Maine Law Review

Volume 61 | Number 2 Article 5

June 2009

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"[It is] the duty of government to render prompt justice against itself."
Abraham Lincoln[1]

I. INTRODUCTION

Takings doctrine is a mess. Let's just accept that and establish specialized federal and state "takings courts" to adjudicate takings claims. Takings claims arise when governmental conduct is alleged to detrimentally affect private property. Adjudication of takings claims may initially seem straightforward: the Fifth Amendment's Just Compensation Clause,[2] as well as analogous state constitutional provisions,[3] plainly provide that the government shall not take private[4] property for public use without just compensation. There are circumstances that clearly fall within such prohibitions. For example, if I own a vacant lot that happens to be located in the path of a proposed freeway, there is no question that the government can use its inherent power of eminent domain to bring a "direct" condemnation proceeding during which a battle of experts will determine the amount of compensation I will receive.[5]

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* Professor of Law, S.J. Quinney College of Law at the University of Utah. This Article was funded in part by the University of Utah College of Law Excellence in Teaching and Research Fund. I would like to thank my wife Karen Martinez for her insightful comments and brilliant suggestions on this Article. I am also particularly grateful for the invaluable and infinitely patient research assistance provided by John Bevan of the S.J. Quinney Law Library.

1. Cong. Globe, 37th Cong., 2d Sess. 2 (1862) (urging Congress to give the Court of Claims the power to issue enforceable final judgments, rather than mere recommendations to be submitted to Congress for its consideration).

2. The Fifth Amendment provides, in relevant part, "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. This prohibition extends to state governments through the Due Process Clause of the Fourteenth Amendment. The Fourteenth Amendment's Due Process Clause provides, in pertinent part, "[N]or shall any State deprive any person of . . . property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

In *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 233, 241 (1897), the Supreme Court first held the Fifth Amendment's Just Compensation Clause applicable to the states through the Fourteenth Amendment's Due Process Clause.

3. State just compensation provisions are similar to the Federal Just Compensation Clause, except that many add that "damaging" of private property also will give rise to just compensation. *See, e.g.*, CAL. CONST. art. I, § 19 ("Private property may be taken or damaged for a public use and only when just compensation . . . has first been paid to . . . the owner."); UTAH CONST. art. I, § 22 ("Private property shall not be taken or damaged for public use without just compensation.").

4. The prohibition also applies to taking by the federal government of property held by state and local government entities. United States v. 50 Acres of Land, 469 U.S. 24, 31 (1984).

5. The power of eminent domain, sometimes known as the power of "direct condemnation," is referred to as "an attribute of sovereignty." Boom Co. v. Patterson, 98 U.S. 403, 406 (1878). The Court further explained:

This relatively straightforward "direct condemnation" scenario contains certain classic elements: (1) something we unquestioningly identify as property is plainly involved—land and all attributes of land ownership; (2) the governmental conduct is, without doubt, a "taking" for a "public use" because it puts the public in my place with respect to the land—the vacant lot, formerly mine exclusively, will become a few hundred feet of freeway surface used by the public for getting places quickly; and (3) the governmental conduct here can be regarded as a *purposeful act of expropriation* where the condemning agency knows both that it is drastically altering my status in reference to the land *and* that it therefore would be obligated to compensate me for its conduct. This standard case of direct condemnation rarely presents legal problems as long as certain minimal requirements—fair procedure, a governmental purpose, and fair compensation—are met.[6]

Problems arise, however, in the *non*-direct condemnation setting, where governmental conduct varies from the classic direct condemnation script. Suppose, for example, that when I purchased the vacant lot it was zoned for apartment buildings. If the city thereafter rezones the area to allow only single-family residences in order to reduce traffic congestion, noise, and overall crowded conditions that apartment buildings bring, then my lost *expectation* of someday constructing an apartment building on it is not so obviously a loss of "property." In the direct condemnation situation, a physical, tangible vacant lot is involved, whereas here, only the intangible hope and the concomitant lost value of using the property for apartments is affected.[7] Even if that hope will be treated as "property" by law, it is not so obvious that a "taking" for "public use" has occurred. What should the law consider as the "relevant" property? Should we focus broadly on *all* the potential uses of the vacant lot as the relevant property, or should we focus narrowly on the hoped-for apartment use? If the relevant property is broadly defined, then merely one use among many potential uses has been prohibited, and the relevant property has been merely diminished, not destroyed. Such diminution could be treated as a cost of living in a civilized society—like speed limits—whereby absolute freedom is constrained so that relative freedom can be preserved.

If we instead define the "relevant property" narrowly, as consisting of the prospective apartment use, perhaps measured as the difference in value between single-

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> The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The [constitutional clauses] . . . providing for just compensation for property taken [are] . . . mere limitation[s] upon the exercise of the right.

Id.; *see also* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 239-40 (1984); Berman v. Parker, 348 U.S. 26, 32 (1954); City of Oakland v. Oakland Raiders, 646 P.2d 835, 837 (Cal. 1982) (holding that eminent domain power is an "inherent attribute of sovereignty" that authorizes the taking of intangible personal property such as a professional football franchise).

6. *See* Thomas Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 GEO. WASH. L. REV. 355 (1983) (critiquing the relatively flimsy nature of the "public use" limitation).

7. The hope of keeping the lot is also involved in the direct condemnation setting, of course, but is deemed incorporated into the fair market value paid as just compensation. *See generally* Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677 (2005) (examining different valuation mechanisms); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (applying a personhood perspective of property to takings).

family and apartment use, it is possible to argue that *all* of my relevant property has been affected. Is it reasonable to say the public has "acquired" my expectation, as in the direct condemnation scenario, and should therefore pay me? Or is the extinction of my expectation for a public purpose—that the public is simply better off with fewer apartments in the area—and therefore no remedy is due? But is extinction of such an *expectation*, even if for a "public purpose," sufficient to trigger some sort of remedy? We have a range of remedial choices: Should I be entitled to have the rezoning ordinance declared invalid? Am I entitled to damages? What measure of damages? Should I be able to force the city to buy my lot, or at least to pay damages for having diminished its value from apartment to single-family residential use?

Would awarding compensation to me in any "*non*-direct condemnation" setting unduly infringe on the city's authority to commit the public treasury? In the direct condemnation setting, the city proceeds with a conscious expectation that it will be financially obligated to the owner. With less overt forms of governmental conduct, such as zoning, the city does not expect to pay for its incursion—if there is indeed "property" that might be affected by the governmental conduct and if such an incursion has in fact occurred—and might act otherwise if it were aware of the obligation to compensate. Adjudication of takings claims in both the direct and non-direct condemnation settings involves the seemingly straightforward "property-takings-remedy" inquiry. One need only determine (1) whether a protectible private property interest is involved, (2) whether governmental conduct has improperly affected that interest, and (3) whether the property owner is entitled to a remedy. But it is particularly in the non-direct condemnation settings that just compensation jurisprudence has become especially intractable.[8] The formulation of a predictable, coherent, and generally accepted analytical approach for answering these questions in non-direct condemnation settings has long eluded both courts and scholars alike.[9]

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8. My work in the takings field includes: JOHN MARTINEZ, GOVERNMENT TAKINGS (2006) [hereinafter MARTINEZ, GOVERNMENT TAKINGS]; John Martinez, *Wrongful Convictions as Rightful Takings: Protecting "Liberty-Property"*, 59 HASTINGS L.J. 515 (2008); John Martinez & Karen L. Martinez, *A Prudential Theory for Providing a Forum for Federal Takings Claims*, 36 REAL PROP. PROB. & TR. L.J. 445 (2001) [hereinafter John Martinez & Karen L. Martinez, *A Prudential Theory*]; John Martinez & Nick J. Colessides, *Taming the Takings Tiger*, 12-Jan UTAH B.J. 7 (1999); John Martinez, *A Framework for Addressing Takings Problems*, 9-Jul UTAH B.J. 13 (1996); John Martinez, *Statutes Enacting Takings Law: Flying in the Face of Uncertainty*, 26 URB. LAW. 327 (1994); John Martinez, *Trees in the Forest: A Reply to Professor Laitos*, 13 J. ENERGY NAT. RESOURCES & ENVTL. L. 51 (1993); John Martinez, *A Critical Analysis of the 1987 Takings Trilogy: The Keystone, Nollan and First English Cases*, 1 HOFSTRA PROP. L.J. 39 (1988); John Martinez, *Reconstructing Takings Doctrine by Redefining Property and Sovereignty*, 16 FORDHAM URB. L.J. 157 (1988); John Martinez, *Taking Time Seriously: The Federal Constitutional Right to be Free From "Startling" State Court Overrulings*, 11 HARV. J.L. & PUB. POL'Y 297 (1988). Substantial portions of my four-volume treatise on LOCAL GOVERNMENT LAW are devoted to the takings problem. *See* 3 C. DALLAS SANDS, MICHAEL E. LIBONATI & JOHN MARTINEZ, LOCAL GOVERNMENT LAW §§ 16.01-.64 (West 2008) [hereinafter SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW]; *see also* JOHN MARTINEZ & MICHAEL E. LIBONATI, STATE AND LOCAL GOVERNMENT LAW: A TRANSACTIONAL APPROACH (2000).

9. *See* Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 URB. LAW. 307, 308 (1998) ("The incoherence of the U.S. Supreme Court's output in this field has by now been demonstrated time and again by practitioners and academic commentators ad nauseam, and I refuse to add to the ongoing gratuitous slaughter of trees for the paper consumed in this frustrating and increasingly pointless

In 1978, the United States Supreme Court confessed that takings analysis is hopelessly ad hoc.[10] Decades later, in 2005, the Court abrogated a test for takings that it had applied for twenty-five years.[11] Some scholars have even resigned themselves to embracing vagueness as a virtue in takings jurisprudence.[12] They concede that "bounded uncertainty" is the best we can expect.[13]

Because takings doctrine is in such disarray, it is not surprising that adjudication of takings claims in state and federal courts is also a sorry sight. Courts seem to lose track of even the most basic legal principles when adjudicating takings claims. For example, one state trial court concluded that a *statutory* proceeding initiated by the state Department of Transportation prevented a landowner from asserting either state or federal *constitutional* takings claims.[14] It is elementary, of course, that a constitutional right cannot be abrogated by a statute.[15]

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enterprise."); Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91, 91 (1995); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 566-67 (1984) (criticizing the diminution in value test). For classical analyses of takings law see BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977); Arvo Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1971) (analyzing three types of recurring police power takings cases); David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed From* Penn Central *to* Dolan*, and What State and Federal Courts are Doing About It*, 28 STETSON L. REV. 523 (1999) (arguing state and federal courts are responsible for much of the ambiguity in takings jurisprudence); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967) (reviewing ethical foundations for the line between compensable and non-compensable harms); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) (reviewing the difficulty of distinguishing takings from regulation); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

10. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1978) ("[T]his Court, quite simply, has been unable to develop any set formula for determining when 'justice and fairness' require . . . [compensation] by the government . . . .").

11. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 548 (2005) (abrogating the test for takings which considers whether governmental conduct does "not substantially advance a legitimate governmental objective").

12. Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 100 (2002) ("But as for a nice clean general statement of how to tell when private property has been taken for public use by regulation—who knows, after lo these many years?").

13. Hannah Jacobs Wiseman, *Notice and Expectation Under Bounded Uncertainty: Defining Evolving Property Rights Boundaries Through Public Trust and Takings*, 21 TUL. ENVTL. L.J. 233, 280-81 (2008) ("Although I have discussed uncertainty in a negative context up to this point, arguing that uncertain property rights boundaries have created unclear expectations and inconsistent notice, a limited amount of uncertainty is necessary to permit flexibility in the law as public needs change.").

14. *See generally* Wintergreen Group, LC v. Utah Dep't of Transp., 2007 UT 75, 171 P.3d 418 (vacating district court decision to hold that a landowner against whom direct condemnation action has been filed can bring counterclaim or independent action for inverse condemnation).

15. For example, in *Colman v. Utah State Land Board*, 795 P.2d 622 (Utah 1990), the Utah Supreme Court considered whether the common law doctrine of sovereign immunity, as codified in the state's government immunity statute, prevailed over the individual state constitutional right to just compensation. The court explained:

> The history of [the cases holding that the Utah Legislature by statute could hold itself immune from takings claims brought under Utah Constitution article I, section 22] shows that for a time the Court's concentration on the doctrine of sovereign immunity caused it to neglect this constitutional provision, which was designed to protect individual rights. This

As another example, some courts insist that if a governmental agency or official lacks eminent domain authority, then such agency or official cannot be held liable for a takings claim.[16] On the contrary, it is the conduct of the government and its impact on the owner that matters, not whether the government had the authority to engage in such conduct.[17] Otherwise, governmental defendants could simply harm property rights, and thereafter claim lack of authority as a defense.

As a third example, courts often have difficulty distinguishing between the governmental conduct involved and the impact on the owner. Thus, courts often discuss takings settings as consisting of either "physical" takings or "regulatory" takings.[18] In

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> elevation of legislation and common law principles over a clear constitutional limitation strikes at the heart of constitutional government. The people of Utah established the Utah Constitution as a limitation on the power of government. It can hardly be maintained that the doctrine of sovereign immunity, alone among all doctrines, is outside of the limitations the people established.

Id. at 634-35. Additionally, the court provided:

> The purpose of a constitution is to provide an orderly foundation for government and to keep even the sovereign . . . within its bounds. Therefore, the legislative power itself must be exercised within the framework of the constitution. Accordingly, it has been so long established and universally recognized, as to be hardly necessary to state, that if a statutory enactment contravenes any provision of the constitution, the latter governs.

Id. at 635 (quoting Dean v. Rampton, 556 P.2d 205, 206-07 (Utah 1976)).

16. *See, e.g.*, United States v. North Am. Transp. & Trading Co., 253 U.S. 330, 333 (1920) ("In order that the Government shall be liable it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power."); State v. The Mill, 809 P.2d 434, 437 (Colo. 1991) ("There can be no 'inverse condemnation' . . . where no right exists in the governmental agency to proceed under eminent domain."); City of Ashland v. Hoffarth, 733 P.2d 925, 928 (Or. Ct. App. 1987) (stating that the second element of an inverse condemnation claim is that the agency alleged to have taken private property must have the power of eminent domain); *see generally* 3 SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, *supra* note 8, §§ 16.50 n.11, 21.43 n.5 (collecting cases); Jed Michael Silversmith, *Takings, Torts & Turmoil: Reviewing the Authority Requirement of the Just Compensation Clause*, 19 UCLA J. ENVTL. L. & POL'Y 359 (2001/2002); Matthew D. Zinn, Note, *Ultra Vires Takings*, 97 MICH. L. REV. 245 (1998).

The most recent origin of this "wrong turn" in takings jurisprudence seems to be the case of *United States v. Clarke*, 445 U.S. 253 (1980), where the issue was whether 25 U.S.C. § 357 authorized the Municipality of Anchorage to acquire a right-of-way over allotted Indian trust lands by seizure, or whether the federal statute only authorized local governments to acquire such lands through a formal judicial action for direct condemnation. The Court held that the statute did not authorize acquisition of such land by seizure. *Id.* at 258. Apparently, the real dispute was about the date of valuation: the property would be valued as of the date of the invasion if acquisition by seizure was authorized, whereas, the property would be valued during the course of the judicial proceeding—a much later date when the land would likely be much more valuable—if formal eminent domain direct condemnation was authorized. *See id.* Indeed, the litigation ultimately was resolved after the Municipality brought a formal condemnation proceeding which concluded in 1992. *See* Law Offices of Vincent Vitale v. Tabbytite, 942 P.2d 1141, 1144-45 (Alaska 1997) (discussing subsequent history of the *Clarke* litigation).

The *Clarke* Court held that § 357 did not authorize acquisition by seizure. 445 U.S. at 259. That is a far cry from the idea that a government agency, or official who lacks the authority of eminent domain, cannot possibly commit non-direct condemnation takings.

17. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 547-48, (2005) (holding that it is the impact on the owner that matters in a takings claim).

18. *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 n.17 (2002) (conflating governmental conduct and the impact on the owner); *see generally* John Martinez & Karen L. Martinez, *A Prudential Theory*, *supra* note 8, at 453 (pointing out critical distinction between governmental conduct and the impact of such conduct on an owner).

actuality, takings jurisprudence deals, on one side, with *government conduct* that is either physical or non-physical ("regulatory," in that it restricts legal rights to use, exclude, or transfer), and on the other side, with *impact on the owner* that is either physical or non-physical ("regulatory," in that it has an impact on the legal rights to use, exclude, or transfer). Because greater protection to property owners is provided from governmental conduct that has physical impacts, it is crucial to properly identify and distinguish those situations.[19]

Courts are also confused at the very basic level of whether the mens rea of the governmental agency or official involved matters. Some courts insist that only *intentional* conduct aimed at acquisition of property can amount to a taking.[20] Many courts conclude that at least *negligent* governmental conduct is required before a taking can be found, and consequently, that non-negligent behavior by the government that causes harm to private property owners is not actionable.[21] However, takings are strict liability claims: intentional, reckless, or negligent conduct need not be shown in order to impose liability.[22]

But this is not "yet another takings article" seeking to achieve greater certainty and coherence in the field of takings jurisprudence. Instead, this Article suggests that we should start from the assumption that takings law is incoherent, complex, and intractable, and that we should establish specialized federal and state takings courts for adjudicating such claims.

Specialized courts have long been a hallmark of American jurisprudence. We have specialized courts for many particular areas of law, including family law, small claims, and landlord-tenant disputes.[23] Specialized federal and state takings courts would be consistent with that tradition of establishing special tribunals for specialized areas of law.

But we should not simply establish new federal and state takings courts without a metric for evaluating their success or failure. Thus, once the need for a new system for adjudicating takings claims is acknowledged, we should create a critical analytical

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19. *See* 3 SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, *supra* note 8, § 16.53.40 n.51 (collecting cases illustrating permanent physical occupation takings).

20. *See, e.g.*, Sun Oil Co. v. United States, 572 F.2d 786, 818 (Ct. Cl. 1978); Edwards v. Hallsdale-Powell Util. Dist. Knox County, Tenn., 115 S.W.3d 461, 467 (Tenn. 2003) (holding that a taking did not occur when claimants' homes were flooded with raw sewage on two occasions because the district did not act purposefully or intentionally); Vokoun v. City of Lake Oswego, 56 P.3d 396, 401 (Or. 2002).

21. The requirement of negligence is particularly prevalent in the flood control improvements setting. *See, e.g.*, Bunch v. Coachella Valley Water Dist., 935 P.2d 796, 810 (Cal. 1997) (holding that a "reasonableness test applies to cases involving public flood control works that cause physical damage to private property"); *see generally Lingle*, 544 U.S. at 548 (2005) (explaining that a plaintiff challenging "a government regulation as an uncompensated taking of private property may proceed under one of the [following] theories . . . —by alleging a 'physical' taking, a *Lucas*-type 'total regulatory taking,' a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*.").

22. *See* Barto Watson, Inc. v. City of Houston, 998 S.W.2d 637, 642 (Tex. App. 1999) (holding that mistake is no defense to a takings claim); Albers v. County of Los Angeles, 398 P.2d 129 (Cal. 1965) (holding that damage to property caused by a landslide triggered by county road improvements was compensable under state takings clause); 3 SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, *supra* note 8, § 16.53.40 n.5, 10 (collecting cases).

23. For a comprehensive description of the various specialized courts, see Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377 [hereinafter Dreyfuss, *Specialized Adjudication*].

framework to evaluate the ultimate success or failure of such new specialized federal and state takings courts.

Part I of this Article reviews existing federal and state systems for adjudicating takings claims. First, the adjudication of takings claims against the federal government in the United States Court of Federal Claims and in the federal district courts is described and critically analyzed. The adjudication of takings claims against state and local governments, in federal courts and state courts of general jurisdiction, is then described and evaluated. Next, the adjudication of takings claims against state and local governments in more particularized state courts of claims are considered. Part I concludes with a brief mention of state commissions and boards that also resolve takings claims against state and local governments.

Part II of the Article sets out a critical analytical framework for structuring and evaluating the ultimate success or failure of specialized federal and state "takings courts."

Part III sets out the critical features of a proposed system of specialized federal and state takings courts and examines each of these features in light of the suggested critical analytical framework. The Article proposes that there should be separate specialized federal and state takings courts with exclusive subject matter jurisdiction over takings claims. The Article also suggests that takings claimants should be required to submit notice of the takings claim to the government agency or official involved in order to secure a final administrative decision and denial of compensation before such claims are ripe for judicial adjudication. Finally, the Article proposes that no jury trial should be available in such specialized federal and state takings courts, but that special masters, commissioners, or magistrates should be freely utilized for the compilation of a factual record necessary for a complete adjudication of takings claims by such courts.

II. EXISTING SYSTEMS FOR ADJUDICATING TAKINGS CLAIMS

There are four existing systems for adjudicating takings claims in the United States. The first system is for the adjudication of takings claims against the federal government and consists of the United States Court of Federal Claims and federal district courts. The second existing system is for adjudication of takings claims against state and local governments. It consists of federal district courts and state courts of general jurisdiction, as well as state courts of claims. The third existing system is comprised of state boards and commissions which render typically advisory, non-binding, or preliminary decisions with respect to takings claims against state and local governments. Each of these systems will be critically examined in turn.

A. Takings Claims Against the United States

1. In the United States Court of Federal Claims and Federal District Courts—An Uneasy Division of Labor

A takings claim seeking damages against the United States ordinarily must be brought in the United States Court of Federal Claims.[24] However, the federal district

24. *See* Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 11-12 (1990); United States v. Causby,

courts have concurrent jurisdiction to consider takings claims against the United States that do not exceed $10,000.[25] This has resulted in an uneasy division of labor between the two types of courts.

a. Sovereign Immunity as the Starting Point

The concept of sovereign immunity is the starting point for considering systems for processing of takings claims against the federal government.[26] Sovereign immunity provides that because a sovereign holds all power, no one can hold the sovereign responsible for his actions.[27] Therefore, the concept of sovereign immunity in its pure form provided that no one could sue the sovereign without the sovereign's consent.

When governments replaced sovereigns, the concept of absolute governmental immunity took the place of absolute sovereign immunity and shielded governments from suit without their consent. It followed naturally that if a government had given

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328 U.S. 256, 267 (1946); *see also* Roman v. Velarde, 428 F.2d 129, 133 (1st Cir. 1970) (holding that if federal takings claims arise directly under the Federal Constitution, and exceed $10,000, such claims must be brought in the Court of Claims under the Tucker Act).

25. 28 U.S.C. § 1346(a)(2) (2006). Also known as "Little Tucker Act," § 1346(a)(2) grants the district courts original jurisdiction concurrent with the United States Court of Federal Claims over any:

> civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . .[with the exception of cases] which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978.

Id.; *see also* Clinton v. Goldsmith, 526 U.S. 529, 540 n.14 (1999) (describing the jurisdiction of federal district courts under the Little Tucker Act and stating that "[a]ppeals are taken to the Federal Circuit"); United States v. 255.21 Acres in Anne Arundel County, Md., 722 F. Supp. 235, 238-41 (D. Md. 1989) (inverse condemnation claim against the federal government exceeding $10,000 may only be heard in the United States Court of Federal Claims). For an excellent discussion of the nuanced territory between the district courts and the Court of Federal Claims under the Tucker Act, see 14 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3657 (3d ed. 1998).

26. *See* MARTINEZ, GOVERNMENT TAKINGS, *supra* note 8, §§ 14:1-:11 (addressing sovereign immunity and takings law—including state, local and federal defendants); MARTINEZ & LIBONATI, *supra* note 8, at 179-82 (discussing the principle of sovereign immunity under state law); *see also* Hall v. Utah State Dep't of Corr., 24 P.3d 958, 965 (Utah 2001) ("The rationale . . . derives naturally from basic principles of sovereign immunity."). For an extended discussion of the principle of sovereign immunity, see John Martinez, *Hurry Up and Wait: Negative Statutes of Limitation in the Government Tort Liability Setting*, 19 ST. JOHN'S J. LEGAL COMMENT. 259, 265-84 (2005) [hereinafter Martinez, *Hurry Up and Wait*].

27. Justice Traynor explained the nature of royal sovereign immunity in *Muskopf v. Corning Hospital District*:

> Sovereign immunity began with the personal prerogatives of the King of England. In the feudal structure the lord of the manor was not subject to suit in his own courts. The king, the highest feudal lord, enjoyed the same protection: no court was above him. Before the sixteenth century this right of the king was purely personal. Only out of sixteenth century metaphysical concepts of the nature of the state did the king's personal prerogative become the sovereign immunity of the state. There is some evidence that the original meaning of the pre-sixteenth century maxim—that the king can do no wrong—was merely that the king was not privileged to do wrong. The immunity operated more as a lack of jurisdiction in the king's courts than as a denial of total relief. There was jurisdiction, however, in the Court of Exchequer for equitable relief against the crown.

359 P.2d 457, 458-59 n.1 (Cal. 1961) (citations omitted).

its consent to be sued—usually through a statute defining the circumstances in which the government waived sovereign immunity[28]—the government could set any conditions it pleased on suits against it, and those conditions had to be strictly obeyed.

b. From "Petitions to a Sovereign" to Takings Petitions to Congress

The American system for processing claims against the government is derived from the English system.[29] The English King could not be sued in the King's own courts, but it was possible to obtain relief through a "petition of right" submitted directly to the King.[30]

The "petition of right" bears a direct connection to the concept of just compensation claims against governments in the United States.[31] The King's failure to heed

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28. There are two principal models of government liability statutes. First, there are "closed-ended" statutes, which provide that governments are immune unless an exception is provided by common law, statute or constitutional provision. States with closed-ended statutes include: Arkansas, Delaware, Pennsylvania, Texas, and Utah. *See* ARK. CODE ANN. § 21-9-301 (2008); DEL. CODE ANN. tit. 10, §§ 4012-4042 (2008); 42 PA. CONS. STAT. ANN. §§ 8541-8542 (West 2009); TEX. CIV. PRAC. & REM. CODE ANN. § 101-021 (Vernon 2005); UTAH CODE ANN. § 63G-7-201 (2008).

Second, there are "open-ended" statutes, which provide that governments are liable unless exempted by common law, statute, or constitutional provision. States with open-ended statutes include: Alaska, Arizona, New Mexico, Rhode Island, South Carolina, and Wyoming. *See* ALASKA STAT. § 09.65.070 (2009); ARIZ. REV. STAT. ANN. § 11-981(A)(2) (2008); N.M. STAT. ANN. § 41-13-3 (West 2009); R.I. GEN. LAWS § 9-31-1 (1997 & Supp. 2008); S.C. CODE ANN. § 15-78-40 (2008); WYO. STAT. ANN. §§ 1-39-105 to 1-39-112 (2008).

Regardless of which model is adopted, the law of each state is unique. *See* 3 SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, *supra* note 8, § 27:08 (discussing operation of closed-ended and open-ended statutes).

29. WILSON COWEN ET AL., THE UNITED STATES COURT OF CLAIMS: A HISTORY, PART II, ORIGIN–DEVELOPMENT–JURISDICTION 1855-1978, at 1 (1978).

30. *Id.* at 1-2. Justice Traynor also explained the nature of a "petition of right" in *Muskopf*:

> The method for obtaining legal relief against the crown was the petition of right. The action could not be brought in the king's courts because of their lack of jurisdiction to hear claims against him. The petition of right stated a claim against the king, which was barred only by his prerogative. To the petition "there must always be a reply: 'Let right be done,'" and "it is clear that the petition had assumed the character of a definite legal remedy against the Crown." There were procedural difficulties with the petition, but alternate remedies existed in large part. The main use of the petition of right in the early common law was in real actions, which then covered a wide field. The basic principle was that the petition was proper "whenever the subject could show a legal right to redress." The early precedents may even be read as allowing a petition of right against the king for the torts of his servants. In *Tobin v. The Queen* (1864), 16 C.B.N.S. 309, 111 Eng. Com. Law Rep. 309, however, the court refused to so read the precedents, and held that the crown was not liable for the torts of its servants. This decision arose because of the formalistic and mistaken idea that concepts of vicarious liability did not apply to the crown. Under the Crown Proceedings Act, 1947, however, the crown is today liable for the torts of its servants to the same extent as private persons. One other protection was afforded the subject injured by the king's servants. Many of the king's officers were liable for the wrongs committed, and from the earliest times those officers had to have a sufficient financial standing to make those remedies against them meaningful.

359 P.2d at 458 n.1 (citations omitted).

31. United States v. Mitchell, 463 U.S. 206, 212-13 (1983) (citing PAUL M. BATOR ET AL., THE FEDERAL COURTS AND THE FEDERAL SYSTEM 98 (2d ed. 1973)).

"petitions of right" from the American colonists was one of the grievances that formed the basis for the Declaration of Independence. Thomas Jefferson set out in the Declaration that "[i]n every stage of these Oppressions *we* have Petitioned for Redress in the most humble terms; Our repeated Petitions have been answered only by repeated Injury."[32]

Under the Articles of Confederation, the Confederation Congress first processed claims against the federal government.[33] But as the workload became too burdensome, it created a "Board of Treasury" for handling these claims.[34] In either setting, the claims were handled as private bills for relief, not as claims for the enforcement of a right to compensation.

When the Federal Constitution was adopted on March 4, 1789, Congress simply shifted responsibility for processing claims against the federal government to the Treasury Department. The Treasury Department's decisions were not final, however, because the Constitution provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."[35] The Treasury Department's decisions, therefore, had to be approved by Congress for payment.[36]

c. The Court of Claims—From Mere Administrative Arm of Congress to a "Court"

The Treasury Department was not a judicial body, and over the years that characteristic became a concern because claims were being processed more or less informally rather than through an actual process of adjudication. Thus, on February 24, 1855, Congress established the Court of Claims.[37]

Improving upon the operations of the Treasury Department, the Court of Claims used judicial procedures to adjudicate claims, but the court suffered the same shortcoming as the Treasury Department: its decisions were not enforceable final judgments, but instead were mere recommendations to be submitted to Congress for its consideration.[38] Not until March 3, 1866, was finality accorded to Court of Claims judgments.[39]

For the first thirty-two years of its existence, the Court of Claims' subject matter jurisdiction was limited to those types of cases for which Congress had legislatively waived sovereign immunity. For example, the Abandoned and Captured Property Act of 1863 gave the Court of Claims jurisdiction over claims for property seized by federal government agents during the Civil War.[40]

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32. The Declaration of Independence (U.S. 1776).

33. COWEN ET AL., *supra* note 29, at 2.

34. *Id.* at 2-3 (quoting William M. Wiecek, *The Origin of the United States Court of Claims*, 20 ADMIN. L. REV. 387, 389 (1968)).

35. U.S. CONST. art. I, § 9, cl. 7.

36. COWEN ET AL., *supra* note 29, at 4-5.

37. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612.

38. COWEN ET AL., *supra* note 29, at 20-21.

39. Act of Mar. 17, 1866, ch. 19, 14 Stat. 9.

40. Act of Mar. 3, 1863, ch. 120, § 3, 12 Stat. 820.

d. The Court of Claims—From Mere Instrument of Congress to a Real Judicial Body

The Court of Claims' jurisdiction under its original 1855 statute and under its 1866 amendment, however, did not include the power to adjudicate takings claims brought against the federal government under the Federal Just Compensation Clause.[41]

The next major breakthrough in Court of Claims' authority came with the Tucker Act[42] in 1887, which expressly included jurisdiction over "claims founded upon the Constitution of the United States."[43] The Federal Courts Improvement Act of 1982[44] reorganized and restructured the Court of Claims, which was later renamed the United States Court of Federal Claims.[45] About 10 percent of the cases brought in the Court of Federal Claims today are takings cases.[46]

2. Critical Analysis of System

The United States Court of Federal Claims certainly achieves advantages over the previous system, which consisted of non-binding administrative determinations by the Treasury Department or more prosaically, petitions directly to Congress. However, the disadvantages of the court inhere in the almost incomprehensible division of authority between the Court of Federal Claims and the federal district courts with respect to claims against the United States.

If the claim involved lies in *tort*, then it (1) is governed by the Federal Tort Claims Act,[47] (2) must be brought in a federal district court, not the Court of Federal Claims,[48] and (3) the statute of limitations is two years.[49] On the other hand, if the claim involved is one of *takings*, then (1) it is governed by the Tucker Act,[50] (2) the claim may be brought in the Court of Federal Claims,[51] and (3) the statute of limitations is six years from the accrual of the claim.[52] Such a claim accrues upon the occurrence of the events necessary to give rise to the alleged liability.[53]

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41. Langford v. United States, 101 U.S. 341, 344 (1879) (holding Congress has not conferred jurisdiction on the Court of Claims to adjudicate takings claims against the federal government).

42. Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified as amended in scattered sections of title 28 of the United States Code).

43. *Id.* (codified as and amended at 28 U.S.C. § 1491(a)(1) (2006); *see also* COWEN ET AL., *supra* note 29, at 45.

44. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended in scattered sections of title 28 of the United States Code); *see generally* Richard H. Seamon, *The Provenance of the Federal Courts Improvement Act of 1982*, 71 GEO. WASH. L. REV. 543 (2003).

45. The name "United States Court of Federal Claims" was adopted in 1992. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4506, 4516.

46. Seamon, *supra* note 44, at 549 n.30.

47. 28 U.S.C. §§ 2671-2680 (2006).

48. Carter v. United States, 62 Fed. Cl. 66, 71-72 (Fed. Cl. 2004); Moden v. United States, 60 Fed. Cl. 275, 280-81 (Fed. Cl. 2004).

49. 28 U.S.C. § 2401(b) (2006).

50. *Id.* § 1491.

51. *Carter*, 62 Fed. Cl. at 72.

52. 28 U.S.C. § 2501 (2006).

53. City of Gettysburg, S.D. v. United States, 64 Fed. Cl. 429, 444 (Fed. Cl. 2005); Chipps v. United States, 19 Cl. Ct. 201, 203 (Cl. Ct. 1990), *aff'd*, 915 F.2d 1585 (Fed. Cir. 1990).

Two factors distinguish a tort claim from a takings claim for the purpose of subject matter jurisdiction of the Court of Federal Claims over takings claims against the federal government:

> First, a property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the "direct, natural, or probable result of an authorized activity and not the incidental or consequential injury by the action." Second, the nature and magnitude of the government action must be considered. Even where the effects of the government action are predictable, to constitute a taking, an invasion must appropriate a benefit to the government at the expense of the property owner, or at least preempt the owner[']s right to enjoy his property for an extended period of time, rather than merely inflict an injury that reduces its value.[54]

This distinction between torts and takings does not preclude recovery, but may result in a party having to seek recovery under a different theory of liability, in a different court, and within the constraints of a shorter statute of limitations. The ultimate result, therefore, is a flabbergasting, confusing, and inefficient system whereby a litigant may be forced to adjudicate a takings case in two different courts, under two different theories, and subject to two different statutes of limitation. One court has bemoaned this state of affairs, but offered no solution:

> [T]hough he may have to appear in two proceedings to obtain the totality of that compensation . . . . [t]he 5th Amendment, while it guarantees that compensation be just, does not guarantee that it be meted out in a way more convenient to the landowner than to the sovereign.[55]

B. Takings Claims Against State and Local Governments

Takings claims against state and local governments may arise under the Federal Constitution or under state constitutions. The concept of state sovereign immunity imposes serious constraints on the availability of either system of courts for adjudication of claims against states as states. More fundamentally, however, although federal claims against local governments ostensibly can be adjudicated in federal district courts, the reality is that such federal claims can only be adjudicated in state courts. Additionally, five states have established courts of claims that must also be taken into account as part of the system for adjudicating takings claims against state and local governments. After a discussion of the federal and state courts as fora for adjudication of takings claims against state and local governments, those state courts of claims will be described and critically evaluated.

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54. Ridge Line, Inc. v. United States, 346 F.3d 1346, 1355-56 (Fed. Cir. 2003) (citation omitted) (quoting Columbia Basin Orchard v. United States, 132 F. Supp. 707, 709 (Ct. Cl. 1955) (holding that a claim for the loss of fruit trees resulting from the contamination of a spring caused by the combination of the government's discharge of water into a nearby lake and unprecedented rainfall was compensable, if at all, as a tort and not a taking)); *see also Moden*, 60 Fed. Cl. at 282-90 (applying two-part inquiry from *Ridge Line*).

55. United States v. 101.88 Acres of Land, 616 F.2d 762, 772 (5th Cir. 1980).

1. Federal and State Courts of General Jurisdiction

a. Description of System

The substantive sources for takings claims against state or local governments may derive from federal or state law. The Federal Constitution's Just Compensation, Due Process, Equal Protection, Contracts, and Search and Seizure Clauses provide different textual sources for takings claims.[56]

However, federal claims against *states as states*, are limited by the concept of state sovereign immunity.[57] In 1989, the United States Supreme Court held that Congress did not intend for states to be sued as "persons" under 42 U.S.C. § 1983.[58] Suits against states might be possible, however, as "direct actions" based on the Federal Constitution.[59] Two alternative theories may apply. First, takings claimants may assert substantive rights arising directly from the Just Compensation Clause of the Fifth Amendment of the Federal Constitution.[60] Alternatively, takings claimants may assert a substantive right to injunctive relief against states under the doctrine of *Ex Parte Young*.[61] Under that doctrine, claims may be brought against states to enforce federal constitutional rights so long as no monetary remedy against the state treasury is sought.[62]

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56. *See generally* MARTINEZ, GOVERNMENT TAKINGS, *supra* note 8, §§ 2:2–:20, 2:21–:32.

57. *See generally id.* § 3:21.

58. Will v. Mich. Dep't of State Police, 491 U.S. 58, 65-66 (1989).

59. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (direct action against federal agents under the Fourth Amendment's search and seizure prohibition).

60. Jacobs v. United States, 290 U.S. 13, 16 (1933) (holding that a plaintiff who claims property has been taken can sue directly under the Fifth Amendment). *But see* Garrett v. Illinois, 612 F.2d 1038, 1040 (7th Cir. 1980) (holding that the Eleventh Amendment bars an action against a state for monetary relief under the Just Compensation Clause of the Fifth Amendment). *See generally* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57 (1999) (tracing the history of takings claims against state and local governments); Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067 (2001) (discussing that a direct action might be available in state courts).

The most recent statement from the United States Supreme Court on the issue of direct actions is *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007), in which the Court held that a private landowner has no private right of action for damages under *Bivens* against officials of the Bureau of Land Management in their personal capacities for harassment and intimidation against the landowner allegedly aimed at extracting an easement across the landowner's private property. *Id.* at 2593. The Court reasoned, first, that the landowner had plenty of other claims available, *id.* at 2598-2600, and second, that the balance of reasons for and against creating a new cause of action weighed against creating such a new cause of action, *id.* at 2600-04. Significantly, the case says nothing about the self-executing character of the Federal Just Compensation Clause that allows takings claims to be brought directly under the Federal Constitution against the federal government as an entity. *See also Jacobs*, 290 U.S. at 16; Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 601-02 (2006) ("Indeed, text, structure, and, I would argue, history suggest that the Takings Clause should trump state sovereign immunity.").

61. 209 U.S. 123 (1908).

62. Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 645 (2002) ("In determining whether the doctrine of *Ex Parte Young* [applies,] a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 296 (1997)).

Takings claims grounded in state law, against state and local governments, are still evolving. Two reasons explain this state of affairs. First, the concept of *non*-direct condemnation takings claims in general is a somewhat novel concept in the law.[63] Second, state courts and legislatures historically have relied on federal just compensation doctrine rather than developing their own state takings jurisprudence.[64] In particular, state law takings jurisprudence is still struggling with the relationship between sovereign immunity law and takings jurisprudence.[65] Nevertheless, takings claims against state or local governments may derive from various state constitutions, specifically just compensation clauses, damaging clauses, or applied to public use clauses.[66] Other state constitutional clauses that serve as foundations for takings claims include state open courts and uniform laws clauses.[67]

b. Critical Analysis of System

The dual constitutional foundation for takings claims against state and local governments may at first seem advantageous. However, its appeal quickly disappears in light of the troubled history of adjudication of takings claims against state and local governments, in either state or federal courts.

Federal constitutional claims against states as states are unavailable in either state or federal courts, for practical purposes, because of state sovereign immunity. Federal constitutional claims against local governments in federal courts are unavailable because of the federal takings ripeness doctrine developed by the United States Supreme Court in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.[68] Under this doctrine, a litigant may not adjudicate a federal takings claim in federal district court prior to adjudicating a state constitutional takings claim in state court. However, once such litigation is completed, the doctrines of issue and claim preclusion prevent subsequent adjudication of the federal claim in federal court.[69]

State constitutional takings claims against states or local governments depend on rather paltry state takings law. In some states, litigants must exhaust administrative

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63. *See generally* MARTINEZ, GOVERNMENT TAKINGS, *supra* note 8, § 2:9 (describing the distinction between direct condemnation and non-direct condemnation as the appropriate dichotomy for analysis).

64. *See generally* 3 SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, *supra* note 8, § 16.51 (discussing the development of state takings doctrines).

65. *See generally* Martinez, *Hurry Up and Wait*, *supra* note 26 (discussing the relationship between state sovereign immunity doctrine and government liability concepts).

66. *See generally* MARTINEZ, GOVERNMENT TAKINGS, *supra* note 8, §§ 2:37-:40 (discussing these different types of state constitutional takings claims).

67. *See generally id.* §§ 2:41-:43 (discussing these other state constitutional clauses as bases for takings claims).

68. 473 U.S. 172 (1985). *See also* Levatte v. City of Wichita Falls, 144 S.W.3d 218, 223-24 (Tex. App. 2004) (state constitutional takings claim must be adjudicated before federal takings claim is ripe); Patterson v. Am. Fork City, 67 P.3d 466, 476-77 (Utah 2003) (federal claim is not ripe until state inverse condemnation action has been adjudicated).

69. *See, e.g.*, San Remo Hotel, L.P. v. City & County of San Francisco, 545 U.S. 323, 347-48 (2005) (adjudication of claim or issues in state court precludes adjudication of same claims or issues in federal district court).

remedies before being able to adjudicate such claims in state courts.[70] By comparison, exhaustion of state administrative remedies is not required with respect to federal constitutional claims—other than the Williamson County ripeness doctrine applicable to federal takings claims—brought in federal court.[71]

2. State Courts of Claims

The comparatively few state courts of claims that have been established are woefully inadequate for the task of adjudicating complex takings claims. Five states have claims courts: Illinois,[72] Michigan,[73] New York,[74] Ohio,[75] and West Virginia.[76] None of these serve useful or effective roles in the processing of takings claims.

a. Illinois Court of Claims

The Illinois Court of Claims consists of seven judges appointed by the Governor with the advice and consent of the Illinois Senate, one of whom is appointed Chief Justice.[77] Although the court has jurisdiction over claims based in state law, it is limited to only those claims against the State.[78] Awards are not collectible unless the Illinois General Assembly makes an appropriation for each specific claim.[79]

In Illinois, the demarcation line between the jurisdiction of the Court of Claims and that of the Circuit Court in takings cases is irretrievably blurred. For example, in *Patzner v. Baise*,[80] the Illinois Department of Transportation (IDOT) parked construction machinery in the parking area in front of the plaintiff's real estate office throughout the period of construction of an elevated overpass that directly fronted the plaintiff's land.[81] No part of the plaintiff's land was directly appropriated for the construction.[82] The plaintiff alleged that as a direct result, he was forced to relocate his business.[83] He filed a petition for a writ of mandamus in the Illinois Circuit Court to compel IDOT to initiate eminent domain proceedings in order to receive compensation for the alleged taking or damaging of his property under article I, section 15 of the Illinois Constitution, which provides for just compensation when property is taken or damaged.[84] The Supreme Court of Illinois held that where property has been

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70. *See, e.g.*, *Patterson*, 67 P.3d at 476-77 (state administrative remedies must be exhausted before state constitutional takings claim is ripe for judicial review).

71. *See* Patsy v. Bd. of Regents, 457 U.S. 496, 516 (1982) (exhaustion of administrative remedies not required for § 1983 claims).

72. 705 ILL. COMP. STAT. 505/1 (West 2009).

73. MICH. COMP. LAWS ANN. §§ 600.6401-.6475 (West 2000).

74. N.Y. COURT OF CLAIMS LAW §§ 1-30 (McKinney 2008).

75. OHIO REV. CODE ANN. §§ 2743.01-.51 (West 2009).

76. W. VA. CODE §§ 14-2-1 to -29 (2008).

77. 705 ILL. COMP. STAT. 505/1 (West 2009).

78. *Id.* 505/8.

79. *Id.* 505/24.

80. 552 N.E.2d 714 (Ill. 1990).

81. *Id.* at 715.

82. *Id.*

83. *Id.*

84. *Id.*

physically taken, a writ of mandamus will lie in the State Circuit Court to compel the institution of a proceeding in eminent domain, but that where property has only been "damaged," the only remedy available is a claim for damages in the State Court of Claims.[85]

The *Patzner* court distinguished *Herget National Bank of Pekin v. Kenney*,[86] in which the State had flooded the plaintiff's land, as a situation where land had been physically taken.[87] The court noted that the plaintiff in *Patzner* did not allege that such a *physical* taking had occurred.[88] The court further noted that although the requirement that the plaintiff seek relief in the Court of Claims did not provide the plaintiff with a jury trial, it was a problem of "the inequities inherent in the doctrine of sovereign immunity . . . [which] is for the legislature and not this court [to remedy]."[89] Ultimately, the court concluded that the suit should have been brought against the State, and remanded the case.[90]

The *Patzner* case illustrates the indistinct line between the jurisdiction of a state's court of claims and circuit court in takings cases. In *Patzner*, it is arguable that a physical impact on the plaintiff was involved, albeit only a temporary one. However, the plaintiff conceded that there had been no physical taking. If the plaintiff had alleged such a physical taking, the case would have been properly brought in the Circuit Court for mandamus to compel the initiation of an eminent domain proceeding.[91]

In *Herget*, the State had initially flooded the land, then drained the water, and then proposed to re-flood the land.[92] At that juncture, the plaintiff sued for mandamus in the Circuit Court to stop the re-flooding, or alternatively, to compel initiation of condemnation proceedings.[93] Thus, *Herget* also was a "temporary" physical impact case. The *Herget* court held that the lawsuit was properly brought in the Circuit Court and the writ issued.[94]

But, even if only permanent or semi-permanent physical impacts such as in *Herget* are "takings" that are properly brought in the Circuit Court, there is no rationale for drawing the line there between the jurisdiction of the Circuit Court and the Court of Claims. More importantly, it means that some "takings" cases (broadly construed) will be adjudicated in the Circuit Court and some in the Court of Claims, thus leading to confusion, inefficiency, and ultimately, unfairness. This is particularly so because no jury trial is available in the Court of Claims.[95]

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85. *Id.* at 716-17.

86. 475 N.E.2d 863 (Ill. 1985).

87. *Patzner*, 552 N.E.2d at 718.

88. *Id.* at 717.

89. *Id.* at 718 (quoting S.J. Groves & Sons Co. v. State, 444 N.E.2d 131, 136 (Ill. 1982)).

90. *Id.* ("[W]hen the State will be directly and adversely affected by the judgment, making the State the real party against whom relief is sought, the suit is against the State.").

91. *Id.* at 717-18.

92. *Herget*, 475 N.E.2d at 864.

93. *Id.*

94. *Id.*

95. *Id.* at 717. In a subsequent case, *Evans v. Brown*, the Illinois Court of Appeals adopted the much broader standard that where a plaintiff alleges that the State has physically intruded onto his land and the State claims it already owned the land, because "the State is the real party in interest, . . . the Court of

b. Michigan Court of Claims

The Michigan Court of Claims is "created as a function of the circuit court for the thirtieth judicial circuit."[96] Thus, any judge assigned to this judicial circuit may exercise the jurisdiction of the State Court of Claims.[97] The court has jurisdiction over claims based in state law against the State,[98] but not against local governments.[99] Judgments of the Court of Claims are only collectible out of otherwise unencumbered appropriations of the state agency.[100]

In Michigan, the dividing line between the jurisdiction of the Court of Claims and the Circuit Court is just as confused as in Illinois. For example, in *Lim v. Michigan Department of Transportation*,[101] the plaintiff brought an inverse condemnation action in the Circuit Court alleging that the Michigan Department of Transportation (MDOT), as part of a road-widening project, had relocated a driveway which provided access to the sole pump island of his gasoline service station.[102] The Michigan Court of Appeals upheld dismissal of the plaintiff's action on the ground that the Circuit Court only had subject matter jurisdiction over direct condemnation actions initiated by MDOT to acquire property, whereas the Court of Claims had exclusive jurisdiction over inverse condemnation claims initiated by a property owner.[103]

The court's distinction between actions brought by MDOT, as opposed to actions brought by plaintiffs claiming inverse condemnation, however, breaks down in the situation where an action initiated by MDOT gives rise to inverse condemnation counterclaims seeking recovery for taking or damage in addition to, or different from, the compensation offered by MDOT in the direct condemnation.[104] Conversely, an inverse condemnation action might be brought in the Court of Claims seeking a condemnation-forcing remedy.[105] In either of those settings, the *Lim* court's distinction between MDOT-initiated and plaintiff-initiated takings claims as a means to draw the line between Circuit Court jurisdiction and Court of Claims jurisdiction breaks down.

The case of *City of Luna Pier v. Lake Erie Landowners*,[106] highlights the difficulty with the *Lim* case reasoning. In *City of Luna Pier*, the City entered the defendants'

Claims has exclusive jurisdiction." 642 N.E.2d 1335, 1339 (Ill. App. Ct. 1994). This approach overlooks the threshold question in any takings case, which is the nature and extent of the plaintiff's property rights: if there is no property, there can be no taking or damaging. But that does not solve the jurisdictional puzzle of what forum should make that threshold determination.

96. MICH. COMP. LAWS ANN. § 600.6404(1) (West 2000).

97. *Id.*

98. *Id.* § 600.6419(1).

99. Doan v. Kellogg Cmty. Coll., 263 N.W.2d 357, 359 (Mich. Ct. App. 1977) (holding that counties, cities, villages, townships, and school districts are excluded from the jurisdiction of the Court of Claims).

100. MICH. COMP. LAWS ANN. § 600.6458 (West 2000).

101. 423 N.W.2d 343 (Mich. Ct. App. 1988).

102. *Id.* at 344.

103. *Id.* at 345.

104. *See* Wintergreen Group, LC v. Utah Dep't of Transp., 171 P.3d 418, 422 (Utah 2007) (holding that a landowner against whom a direct condemnation action has been filed can bring a counterclaim or an independent action for inverse condemnation).

105. *See generally* MARTINEZ, GOVERNMENT TAKINGS, *supra* note 8, § 3:29 (describing "condemnation-forcing" strategy).

106. 438 N.W.2d 636 (Mich. Ct. App. 1989).

land to construct and maintain increased flood control protection in March 1985 and, shortly thereafter, the City filed a complaint in the Circuit Court seeking judicial validation of its action.[107] In an earlier, unpublished per curiam decision, the Michigan Court of Appeals held that the action was one in inverse condemnation.[108] The City then abandoned its claim and, on remand, the Circuit Court denied the defendants' motion for attorney fees despite earlier entry of a stipulated judgment against the City.[109] The defendants-landowners appealed, arguing for attorney fees as provided in the State Uniform Condemnation Procedures Act (UCPA).[110] The City contended that the UCPA only applied to direct condemnation actions and that the UCPA did not apply because the Michigan Court of Appeals had already held that this was an inverse condemnation setting, albeit one commenced *by the City*.[111]

In *City of Luna Pier*, the court of appeals held that the UCPA applied and that the landowners were entitled to attorney fees because the "plaintiff was an agency seeking to acquire property pursuant to its powers of eminent domain."[112] The court reconciled the *Lim* case on the ground that *Lim* was an inverse condemnation action brought by property owners, whereas *City of Luna Pier* was an action brought by the government that was also within the jurisdiction of the Circuit Court.[113]

The problem with *City of Luna Pier* is that it placed both direct condemnations and inverse condemnations *brought by the government* in the Circuit Court. Only *inverse condemnation* actions brought *by a property owner*, rather than by the government, fall within the exclusive subject matter jurisdiction of the Court of Claims. Again, this leads to confusion, inefficiency, and ultimately, unfairness. It is particularly egregious because attorney fees are *not* available to property owners who sue in the Court of Claims, yet they *are* available to property owners when the government sues them for direct condemnation or inverse condemnation in the Circuit Court.

c. New York Court of Claims

The New York Court of Claims is comprised of judges appointed by the Governor with the advice and consent of the New York Senate.[114] Only claims based in state law against the State may be filed in that court.[115] Furthermore, judgments in the Court of Claims against the State are payable only out of the State's fund for satisfying judgments of that court.[116] The New York Supreme Court—the state's court of general jurisdiction—first determines whether a taking has occurred, and subsequently the New York Court of Claims determines damages.

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107. *Id.* at 637.
108. *Id.*
109. *Id.* at 637-38.
110. *Id.* at 637; *see* MICH. COMP. LAWS ANN. § 213.66(2) (West 2000).
111. *See City of Luna Pier*, 438 N.W.2d at 637.
112. *Id.*
113. *Id.*
114. N.Y. COURT OF CLAIMS ACT LAW § 2 (McKinney 2008).
115. *Id.* § 9.
116. *Id.* § 20-a; *see also* Burnham v. Bennett, 182 N.E. 222 (N.Y. 1932) (once judgment is entered, legislature need not make specific appropriation for that particular judgment, as all such judgments are payable from general appropriations for payment of judgments of the Court of Claims).

For example, in *Friedenburg v. New York State Department of Environmental Conservation*,[117] regulations by the New York State Department of Environmental Conservation (DEC) had "virtually eliminated the ability of the petitioner to utilize waterfront real property."[118] All but a small upland portion of the petitioners' 2.5 acre residential lot had been classified as tidal wetlands by the DEC.[119] The petitioners applied for a tideland wetlands permit, which was denied by the DEC.[120] The Village of Southampton followed suit by denying the petitioners' application for a village wetlands permit.[121]

The petitioners sued in the New York Supreme Court for an order directing issuance of the state wetlands permit, or in the alternative, that the DEC's action be held a taking and that DEC be ordered to commence condemnation proceedings.[122] The Appellate Division held that—based on the economic impact on the owners, the character of the governmental action, and the effect on the owners' reasonable investment-backed expectations—the petitioners had suffered a taking.[123] The court further concluded, however, that because it had found that a taking had occurred, it "lack[ed] jurisdiction to entertain the claim for damages as such a determination must be made in the Court of Claims."[124] The Appellate Division therefore ordered:

> Accordingly, if the DEC chooses to acquire the property under the exercise of its powers of eminent domain, which is its only option other than granting the petitioners' permit application . . . , any further proceedings to determine the compensation to be paid to the petitioner will be conducted in the Court of Claims.[125]

A more inefficient system for adjudicating takings claims could hardly be imagined. The Tidal Wetlands Act expressly provided that suits regarding the denial of wetland permits could be brought in the New York Supreme Court for a determination of whether the denial constituted a taking without compensation.[126] *Friedenburg* illustrates that, in practice, a litigant must first obtain a determination in the New York Supreme Court that a taking has occurred and then re-file in the Court of Claims for a determination of the compensation due.[127]

d. Ohio Court of Claims

The Ohio Court of Claims is comprised of justices of the existing courts, who are designated as sitting on the Court of Claims either in panels or as a single judge or

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117. 767 N.Y.S.2d 451, 453 (App. Div. 2003).
118. *Id.* at 453.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 458-59 (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).
124. *Id.* at 461.
125. *Id.* at 461-62.
126. N.Y. ENVTL. CONSERV. LAW § 25-0404 (McKinney 2008).
127. *Friedenburg*, 767 N.Y.S.2d at 461-62. It is not clear in New York whether only tidal wetlands permits giving rise to takings claims must follow this structure.

justice.[128] The court has exclusive jurisdiction over actions based in state law against the State.[129]

There appears to be no advantage for litigants to select the Court of Claims for takings actions in Ohio. In *Wilcox Industries, Inc. v. State*,[130] the plaintiff claimed that Ohio Prison Industries was producing items covered by the plaintiff's patent to a room partition system, so plaintiff brought suit in the Court of Common Pleas against the State for an unlawful taking.[131] The Court of Appeals of Ohio held: (1) that the suit was properly brought in state courts as a takings case, and was not a suit for patent infringement within the exclusive jurisdiction of federal courts;[132] but (2) that the Court of Common Pleas had properly dismissed the action because a suit against the State for a taking of a patent right was within the *exclusive* jurisdiction of the Court of Claims.[133]

In 1977, the Court of Appeals of Ohio held, in *Kermetz v. Cook-Johnson Realty Corp.*,[134] that one can sue the State in the Court of Common Pleas for mandamus.[135] Significantly, the *Wilcox* decision, issued in 1992, did not cite to *Kermetz*. In *Kermetz*, a developer was sued in the Court of Common Pleas by a homeowner who claimed damages suffered from flooding caused by a faulty sewer drainage system installed by the developer.[136] The developer filed a third-party complaint against the State, claiming the flooding was caused by water flowing from an adjacent state highway.[137] The entire case was removed to the Court of Claims, which dismissed the developer's third-party complaint for lack of subject matter jurisdiction over claims for *appropriation* (direct condemnation) on the ground that jurisdiction over such actions was conferred exclusively on the Court of Common Pleas by the Ohio's eminent domain statute.[138]

In *Kermetz*, the Court of Appeals of Ohio first noted that the case brought "up for further discussion and refinement some areas of rather intricate law."[139] The court also candidly acknowledged: "It may be readily seen that our prior decisions on the subject

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128. OHIO REV. CODE ANN. § 2743.03(B) (West 2009) (consists of justices of the Supreme Court, Courts of Appeals, or Courts of Common Pleas, or retired judges eligible to serve); *id.* § 2743.03(C)(1) (an action shall be heard and determined by a single judge, although it may be heard by panel in extraordinary situations "presenting novel or complex issues of law or fact").

129. *Id.* § 2743.03(A)(1).

130. 607 N.E.2d 514 (Ohio Ct. App. 1992).

131. *Id.*

132. *Id.* at 515 (contrasting Jacobs Wind Elec. Co. v. Fla. Dep't of Transp., 919 F.2d 726, 728 (Fed. Cir. 1990) (plaintiff can assert takings claim against State) with Chew v. California, 893 F.2d 331, 336 (Fed. Cir. 1990) (State is immune from patent infringement suits alleging a taking)). The court also cited *Motorola, Inc. v. United States*, 729 F.2d 765, 768 (Fed. Cir. 1984) (where patent owner seeks just compensation for unauthorized taking of owner's invention, the "theoretical basis for recovery is the doctrine of eminent domain"), and *Leesona Corp. v. United States*, 599 F.2d 958, 964-65 (Ct. Cl. 1979) (in suits among private parties, theory of recovery is for patent infringement; when government has infringed, theory of recovery is under eminent domain), in support of its application of the law. *Wilcox*, 607 N.E.2d at 515.

133. *Wilcox*, 607 N.E.2d at 516.

134. 376 N.E.2d 1357, 1362 (Ohio Ct. App. 1977).

135. *Id.* at 1362.

136. *Id.* at 1358.

137. *Id.* at 1358-59.

138. *Id.*

139. *Id.* at 1358.

have presented a degree of conflict and resulting confusion. Therefore, the need is apparent for clarification, hopefully to be found within this decision."[140] The court held that the Court of Claims had jurisdiction over such "tortious" or "pro tanto" types of takings (non-direct condemnation), as with any other type of tort action against the State.[141] In the alternative, the court held that the Court of Common Pleas *also* had jurisdiction over actions in mandamus to require the State to initiate an *appropriation* proceeding (forced direct condemnation remedy) where the property owner could show the existence of a clear legal duty of the state official to act in the first instance because the Court of Claims did not provide a remedy in the due course of law because no jury trial was provided in that forum.[142]

The upshot is that in Ohio, suits for takings against the State may be brought *either* as non-direct condemnation suits in the Court of Claims or for mandamus in the Court of Common Pleas.[143]

e. West Virginia Court of Claims

The West Virginia Court of Claims is comprised of three judges appointed by the President of the state Senate and the Speaker of the House of Delegates, with the advice and consent of the Senate.[144] The court has jurisdiction over claims based in state law against the State, but not against local governments.[145] Significantly, the court may only make recommendations regarding claims which the State "should in equity in good conscience discharge and pay."[146]

The West Virginia Court of Claims is not really a "court" at all, but simply an agency for processing claims for which appropriations already exist. Thus, the Supreme Court of Appeals of West Virginia stated that "the court of claims is not a judicial body, but an entity created by and otherwise accountable only to the Legislature."[147] Additionally, the court noted that "[t]he awards of the court of claims . . . are actually recommendations and are not binding on the Legislature."[148]

Even though the West Virginia Court of Claims is not really a court, there is confusion in state law about the manner in which takings claims are to be processed in the state by "real" courts. For example, in *Shaffer v. West Virginia Department of Transportation*,[149] the plaintiff-landowner sued the West Virginia Department of Transportation (WVDOT) in the State Circuit Court for a writ of mandamus to require WVDOT to institute eminent domain proceedings in an effort to compensate the landowner for damages from flooding allegedly caused by the reconstruction of a

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140. *Id.* at 1361.

141. *Id.* at 1362.

142. *Id.*

143. Nacelle Land Mgmt. Corp. v. Ohio Dep't of Natural Res., 584 N.E.2d 790, 792-93 (Ohio Ct. App. 1989) (noting that the only distinction between suing in the Court of Claims for a taking and in the Court of Common Pleas for mandamus is that jury trial is available in the latter but not the former).

144. W. VA. CODE ANN. § 14-2-4 (West 2008).

145. *Id.* § 14-2-13.

146. *Id.*

147. G.M. McCrossin, Inc. v. W. Va. Bd. of Regents, 355 S.E.2d 32, 33 n.3 (W. Va. 1987).

148. *Id.* at 33 n.2 (citing W. VA. CODE ANN. § 14-2-3 (West 2009)).

149. 542 S.E.2d 836 (W. Va. 2000).

highway by WVDOT.[150] The court noted that a mandamus proceeding was the appropriate form of action.[151] The court also noted that the plaintiff in the writ proceeding need only show "'that there is *reasonable cause to believe*' that *the question* of whether"[152] the damage to her property resulted from WVDOT's conduct "*should be resolved by a judge and jury*."[153] This is because the proceedings entailed are twofold: the writ proceeding and the subsequent forced condemnation action.[154]

This peculiar state of procedure results from two constitutional provisions in West Virginia: article III, section 9 states that "[p]rivate property shall not be taken or damaged for public use, without just compensation,"[155] and article VI, section 35 provides that "[t]he State of West Virginia shall never be made defendant in any court of law or equity."[156] The Supreme Court of Appeals of West Virginia has acknowledged that these two provisions "appear to be irreconcilable."[157] Accordingly, the court developed the following procedural remedy:

> [I]f the State Road Commissioner abuses his discretion in failing to institute an action of eminent domain against a property owner who alleges that his property has been taken or damaged as a result of the construction of a public highway, such commissioner will by this Court be directed in a mandamus proceeding to institute such action to determine whether property has been taken or damaged and, if so, the amount of damage the property owner has suffered.[158]

This, of course, leads to a complex and inefficient two-step process.

C. State Commissions and Boards That Address Takings Claims

The third existing system for adjudicating takings claims is comprised of state boards and commissions that render advisory, non-binding, or preliminary decisions with respect to takings claims against state and local governments. These decisions combine three different aspects of takings law: government tort liability, direct condemnation, and non-direct condemnation.

Twelve states have commissions or boards, although not specifically granted authority, which may address takings claims through the exercise of normal duties.[159] Although such boards may address taking claims, their authority and jurisdiction to

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150. *Id.* at 838.
151. *Id.* at 840.
152. *Id.* at 841 (quoting State *ex rel.* Phoenix Insur. Co. v. Ritchie, 175 S.E.2d 428, 429 (W. Va. 1970)).
153. *Id.*
154. *Id.* at 842.
155. W. VA. CONST. art. III, § 9.
156. *Id.* art. VI, § 35.
157. *Phoenix*, 175 S.E.2d at 431.
158. *Id.*
159. The twelve states are: Alabama (ALA. CODE § 41-9-62 (2008)); Arkansas (ARK. CODE ANN. §§ 19-10-101 to -215 (2008)); California (CAL. GOV'T CODE § 905.1 (West 2009)); Connecticut (CONN. GEN. STAT. ANN. § 4-142 (West 2007)); Georgia (GA. CODE ANN. §§ 28-5-60 to -86 (2008)); Idaho (IDAHO CONST. art. IV, § 18); Kentucky (KY. REV. STAT. ANN. § 44.070 (West 2008)); Nebraska (NEB. REV. STAT. §§ 81-8,211 to -8,212 (2008)); New Hampshire (N.H. REV. STAT. ANN. §§ 541-B:2 to -B:9 (2007)); North Carolina (N.C. GEN. STAT. § 143-291(a) (2008)); South Dakota (S.D. CODIFIED LAWS § 21-32-1 (2008)); Tennessee (TENN. CODE ANN. § 9-8-307 (2008)).

provide meaningful remedy is limited. For example, in Alabama, there is a "Board of Adjustment"[160] authorized to satisfy claims against the state "where in law, justice or good morals the same should be paid."[161] Takings claims may be brought against state agencies, despite the constitutional provision, "[t]hat . . . the State of Alabama shall never be made a defendant in any court of law or equity."[162] However, one of the elements of an inverse condemnation claim is that the state agency must have the power of eminent domain.[163] As a result, the Board of Adjustment adjudicates virtually no takings claims in Alabama.

In Arkansas, there is the "Arkansas State Claims Commission."[164] The State Claims Commission has jurisdiction over claims against state agencies, but lacks jurisdiction over claims against local governments.[165] The State Claims Commission has jurisdiction "only over those claims which are barred by the doctrine of sovereign immunity from being litigated in a court of general jurisdiction."[166] Although state courts have jurisdiction over takings claims against state[167] and local[168] governments, the State Claims Commission lacks jurisdiction over such claims.

California statutes authorize local government bodies to establish claim "boards."[169] California's Victim Compensation and Government Claims Board is also established by state statute.[170] Neither of these is authorized to process takings claims.

None of the other states have boards or commissions that possess jurisdiction to adjudicate takings claims in any meaningful sense. Only Nebraska has a State Claims Board that serves a real function in the processing of takings claims.[171] Takings claimants must process their claims through the State Claims Board before such claims can be adjudicated in a state court.[172]

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160. ALA. CODE § 41-9-61 (2008).

161. *Id.* § 41-9-60.

162. ALA. CONST. art. 1, § 14; *see also* Aland v. Graham, 250 So. 2d 677, 679 (Ala. 1971) (inverse condemnation claims available against Alabama state agencies).

163. *Ex parte* Carter, 395 So. 2d 65, 67 (Ala. 1980).

164. ARK. CODE ANN. § 19-10-201(a)(1) (2008).

165. *Id.* § 19-10-204(a).

166. *Id.* § 19-10-204(b)(2)(A).

167. Peculiarly, an action for inverse condemnation is available against the State of Arkansas in the form of an action in equity to enjoin the State from the taking of property until just compensation is provided. *See* Austin v. Ark. State Highway Comm'n, 895 S.W.2d 941, 943 (Ark. 1995).

168. Inverse condemnation is available in Arkansas against a municipality. Robinson v. City of Ashdown, 783 S.W.2d 53, 56-57 (Ark. 1990) (holding that the City's negligence caused inverse condemnation and that the City cannot "escape its obligation to compensate for taking property").

169. CAL. GOV'T CODE §§ 900.2(a), 905.1 (West 2009).

170. *Id.* § 900.2(b).

171. NEB. REV. STAT. § 81-8,211 (2008).

172. *See, e.g.*, Spear T Ranch, Inc. v. Neb. Dep't of Natural Res., 699 N.W.2d 379, 381 (Neb. 2005) (inverse condemnation claim against Nebraska Department of Natural Resources was submitted to Nebraska Claims Board pursuant to state tort claims act; after the board denied the claim, the plaintiff filed suit).

III. AN ANALYTICAL FRAMEWORK FOR STRUCTURING IDEAL FEDERAL AND STATE "TAKINGS COURTS"

The characteristics of an ideal federal or state "takings court" must be ascertained in light of a critical analytical framework for evaluating specialized courts. Accordingly, this Article develops such a framework next, and then applies the framework to sketch out the broad outlines of ideal federal and state "takings courts."

A. Specialized Courts in General

Specialized courts may be defined as substance-specific, specialized tribunals.[173] From time-to-time, there have been recommendations that more specialized courts should be established to deal with particular areas of the law.[174] And indeed, our system of jurisprudence includes a substantial number of specialized courts.

A partial list of the specialized courts now operating in the United States includes: (1) landlord-tenant court, (2) small claims court, (3) traffic court, (4) night court, (5) family court, also known as "domestic relations court," (6) the United States Court of Federal Claims, (7) state courts of claims, (8) probate court, also known as "surrogate's court," (9) labor court in international law, (10) tax court, (11) bankruptcy court, (12) in New Jersey, "Mount Laurel Judges" specialize in considering whether a city or county has met its "fair share" requirement of providing low- to moderate-income housing in the city or county, and (13) in Delaware, a special forum has been created to resolve corporate governance disputes.[175]

As observed in these examples, specialized courts tend to be substance-specific. Accordingly, a specialized court dealing only with the substance of takings law would fall within the mainstream of specialized courts. However, the problem is that in order to determine whether a specialized takings court is successful, one must have a metric or analytical framework, for critically evaluating specialized courts in general, and specialized takings courts in particular.

B. A Critical Analytical Framework for Evaluating Specialized Takings Courts

A critical analytical framework is a tool for determining whether the object under study fulfills the objectives for which the object was constructed. Therefore, a critical analytical framework for evaluating specialized courts should determine whether the specialized court fulfills the objectives for which the court was established.

One type of critical analytical framework for considering specialized courts consists of lists of objective and subjective factors. For example, one set of factors would include a "court's docket-clearing rate, or the number of litigants choosing the

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173. Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1, 3 (1995) [hereinafter Dreyfuss, *Forums of the Future*].

174. *See, e.g.*, ABA Ad Hoc Committee on Business Courts, *Business Courts: Towards a More Efficient Judiciary*, 52 BUS. LAW. 947, 947 (1997) (recommending that "courts which hear a substantial number of corporate and commercial disputes establish specialized court divisions to provide the expertise needed to improve substantially the quality of decision making and the efficiency of the courts with respect to such business cases").

175. *See* Dreyfuss, *Specialized Adjudication*, *supra* note 23, at 384-406.

court rather than other tribunals of comparable adjudicatory authority."[176] Subjective factors would "include the satisfaction that litigants express in the adjudication they received, the regard with which the court is held among lawyers, academics and judges, and the degree to which citizens . . . accept the court's output."[177]

Another, more robust, type of critical analytical framework consists of a set of functional criteria whereby one can consider the success or failure of a particular specialized court.[178] Thus, the advantages derived from a specialized court could include: "improved precision and predictability of adjudication; more accurate adjudication; more coherent articulation of legal standards; greater expertise of the bench; economies of scale that flow from division of labor, particularly including speed, reduced costs and greater efficiency through streamlining of repetitive tasks and wasted motions."[179]

The disadvantages resulting from a specialized court could include a tendency to:

> attract lower quality jurists; become isolated and unable to reap the benefits of "percolation" and "cross-fertilization" that often provide additional information and current developments in the law to generalist courts; be vulnerable to interest-group manipulation, particularly in the selection of judges; lack independence since they are more easily monitored by the legislature and the executive; lack the widespread public acceptance and perception of fairness that traditionally surround generalist courts; lack geographic diversity; create difficulties in dividing the spheres of authority among a mix of generalist and specialized courts; and, make the judicial system less responsive to changes in the caseload mix of the court system.[180]

A "list of factors" approach is a good descriptive tool, in that it allows us to perceive how a court is functioning, but it is not a good analytical tool. By comparison, a functional approach is more robust because it allows us to critically examine the operations of a court in light of the purposes for which the court was established. Therefore, the functional approach measures the achievements and operations of the particular specialized court in comparison to a system of justice without such a court.

A functional approach places particular emphasis on the expertise developed by a judge sitting on such a court. That dimension of considering the success or failure of a specialized court from a functional perspective has been aptly expressed in the business court setting as follows:

> Ultimately, a successful business court depends in each instance on the actual judge hearing business court cases. Judges presented daily with a field of law in which to cultivate their understanding, knowledge, and ability are more likely to come to deeper understandings about the inner workings of the legal principles they face; the patterns that may reveal themselves in the conduct of business cases; and the patterns of thinking and behavior that may appear in parties and counsel. The judge without

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176. This is the approach taken by Professor Rochelle C. Dreyfuss. *See* Dreyfuss, *Forums of the Future*, *supra* note 173, at 11.

177. *Id.*

178. *See* Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67, 88-89 (1995).

179. *Id.*; *see also* Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 330-31 (1991).

180. Stempel, *supra* note 178, at 89; *see also* Bruff, *supra* note 179, at 331-32.

> that experience, faced with business disputes, typically may have to rely upon a less developed understanding of these factors in rendering decisions.[181]

Such expertise would lead to "an enriched understanding and a cultivated application of precedent and growth of the law."[182]

In 1996, the American Bar Association (ABA) also came to the conclusion that a functional approach for evaluating specialized courts was most appropriate.[183] Additionally, the ABA addressed the need for specialized business courts in addressing complex corporate and commercial disputes.[184] The same considerations of efficiency, predictability, experience, and knowledge of substantive law can be used for evaluating specialized courts that deal with takings claims.[185] Several areas of law where specialized courts are utilized, such as bankruptcy law,[186] patent law,[187] and family law,[188] have similarly been evaluated using a functional approach.

In summary, therefore, a functional critical analytical framework for evaluating specialized courts should ask two questions. First, does the court *achieve advantages* over the previous system in terms of: (1) improved precision and predictability of adjudication; (2) more accurate adjudication; (3) more coherent articulation of legal standards; (4) greater expertise of the bench; and (5) economies of scale that flow from divisions of labor, particularly including speed, reduced costs, and greater efficiency through streamlining of repetitive tasks and wasted motions? Second, does the court *avoid the disadvantages* of a specialized court, such as: (1) attracting lower quality jurists; (2) becoming isolated and unable to reap the benefits of "percolation" and "cross-fertilization" that often provide additional information and current developments in the law to generalist courts; (3) becoming vulnerable to interest-group manipulation, particularly in the selection of judges; (4) lacking independence by being

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181. Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 BUS. LAW. 147, 228 (2004).

182. *Id.* at 228 n.659.

183. ABA Ad Hoc Committee on Business Courts, *supra* note 174, at 951-52, 961.

184. *See generally id.*

185. For an excellent description of all the past and present specialized federal courts, see Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625 (2002). Carstens argues that a specialized court should be established to handle all United States Supreme Court original jurisdiction cases, with an appeal available to the United States Supreme Court. *Id.* at 687-93.

For an article that uses a functional approach to describe the many pros and cons of specialization, see LeRoy L. Kondo, *Untangling the Tangled Web: Federal Court Reform Through Specialization for Internet Law and Other High Technology Cases*, J. L. & TECH., Spring 2002, http://www.lawtechjournal.com/articles/2002/01_020309_kondo.pdf. The article concludes with a proposal for greater specialization through the increased deployment of "specialist judges, technical advisors, scientific expert witnesses, 'blue ribbon' expert jury panels, specialist federal high technology judiciaries, or other approaches to provide the necessary specialization within the judiciary to meet evolving challenges [of internet law in] the future." *Id.* at 104.

186. *See, e.g.*, R. Wilson Freyermuth, *Crystals, Mud, BAPCPA, and the Structure of Bankruptcy Decisionmaking*, 71 MO. L. REV. 1069 (2006).

187. *See, e.g.*, Mark D. Janis, *Patent Law in the Age of the Invisible Supreme Court*, 2001 U. ILL. L. REV. 387.

188. *See, e.g.*, Barbara A. Babb, *Where We Stand: An Analysis of America's Family Law Adjudicatory Systems and the Mandate to Establish Unified Family Courts*, 32 FAM. L.Q. 31 (1998).

overly-controlled by the legislature and the executive; (5) lacking widespread public acceptance and perception of fairness that traditionally surround generalist courts; (6) lacking geographic diversity; (7) creating difficulties in dividing the spheres of authority among a mix of generalist and specialized courts; and (8) making the judicial system less responsive to changes in the caseload mix of the court system as a whole?

IV. STRUCTURING IDEAL FEDERAL AND STATE TAKINGS COURTS

Using the metric of the analytical framework, we can begin the process of structuring ideal federal and state takings courts.

A. Separate Federal and State Takings Courts

A separate federal court focusing exclusively on federal takings claims against the United States should be established in the federal court system, and a separate state court focusing exclusively on state and federal takings claims against state and local governments should be established in each state court system.

The need for a separate federal takings court is demonstrated, at least partially, by the seriously fragmented manner in which the United States Court of Federal Claims and federal district courts share jurisdiction over takings claims brought against the federal government. First, claims must be sorted depending upon whether they are tort claims or takings claims. As discussed above, the distinction between the two types of claims is far from predictable.[189] Second, the consequence of "guessing wrong" is that a claimant may unknowingly file in the wrong court, resulting in wasted time and resources for all concerned. Third, the existing system unapologetically acknowledges that a claimant may indeed have to adjudicate two separate lawsuits, one sounding in tort in a federal district court, and another in takings in the United States Court of Federal Claims.[190]

The need for separate state takings courts arises from two sources. First, after *San Remo Hotel*,[191] most takings cases against state and local governments will arise in state courts under state law. This is because *San Remo Hotel* established that federal just compensation claims are not ripe until a claimant has fully adjudicated a state just compensation claim in state court.[192] Furthermore, because *San Remo Hotel* established that both the federal and state claims can be adjudicated simultaneously in the state forum,[193] from a practical standpoint, federal just compensation claims against state and local governments will undoubtedly be adjudicated in state courts.

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189. *See supra* Part II.A.2.

190. *See* United States v. 101.88 Acres of Land, 616 F.2d 762, 772 (5th Cir. 1980) ("[Therefore,] though he may have to appear in two proceedings to obtain the totality of that compensation [t]he 5th Amendment, while it guarantees that compensation be just, does not guarantee that it be meted out in a way more convenient to the landowner than to the sovereign.").

191. San Remo Hotel, L.P. v. City and County of San Francisco, Cal., 545 U.S. 323 (2005).

192. *Id.* at 337-38.

193. *Id.* at 346.

Second, state just compensation law is evolving to require exhaustion of both administrative[194] and judicial[195] remedies before state just compensation claims are ripe for judicial adjudication. For example, the State of California requires that a takings claimant asserting a state just compensation claim must first bring an action seeking a writ of mandamus or mandate in order to ripen the state just compensation clause claim for judicial adjudication.[196]

Specialized federal and state takings courts would achieve advantages over the existing systems by consolidating adjudication of takings claims against the United States and against state and local governments, in one forum in each system of courts. Improved precision and predictability, as well as accurate adjudication, would be achieved through the expertise arising from such specialized courts. Moreover, efficiencies would be achieved through more consistent determinations, perhaps leading to fewer appeals.

The disadvantages of separate, specialized federal and state takings courts could be avoided through careful selection procedures to ensure that highly qualified jurists would be appointed to such courts. Because takings cases arise in practically unlimited types of settings, it is highly unlikely that jurists on such specialized takings courts would become isolated from the mainstream of legal developments. Since the judges on such courts would be adjudicating cases involving claims against federal, state, and local governments, it would be imperative to shield such judges from political pressures.[197] Federal district court judges already enjoy positions that are comparatively secure from political pressure because of life tenure and the relative difficulty and rarity of impeachment. State takings court judges would have to be similarly protected.[198]

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194. MARTINEZ, GOVERNMENT TAKINGS, *supra* note 8, § 4:15 (exhaustion as prerequisite to adjudication of state constitutional claims).

195. *Id.* § 5:6 (exhaustion of judicial remedies requirement for state takings claims against state or local governments).

196. Hensler v. City of Glendale, 876 P.2d 1043, 1051 (Cal. 1994).

197. For an excellent discussion on the dismal failure of the Commerce Court, which only existed from 1910 to 1913, see George E. Dix, *The Death of the Commerce Court: A Study in Institutional Weakness*, 8 AM. J. LEGAL HIST. 238 (1964). Dix argues that the Commerce Court failed because it lacked two characteristics, either of which might have preserved it: (1) the court failed to attract the support of any of the vested interests involved, including the Interstate Commerce Commission, the railroads, or the political parties; and (2) the court lacked the "judicial insulation" that accompanies public respect for the judiciary, as it was more or less an add-on to the judicial system. *Id.* at 239-40.

198. The Utah Supreme Court stated:

> It is . . . important to note that in a republican form of government, and as specified in our state constitution, the judicial power of the State is vested in this court. Moreover, judges must exercise that power only in accord with the law and the facts of the case, without regard to pressures brought by the other branches of government or special interests of any kind. This, too, we have labored to do. If media reports are accurate of threats by members of the Legislature to withhold salary increases for all state employees generally, and judicial salaries in particular, in an effort to force this court to act more quickly or to reach a certain result, then those making such threats fail to grasp the very core of the separation of powers doctrine and the value to the people of our state of a truly independent and responsible judiciary. Further, the suggestion in the briefing of the State that a decision unfavorable to the State's position might result in a negative impact on judicial retirement benefits, among others, might also be perceived as an unwise effort to appeal to personal interests, an effort

B. Exclusive Subject Matter Jurisdiction Limited to Takings Claims

Governmental conduct which gives rise to takings claims may also give rise to claims under other legal theories.[199] For example, physical governmental conduct, such

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that we reject as disrespectful of our function and therefore of the constitutional responsibilities of the judicial branch itself.

Utah Pub. Employees Ass'n v. State, 131 P.3d 208, 213 (Utah 2006).

199. For example, the possible claims may be viewed in terms of the following organizational structure:

I. Federal Defendants
  A. Entity Federal Defendants
    1. State Law Claims
      a. Common Law
      b. Statutory
      c. Constitutional
    2. Federal Law Claims
      a. Common Law
      b. Statutory
      c. Constitutional
  B. Individual Federal Defendants
    1. State Law Claims
      a. Common Law
      b. Statutory
      c. Constitutional
    2. Federal Law Claims
      a. Common Law
      b. Statutory
      c. Constitutional

II. State-level Defendants
  A. Entity State-level Defendants
    1. State Law Claims
      a. Common Law
      b. Statutory
      c. Constitutional
    2. Federal Law Claims
      a. Common Law
      b. Statutory
      c. Constitutional
  B. Individual State-level Defendants
    1. State Law Claims
      a. Common Law
      b. Statutory
      c. Constitutional
    2. Federal Law Claims
      a. Common Law
      b. Statutory
      c. Constitutional

III. Local Government-level Defendants
  A. Entity Local Government-level Defendants
    1. State Law Claims
      a. Common Law
      b. Statutory
      c. Constitutional
    2. Federal Law Claims
      a. Common Law

as when police officers demolish private property while pursuing a fleeing felon, might give rise to a common law tort claim as well as a constitutional takings claim.[200] Similarly, non-physical governmental conduct, such as when an government agency grants or denies a land development permit, might give rise to a claim for a statutory petition for review as well as a constitutional takings claim.[201]

If all such additional claims were adjudicated in the new specialized federal and state "takings courts," those courts would quickly grind to a halt. Moreover, if judges on such courts were required to adjudicate takings claims as well as all those other possible claims, then such judges could easily get bogged down spending most of their time on non-takings claims, and would not develop the expertise on adjudication of takings claims.

Therefore, the subject matter jurisdiction of specialized federal and state takings courts should be limited to adjudication of takings claims. This would avoid the current problems concerning the proper forum for adjudication of takings claims as between the United States Court of Federal Claims and federal district courts. Similarly, this would avoid the current confusion over the relationship between the subject matter jurisdiction of state courts of claims and state courts of general jurisdiction over takings claims.

In order to assure that all takings claims are channeled into the specialized federal and state takings courts, such courts should be granted *exclusive* subject matter jurisdiction, limited to takings claims. Otherwise, the expertise of such courts would not be utilized to its maximum potential. Moreover, adjudication of takings claims by other, non-specialized courts, would risk the same kinds of problems that exist under the existing systems.

Accordingly, a takings claimant would be given the choice whether to adjudicate takings claims in the specialized federal and state takings courts, to adjudicate claims

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b. Statutory
c. Constitutional

B. Individual Local Government-level Defendants
1. State Law Claims
a. Common Law
b. Statutory
c. Constitutional
2. Federal Law Claims
a. Common Law
b. Statutory
c. Constitutional

This organizational structure is derived from MARTINEZ & LIBONATI, *supra* note 8, at 177 n.143. For discussion of additional considerations, such as exhaustion of judicial and administrative remedies and identification of the proper forum, see MARTINEZ, GOVERNMENT TAKINGS, *supra* note 8, §§ 3:1-:62.

200. *Compare* Customer Co. v. City of Sacramento, 895 P.2d 900 (Cal. 1995), *cert. denied*, 516 U.S. 1116 (1996) (denying recovery to an owner whose store was damaged by police looking for a criminal suspect, on grounds that a benefit was conferred and that an emergency existed), *with* Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38 (Minn. 1991) (holding that an owner in similar circumstances was entitled to compensation).

201. For example, Utah law provides that a municipality's land use decisions can be challenged as "arbitrary, capricious, or illegal." UTAH CODE ANN. § 10-9a-801(3)(a)(ii) (2008); *see also id.* § 17-27a-801(3)(a)(ii) (similar provision applicable to counties).

arising under other theories in non-specialized courts, or to proceed simultaneously in both courts. If the claimant is successful in one or the other of such courts, then of course only one recovery would be available. If the claimant is unsuccessful in one or the other of such courts—and the statute of limitations for filing in the alternative court has not run[202]—then the claimant should be allowed to proceed to the other court, albeit only in regard to the claims that could have been litigated in the other court in the first instance.

As litigation involving takings claims may also be initiated by the government, it is necessary to coordinate the operation of the specialized federal and state courts of claims with the federal and state courts of general jurisdiction in regard to those settings. These involve situations where the government initiates litigation by bringing a direct condemnation action in the federal or state court of general jurisdiction and the property owner seeks to assert a takings claim in response.[203] In order to ensure that takings claimants will have their matter adjudicated by the specialized federal or state takings courts, and also in order to protect the exclusive jurisdiction of such courts over those claims, takings claimants should be allowed to remove such lawsuits initiated by the government to the specialized federal or state takings courts.

However, the choices of fora and theories available to a takings claimant must be harmonized with the rules of preclusion. Claim preclusion applies where both cases involve the same parties or their privies. Alternatively, issue preclusion applies where the issue litigated is identical in both actions, although the parties are not. Such rules of preclusion are applicable in both state and federal courts.[204] If claim preclusion were strictly applied, a litigant would be forced to join both takings and non-takings claims in the forum of the first lawsuit. That would defeat the purpose of having specialized federal and state takings courts. Accordingly, a litigant should not be

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202. If a claimant chooses one forum and the matter is dismissed other than on the merits, such as for lack of subject matter jurisdiction, then a savings statute may extend the time for re-filing the suit in the proper court. *See, e.g.*, 28 U.S.C. § 1367(d) (2006) (if a federal court dismisses state law-based supplemental claims, the period of limitations for any such dismissed claims "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed, unless state law provides for a longer tolling period"); UTAH CODE ANN. § 78B-2-111(1) (2008). The Utah provision states:

> If any action is timely filed and the judgment for the plaintiff is reversed, or if the plaintiff fails in the action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the action has expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.

Id.; *see also* Madsen v. Borthick, 769 P.2d 245, 246, 254 (Utah 1988) (holding that plaintiffs' suit against government officials in their personal capacities was timely filed as allowed by state savings statute because it had been filed within one year of dismissal of prior suit brought against government entity that had been dismissed for lack of jurisdiction for failure to file a notice of claim).

203. The government's initial lawsuit might take the form of a direct condemnation action. *See* Wintergreen Group, LC v. Utah Dep't of Transp., 171 P.3d 418 (Utah 2007) (holding landowner against whom direct condemnation action has been filed can bring counterclaim or independent action for inverse condemnation). Alternatively, the government's lawsuit may take the form of an inverse condemnation action. *See City of Luna Pier*, 438 N.W.2d 636 (Mich. 1989) (holding both direct condemnations and inverse condemnations brought by the government may be filed in the circuit courts).

204. *See, e.g.*, San Remo Hotel, 545 U.S. at 347-48; *see generally* 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4402 (2d. ed. 2002) (explaining the basic terminology of res judicata).

forced to do so, and claim preclusion should not apply to takings and non-takings claims.

Nevertheless, issue preclusion should apply to takings and non-takings claims. If a litigant adjudicates the takings claim first, resolution of all issues actually litigated in the specialized takings court would be binding on any subsequent litigation in a non-takings court under non-takings theories. Conversely, if a litigant proceeds first in a non-takings court, resolution of all issues actually litigated in the non-takings court would be binding on any subsequent litigation in a takings court regarding the takings claims. This would avoid duplicative and possibly inconsistent determination of the same issues.

C. Ripeness Requirements and Notice of Takings Claim

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,[205] the United States Supreme Court held that two distinct ripeness requirements apply to Federal Just Compensation Clause claims.[206] First, the claimant must obtain a "final" decision from whatever government agency or official can inform the claimant about how the claimant's property rights will be affected.[207] Thus, the Court determined that a subdivision developer not only had to submit a development application, but once that was denied, the developer must also be denied a variance from the local board of adjustment.[208] Significantly, the Court further held that appeals need not be exhausted, but administrative mechanisms for obtaining a final decision must be utilized.[209] Second, the claimant also must satisfy the "completeness" requirement, whereby the claimant must also seek and be denied compensation before a Just Compensation Clause claim would be ripe for judicial review.[210] The Court reasoned that the Just Compensation Clause does not prohibit takings, but does prohibit takings without payment of just compensation, and therefore, until the claimant was denied compensation, the Just Compensation Clause claim was not complete for purposes of judicial resolution.[211]

For state constitutional just compensation clause claims, the finality requirement takes the form of a straightforward exhaustion of administrative remedies requirement.[212] The completeness requirement takes the form of "takings precursor" requirements,[213] such as the filing of a statutory petition for review.[214]

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205. 473 U.S. 172 (1985).

206. *Id.* at 186.

207. *Id.*

208. *Id.* at 188.

209. *Id.* at 192-94.

210. *Id.* at 195.

211. MARTINEZ, GOVERNMENT TAKINGS, *supra* note 8, §§ 4:14-:17, 5:3, 5:8 (examining ripeness requirements).

212. *See, e.g.*, Patterson v. Am. Fork City, 67 P.3d 466, 472 (Utah 2003) (providing state administrative remedies must be exhausted before state constitutional takings claim is ripe for judicial review).

213. *See* MARTINEZ, GOVERNMENT TAKINGS, *supra* note 8, § 5:1 (discussing "takings precursor" requirements).

214. *See, e.g.*, Hensler v. City of Glendale, 876 P.2d 1043, 1051 (Cal. 1994) (discussing petition for review and declaratory relief actions required); *In re* Ward v. Bennett, 592 N.E.2d 787, 790-91 (N.Y. 1992) (Article 78 proceeding required).

The fundamental policy underpinning of both the finality and completeness requirements is to ensure that courts are not called upon to adjudicate claims that could have been resolved at an earlier stage by the government agency or official claimed to have committed a taking. This policy applies with equal force to specialized federal and state takings courts. Accordingly, a takings claimant should be required to submit notice of a takings claim to the government agency or official involved before resorting to such courts for judicial adjudication of their alleged takings claim. A notice of takings claim would begin the process whereby the government agency or official involved provides the claimant with a final decision, as well as a denial of compensation sufficient to make the takings violation complete. Once the takings claimant provides the specialized federal or state takings court with evidence of such final decision and complete takings violation, the takings claim would be ripe for judicial adjudication. No additional administrative or judicial "takings precursor" proceedings are necessary to ripen the takings claim, as the government official would have ample opportunity to render a final decision and to deny compensation if they are so inclined.[215] Moreover, neither the finality nor completeness requirements would apply if it would be futile for the takings claimant to ask for a final determination or for compensation.[216]

D. No Jury Trial

It is not altogether clear, either under federal or state just compensation doctrine, whether Just Compensation Clause claimants are entitled to a jury trial. Thus, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[217] the United States Supreme Court held that, although there was no statutory right to jury trial under § 1983, the Seventh Amendment conferred the right to a jury.[218] The Court reasoned that because a § 1983 action for regulatory takings, where the plaintiff seeks damages, is analogous to common-law tort actions to recover damages for governmental interference with property interests, and is therefore one "at law."[219] In addition, the Court held that providing jury trials for regulatory takings issues would preserve the substance of the common law right to recover against the government when the Seventh Amendment was adopted.[220]

Moreover, where state just compensation doctrine is concerned, the question of whether a takings claimant is entitled to a jury also remains uncertain.[221] This is not

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215. For a discussion of the role of notice of claim requirements in the takings claims setting, see MARTINEZ, GOVERNMENT TAKINGS, *supra* note 8, § 4:19; Martinez, *Hurry Up and Wait*, *supra* note 26; John Martinez & Karen Martinez, *A Prudential Theory*, *supra* note 8.

216. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1012 n.3 (1992) (holding if claimant's further application would be pointless, claimant's takings claim is ripe); Estate of Friedman v. Pierce County, 752 P.2d 936, 938-39 (Wash. Ct. App. 1988) (discussing futility exception); MARTINEZ, GOVERNMENT TAKINGS, *supra* note 8, §§ 4:16, 5:5 (discussing "futility" exception to ripeness requirements).

217. 526 U.S. 687 (1999).

218. *Id.* at 720-21 (finding that there is a right to jury trial for determination of whether claimant has been deprived of all economically viable use of his property).

219. *Id.* at 709-10.

220. *Id.* at 718-19.

221. *See* UTAH CONST. art. 1, § 10 (providing that "in civil cases, three-fourths of the jurors may find a verdict . . . [and] a jury in civil cases shall be waived unless demanded"); Int'l Harvester Credit Corp. v.

surprising, because state just compensation doctrine has been borrowed, in part, from federal just compensation doctrine.[222]

In terms of our critical analytical framework, the advantages of the existing system for adjudicating takings claims in federal and state courts is largely premised on an understanding of the intricacies of takings doctrine. In light of the complex and largely incoherent nature of takings law, as even the United States Supreme Court acknowledged in *City of Monterey*, the distinction between legal questions and factual questions is extremely difficult to draw. Because the City approved the instructions that were submitted to the jury, the Court held that the case did "not present an appropriate occasion to define with precision the elements of a temporary regulatory takings claim."[223] The Court thereby seemed to hold that the jury instructions were not improper—but not necessarily correct. That uncertainty arose because of the incoherent and intractable nature of takings doctrine itself. Thus, the Court could neither approve nor disapprove of the jury instructions because such a determination presupposed, and depended upon, an articulation of the applicable legal doctrine of takings.

Takings doctrine has become neither more predictable nor understandable in the interim. Accordingly, it would seem that adjudication of takings claims, including purely factual questions, should be left to judges for determination, not juries.

E. Special Masters, Commissioners, or Magistrates

As takings cases encompass all settings where governmental conduct—whether physical or nonphysical—has an untoward effect on property, the numbers of takings cases that can and will arise before specialized federal and state "takings courts" to adjudicate may be very large in number; thus, it is advisable for the judges on such courts to utilize the services of special masters, commissioners, or magistrates. Such special masters, commissioners, or magistrates could narrow down the legal and factual issues, make preliminary factual determinations, and perhaps dispose of some of the substantive workload that is surely to be confronted by specialized takings courts.

Pioneer Tractor, 626 P.2d 418, 419 (Utah 1981) (discussing a "virtually unanimous intention on part of the framers of the [Utah] Constitution to preserve a constitutional right to trial by jury in civil cases"); Hyatt v. Hill, 714 P.2d 299, 301 (Utah 1986) (jury trial in civil cases extends only to cases that would have been cognizable at law at the time the Utah Constitution was adopted); UTAH CODE ANN. § 78B-5-101 (2008) (providing that in actions for the "recovery of specific real or personal property, with or without damages, or for money claimed due upon contract or as damages for breach of contract, or for injuries, an issue of fact may be tried by a jury, unless a jury trial is waived or a reference is ordered"); UTAH CODE ANN. § 78B-5-102 (2008) ("All questions of fact, where the trial is by jury, other than those mentioned in Section 78B-5-103 are to be decided by the jury, and all evidence is to be addressed to them, except when otherwise provided."); *see also* Richards v. Salt Lake City, 161 P. 680 (Utah 1916) (determination of whether road debris on private lot warrants compensation is for the jury); UTAH R. CIV. P. 38 ("The right to trial by jury as declared by the constitution or as given by statute shall be preserved to the parties."). *But see* Cornish Town v. Koller, 817 P.2d 305 (Utah 1991) (no right to jury trial for determination of public necessity for direct condemnation).

222. *See generally* 3 SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW, *supra* note 8, § 16.51 (collecting cases).

223. *City of Monterey*, 526 U.S. at 721-22.

In terms of the critical analytical framework, the use of such special masters, commissioners, or magistrates would be advantageous over the existing system because by extension, these officers would become more expert at adjudicating takings cases. Additionally, the determinations by such officers would be subject to review by judges on the specialized federal and state takings courts, therefore no significant disadvantages would be generated by such a procedure.

V. CONCLUSION

This Article proposes that we acknowledge the difficulty and complexity of takings doctrine, both at the federal and state levels. For all that appears, bright line rules in this field are simply not possible. On the other hand, it is simplistic to believe that the only other choice is "*ad hocery*."[224] The middle ground may be the creation of specialized federal and state takings courts, where perhaps we can achieve just and fair takings adjudications.

224. *See* Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1571 (Fed. Cir. 1994) (viewing the takings problem as one where the search for a solution leads to two opposite poles: bright line rules or "*ad hocery*").