact of judicial clerks); *see also* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 144 (1985).
172. *See* Neuborne, *supra* note 168, at 1124–26 (citing greater "bureaucratic receptivity" to the Supreme Court for federal judges than for state judges, whose relationship with the Court is "attenuated"; federal judges' "institutional duty to anticipate" the views of the Court; and the greater distance from pressures and knock-on effects of decisions for federal courts versus state courts).
173. *See id.* at 1127–28.

the majoritarian position exist, state trial judges are far more likely to embrace them than are federal judges."[174]

The fact that most litigants can at least attempt to appeal the decisions of trial courts in both state and federal judicial systems, however, makes a side-by-side comparison of trial courts an incomplete assessment of parity. Specifically, because state appellate courts and state supreme courts can correct the errors of lower courts, is it possible that this error-correcting function also corrects for any lack of parity? Even conceding that state appellate judges and federal judges present no gap in parity, one can argue that when constitutional adjudication emphasizes evidence related to intent and motive, the error-correction role of state appellate judges is not a suitable stand-in for technical competence and integrity at the factfinding stage.[175]

Is it possible to actually measure parity without relying on the perception of plaintiffs or on plaintiffs' jurisdictional choices as a proxy? In a seminal article, Erwin Chemerinsky expressed doubt in any meaningful measurement of parity, writing, "I fear the debate over parity is permanently stalemated because parity is an empirical question . . . for which there never can be any meaningful empirical measure."[176] But Brett Gerry has also compared federal and state court application of exactions cases and concluded that there was strong evidence for parity in takings adjudication.[177] Also, other empirical studies conclude that "there is no clear reluctance on the part of state courts to uphold a federal claim that would be upheld in federal district courts."[178]

Assumptions and arguments about parity may also differ across the range of constitutional rights at issue. For some civil rights, certain jurisdictions may be

174. *Id.* at 1128; *cf.* Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 240 (1983) (reporting that in their empirical study comparing federal district courts and state appellate courts, the federal courts upheld the constitutional claim 41 percent of the time, while the state courts did so only 32 percent of the time). William Rubenstein argues that state judges, who may be exposed to political pressures, do a better job of vindicating equality rights of groups "widely dispersed throughout the population" and organized electorally than they do sustaining civil liberty claims. *See* William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 622–24 (1999) (discussing the successes of gay people and women with group-based equality claims in state court).

175. *See* Neuborne, *supra* note 168, at 1116 n.45; *cf. id.* at 1119 (discussing the "expense, delay, and uncertainty" in relying upon appellate error correction).

176. Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 236 (1988) ("[T]he issue of parity cannot be resolved . . . .").

177. Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of* Nollan v. California Coastal Commission, 23 HARV. J.L. & PUB. POL'Y 233, 290–93 (1999) (examining state and federal court interpretation and application of *Nollan* and finding "strong empirical evidence of parity between state and federal courts in the takings area").

178. Solimine & Walker, *supra* note 174, at 240–41. *But cf. id.* (reporting that in their study the federal courts upheld the constitutional claim 41 percent of the time, while the state courts did so only 32 percent of the time).

perceived as friendly or unfriendly for plaintiffs seeking to assert their rights. For example, litigants seeking to obtain and defend the rights of gay and lesbian individuals to marry "have generally fared better in state courts than they have in federal courts."[179] Results like these may not be a function of institutional factors or technical parity, but rather stem from political considerations that prospective litigants ignore at their own peril.[180]

The parity debate is not only about litigant choice, but also about relative judicial competence and the resultant fairness to litigants. The Supreme Court in *San Remo Hotel* seemed reluctant to provide a federal forum to regulatory takings plaintiffs, pointing out what the Court considered to be state court advantages in competency and experience in resolving land use disputes.[181] It is possible that this logic masks a results-oriented approach by the Court.[182] Furthermore, an approach at measuring and defining parity by relying on experience in adjudication is flawed—and circular in nature—due to the Court's earlier intervention in *Williamson County*.[183] It may be self-serving for the Court to cite greater state court competency to adjudicate regulatory takings claims when the reason they gained comparative experience was the second prong of the *Williamson County* ripeness test. But just because the logic is self-serving does not mean it is not true.

Given the considerations above, is the parity issue irrelevant to the analysis of *San Remo Hotel*'s impact? Are critics of *San Remo Hotel* using parity to "disguise the expression of nakedly ideological preferences" rather than to litigate

179. Rubenstein, *supra* note 174, at 599.

180. As William Rubenstein explained:

> Whatever their alleged institutional advantages, the federal courts have proved unsympathetic to a wide variety of civil liberties and civil rights concerns because of the political ideology of those who have appointed and confirmed federal judges for the past several decades. Similarly, gay litigants may have had more success in state courts recently not because of the institutional factors I spell out here, but simply because the judges in these fora reflect a broader ideological spectrum.

Id. at 624.

181. *See* Rubin, *supra* note 17, at 917 (citing San Remo Hotel, L.P. v. City of San Francisco, 545 U.S. 323, 347 (2005)). I address these arguments in Part II.B.4, *infra*.

182. *Cf.* Neuborne, *supra* note 168, at 1111 (discussing the Court's results-oriented decisions on federalism during the Reconstruction era, during which the Court relied on federal protection for constitutional rights when the Court was sympathetic to the right involved but favored state protection when the Court "harbored serious reservations about the substantive wisdom of the rights"). Given my analysis that the result in *San Remo Hotel* was not constitutionally compelled, *supra* notes 124–127 and accompanying text, this raises concerns about motive. If the Court's decision is policy-oriented in some substantial way, we would prefer that the Court is explicit about its reasoning.

183. *See* Breemer, *supra* note 24, at 288.

regulatory takings claims in state court?[184] Similarly, those "who believe that state courts are more likely to favor the government over the individual may simply be using the parity argument as a tool to advance their ideological agenda."[185]

These arguments seem to make parity much less relevant to our concerns about a barrier to lower federal court jurisdiction, as many critics of the *San Remo Hotel* decision advance ideological or results-based concerns rather than considerations of pure parity. Thus, for example, such a critic would argue that even though state appellate courts will have a chance to correct a state trial court's evaluation of the character of government action in an as-applied regulatory takings claim, it is no substitute for technically competent factfinding regarding the government action that is unaffected by majoritarian pressures.[186] On the other hand, even weak evidence of parity suggests that state courts are constitutionally adequate[187] and that critics of parity in takings jurisprudence are expressing a political preference rather than an institutional one.[188]

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184. Friedman, *supra* note 22, at 1221. "Parity unavoidably is based on ideology: How one assesses parity inevitably depends on how one feels about the underlying interests at stake in the decision to allocate cases between state and federal courts." *Id.* at 1221 n.26.

185. Chemerinsky, *supra* note 176, at 253. B*ut cf. id.* ("Generally, it is the more liberal Justices and commentators who favor federal court jurisdiction and the more conservative ones who oppose it."). In the regulatory takings context these roles are reversed, perhaps because it is property rights instead of civil rights that are being adjudicated.

186. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). *But see* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005).

187. Weak parity is an argument that state courts are unbiased and competent enough to provide a constitutionally adequate forum even if they are not interchangeable with federal courts (the strong parity thesis). *See* MICHAEL E. SOLIMINE & JAMES L. WALKER, RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM 58–59 (1999) (endorsing a weak parity thesis); Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 610–11 (1991) (arguing that weak parity is accepted by both sides of the debate); *see also* Michael Wells, *Who's Afraid of Henry Hart?*, 14 CONST. COMMENT. 175, 185–86 (1997) (arguing that state and federal courts "are not interchangeable").

188. *See supra* notes 180, 185. I think that the ideal liberty and constitutional rights-maximizing rule would allow plaintiffs the choice between state and federal court. *See* Chemerinsky, *supra* note 176, at 309 ("[W]hen the federal and state courts have concurrent jurisdiction they will compete with each other in the protection of individual liberties."); *see also infra* Part II.B.4 (discussing competitive federalism as rights-enhancing). That way, if either jurisdiction is perceived as hostile—or actually is hostile—to certain constitutional rights, the market for litigation will guide cases to the sympathetic court. Of course, current statutory commands and Supreme Court precedent do not purport to maximize rights, and definitely do not actually allow plaintiffs free choice of jurisdiction. *See, e.g.*, 28 U.S.C. § 1332 (2006) (setting an amount in controversy requirement for diversity jurisdiction); 28 U.S.C. § 1338(a) (2006) (creating exclusive federal district court jurisdiction in patent, plant variety protection, and copyright cases); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806) (Marshall, J.) (judicially creating a rule of complete diversity); *supra* notes 112–113 and accompanying text (discussing the example of the Fourth Amendment, in which litigants are required to initially argue in state court and are only allowed in federal court through habeas corpus jurisdiction).

Concerns raised by parity arguments beg other questions. What about the role of the Supreme Court? And what do the unique factual and legal circumstances of takings challenges mean for state court competency?

2. Jurisdiction Stripping as Discrimination Against Property Rights

The effect of *San Remo Hotel* is that the lower federal courts will not have jurisdiction over most as-applied regulatory takings challenges.[189] Can or should the Supreme Court be allowed to do this when a federal constitutional right is at stake? How should we treat this "judicial jurisdiction stripping"?[190]

Jurisdiction stripping is directly related to the parity debate. The Warren Court considered lower federal court jurisdiction "necessary to ensure adequate protection of constitutional rights," and thus it expanded the reach of federal jurisdiction.[191] Indeed, preventing access to the federal courts may harm individual liberties more than is gained—administratively or otherwise—by exclusive state adjudication.[192] And the opportunity to litigate in either forum, with plaintiffs given the right to choose which venue best suits their claim, may in fact maximize the protection of constitutional rights.[193]

Perhaps it does not matter that the federal constitutional rights at stake in takings cases involve property and just compensation and not individual civil rights.[194] But unlike civil rights, property rights come along with unattenuated and explicit economic incentives to resort to the political and legislative branches for recourse. Furthermore, there is also likely to be little overlap with "discrete and insular minorities,"[195] and therefore the political process will be available to regulatory takings plaintiffs. Many disagree with this assessment, though.[196] Although it is difficult to argue that takings claims—federal

189. *See infra* Part III.A (analyzing which types of claims are barred by post–*San Remo Hotel* law).

190. *See* Keller, *supra* note 15, at 201 n.16 (distinguishing judicial jurisdiction stripping from congressional jurisdiction stripping).

191. Chemerinsky, *supra* note 176, at 234; *see, e.g.*, England v. La. Bd. of Med. Exam'rs, 375 U.S. 411 (1964) (increasing the reach of federal jurisdiction by allowing parties to relitigate issues reserved in federal court even though they subsequently had some claims heard by a fair and competent state tribunal).

192. *See* Owen Lipsett, Note, *The Failure of Federalism: Does Competitive Federalism Actually Protect Individual Rights?*, 10 U. PA. J. CONST. L. 643, 645 (2008).

193. *See* Chemerinsky, *supra* note 176, at 302.

194. *Cf.* Kanner, *supra* note 11, at 1066 ("Justice Holmes had earlier likewise admonished that in eminent domain law the Constitution deals with people, not with tracts of land.").

195. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Of course, zoning against disfavored religious group or minorities is possible. But most cases will involve developers and large enough sums of money to guarantee incentives for recourse to the state political branches.

196. *See, e.g.*, San Remo Hotel, L.P. v. City of San Francisco, 545 U.S. 323, 351 (2005) (Rehnquist, C.J., concurring in the result) ("But that principle does not explain why federal takings claims in particular should be singled out . . . .").

constitutional rights that are part of the original Bill of Rights[197]—are unimportant, some commentators have asserted that takings are lower on the hierarchy of constitutional rights, coming at the very end of the Fifth Amendment.[198] The question of the importance of takings again shows an outcome-oriented dynamic: Those who feel that property rights should receive a higher degree of protection point out that it is a constitutional right, while their opponents point out it is comparatively less important than restraints on capital punishment, etc., which are also found in the Fifth Amendment.[199]

Given the ambiguity in determining the importance of different rights, it seems odd to argue that the question of what cases and rights can be adjudicated in federal court should be a political one. But this seems to be the consensus view regarding the control of federal jurisdiction. As Chemerinsky argues, "[t]he Supreme Court need not, and should not, fashion its own jurisdictional rules. It is for Congress to determine the scope of federal court jurisdiction and the relationship between federal and state courts."[200] Chief Justice John Marshall also counseled against the Court engaging in jurisdiction stripping, citing separation of powers concerns.[201] If Congress has—by implication, in establishing general federal question jurisdiction—given jurisdiction to federal judges with life tenure to hear takings cases arising under federal constitutional rights, why should the Court contravene this intent?[202]

There are recognized and settled exceptions to this presumption against judicial jurisdiction stripping, but Scott Keller has argued that they are narrow and inapplicable to federal takings claims.[203] The prudential rules stripping lower

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

198. *See* U.S. CONST. amend. V; *see also* Rubin, *supra* note 17, at 901 (referencing analysis by James W. Ely).

199. *See* U.S. CONST. amend. V (enumerating several due process rights, but listing rights involving life and liberty before rights involving property); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 911 F.2d 1331, 1338 n.5 (9th Cir. 1990) (per curiam) ("Suffice it to say that even the framers of the fifth amendment saw the wisdom of enumerating life, liberty, and property separately, and that few of us would put equal value on the first and the third."); JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 139–41 (3d ed. 2008) (analyzing Supreme Court precedent, and concluding that after the New Deal the Court began protecting property rights to a lesser extent than personal and individual liberties); *cf. Carolene Prods. Co.*, 304 U.S. at 152 n.4 (conceding that while the Court applied rational basis review to governmental actions affecting due process rights involving property or economic liberty, a "more searching judicial inquiry" may be called for when personal liberties are implicated).

200. Chemerinsky, *supra* note 176, at 289–90.

201. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821). Separation of powers concerns arise primarily because the Constitution gives Congress the power to control lower federal court jurisdiction. *See* U.S. CONST. art. III, § 1; *see also* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 77 (1984).

202. *See* Breemer, *supra* note 24, at 280–81.

203. *See* Keller, *supra* note 15, at 226–30.

federal courts of jurisdiction over cases involving domestic relations and probate are supported by history and precedent, both of which were lacking in the takings context.[204] A third category of prudential judicial jurisdiction stripping involves matters of state taxation, which, like federal takings, involves federal question jurisdiction for the lower federal courts.[205] But cases involving state taxation are distinguishable from cases involving takings of property pursuant to state regulatory action—"a regulatory taking would require a state to pay just compensation to a very small number of individuals, where suspending collection of state taxes would result in lost revenue from millions of taxpayers."[206] The structural federalism concerns in takings may not be significant enough to justify action by the Court to strip lower federal court jurisdiction and may counsel in favor of Congress making an independent judgment on jurisdiction in due course.[207]

Conversely, focusing on Congress as the body best situated to make these jurisdictional choices could be merely a normatively inspired dodge. Some scholars argue that "the principle of legislative supremacy in defining federal court jurisdiction simply shifts the question of parity from the courts to Congress."[208] Even assuming that Congress should be making policy decisions and that the Court should refrain from legislating from the bench, the Court is left with a say in the matter. Black letter law holds that congressional power to control lower federal court jurisdiction is plenary[209]—but there is no similar consensus that it must be exclusive.[210]

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204. *See id.* at 228–29.

205. *See id.* at 229–30.

206. *Id.* at 233.

207. Chemerinsky, *supra* note 176, at 290 (arguing that Congress should decide the bounds of federal jurisdiction because national political processes best determine the state/federal relationship and issues in jurisdiction); *see also* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 319–26 (5th ed. 2003) (discussing congressional power over the jurisdiction of the Article III courts); *infra* Part II.B.4 (discussing structural federalism concerns implicated by regulatory takings jurisprudence).

208. Chemerinsky, *supra* note 176, at 292.

209. *See, e.g.*, Ankenbrandt v. Richards, 504 U.S. 689, 697–98 (1992) (discussing provisions in the Constitution that give Congress the power to create and control the jurisdiction of inferior Article III courts); Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938) ("There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."); Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers."); Redish, *supra* note 201, at 115 ("Indeed, throughout the nation's history, Congress has retained for itself the authority to decide when federal courts should decline to exercise their jurisdiction."). *But cf.* FALLON, JR. ET AL., *supra* note 207, at 330–35 (discussing arguments—based on the Madisonian compromise, Justice Story's mandatory theory of Article III, and external restrictions imposed by other constitutional provisions—against congressional power to exclude cases from the lower federal courts).

210. In fact, the Supreme Court has judicially created rules where federal courts must refuse jurisdiction even though constitutional and statutory jurisdictional requirements are met. CHEMERINSKY, *supra*

Finally, just because the Court is plausibly engaging in jurisdiction stripping, this does not automatically discriminate against property rights. Supporters of strong property rights would claim that jurisdiction stripping combined with lack of true parity—and the fear of bias in the state courts in favor of state government—results in too little protection.[211] But Kathryn Kovacs argues that "[r]elegating takings claims to state court does not, therefore, flout the intent of § 1983 any more than does relegating the claims of victims of official misconduct or criminal defendants to state court."[212] No one argues that such an arrangement facially discriminates against criminal defendants, making criticism of *San Remo Hotel* correspondingly weaker. The move by the Court may give critics grounds to be skeptical of the Court's motives, but from a constitutional perspective, the Court's move is certainly permissible.

3. The (In)Sufficiency of Certiorari Jurisdiction

Of course, removing lower federal court jurisdiction for most regulatory takings claims does not mean that there is no federal judicial protection. The Supreme Court still may exercise its error-correction function over state interpretation of federal statutory and constitutional law.[213] The question, then, becomes whether Supreme Court supervision of the state courts is adequate to protect constitutional rights for just compensation, and to ensure uniform application of federal constitutional rights throughout the country. While this lesser capacity for review is not ideal, it is constitutionally adequate and systematically sound in light of other policy considerations.

There are certainly reasons to be skeptical of relying on Supreme Court certiorari jurisdiction alone to safeguard federal rights. Under this regime, regardless of the substance of takings jurisprudence, the only federal input in this area will be "an occasional policy-setting decision by the Supreme Court."[214]

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note 4, at 783; *see* FALLON, JR. ET AL., *supra* note 207, at 1179 (identifying judicially-developed rationales for federal court arbitration based upon exhaustion, comity, equity, and federalism); *see also* Redish, *supra* note 201 (criticizing abstention doctrine as improvident, and arguing that the federal courts should exercise all jurisdiction conferred by Congress).

211. *Cf.* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 911 F.2d 1331, 1346–47 (9th Cir. 1990) (Kozinski, J., dissenting in part) (arguing against relegating constitutional property rights to lesser status or protection).

212. Kovacs, *supra* note 111, at 38.

213. *See* SUP. CT. R. 10 (enumerating illustrative considerations to be used in determining certiorari petitions, including whether a state court "has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with" Supreme Court precedent); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874) (affirming the Supreme Court's power to review questions of federal law decided by state courts).

214. Fletcher, *supra* note 139, at 776.

This type of involvement is different in kind and in quantity from district courts hearing cases individually with a circuit court ensuring legal uniformity in an oversight role.[215] James Madison was skeptical of relying upon the Supreme Court alone to supervise state courts in this manner,[216] and Barry Friedman argues that "at present no one plausibly can argue that Supreme Court review standing alone is enough" to address federal interests.[217]

Looking at regulatory takings in particular, there are several specific problems with relying solely on Supreme Court review. First, regulatory takings cases will be difficult for the Supreme Court to review because of the necessity of understanding and defining a state's background property law in order to apply the *Penn Central* test.[218] In doing so, the Court will have to assess the rights a property owner enjoyed both before and after a challenged state action.[219] Second, because each case is inherently dependent upon a specific state's law, the Court's decision may provide only limited guidance to future adjudicators.[220] Finally, the Supreme Court's institutional role to provide uniform application of federal law is similarly attenuated in regulatory takings cases because outcomes depend upon state law and specific factual findings.[221]

Though Supreme Court certiorari jurisdiction probably fails at providing uniformity and guidance, it does remain valuable in its error-correcting role. One major concern in takings cases is a breakdown in the political process,[222] and the Supreme Court can "provide[ ] some help in cases that fall through [the] cracks."[223] Although Supreme Court cases are a rare commodity in the present era, the threat of quickly granted certiorari and summary reversal is probably sufficient to deter the worst of possible state court abuse. But such abuse would have to be quite exceptional to compel certiorari, especially given the discretion delegated to state courts to apply a flexible standard.[224] After all, the states have

215. *See* Lipsett, *supra* note 192, at 658.

216. *See supra* Part II.B.1.

217. Friedman, *supra* note 22, at 1219 (citing Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 827 n.6 (1986) (Brennan, J., dissenting)).

218. *See* Sterk, *supra* note 55, at 226.

219. *See id.* at 227.

220. *See id.* at 228–33.

221. *See id.* at 233. This may be why the Supreme Court's takings jurisprudence has relied principally on establishing several per se rules; the per se rules avoid problems of state-by-state differences and fact-sensitive balancing.

222. *See id.* at 233–34 (discussing externalities and limited opportunities for coalition-building by outsiders in local land use planning, which requires judicial review to discipline). For many scholars, "land use issues are fundamentally political in nature and should be resolved by the political branches unless some systemic failure in the legislative process requires judicial intervention." *Id.* at 216 n.62 (collecting sources).

223. Friedman, *supra* note 22, at 1259.

224. *See generally* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985) (discussing the similarities and differences between legal rules and standards).

been delegated enough discretion so that they (the states) always win upon review by the Supreme Court.[225]

So, with these inadequacies in Supreme Court review and institutional concerns about parity, the ultimate question that remains is why the Court is comfortable delegating takings challenges to the state courts?

4. Federalism

Principles of federalism help explain why it makes sense to delegate the majority of regulatory takings litigation to state courts. There are, however, potential concerns with the motives of state courts and governments, and with the capability of federalism principles to address every criticism of the *San Remo Hotel* decision. But political accountability and competitive federalism each provide partial justifications for the decision.

Our comfort with allocating enforcement and management of these federal rights to state courts should relate to the extent that we think it is permissible for property rights to be protected to a different degree in different jurisdictions[226] and whether we think there could be a race to the bottom in property rights without direct federal involvement in takings. The Court in *Kelo* echoed this framework:

> Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the "great respect" that we owe to state legislatures and state courts in discerning local public needs. For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.[227]

a. Potential Breakdowns With Federalism and Property Rights

There are several problems with delegating enforcement of federal takings law to the states. One problem is the underlying justification of delegating enforcement: namely, the state's familiarity with the "complexities and realities

225. *See* Sterk, *supra* note 55, at 238.

226. This claim should not be too objectionable; common law property rights and entitlements already vary from state to state, and varying the amount that property entitlements are protected is a similar concept.

227. Kelo v. City of New London, 545 U.S. 469, 482–83 (2005) (citation omitted).

of local restraints" on property rights.[228] That claim may be necessary to delegate enforcement, but it is clearly not sufficient; after all, states are most familiar with the factual realities involved in First Amendment litigation, but the federal courts are still available to vindicate rights of free speech and free expression.[229]

Another problem lies in what some believe are the political incentives and inclinations of the state courts to interpret less and less constitutional protection against regulatory takings.[230] State and federal courts face similar concerns regarding judicial economy; more importantly, elected state court judges may feel pressure to vindicate popular state legislative actions or to rule in favor of the state government on these issues.[231] Further, there may in fact be an inherent agency problem confronting delegation of takings enforcement to the states that requires federal involvement. State governments have "informational advantage[s] and . . . strong self-interest[s]" in the allocation of scarce resources—including property—and interstate competition may be incapable of disciplining individual states from violating property rights in a deleterious manner.[232]

Furthermore, some have argued that the importance of federalism concerns pales in comparison to the vindication of civil rights. Burt Neuborne has criticized the Court's tendency to show concern for federalism and judicial economy over "the importance of having constitutional claims heard by the more sympathetic and competent forum."[233] And the Court itself may also have sent signals in its *Penn Central* jurisprudence that federalism concerns are not paramount. The only governmental actions invalidated by the Court using the *Penn Central* test have been federal statutes, in which uniformity (and not federalism) is the principal concern.[234]

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228. Breemer, *supra* note 24, at 289–90 (discussing First Amendment litigation).

229. *Id.* at 290. As Gene Nichol, Jr. stated:

> In short, while the first amendment allows citizens to attack regulations that may inhibit their speech even before such regulations have been enforced, the takings clause demands a showing by the challenger that the regulating authority has foreclosed all economically viable options. It is obviously more difficult, therefore, to present a ripe takings claim than a ripe first amendment challenge.

Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 167 (1987).

230. *See* Sterk, *supra* note 55, at 217 (discussing the work and theories of William Fischel). If states provide less protection for property rights, they will pay just compensation incident to regulatory action less often.

231. For arguments against electing state judges, see Institute for the Advancement of the American Legal System, O'Connor Judicial Selection Initiative, http://www.du.edu/legalinstitute/judicial_selection.html (last visited June 14, 2010); *see also* Institute for the Advancement of the American Legal System, Formal Methods of Judicial Selection in Each State, http://www.du.edu/legalinstitute/judicial_map.html (last visited June 14, 2010) (summarizing methods of judicial selection in each state).

232. Lipsett, *supra* note 192, at 659.

233. Neuborne, *supra* note 168, at 1117–18 (criticizing the Burger Court's exhaustion jurisprudence, and comparing it to the Warren Court's judicial allocation jurisprudence, including *England*).

234. *See* Sterk, *supra* note 55, at 252.

b. Political Accountability as a Partial Solution

I do not think these criticisms of the role of federalism in takings jurisprudence are sound. First, takings can be distinguished from free speech; federalism has a (central) role in takings jurisprudence primarily because the federal government has defined "speech," but generally leaves the states to their own devices to define "property."[235]

Another rejoinder to the criticisms of a federalism justification for delegation to the states is political accountability. "[P]olitical accountability lends legitimacy to constitutional adjudication by state courts."[236] State judges may have more moral or political authority in some cases precisely because they are elected and therefore are able to confront state legislative decisions as an equally representative branch of government. Although it is not clear whether property rights are influenced by political accountability, there is probably less cause to be concerned about the impact of political accountability on takings claims than on civil rights and equal protection claims, for example. Regulatory takings plaintiffs, by definition and necessity, are part of the propertied class, and likely have the capacity for recourse to the political branches.[237] With this politically accountable institutional framework in state courts and state governments, the Court has expressed a reluctance to substitute their judgment from afar.[238]

Further, the Court's jurisprudence suggests that it favors political solutions for many of these issues, as it is more efficient to address systematic problems with regulatory takings through political recourse than through piecemeal litigation.[239] Such litigation is also more likely to disrupt delicately balanced comprehensive

235. *Id.* at 222; *see also* Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ."). However, because the word "property" is used in the text of the Fifth Amendment, the meaning of property may at times take on a constitutional significance. U.S. CONST. amend. V; *cf.* Williams v. North Carolina, 325 U.S. 226, 239 (1945) (defining "domicile" for constitutional law purposes for similar reasons).

236. Sterk, *supra* note 55, at 235.

237. *See id.* "Similarly, if one views state judges generally as members of a 'propertied' class, it is difficult to argue that their affinity will naturally and consistently lie with government decisionmakers rather than with aggrieved landowners." *Id.* at 235–36. Regulatory takings plaintiffs should not be confused with plaintiffs litigating eminent domain because their property is blighted; instead, regulatory takings plaintiffs are typically developers or people who own land for investment purposes. *See, e.g.*, San Remo Hotel, L.P. v. City of San Francisco, 545 U.S. 323, 328–29 (2005) (tourist hotel); Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson County, 473 U.S. 172, 175 (1985) (land developer); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 115 (1978) (Grand Central Terminal); Mugler v. Kansas, 123 U.S. 623, 656–57 (1887) (alcohol distillery); Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 121 (2d Cir. 2003), *abrogated by San Remo Hotel*, 545 U.S. 323 (land developer).

238. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 541–44 (2005).

239. *See* Kelo v. City of New London, 545 U.S. 469, 489 (2005).

land use plans than would a political solution at the appropriate level of government.[240] In large part, the Court's takings jurisprudence has been characterized by deference to state and local institutions. State legislatures and state courts actually do protect against overly burdensome or abusive land use regulation, and enjoy "institutional advantages . . . in constraining regulatory abuse."[241]

The principle argument against deference to local political processes is the concern that local government manifests itself as "majoritarian, factional, and exclusive" in interactions with its own citizens, to say nothing of outsiders.[242] While deference to politically accountable institutions may have certain benefits, critics argue, those benefits may not outweigh the loss "of a forum capable of protecting individual rights in the face of local political dissatisfaction."[243] But even these concerns about local governance should not outweigh the importance of federalism in takings jurisprudence. Property owners and citizens affected by state regulatory actions have recourse available beyond bringing takings claims in state court.[244] Local land use decisions are generally subject to enabling state legislation, which can curtail local abuses of discretion both systematically and specifically.[245] State legislation governs procedural and substantive requirements for land use regulation and can also alter background property entitlements.[246] And even a local government prone to factionalism and exclusivity must still operate pursuant to its own ordinances.

At some level of abuse, political accountability should compel "[l]ocal governments [to] check their own discretion."[247] Although there is the potential for case-by-case abuse[248] and the probability of some spillover costs in the short term, state institutions are sufficient to monitor and administer this process without

240. *See id.* at 483–84.

241. Sterk, *supra* note 55, at 206; *see also* Fenster, *supra* note 138, at 730 ("[T]he Court's relative deference to the web of government institutions . . . shape[s] land use regulations on the ground.").

242. Fenster, *supra* note 138, at 738.

243. Neuborne, *supra* note 168, at 1128.

244. *See* Fenster, *supra* note 138, at 759–60.

245. *See* ELLICKSON & BEEN, *supra* note 66, at 29 (discussing the granting of land use powers to local governments by state statute, limited by the doctrine of "Dillon's Rule," requiring narrow judicial construction of local land use powers).

246. *See id.* at 275–76 (discussing state statutes mandating assessment of proposed state and local land use actions).

247. Fenster, *supra* note 138, at 764.

248. Immobile property owners may have no exit from a local jurisdiction, and no voice in the political or regulatory environment. Local government may be able to trample the property rights of such individuals without judicial oversight. *See* Sterk, *supra* note 55, at 217 n.63 (discussing the work and theories of William Fischel).

the additional oversight of Article III courts hearing constitutional claims.[249] Local control of land use has many inherent benefits,[250] and recourse to state courts is simply sufficient to deal with the risk of abusive regulation.

c. Competitive Federalism as a Partial Solution

Skepticism of local governments, however, might even support an argument in favor of takings delegation, but only if we think competitive federalism will work.[251] The effect of delegating takings jurisprudence to state courts may systematically favor additional protections for property, despite the inherent agency problems. Under *Penn Central*, states are allowed to constitutionally and statutorily protect property from uncompensated takings to a greater extent than federal court precedent dictates. In doing so, they can effectively insulate themselves from federal oversight.[252] Under this process, competitive federalism may both influence takings jurisprudence and promote increased liberty—in the form of property rights.

The question remains as to whether people will be informed enough of the impact of regulatory takings and takings jurisprudence to act on that information. If we are skeptical of that, is there reason to think that regulatory takings and takings jurisprudence will affect property values and economies enough to create individual incentives? Further, is there reason to believe that states and local governments will structure their land use and takings regulation to compete for

249. *See* Fenster, *supra* note 138, at 771. Recourse to state political institutions is a commonplace feature of real estate development. Real estate developers, who often find themselves as regulatory takings plaintiffs, *see supra* note 237, are major campaign contributors, are highly organized as an interest and advocacy group, and are "repeat players before the commissions and legislative bodies." *See* ELLICKSON & BEEN, *supra* note 66, at 305–07 (discussing empirical evidence relating to public choice theory in respect to dealmaking between developers and state political institutions).

250. *See* Fenster, *supra* note 138, at 770–71. There are several flavors of political theory that support this claim. Under Tocquevillean localism, local governments will develop institutional capacities through the opportunity to self-manage land use regulation. Under Brandeisian and Tieboutian localism, local governments will compete with each other for citizens, spurring innovation and experimentation. And under communitarian localism, regulation of land use will be more responsive and participatory. *Id.*

251. As described by Vicki Been, "[j]ust as competition among producers of products and services constrains greed, the theory of competitive federalism postulates that competition among and within governments and between a government and private parties serves as a significant constraint upon the behavior of the politicians and bureaucrats who make up the government." Been, *supra* note 41, at 506–07. Furthermore, "[j]ust as consumers shop for goods in the private market, consumers will 'shop' for a particular level and combination of public goods and 'buy' by moving to the community that offers the preferred package." *Id.* at 507 (describing the scholarship of Charles Tiebout).

252. *See* Michigan v. Long, 463 U.S. 1032, 1037–41 (1983) (reaffirming the rule that the Supreme Court will not review final state decisions based on "adequate and independent" state law grounds, indicated by a plain statement to that effect in the state court decision); Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1491–92 (1987).

businesses and people to interact with or move to that jurisdiction? Does it matter that takings rights are constitutional rights, and not just any other stick in the property owner's bundle?

These questions raise some legitimate concerns. First, although competitive federalism may work with regards to many types of regulation,[253] takings may not be responsive to interjurisdictional competition because we are dealing with Blackacre, which is immobile. Next, because of the indeterminacy of the *Penn Central* test, along with the standards used in most land use and eminent domain litigation, it may be very difficult to predict the outcome of cases in advance.[254] Paired with the reality of property immobility, this informational indeterminancy would dramatically weaken the responsiveness to changed regulatory and jurisprudential contexts between jurisdictions and reduce the premium on attempts to ascertain this information in the first place. This information gap will accordingly undercut the ability of competitive federalism to discipline state and local government through the market. Finally, future homeowners are at risk, as they currently have no voice in the political process. Overall, "[t]he discipline that competing jurisdictions provide is not perfect."[255]

But I think that competitive federalism can effectively—even if not perfectly—discipline state governments and state courts. "Across the country . . . local governments compete with each other for residents by offering a package of taxes, services, and amenities . . . ."[256] Although real property cannot be transferred to a new jurisdiction, property owners can still react to actions taken by local and state governments and exit the market.[257] In terms of the political process, even future homebuyers should be relatively protected, because the current homeowners have political incentives to protect the value of their property—greater demand for housing in a jurisdiction leads to higher prices. There is some evidence that this process is at work post-*Kelo*, as several states have "enacted or amended laws restricting takings," a move by which state governments responded to calls for additional property protections by curtailing

253. For an illustration of competitive federalism at work, see Been, *supra* note 41, at 511–28 (discussing how municipalities interact and compete with each other through exaction fees).

254. *See* Lipsett, *supra* note 192, at 657 (describing takings adjudication as "significantly less predictable" than other civil rights); Schlag, *supra* note 224.

255. Fenster, *supra* note 138, at 768.

256. *Id.* at 767.

257. *See id.* at 767–68. If the bundle of taxes and regulations, along with the applicable standards in state court for regulatory takings, are taken into account, it should affect property prices. In a state that is hostile to takings claims, "the value of property 'rights' would always have been heavily discounted to reflect the risk of redefinition." Sterk, *supra* note 55, at 236. These economic forces can discipline state and local governments, as well as reinforce a hostile takings regime by diminishing investment-backed expectations.

their own ability to pass regulatory takings.[258] Accordingly, competitive federalism may provide a way around the parity debate by letting citizens choose among the states for the optimally sympathetic jurisdiction. In that sense, competitive federalism may lead to increased protection of individual liberties, both through competition for businesses and residents and through political accountability.[259]

Even if society is comfortable with allowing values of federalism to affect the adjudication of constitutional rights, the parity and jurisdiction-stripping debate resurfaces. Competitive federalism, and delegation to the states in general, seem well-suited to systematically manage takings enforcement but do not fully address fairness concerns for the litigant at bar. Even if a hostile takings decision by a state supreme court will likely adjust the investment-backed expectations of future regulatory takings litigants, the actual party to the court's judgment may not have had any reasonable warning that their property could be encumbered sans compensation. Essentially, even if we are satisfied with federalism's role in regulatory takings, we still must grapple with the concerns for constitutional rights raised in the parity debate. The next Subpart helps to cut this Gordian knot.

5. Ripeness Concerns are Actually Judgments About Comparative Competency

Both *Williamson County*[260] and *San Remo Hotel*[261] characterize the deficiency in the as-applied challenge raised in federal district court as a ripeness issue. This Subpart argues that ripeness is probably not the central concern and that there are several prudential issues wrapped up in the concern for ripeness that better explain the results. Given that state courts are more competent and experienced in the area of regulatory takings, and are politically accountable, the Court may

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258. *See* Lipsett, *supra* note 192, at 656.

259. *Cf.* Been, *supra* note 41, at 527–28. Vicki Been summarized empirical evidence of competitive federalism in the takings arena:

> Given the availability of numerous communities from which to choose and differences between the public service and tax packages that communities offer, the fact that consumers shop for a public service and tax package is strong evidence supporting the core Tiebout proposition that jurisdictions compete for residents by attempting to offer desirable public service/tax packages. Municipal leaders often cite competition from nearby communities as the justification for their inability to raise taxes or decrease public services. The empirical evidence indicates that such competition is indeed a reality.

Id.; *cf.* Chemerinsky, *supra* note 176, at 309 ("[W]hen the federal and state courts have concurrent jurisdiction they will compete with each other in the protection of individual liberties.").

260. 473 U.S. 172 (1985).

261. 545 U.S. 323 (2005).

rationally decide it is preferable for federal courts to abstain from deciding most regulatory takings cases in light of these comparative state court advantages. Overall, this preference for state court adjudication, and not pure ripeness concerns, better provides part of the explanation for the Court's decision to delegate regulatory takings to the states.

Ripeness doctrine promotes judicial economy by denying Article III jurisdiction over cases in which the facts may be too abstract for adjudication.[262] In response to these policy concerns, federal courts cite "Article III limitations on judicial power and . . . prudential reasons for refusing to exercise jurisdiction."[263] The Court has indicated that the *Williamson County* ripeness test is only a prudential rule[264] and does not present a problem for Article III case or controversy jurisdiction. Prudential reasons for denying jurisdiction may be abrogated by Congress since they simply reflect the Court's policy judgment rather than act as binding constitutional commands. However, Scott Keller argues that *Williamson County*'s second prong is not a ripeness rule but should be viewed as either federalism-based abstention or Supreme Court jurisdiction stripping.[265] Requiring plaintiffs to sue in state court is not necessary to ensure a concrete issue fit for judicial resolution, as one would expect if ripeness per se was truly the primary concern in regulatory takings cases; indeed, a final administrative decision has already been issued. By comparison, requiring plaintiffs to sue in state court will actually bar plaintiffs with concrete claims fit for judicial resolution from federal court.[266]

Even if *Williamson County*'s second prong is primarily concerned with ripeness, the *San Remo Hotel* Court barely discussed ripeness in reaching its holding. While the Court's prior analysis in *Palazzolo v. Rhode Island*[267] indicates that the purpose of applying the ripeness doctrine in the context of regulatory takings is to develop the record to concretely define the effect of the government action,[268] the *San Remo Hotel* decision spends more time discussing comparative competency, suggesting that the Court was more focused on federalism or

262. *See* U.S. CONST. art. III, § 2; Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967); *see also* Flast v. Cohen, 392 U.S. 83, 96–97 (1968); 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3532, at 365–69 (3d ed. 2008).

263. Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 n.18 (1993).

264. *See* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 733–34 & n.7 (1997); *see also* San Remo Hotel, L.P. v. City of San Francisco, 545 U.S. 323, 349 (2005) (Rehnquist, C.J., concurring).

265. *See* Keller, *supra* note 15, at 208–25.

266. *See id.* at 212–13; *see also* Abbott Labs., 387 U.S. at 149, 152 (creating a two-part ripeness rule, in which federal courts examine: (1) the fitness of issues for judicial decision; and (2) the hardship to the party of withholding resolution).

267. 533 U.S. 606 (2001).

268. *See id.* at 622.

judicial economy than defining the record.[269] If it is not (primarily) ripeness that is at issue, what could the Court have been concerned about in *Williamson County* and *San Remo Hotel*?

Put simply, the Court supported its policy-oriented holding on grounds of comparative competency. A competency gap between federal and state courts exists in this area of law because property law is state law.[270] "The 'property' protected by the Takings Clause is defined not by a single sovereign, but by the legislative enactments and judicial pronouncements of fifty separate states."[271] Because the Takings Clause only protects against abrupt changes in property rights, and changes in property rights can only be measured against state law, state courts—on the trial, appellate, and supreme levels—have an advantage over federal courts in making these decisions.[272]

Comparative competency can also be persuasive when considering the suitability of a court to hear certain types of claims. When the Court delegated takings enforcement to state courts, it may have looked like a lack of commitment to vindicating property rights. It also may have seemed like a purely self-interested argument motivated by judicial economy. But these critiques might actually be backwards; state courts might actually be the more competent—and sympathetic—forum for takings plaintiffs. Federal courts have consistently cited a desire to avoid sitting "as a zoning board of appeals" in takings cases,[273] possibly to an even greater extent when the amount in controversy is smaller than the diversity "amount in controversy" requirement.[274] Federal courts may also have greater trust in the ability and willingness of state institutions to be fair when adjudicating property rights.[275] Finally, state institutions will likely

269. *See San Remo Hotel*, 545 U.S. at 347 ("State courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations . . . .").

270. Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .").

271. Sterk, *supra* note 55, at 205.

272. *See* Sterk, *supra* note 140, at 288; *see also* Sterk, *supra* note 55, at 225.

273. Vill. of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting); *see also* Kovacs, *supra* note 111, at 43 n.283 (citing cases that assert that the federal courts are not a zoning board of appeals).

274. *See* 28 U.S.C. § 1332 (2006).

275. Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 96–97 (1995).

be better informed and better situated to weigh "delicate political balance[s]" in difficult and complex regulatory cases.[276]

6. Other Policy Concerns

Though the appropriateness of state institutions to factfind, manage, and decide federal takings claims may offset concerns about parity and jurisdictional discrimination, there are additional policy concerns, not discussed in *San Remo Hotel*, that further support the decision.

During the *San Remo Hotel* litigation, the Ninth Circuit recognized that "land use planning is a sensitive area of social policy."[277] A strong undercurrent in jurisdictional delegation of land use litigation is the state's interest in retaining autonomy and control over land use regulation. While state governments are not allowed to invade private property, state and local governments must be able to govern by "adjusting the benefits and burdens of economic life to promote the common good."[278] If the ability to make such adjustments was substantially constrained by forcing a payoff to those who lose out in the process, local land use administration could grind to a halt. Our constitutional framework allows flexibility for good faith attempts by state and local governments to address social and economic problems by experimenting with various policies.[279]

But this pendulum between allowing the states room to govern and mandating the payment of transaction costs to any regulatory losers quickly sharpens into a question of degree. The Takings Clause does not categorically prevent government regulation, "but rather . . . secure[s] *compensation* in the event of otherwise proper interference amounting to a taking."[280] Supporters of strong property rights argue that if too much interference is permitted without forcing the government to pay compensation, individual rights will be trampled,

276. *See* Kovacs, *supra* note 111, at 45 (citing Gardner v. Baltimore Mayor, 969 F.2d 63, 68 (4th Cir. 1992)) (discussing how the psychological disposition of state judges, and their vulnerability to electoral pressures, cuts in favor of the ability of state courts to adjudicate regulatory takings cases).

277. San Remo Hotel, L.P. v. City of San Francisco, 545 U.S. 323, 340 (2005) (citing San Remo Hotel v. City of San Francisco, 145 F.3d 1095, 1105 (9th Cir. 1998)).

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

279. *See* Guggenheim v. City of Goleta, 582 F.3d 996, 1034 (9th Cir. 2009), *rehearing en banc granted by* 598 F.3d 1061 (9th Cir. 2010) (observing that with regards to the social and economic issue of affordable housing, "the Constitution affords state and local governments the flexibility to experiment to find a workable approach"); *see also* Hannah Jacobs, *Searching for Balance in the Aftermath of the 2006 Takings Initiatives*, 116 YALE L.J. 1518, 1520–21 (2007) (claiming that partial regulatory takings schemes are bad policy because they raise regulatory costs and stifle regulation and community influence on the character of their neighborhood).

280. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 315 (1987).

and economic growth will be negatively affected.[281] But this might not matter, as jurisdictions abusing power without paying just compensation will lose out in future investment to other jurisdictions. Accordingly, local political actors should independently make this policy choice. Until now, many federal judges have agreed with this outlook, largely in an attempt to delegate this policy choice to state and local institutions.[282] After all, entrusting federal judges with the power to balance these interests would make each federal judge "the Grand Mufti of local zoning boards."[283]

The requirement for states to provide just compensation has jurisprudential effects that diminish the importance of federal court litigation and perhaps even the importance of takings litigation.[284] Because states are required to pay just compensation for takings, "a number of state courts have developed a clear preference for policing local regulation with state law doctrines rather than the . . . Takings Clause."[285] By creating state law doctrines to remedy local abuse, state courts can avoid the just compensation remedy by paying damages or by granting injunctive relief. And when state supreme courts base their holdings entirely on state law, the Supreme Court would have no review, allowing the states to develop their own jurisprudence—and allowing the Supreme Court to maximize its jurisdiction by focusing elsewhere.[286]

Finally, institutional interactions lend support to the Court's delegation of takings litigation to the states. Landowners and developers have demonstrated that they have a significant voice in state legislatures and that many of their rights can be vindicated politically.[287] There is no reason to think that the interests of landowners and developers are not represented to some extent in Congress, where jurisdictional delegation can be altered or adjusted. And there are many reasons to prefer that political bodies decide on the fit and appropriateness of regulatory options.[288] While there is a thin line between courts making

281. *See supra* note 213.
282. *See supra* notes 138–143, 241 and accompanying text.
283. Hoehne v. County of San Benito, 870 F.2d 529, 532 (9th Cir. 1989).
284. *See* Kovacs, *supra* note 111, at 34–35.
285. Sterk, *supra* note 55, at 263–64.
286. *See* Sterk, *supra* note 140, at 289–92. As Judge Posner noted:

> This case presents a garden-variety zoning dispute dressed up in the trappings of constitutional law . . . . If the plaintiffs can get us to review the merits of the Board of Trustees' decision under state law, we cannot imagine what zoning dispute could not be shoehorned into federal court in this way, there to displace or postpone consideration of some worthier object of federal judicial solicitude.

Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988).
287. *See* Sterk, *supra* note 55, at 259.
288. *Cf.* Guggenheim v. City of Goleta, 582 F.3d 996, 1021 (9th Cir. 2009), *rehearing en banc granted by* 598 F.3d 1061 (9th Cir. 2010) (characterizing rent control as a "naked transfer"). The language used in this broad decision will greatly reduce the ability of all states in the Ninth Circuit to experiment

policy and courts deciding whether the government must compensate property owners under the Takings Clause, the impact of such decisions by federal courts would comparatively stifle state experimentation. Because of these competing policies and institutional interactions and because of the importance of local influence on land use regulation, "[a]s a normative matter, the Supreme Court's approach is consistent with its institutional role in our federal system."[289]

7. Conclusions

The critics of *San Remo Hotel* are correct to be concerned about the Court's use of jurisdiction stripping and the insufficiency of certiorari jurisdiction to ensure uniform enforcement of federal constitutional rights. But there are several counterarguments that adequately address these issues. The parity concerns of takings plaintiffs—and their desire to select a sympathetic forum—is addressed by the interaction of competitive federalism. Furthermore, competency and ripeness concerns outweigh concerns of discrimination by jurisdiction stripping. Jurisdictions that do not grant just compensation for partial regulatory takings will have to compete for residents and investments with those that do. Investment-backed expectations in noncompensating jurisdictions will adjust accordingly, checked by political accountability and local sentiments. Finally, policy (the developer's recourse to politics) and federalism (the unique role of state law in takings) reinforce the Court's delegation in *San Remo Hotel*.

There remain colorable arguments that the *San Remo Hotel* Court overstepped its constitutional role and that Congress might be better positioned to weigh these types of policies. But according to the previous analysis, not only did the Court get it right, but Congress may still supersede the Court's policy balance if it disagrees.

III. PROJECTING FUTURE DOCTRINE

While "relegating takings claims to state courts is not as grievous as many courts, commentators, and members of Congress assume,"[290] I assume that the targets of such regulation will probably still object. The next Part considers the likely response of takings plaintiffs to *San Remo Hotel*. I will discuss how landowners might attempt to circumvent the *San Remo Hotel* decision and

with rent control statutes to address affordable housing issues. Regardless of the wisdom of rent control, it is clear that Judge Bybee has made a significant policy decision that takes options away from political institutions.

289. Sterk, *supra* note 55, at 271.

290. Kovacs, *supra* note 111, at 3.

how future doctrine will likely deal with difficult cases. Finally, I will consider possible ways to improve the new status quo through a multijurisdictional approach that preserves gains in judicial economy and delegation while providing some procedural safeguards for takings plaintiffs.[291]

A. Circumvent *San Remo Hotel*?

With res judicata barring regulatory takings plaintiffs from federal court, there are several options available to a litigant who believes that her case will receive unfriendly treatment in state court or that a particular federal judge is likely to be more sympathetic to property rights.[292] Facial regulatory takings claims seem to be the surest way of securing a federal forum. The Court in *San Remo Hotel* stated unambiguously that facial claims did not have to be ripened before federal court litigation.[293] Plaintiffs will also be allowed to utilize an *England* reservation to preserve facial claims for federal litigation while litigating the as-applied claims in state courts so long as they do not "seek state review of the same substantive issues they [seek] to reserve."[294]

The problem for would-be plaintiffs lies in successfully stating a facial claim.[295] Also, after *Lingle v. Chevron U.S.A., Inc.*,[296] plaintiffs may no longer state facial takings claims under the "substantially advances" test, further circumscribing possibility of relief for facial claims.[297] Plaintiffs must instead allege that the government action—by definition and without qualification—will

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291. *But cf.* Sterk, *supra* note 140, at 300 (arguing that the jurisdictional bar to regulatory takings claims should also be extended to encompass per se takings claims).

292. Generally, regulatory takings plaintiffs prefer litigating in federal court because of the relatively high percentage of judges in the federal courts appointed by Republican presidents—a proxy for conservatism and support for strong property rights. *Cf.* William P. Marshall, *The Empty Promise of Compassionate Conservatism: A Reply to Judge Wilkinson*, 90 VA. L. REV. 355, 364 n.48 (2004) ("The conservative solicitude for property owners, moreover, extends beyond the substantive issues present in takings cases—it also extends to the conservatives' leniency with respect to property owner litigants' access to the courts.").

293. *See* San Remo Hotel, L.P. v. City of San Francisco, 545 U.S. 323, 345 (2005) ("Petitioners were never required to ripen the heart of their complaint—the claim that the [ordinance] was facially invalid . . . ."); *see also supra* note 115 (noting that the *Williamson County* ripeness requirements do not apply to facial claims).

294. *Id.* at 346.

295. *See* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 736 n.10 (1997) (noting that facial takings plaintiffs face an "uphill battle"). A facial challenge is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [law] would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). Conversely, as-applied challenges examine the government action's impact on the particular property at issue.

296. 544 U.S. 528 (2005).

297. *See id.* at 548 (rejecting a "rule that says a regulation affecting property constitutes a taking on its face solely because it does not substantially advance a legitimate government interest").

constitute a taking of their property by reference only to the economic effects of regulation.[298]

Like facial takings claims, it also appears that plaintiffs may be able to secure a federal forum when requesting noncompensatory relief from government action. Such claims have been analogized to facial takings claims,[299] and may be immediately ripe because of the factual requirements underlying the claims. For example, requests for declaratory relief might involve proposed exaction fees, though the developer would be required to sue before obtaining the desired permit.[300] Litigants with facial claims against regulatory takings other than exactions may also be able to advance their claims under theories of declarative or injunctive relief. However, a critical drawback behind this theory of obtaining federal jurisdiction is that it is not clear how a regulatory takings plaintiff actually benefits from declaratory relief, to the extent such a plaintiff can also satisfy the factual and ripeness requirements for a facial claim.

Opportunities seem less promising for takings plaintiffs attempting to reach a federal forum by styling their claims as substantive due process violations.[301] Courts have been unfriendly to takings claims masquerading as due process claims and generally have held that the *Williamson County* ripeness requirements apply to these attempts.[302] Due process claims for diminution of property value construed as takings claims face a significant hurdle—*Lingle* held that facial takings claims could not rely upon arguments that the government action does not substantially advance legitimate government interests.[303] The combination of judicial preference to constructively construe due process claims as takings

298. The Ninth Circuit, in *Guggenheim v. City of Goleta*, 582 F.3d 996 (9th Cir. 2009), *rehearing en banc granted by* 598 F.3d 1061 (9th Cir. 2010), may clarify some of the open questions surrounding facial takings challenges. The original three judge panel confirmed that facial takings challenges under *Penn Central* could be asserted, allowing takings plaintiffs an avenue around *Williamson County*. *Id.* at 1015. The plaintiffs in *Guggenheim* did not even fulfill the first *Williamson County* prong, although the panel held that their claims were ripe because the case had been heavily litigated and the state had forfeited any objection to *Williamson County*'s prudential ripeness requirements. The panel made several decisions that allowed it to reach the merits and kill the rent control ordinance at issue; some of these judgments may be rejected in the subsequent en banc opinion.

299. *See* Breemer, *supra* note 24, at 302–03.

300. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841–42 (1987); Breemer, *supra* note 24, at 303.

301. Substantive due process claims involve asserting the existence of an interest (dependent on state property law) and demonstrating proof of arbitrary and capricious interference of that interest by the government. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 542 (2005).

302. *See* Sterk, *supra* note 55, at 241 n.173.

303. *Lingle*, 544 U.S. 528.

claims and the inability of takings plaintiffs to assert a "substantially advances" argument may well foreclose this attempt to reach a federal forum altogether.[304]

In light of these considerations, how can plaintiffs craft their claims in order to receive compensation for the diminution in value of their property? One idea is for the takings plaintiff to assert a substantive due process violation and to request an injunction and damages rather than just compensation.[305] By tailoring claims in this manner, and by requesting damages and an injunction rather than just compensation, it may be possible to avoid the ripeness requirements. To follow this route, though, plaintiffs would have to carefully calculate the expected difference in recovery between damages as opposed to just compensation remedies and then weigh this against the likelihood of winning on the merits or obtaining a fair trial in state court. I would imagine that in most cases it probably makes more sense to sue for just compensation in state court, because after discounting expected damages by likelihood of success the expected compensation is unlikely to be larger than simply litigating an inverse condemnation claim in state court.

B. Application to Problem Cases

1. Intersecting Federal and State Government Action

One difficulty arises when a plaintiff's taking claim is caused by an action involving both federal and state governments. When the federal government takes property, plaintiffs are statutorily required to raise their claims against the United States in the Court of Federal Claims.[306] For claims against state governments that do not involve physical occupation or violation of a per se rule, plaintiffs must sue in state court.[307] May a plaintiff sue in federal district court or the Court of Federal Claims if the state government, acting pursuant to federal law, diminishes the value of her property? For example, states may alter land use policies in response to requirements imposed by federal environmental statutes. The federal district court will likely have better capacity to understand and apply

304. This result is not settled; the Ninth Circuit recently ruled in *Crown Point Development, Inc. v. City of Sun Valley*, 506 F.3d 851 (9th Cir. 2008), that plaintiffs claiming an ad hoc taking under *Penn Central* should be analyzed under the Fifth Amendment, but a claim that the government acted illegitimately is a due process claim that is not subject to the *Williamson County* ripeness requirements. *Id.* at 856 (holding that "[n]o amount of compensation can authorize [government] action" that violates the due process clause).

305. *See* Robert H. Thomas, *The Ninth Circuit Rediscovers Substantive Due Process in Land Use Cases*, ZONING & PLAN. L. REP., Dec. 2008, at 6 & 11 nn.61–64.

306. *See supra* note 3.

307. *See supra* notes 39–40 and accompanying text.

the underlying federal law, and the lower federal courts—subject to appellate oversight—will be able to ensure that the law is applied uniformly.

However, there are several reasons to think that federal district court should not be the appropriate forum to adjudicate such cases.[308] First, although the legal questions will involve a greater proportion of federal issues, the concurrent factual and state property law issues will not have ripened at all. Even if a final administrative decision is required to solidify the factual issues for determination, the state courts will still be better positioned to interpret issues of state law when weighing investment-backed expectations and the effect of the regulation on property.

Next, even when the takings claim relates to federal law, a state forum would be more competent in evaluating the character of the state government's actions. Even if the federal law compelled the state legislative or executive action, the state would have recourse under the Tenth Amendment to obtain compensation or relief from the federal government.[309] Assuming the state government has some discretion as to how it regulates under the influence of federal law—as is the case with state implementation plans under the Clean Air Act—the burden of regulatory choices should fall upon the states themselves.[310]

Finally, the argument against a federal forum makes sense when considering that claims against the United States must be filed in the Court of Federal Claims. If a takings plaintiff is unable to construe the interaction of federal and state law to plead claims against the federal government—which would plead the plaintiff out of district court, anyway—then a federal district court should not be the appropriate venue for claims against the state.

2. Diversity Jurisdiction

Another difficult question is how the holding of *San Remo Hotel* might impact the ability of a takings plaintiff to gain access to federal district court through diversity jurisdiction. Such a plaintiff would have to own enough

308. In a district court enforcement action under the Clean Air Act, the defendant power company raised a Fifth Amendment takings claim as an affirmative defense. The court rejected the defense on motion to dismiss. *See* United States v. Am. Elec. Power Serv. Corp., 218 F. Supp. 2d 931, 938–40 (S.D. Ohio 2002). In cases in which a power company plaintiff asserts these types of claims against a state government, the claims should be similarly dismissed.

309. *See* Printz v. United States, 521 U.S. 898, 923–25 (1997); New York v. United States, 505 U.S. 144, 188 (1992).

310. *See* Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1161 (1995) (describing the interaction between the Clean Air Act and state implementation, in which states have responsibility for pollution reduction, but the state's sovereignty is not unconstitutionally impaired).

property to satisfy the diversity jurisdictional amount in controversy requirement, yet be domiciled or have their principle place of business in another state.[311] Even assuming these requirements were met, the federal district court would be bound to apply the relevant state law anyway.[312] This tactic would not allow a takings plaintiff to circumvent unfavorable state property rules, but it would at least allow the plaintiff to have a federal judge—who may be more ideologically inclined to aggressively protect property rights—adjudicate the case.

Can diversity jurisdiction overcome the *Williamson County* ripeness tests? This depends on the extent to which the ripeness tests are prudential as opposed to constitutionally mandated jurisdictional limits under Article III. Because it is likely that both *Williamson County* prongs are prudential,[313] the question shifts to whether diversity jurisdiction should make up for a plaintiff's failure to fulfill either or both prongs of the test.

If a diversity plaintiff cannot plausibly plead that she has received a final administrative decision in a takings claim,[314] a federal court should exercise prudential ripeness principles to decline jurisdiction. Although the claims will be concrete enough to form an Article III case or controversy, the concerns discussed in the *Williamson County* opinion still directly apply. Moreover, these prudential concerns have nothing to do with the forum chosen. A final administrative decision is important for takings claims to ensure that all parties are clear as to how the regulation applies to plaintiffs for their as-applied claim, and should not be so easily circumvented through diversity jurisdiction.

A plaintiff submitting a diversity claim after receiving a final decision, but before filing suit in state court,[315] raises a closer question. The second prong of the *Williamson County* test has been widely criticized, and many judges might be inclined to justify holding claims ripe when presented with a way to legally distinguish binding precedent.[316] A plaintiff could also argue that because the

311. *See* 28 U.S.C. § 1332 (2006). These two requirements together should eliminate a large percentage of potential cases.

312. *See* 28 U.S.C. § 1652 (2006) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.").

313. *See supra* note 264.

314. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985) (first prong).

315. *See id.* at 194 (second prong).

316. *Cf.* Guggenheim v. City of Goleta, 582 F.3d 996, 1011–13 (9th Cir. 2009), *rehearing en banc granted by* 598 F.3d 1061 (9th Cir. 2010) (using the history of litigation and waiver to hold that the case was ripe for adjudication).

federal court is applying state law in diversity, the federal court is in effect applying state procedure and thus fulfilling the requirements of *Williamson County*. If the district court holds against the plaintiff on state law claims, the court might as well adjudicate the federal claims to evade preclusion through simultaneous adjudication.

If faced with this scenario, however, a federal judge should not entertain the federal takings claim.[317] First, allowing a plaintiff to bring a claim arising under the federal Constitution through the back door using diversity jurisdiction subverts the intent of the jurisdictional statute, exposing the attempt to avoid the prudential ripeness doctrine. Also, the fact that such a plaintiff owns the requisitely substantial amount of property in the state undermines the outsider prejudice justification for diversity jurisdiction. A state judge is probably less likely to show parochial bias against someone who is associated with the state in a substantial, concrete manner like property ownership.[318] Additionally, competitive federalism should allow market forces to correct for any state institutional bias against outside investment; if a state court is hostile towards such interests, state citizens will be affected by a decline in their property values in proportion to the reduced out-of-state demand.

3. Waiver

Another potential area of ambiguity concerns the effect of the defendant's waiver of jurisdictional objections. Jurisdictional principles are sometimes unwaivable; for example, a federal court must ensure that an actual Article III case or controversy exists before it may adjudicate a case, even if the defendant neglects to raise any objections. The *Williamson County* ripeness requirements are prudential in nature,[319] and therefore a court should be "permitted, but not obligated, to consider [jurisdictional issues] *sua sponte*."[320]

317. There is little case law touching on this question. *Compare* SK Fin. SA v. La Plata County, 126 F.3d 1272, 1276 (10th Cir. 1997) (holding that a lawsuit for inverse condemnation—a takings claim under state law—can be brought in federal court when there is diversity of citizenship), *with* Samaad v. City of Dallas, 940 F.2d 925, 934 (5th Cir. 1991) (dismissing pendent state law inverse condemnation claims as unripe because the plaintiffs had not sought relief from state court). *See also* CBS Outdoor Inc. v. N.J. Transit Corp., No. 06-2428 (HAA), 2007 WL 2509633, at *23 (D.N.J. Aug. 30, 2007) (declining to take jurisdiction over regulatory takings claims because diversity of citizenship was not successfully pleaded and supplemental jurisdiction would be improper).

318. The original justification for diversity jurisdiction is not entirely clear. To the extent that diversity jurisdiction is not intended to protect out-of-state residents but rather to protect against populist state legislatures, my argument against diversity jurisdiction is weaker. *See* CHEMERINSKY, *supra* note 4, at 296–97 (citing arguments made by Judge Henry Friendly).

319. *See* cases cited *supra* note 264.

320. Day v. McDonough, 547 U.S. 198, 209 (2006) (analyzing a statute of limitations restriction on jurisdiction under the Antiterrorism and Effective Death Penalty Act of 1996).

A more difficult question is whether the government can waive this argument and what effect that waiver should have. To answer that question, courts should explicitly examine whether the waiver implicates the underlying justifications for the prudential limitation.[321] Otherwise, a court would be able to pick and choose when it wanted to ignore the prudential limitations when it wanted to reach the merits—or likewise apply the prudential limitations if it wanted to punt a particular case back to state court.[322]

Because the prudential limitations on jurisdiction are based on competency, federalism, and efficiency grounds, the circumstances in which a court waives and does not enforce the *Williamson County* ripeness requirement should be quite narrow.[323] Courts have answered this question inconsistently.[324] Except in circumstances in which a defendant has pretextually removed regulatory takings claims to delay a final decision—for example, when the unripe claims are the only claims over which the district court has independent jurisdiction—federal courts should remand regulatory takings cases to state court. Defendant consent does not remedy competency concerns, making it imprudent to adjudicate these claims and preventing the state courts from weighing in on the substantive merits. But waiver is permissible when a defendant attempts to delay

321. *See* LaDuke v. Nelson, 762 F.2d 1318, 1323 & n.4 (9th Cir. 1985).

322. *Cf.* Adler v. Bd. of Educ., 342 U.S. 485, 496–98 (1952) (holding a First Amendment claim ripe and ruling against plaintiff on the merits, when some dissenters disagreed on the merits and Justice Frankfurter dissented on ripeness grounds). In *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), the defendants removed a case to federal district court. The district court permitted removal even though the plaintiff claimed a regulatory taking under the federal constitution. *See id.* at 160–61. Instead of remanding the regulatory takings claims, which had not yet ripened under the state litigation prong of *Williamson County*, the district court granted the defendants summary judgment. *See id.* at 160. This issue could be viewed in terms of waiver (the state defendant waived actual state litigation as a requirement by removing the case) or it could be viewed like *Adler*, in which the Court had no issue reaching the merits—despite ripeness concerns—because of its substantive view of the merits.

323. In *Guggenheim v. City of Goleta*, 582 F.3d 996 (9th Cir. 2009), *rehearing en banc granted by* 598 F.3d 1061 (9th Cir. 2010), Judge Bybee reached the merits of the plaintiffs' facial takings claim even though the plaintiffs had not received a final administrative decision. Judge Bybee relied upon the years of prior litigation and the government's waiver of this argument in deciding that the plaintiffs had "substantially satisfied the *Williamson* [*County*] requirements." *Id.* at 1012. Notably, the court also held that waiver by the government altered the evidence that the plaintiffs were allowed to assert, which changed the plaintiffs' facial challenge into an as-applied challenge in everything but name. This way, the plaintiffs successfully circumvented the *Williamson County* requirements, while perhaps being cheered on by the court, which criticized *Williamson County* in the same opinion. *See id.* at 1008.

324. *See* McClung v. City of Sumner, 548 F.3d 1219, 1224 (9th Cir. 2008) (affirming *Tapps Brewing Inc. v. City of Sumner*, 482 F. Supp. 2d 1218 (W.D. Wash. 2007) and assuming without deciding that the regulatory takings claim was prudentially ripe); *Tapps Brewing Inc.*, 482 F. Supp. at 1227 (agreeing with the plaintiffs that it would be unfair "to permit the government to remove this action to federal court and then hold that the Plaintiffs' claim is unripe because the Plaintiffs did not litigate in state court" after the plaintiffs had actually litigated similar issues in state court); Anderson v. Chamberlain, 134 F. Supp. 2d 156, 160–62 (D. Mass. 2001) (remanding plaintiff's regulatory takings claim even though defendants had removed the case from state to federal court); *see also supra* notes 322–323.

adjudication by removing and then asking the federal court to hold the regulatory taking claims unripe. At that point, adjudication of the takings claim (if possible) may be in the interest of justice and efficiency.

4. Facial Regulatory Taking Claims

The easiest way for a takings plaintiff to reach federal court is to assert a facial challenge against the state regulation. "Facial challenges are exempt from the [final decision] prong of the *Williamson* [*County*] ripeness analysis because a facial challenge by its nature does not involve a decision applying the statute or regulation."[325] Despite the problems facing an as-applied challenge in federal court after *Williamson County* and *San Remo Hotel*, the Court has recently expanded the availability of facial challenges to plaintiffs. In *Palazzolo v. Rhode Island*,[326] the Court opened the door for plaintiffs to bring takings claims in federal court if they had acquired property after the challenged regulation went into effect, irrespective of the plaintiffs' actual or constructive notice of the regulation. This broadened the scope of possible plaintiffs, though the most likely barrier to a facial challenge—the statute of limitations—remains an important restriction.[327]

The other major limitation on facial challenges is the difficulty of succeeding on the merits. "[A] facial challenge alleges that the statute or regulation is unconstitutional in the abstract,"[328] in that "no set of circumstances exists under which the [government action] would be valid."[329] This limits the amount and type of evidence that a plaintiff may offer to support their claim to just compensation. A plaintiff asserting a facial claim may only submit evidence relating to the general, theoretical effect of the government action, but not evidence relating to how the government action specifically affected the plaintiff's property.[330] Thus, facial takings plaintiffs face an "uphill battle."[331]

A facial regulatory taking challenge is analyzed under the *Penn Central* factors. The limitation on evidence makes it very difficult for a plaintiff to demonstrate that a regulation, in all cases, goes too far in intruding upon

325. Hacienda Valley Mobile Estates v. City of Morgan Hill, 353 F.3d 651, 655 (9th Cir. 2003).

326. 533 U.S. 606 (2001).

327. In fact, this arrangement may encourage perverse behavior because most facial claims will quickly fall prey to the statute of limitations if they attempt to ripen as-applied challenges in state court.

328. *Guggenheim*, 582 F.3d at 1013–14.

329. United States v. Salerno, 481 U.S. 739, 745 (1987).

330. *See Guggenheim*, 582 F.3d at 1014. Note that creative plaintiffs may easily circumvent the spirit of this rule, as some discussion of general economic principles may need few inferences to project the effect on plaintiff's property.

331. Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 736 n.10 (1997).

investment-backed expectations and property values. After *Lingle v. Chevron*,[332] plaintiffs may no longer assert a facial claim that the government action does not substantially advance legitimate government interests. Instead, plaintiffs must prove that the government's action either effectuates a physical invasion[333] or that the burden of regulation falls on a discrete, narrow class of individuals, as contrasted with a wide societal pool or tax base.[334]

Although facial challenges typically begin and end with the challenged law, the court must look beyond the law in two circumstances for takings cases. First, the plaintiff must establish an injury-in-fact to satisfy Article III standing.[335] Second, the court must look at the effect of the statute's enactment on the populace at large, relying on general economic principles.[336] The court cannot look too closely at the specific economic impact on the plaintiff, lest the facial challenge become a de facto as-applied challenge; however, this is a difficult line to draw. For example, the Ninth Circuit in *Guggenheim v. City of Goleta*[337] attempted to establish injury while avoiding transforming a facial challenge into an as-applied challenge. But instead of determining what evidence was permissible, the court relied on the defendant's waiver to consider very specific evidence of economic impact on the plaintiffs. In doing so, the court plainly transformed the case into an as-applied challenge in everything but name.[338]

If federal courts are to entertain facial regulatory taking without impermissibly intruding onto the policymaking role of state institutions, they must be careful not to artificially analyze cases as though they are as-applied challenges. To avoid this, courts should consider enough evidence of the direct effect on the plaintiff to establish standing,[339] and then proceed only by reference to general economic principles and "no set of circumstances" limitations. For example, when dealing with a facial challenge to a state law that restricts the type or the extent of development in a certain locale, a court should first ensure that the

332. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005).

333. *See id.* at 538.

334. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960).

335. *See* Allen v. Wright, 468 U.S. 737, 750–51 (1984) (discussing what constitutes a judicially cognizable injury when analyzing standing requirements).

336. Guggenheim v. City of Goleta, 582 F.3d 996, 1017 (9th Cir. 2009), *rehearing en banc granted by* 598 F.3d 1061 (9th Cir. 2010).

337. *Id.*

338. *See id.* at 1019 (discussing with specificity the effect of rent control on the plaintiffs' property, using overly-precise dollar figures); *id.* at 1023 (discussing the plaintiffs' specific rate of return). The court quite transparently wanted to reach the merits of the case and appeared to be signaling the Supreme Court to reexamine *Williamson County*. *See id.* at 1007–08 (describing the *San Remo Hotel* concurrence, and "musing" about overturning *Williamson County* while indicating it was bound by precedent).

339. *See id.* at 1017.

plaintiff owns land capable of such development in the affected area. However, once injury-in-fact and standing have been established, the character or the extent of the plaintiff's injury should be inconsequential to the facial takings claim. Instead, the court should focus on general economic principles to determine under *Penn Central* if there has been an unconstitutional interference with investment-backed expectations.

C. Imagining Future Doctrine: Collateral Review, Habeas Corpus, and Multijurisdictionality

Ultimately, this Comment concludes that state court adjudication of regulatory takings is sufficient because of finality interests, competitive federalism, the familiarity with state law and local conditions, and the unlikelihood of discrimination against property rights. But this analysis identified unresolved concerns about parity, the sufficiency of certiorari jurisdiction, and unfairness to some individual litigants. These same concerns are present in the justification for federal habeas review of state court convictions. Correspondingly, Congress should act to statutorily grant jurisdiction to lower federal courts for limited collateral review of regulatory takings claims. Such a statute would also craft a limited exception to the prudential Supreme Court doctrine that precludes appellate review of final state court judgments by lower federal courts.[340]

There are several similarities between the problems faced by regulatory takings plaintiffs and individuals challenging criminal detention. First, unless a federal action or federal crime is at issue, the initial litigation will generally take place in state court.[341] Second, both classes of individuals must challenge the state court decision by appeal, often followed by collateral challenge in state court. As a general rule, a federal forum avoids review of state court decisions due to principles of comity until state procedures have been complied with or exhausted.[342] Third, there are strong governmental interests in both cases against continued or subsequent litigation in federal courts due to a need for finality of judgment. Fourth, both classes of plaintiffs are essentially arguing that state court adjudication in their case was constitutionally deficient: Either the state's underlying action violated some constitutional or procedural right or the state court simply used the incorrect constitutional standard and committed a harmful

340. *See infra* notes 354–356 and accompanying text (discussing the *Rooker-Feldman* doctrine).

341. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 544 n.153 (2001) (citing statistics that suggest there are at least twenty times more state criminal cases than federal criminal cases).

342. FALLON, JR. ET AL., *supra* note 207, at 1296–1301.

error.[343] Essentially, in both regulatory takings and habeas corpus cases, the party seeking federal review thinks that the underlying state court litigation was legally flawed.

There are obvious differences, of course. Takings plaintiffs are usually in a position where the government action has affected them directly, whereas criminal defendants are accused of committing some act or omission against the state laws. Although some takings plaintiffs are developers undertaking activity and attempting to obtain necessary permits, the underlying taking can still be characterized as a government decision affecting them. In other words, takings plaintiffs generally do not come to the taking.[344] While this is similar to individuals who challenge criminal convictions by asserting actual innocence, such cases are rare.[345]

As discussed, direct Supreme Court review of state court adjudication may not be adequate to completely enforce federal rights.[346] In theory, the federal judiciary supervises state courts through direct Supreme Court review and—in the case of criminal law—using "district courts on habeas to inquire into the fairness of the state's process."[347] The Court has indicated that it can manage uniformity and correct misinterpretations of federal law by using only its certiorari jurisdiction.[348] But because so many cases are appealed and certiorari is granted to so few cases per year, this is a dubious claim.[349] Is there a way to optimize the protection of federal takings rights but still address the policy concerns that underpin the Court's state delegation jurisprudence?

The current framework for takings litigation may benefit from a multijurisdictional approach that incorporates varying degrees of both state and federal review. As Barry Friedman argues, "[b]y utilizing . . . multijurisdictional solutions, the competition over interests, and the sacrifice of some interests, can be avoided."[350] Multijurisdictional solutions generally involve sequencing or double

343. *Cf.* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "harmless error [as] [a]n error that does not affect a party's substantive rights or the case's outcome. A harmless error is not grounds for reversal").

344. *But cf.* Palazzolo v. Rhode Island, 533 U.S. 606, 611–16 (2001) (holding that a plaintiff who purchased property that is already subject to a regulatory taking may still sue for just compensation).

345. *See* Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 341 (1993) (asserting that few cases are heard via the innocence exception).

346. *See supra* Part III.B.3.

347. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 524 (1963) (discussing federal supervision of state courts in enforcing federal constitutional rights in criminal law).

348. *See* Tafflin v. Levitt, 493 U.S. 455, 465 (1990) (discussing state adjudication of federal RICO claims); Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 816 (1986).

349. *See Merrell Dow Pharms.*, 478 U.S. at 827 n.6 (Brennan, J., dissenting).

350. Friedman, *supra* note 22, at 1274.

tracking litigation, with both state and federal court utilized to address the issues instead of forcing cases into one jurisdiction or the other. Not all multijurisdictional solutions involve full relitigation of previously decided issues, though.

The preferred approach for takings plaintiffs after *Williamson County*, using an *England* reservation to save federal constitutional claims for subsequent federal court litigation while ripening the dispute in state court, is one version of a multijurisdictional solution. But that approach inefficiently duplicates factfinding, involves substantially identical analysis of the facts in each forum, and consumes substantial judicial resources. A new multijurisdictional approach could rely on case management, rather than on a rejection of sequencing, to avoid some of the costs of sequencing. Factfinding could be done in one jurisdiction and deferred to in the other, and legal analysis could focus on distinct issues instead of duplicating.[351]

A jurisdictional framework that might address the policies and concerns on both sides of the debate would maintain the state courts in their current primary role, but would allow federal district courts the ability to collaterally review final state court decisions. State trial courts are competent to find facts, and state appellate and supreme courts can ensure that state property law principles are settled definitively. At this point, a takings plaintiff would be allowed to file a stylized due process claim in federal district court, alleging that either the state court adjudication was procedurally unfair,[352] or that the state court had clearly employed the wrong legal standard, resulting in harmful error. The district court would not have the expectation to find facts specific to the taking and would defer to state courts on those matters.[353] Limited factfinding regarding procedure may be allowed, particularly if doing so is necessary to determine whether the state court's legal error was harmless or not. The district court would essentially provide an additional, though very limited, federal forum to check the administration of federal rights in state courts—much like they already do in the habeas corpus context. This would also allow the Supreme Court to judiciously use its certiorari jurisdiction in an error-correction mode, ensuring uniform

351. *See id.* at 1276–78.

352. This would presumably focus on a claim of institutional bias against the state courts, perhaps because of majoritarian influence. Plaintiffs would have to plead with some specificity to state these claims—simple assertions would not suffice.

353. I think that the most appropriate standard of review to employ to prevent relitigation while policing abuse of discretion by state courts is an arbitrary or capricious standard. *See* The Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006) (arbitrary and capricious review); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977) ("Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."). This standard would apply both to findings of fact and to application of law. Also, attempts to pretextually factfind can be disciplined by circuit review.

application of constitutional norms to the extent possible with uneven background property law principles.

Though a multijurisdictional solution would necessarily add administrative costs to the litigation, these costs are worth the reinforced norms and the improvement upon the post–*San Remo Hotel* status quo.[354] A system allowing limited collateral review will not only provide greater protection to individual litigants but will also ensure that the bulk of takings litigation actually occurs in state courts. Furthermore, limited collateral review would strain judicial resources less than if the Court had permitted an *England* (or *Santini*)[355] exception for takings plaintiffs to reserve their claims for subsequent federal relitigation of factual issues.[356]

A counterargument to this approach involves its lack of comity and respect for state courts. Under the Supreme Court's prudential *Rooker-Feldman* doctrine, "federal courts do not have jurisdiction pursuant to § 1983 to review the judgments and decisions of state courts."[357] In rebuttal, the so-called *Rooker-Feldman* doctrine is not constitutionally mandated,[358] and if collateral review shows that state litigation was not full and fair, preclusion and *Rooker-Feldman* should not even apply. But *Rooker-Feldman* may prevent collateral review by federal district courts of the legal standard employed by the state courts, as a change in the legal test does not show that litigation has not been full and fair.

Enabling such multijurisdictional review of regulatory takings cases probably requires congressional action. The proposed multijurisdictional solution arguably conflicts with the rationale underpinning the *Rooker-Feldman* doctrine, but the doctrine is prudential, and Congress may create an exception. Also, the standard of review enabled by the Court acting without congressional action is likely to be so stringent as to be subsumed by existing due process claims.[359] Congressional action can clarify the standard of review, and Congress

354. I would not expect many of these stylized claims to succeed. Although the result would not change in many cases, "at least one litigant will prefer the multijurisdictional solution" to the takings litigation problem, and the multijurisdictional solution will reinforce fairness and federalism norms. Friedman, *supra* note 22, at 1278.

355. *See* Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 130 (2d Cir. 2003), *overruled by* San Remo Hotel, L.P. v. City of San Francisco, 545 U.S. 323 (2005) (creating a "Santini" exception—based on the *England* reservation—for regulatory takings plaintiffs).

356. Although many plaintiffs may attempt to use this remedy, limited collateral review will still avoid discovery and factfinding at trial where substantial judicial resources are consumed.

357. CHEMERINSKY, *supra* note 4, at 481 (discussing the *Rooker-Feldman* doctrine).

358. Federal courts collaterally review state court final decisions via the federal habeas corpus statute. The rejoinder to this argument may be to reinforce the notion that Congress, not the courts, should be involved in creating such a multijurisdictional approach.

359. *See, e.g.*, Kremer v. Chem. Constr. Corp., 456 U.S. 461, 480–81 (1982) (stating that when litigants are denied a full and fair opportunity to litigate, or if the judgment is fundamentally flawed, preclusion principles do not apply).

is well-equipped to weigh the costs to judicial economy of this modest extension of jurisdiction.

If ideological conservatives disagree with *San Remo Hotel* because of its possible negative impact on property rights, the way forward may involve an ironic doctrinal twist. Conservatives have traditionally opposed vigorous federal habeas corpus review of state court convictions, generally citing federalism and comity concerns. But perhaps these arguments against collateral review will look less convincing to conservatives when property rights are stake.[360]

CONCLUSION

Although controversial, the federalism underpinnings of *San Remo Hotel* outweigh concerns that its jurisdiction stripping discriminates against property rights. Further, despite normative preferences for congressional control of federal court jurisdiction and for opportunities for constitutional claimants to vindicate their rights in federal court, the balance of policy supports the result in *San Remo Hotel*. State courts and state legislatures are constitutionally adequate guardians of their citizens' property rights in most cases, and sensitive land use policy is best calibrated at the local level. Additionally, the competency of state courts to decide land use and property issues may be greater than that of the federal courts. Finally, political accountability and competitive federalism should help prevent a race to the bottom concerning protection of property from unconstitutional government interference.

However, even though this Comment's analysis shows that litigants will be treated fairly in state courts, there may be room in the judicial framework for reasonable and targeted collateral review to ensure that individual litigants receive a fair hearing on their federal constitutional claim. If defenders of strong property rights in Congress wish to ameliorate perceived unfairness created by the current jurisdictional state of affairs, they are better off enabling limited collateral review of state court takings decisions rather than rejecting the entire *Williamson County*/*San Remo Hotel* framework, thus making each federal judge "the Grand Mufti" of land use decisions.[361]

360. *See* Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 434 (2002) ("When federalism and substantive conservatism come into conflict, substantive conservatism frequently dominates.").

361. Hoehne v. County of San Benito, 870 F.2d 529, 532 (9th Cir. 1989); *see also* text accompanying *supra* note 280.