

NOTE

BRINGING A JUDICIAL TAKINGS CLAIM

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This Note seeks to answer a set of questions prompted by the Supreme Court's 2010 decision in Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection. In that case, six Justices recognized that the Constitution provides some protection against so-called judicial takings—court decisions that, like executive and legislative action, might be deemed to take property rights. But the Court's fractured holding provided little guidance on a handful of practical issues that will be of immense interest to potential judicial takings plaintiffs, like whether such claims can be brought in federal court and what remedies might be available. I argue that a judicial takings plaintiff should be able to bring her case in federal district court, notwithstanding the barriers the Supreme Court has erected that keep the vast majority of federal takings litigation in state court. I further argue that while the Eleventh Amendment likely precludes a federal court from awarding money damages in a judicial takings case, equitable relief—in the form of invalidation of the offending state court opinion—should be available.

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INTRODUCTION

In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,¹ the Supreme Court breathed life into the doctrine of judicial takings—the idea that judicial decisions, like executive and legislative action, might be deemed to take property rights under the Takings Clause of the Fifth Amendment. Before the case, judicial takings were the province only of law review articles, a few offhand mentions in Supreme Court concurring and dissenting opinions, and one or two cases in the lower federal courts.² *Stop the Beach Renourishment* firmly established the proposition that the U.S. Constitution provides some protection against judicial redefinition of property rights, though the Court was unable to determine whether the source of that protection is the Takings Clause of the Fifth Amendment or the Due Process Clause of the Fourteenth Amendment.³ In this Note, I seek to shed light on the unexamined questions of how and where, in the wake of that case, a party aggrieved by a judicial property law decision might actually go about bringing such a claim, and what remedy she might hope to obtain. I conclude that a plaintiff bringing a judicial takings claim (or a due process claim rooted in judicial takings) should be able to have her case heard in federal district court, notwithstanding the barriers the Supreme Court has erected that keep the vast majority of federal tak-

1. 130 S. Ct. 2592 (2010).

2. See *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1212 (1994) (Scalia, J., dissenting from denial of certiorari); *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring); *Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986); *Sotomura v. Cnty. of Hawaii*, 460 F. Supp. 473 (D. Haw. 1978); Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 (1990); Roderick E. Wals-ton, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379.

3. Compare 130 S. Ct. at 2602 (plurality opinion) (“In sum, the Takings Clause bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking.”), with *id.* at 2615 (Kennedy, J., concurring in part and concurring in the judgment) (“The Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is ‘arbitrary or irrational’ under the Due Process Clause.”).

ings litigation in state court. I further argue that while the Eleventh Amendment likely prevents a federal court from awarding money damages to a judicial takings plaintiff, equitable relief—in the form of invalidation of the offending state court opinion—should be available.

A. *The Supreme Court's Decision in Stop the Beach Renourishment*

The plaintiffs in *Stop the Beach Renourishment* were beachfront property owners in Walton County, Florida, who sought to prevent local government from restoring beaches adjacent to their property under Florida's Beach and Shore Preservation Act.⁴ The restoration contemplated adding sand to beaches that had been eroded in recent years by hurricanes.⁵ The new sand would have pushed the mean high-water line further out to sea, but the boundary of the plaintiffs' property would have remained fixed—that is, it would no longer extend to the mean high-water line, and the plaintiffs would no longer be beachfront property owners.⁶ After bringing an unsuccessful administrative challenge to the plan, the plaintiffs filed suit in state court, arguing that the government's action would deprive them of two property rights they possessed under Florida law: the right to receive accretions⁷ to their property and the right to have the contact of their property with the water remain intact.⁸ The Florida Supreme Court rejected their claim.⁹ After unsuccessfully petitioning for rehearing, the plaintiffs then filed a petition for a writ of certiorari, asserting that the Florida Supreme Court's ruling itself effected a taking by redefining their property rights out of existence.¹⁰

With Justice Stevens, a Florida property owner, recused, all eight Justices who heard the case agreed that the Florida Supreme Court had not impermissibly changed the state's property law.¹¹ But in reaching that conclusion, a majority of the Court could not agree upon what test to apply to judicial takings claims. Writing for a four-Justice plurality, Justice Scalia concluded that “the existence of a taking does not depend upon the branch of government that effects it.”¹² Thus, in the plurality's view, a judicial opinion that eliminates an

4. *Id.* at 2599-2600 (majority opinion).

5. *Id.* at 2600.

6. *Id.* at 2599.

7. An accretion is “an addition of solid material . . . to riparian land gradually and imperceptibly made by the water to which the land is contiguous; it is a gradual and imperceptible increase of land through the operation of natural causes.” 65 C.J.S. *Navigable Waters* § 105 (West 2010) (footnotes omitted).

8. 130 S. Ct. at 2600 (citing *Save Our Beaches, Inc. v. Fla. Dep't of Env'tl. Prot.*, 27 So. 3d 48, 57 (Fla. Dist. Ct. App. 2006)).

9. *Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008).

10. 130 S. Ct. at 2600-01; Petition for Writ of Certiorari at 15, *Stop the Beach Renourishment*, 130 S. Ct. 2592 (No. 08-1151), 2009 WL 698518.

11. 130 S. Ct. at 2610-13.

12. *Id.* at 2608 (plurality opinion).

“*established* property right”—that is, a property right “about [whose] existence” there is no “doubt” under settled law—constitutes a Fifth Amendment taking just as legislative or executive action would.¹³ Justice Kennedy, joined by Justice Sotomayor, would have reserved the question of whether judicial action can give rise to a claim under the Takings Clause, but argued that the Due Process Clause applies: “If a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law.”¹⁴ Justice Breyer, joined by Justice Ginsburg, would have stopped short of announcing whether either the Takings Clause or the Due Process Clause could afford relief to property owners aggrieved by courts, since under any test, the Florida Supreme Court decision at issue did not eliminate property rights.¹⁵

B. *Questions Remaining in the Wake of Stop the Beach Renourishment*

Scholarly reaction to *Stop the Beach Renourishment*, like the judicial takings commentary that preceded the case, has focused primarily on broad theoretical questions, such as whether a judicial takings doctrine should exist,¹⁶ whether it is a more suitable vehicle than due process,¹⁷ its implications for federalism¹⁸ and separation of powers;¹⁹ its definition of what constitutes property;²⁰ and its effect on the modern role of courts²¹ and the evolution of the common law.²² While these questions are interesting and weighty, far less attention, both before and after *Stop the Beach Renourishment*, has focused on the thorny practical issues that will be of far more interest to potential judicial takings plaintiffs. Such issues include whether, where, and when plaintiffs may be able to bring their judicial takings claims, as well as what remedies they

13. *Id.* at 2608 n.9.

14. *Id.* at 2614 (Kennedy, J., concurring in part and concurring in the judgment).

15. *Id.* at 2618-19 (Breyer, J., concurring in part and concurring in the judgment).

16. See Richard Ruda, *Do We Really Need a Judicial Takings Doctrine?*, 35 VT. L. REV. 451 (2010).

17. See Ilya Shapiro & Trevor Burrus, *Judicial Takings and Scalia’s Shifting Sands*, 35 VT. L. REV. 423, 431-34 (2010).

18. See E. Brantley Webb, Note, *How to Review State Court Determinations of State Law Antecedent to Federal Rights*, 120 YALE L.J. 1192 (2011); Julia B. Wyman, *In States We Trust: The Importance of the Preservation of the Public Trust Doctrine in the Wake of Climate Change*, 35 VT. L. REV. 507 (2010).

19. See *The Supreme Court: 2009 Term—Leading Cases*, 124 HARV. L. REV. 179, 306-09 (2010) [hereinafter *2009 Leading Cases*].

20. See Laura S. Underkuffler, *Judicial Takings: A Medley of Misconceptions*, 61 SYRACUSE L. REV. 203 (2011).

21. See Amnon Lehavi, *Judicial Review of Judicial Lawmaking*, (Mar. 19, 2011) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1788242.

22. See Timothy M. Mulvaney, *The New Judicial Takings Construct*, 120 YALE L.J. ONLINE 247 (2011), <http://yalelawjournal.org/images/pdfs/946.pdf>.

might seek. Indeed, as Justice Kennedy recognized in his concurring opinion, it remains “unclear” both “how a party should properly raise a judicial takings claim” and “what remedy a reviewing court could enter after finding a judicial taking.”²³ Justice Kennedy viewed these “difficult questions” and others as good reason to avoid recognizing a judicial takings doctrine,²⁴ and a variety of commentators have noted these problems without exploring them in detail.²⁵

My aim is to provide some answers to these questions, laying out a road-map of sorts for how a judicial takings claim may be brought after *Stop the Beach Renourishment* and what obstacles plaintiffs will face along the way. This Note proceeds in three Parts. The first Part asks—from a descriptive, rather than a normative, standpoint—when judicial takings might provide an avenue for relief. That is, when can property owners who feel aggrieved by judicial opinions hope to bring a successful challenge, under either the Takings Clause or the Due Process Clause? (Because, as I explain, there will likely wind up being little practical difference between bringing a claim under the Takings Clause and under the Due Process Clause, I use the term “judicial takings” to refer broadly to claims brought under either clause asserting that a judicial opinion unconstitutionally deprived the plaintiff of a preexisting property right.) I begin by asking, given the fractured holding in *Stop the Beach Renourishment*, what law controls such claims today.²⁶ Concluding that plaintiffs can rely upon *Stop the Beach Renourishment* to provide a basis for seeking at least some relief, I discuss how principles of ordinary takings law doctrine—such as the distinction between physical and regulatory takings and the public use requirement—might apply in the judicial takings context.

The second Part addresses the difficulty plaintiffs will face in seeking to have judicial takings claims heard in federal court. Judicial takings plaintiffs can be expected to have an exceptionally strong preference for proceeding in federal court, since in nearly all cases they will be alleging that state courts have taken their property—not an attractive claim to present to those very same state courts. But the Supreme Court has established an interlocking set of procedural barriers, grounded in principles of ripeness and preclusion, that generally prevent the vast majority of takings claims from being heard in federal court.²⁷ Most commentators have argued that these doctrines will bar federal courts from entertaining judicial takings claims. While that is a possibility, I conclude that alleged judicial takings likely constitute one of the few categories

23. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2616-17 (2010) (Kennedy, J., concurring in part and concurring in the judgment).

24. *Id.* at 2615. *But see id.* at 2607 (plurality opinion) (recognizing the uncertainty but arguing that the resolution of the issues “hardly presents an awe-inspiring prospect”).

25. *See, e.g.*, John D. Echeverria, *Stop the Beach Renourishment: Why the Judiciary Is Different*, 35 VT. L. REV. 475, 482-83 (2010); Thompson, *supra* note 2, at 1511, 1522.

26. *See Marks v. United States*, 430 U.S. 188, 193-94 (1977).

27. *See San Remo Hotel, L.P. v. City & Cnty. of S.F.*, 545 U.S. 323 (2005); *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

of takings claims that can squeeze through these barriers and may proceed in federal court, because it would be futile to bring them in state court. I also conclude that the *Rooker-Feldman* doctrine would not serve as a bar to federal court litigation of judicial takings claims.

The third Part discusses what remedies might be available to plaintiffs whose property rights have been taken by court decisions. There are two obvious possibilities: compensation and invalidation of the offending court decision. There is a strong presumption that compensation is the appropriate remedy for judicial takings, just as it is the default remedy for legislative and executive takings. Yet the Eleventh Amendment likely bars federal courts from ordering states to pay compensation for takings effected by their judiciaries. As a result, plaintiffs are more likely to succeed in seeking invalidation than they are in seeking compensation. While equitable relief is not normally available as a takings remedy, there is good reason to believe, as the Court suggested in *Stop the Beach Renourishment*, that it is appropriate in this context—largely because of the practical unavailability of compensation as an alternative, and because judicial takings claims implicate not only the Takings Clause but also the Due Process Clause, for which equitable relief is a more natural remedy. I conclude by noting that while, for a variety of reasons, successful judicial takings claims are likely to be relatively rare, the doctrine is valuable both to the handful of plaintiffs who present meritorious claims and as a tool for reminding courts of their obligation to tread carefully when contemplating new rules of law that threaten to destroy existing property rights.

I. DETERMINING WHETHER A JUDICIAL TAKINGS CLAIM IS VIABLE

Stop the Beach Renourishment seems to offer a promising avenue of relief for a property owner who believes that a judicial opinion has changed the law in a way that deprives her of a property right she formerly held. But there are several initial hurdles she will have to overcome before bringing a successful claim in any court. She will have to convince the court that the fractured holding in *Stop the Beach Renourishment* provides controlling law to govern her claim; she will have to demonstrate that the offending judicial action constitutes a taking under the ordinary principles of takings law applicable to legislative and executive action; and, depending on what relief she seeks, she may have to establish that her property was taken for public use.

A. *Controlling Law After Stop the Beach Renourishment*

The first step in a prospective judicial takings action relying upon *Stop the Beach Renourishment* will be to unpack the opinions handed down by the Court in that case. As discussed in the Introduction, no opinion garnered the support of a majority of the Court. Justice Scalia's plurality opinion, joined by three other Justices, would have recognized judicial takings claims under the Takings

Clause; Justices Kennedy and Sotomayor would have recognized such claims under the Due Process Clause; and Justices Ginsburg and Breyer would have left the question for another day. Thus, while six Justices agreed that the Federal Constitution provides some protection for property owners aggrieved by judicial opinions, they could not agree on what the source of that protection is and what its contours are—leaving litigants (including those seeking certiorari in the Supreme Court) in a state of uncertainty. Since *Stop the Beach Renourishment* was decided, several parties receiving adverse judgments from state courts in property cases have sought certiorari under a judicial takings theory. These petitions reflect the different approaches litigants can be expected to take in the wake of *Stop the Beach Renourishment*. Some simply treat the four-Justice plurality opinion as if it were a majority opinion and seek to proceed under the Takings Clause.²⁸ Others argue that lower courts ran afoul of the principles endorsed by *both* the plurality *and* by Justice Kennedy’s concurrence,²⁹ while still others explicitly ask the Court to determine what law governs alleged judicial takings.³⁰

A better approach is to analyze the case under the standard set forth in *Marks v. United States*: “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds’”³¹ While the rule of *Marks* need not be applied in every case,³² it is the ordinary tool lower courts employ to navigate fractured holdings of the Supreme Court—as evidenced most recently by their efforts to implement the Court’s 4-1-4 decision in *Rapanos v. United States*, concerning which waterways are subject to regulation under the Federal Clean Water Act.³³

28. See Petition for Writ of Certiorari, *Cwik v. Giannoulas*, 131 S. Ct. 476 (2010) (No. 10-249), 2010 WL 3300142 (cert. denied); Petition for Writ of Certiorari, *Selrahc Ltd. v. Seeco, Inc.*, 131 S. Ct. 280 (2010) (No. 10-69) (cert. denied).

29. See Petition for Writ of Certiorari at 17-18, *Maunalua Bay Beach Ohana 28 v. Hawaii*, 131 S. Ct. 529 (2010) (No. 10-331), 2010 WL 3518678 (cert. denied).

30. See Petition for Writ of Certiorari, *Albrecht v. Treon*, 131 S. Ct. 1047 (2011) (No. 10-687), 2008 WL 8159846 (cert. denied).

31. 430 U.S. 188, 193 (1977) (plurality opinion) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

32. See *Nichols v. United States*, 511 U.S. 738, 745-46 (1994) (“We think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it.”).

33. 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring) (anticipating that lower courts will apply *Marks* to “feel their way on a case-by-case basis”). Some courts have used a straightforward *Marks* analysis in applying *Rapanos*, treating Justice Kennedy’s concurrence as the narrowest ground. See, e.g., *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006) (per curiam). Others have used a similar but more nuanced analysis, finding jurisdiction under the Clean Water Act whenever, from the facts of the case, it is apparent that either the *Rapanos* plurality or Justice Kennedy would agree with the four *Rapa-*

Applying *Marks* to *Stop the Beach Renourishment* is not a straightforward task. Much like in *Rapanos*, the approaches taken by the plurality opinion and by Justice Kennedy's concurrence are logically distinct. Because they rely upon two separate constitutional provisions—the Takings Clause and the Due Process Clause—it is difficult to see how one approach can be viewed as a narrower formulation of the other, except insofar as the Takings Clause is more narrowly confined to the property context. But one should not thereby conclude, as some commentators wrongly have,³⁴ that *Stop the Beach Renourishment* set no binding precedent. While the plurality and Justice Kennedy arrived at their conclusions in different ways, they agreed on an affirmative answer to the key question presented by *Stop the Beach Renourishment*: whether there exists some federal constitutional constraint on judicial elimination of private property rights. The two opinions used nearly identical language in describing the judicial conduct they sought to restrict.³⁵ Moreover, neither the plurality nor Justice Kennedy ruled out the other's approach. The plurality's reluctance to endorse a due process theory was rooted in its belief that because the Takings Clause of the Fifth Amendment "provides an explicit textual source of constitutional protection" against judicial takings, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing those claims."³⁶ Were that approach taken off the table, the plurality might well have recognized a cause of action rooted in due process. Similarly, Justice Kennedy's opinion did not conclude that the Takings Clause was inapplicable to judicial opinions—only that the Court should look to due process first.³⁷ It is reasonable to suppose that the two paths would lead to the same result in virtually every case.

nos dissenters that the Act applies to a waterway. *See, e.g.*, *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006). Commentators have recognized that under either approach, the implementation of *Rapanos* bolsters the general principle of *Marks* that in applying fractured Supreme Court holdings, lower courts must seek to determine which propositions implicitly garnered the support of a majority of the Court. *See, e.g.*, Joseph M. Cacace, Note, *Plurality Decisions in the Supreme Court of the United States: A Reexamination of the Marks Doctrine After Rapanos v. United States*, 41 SUFFOLK U. L. REV. 97 (2007).

34. *See, e.g.*, L. Kinvin Wroth, *Hold Back the Sea: The Common Law and the Constitution*, 35 VT. L. REV. 413, 413 (2010) (asserting that *Stop the Beach Renourishment* "may make no law at all").

35. *Compare* *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2602 (2010) (plurality opinion) ("If . . . a court declares that what was once an established right of private property no longer exists, it has taken that property . . ."), *with id.* at 2614 (Kennedy, J., concurring in part and concurring in the judgment) ("If a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law.").

36. *Id.* at 2606 (plurality opinion) (quoting *Albright v. Oliver*, 510 U.S. 266, 273 (1994)).

37. *See id.* at 2615-16 (Kennedy, J., concurring in part and concurring in the judgment).

The situation in the wake of *Stop the Beach Renourishment* bears a striking resemblance to that which followed the Court's decision twelve years earlier in *Eastern Enterprises v. Apfel*.³⁸ That case concerned a challenge to a federal statute which sought retroactively to compel coal companies to fund health care benefits for retired employees. A four-Justice plurality determined that the statute effected an uncompensated taking of property; Justice Kennedy concurred, but relied upon due process.³⁹ In applying *Eastern Enterprises*, most lower courts determined that, because the two approaches were nearly identical and produced the same outcome, the two opinions together served as precedent, at least for plaintiffs who stood in a substantially identical position to *Eastern Enterprises*.⁴⁰ Indeed, at least one lower federal court has used *Eastern Enterprises* as a basis for invalidating, on due process grounds, a state supreme court decision retroactively imposing tort liability,⁴¹ noting in the process that *Stop the Beach Renourishment* provides further support for the "conclusion that the judicial development of the common law, just like a legislative enactment, can violate the constitution."⁴²

In *Stop the Beach Renourishment*, of course, the Court unanimously *rejected* the takings claim on the merits, so one might argue that the opinions discussing what would be a viable judicial takings claim are dicta. Indeed, Justice Breyer adopted this line of reasoning in his concurrence, concluding that it was unnecessary for the Court to decide whether other, more meritorious judicial takings claims might succeed.⁴³ Justice Scalia, in response, insisted the Court did have to decide what a successful judicial takings claim, if it existed, would consist of, lest the Court "grapple with the artificial question of what would constitute a judicial taking if there were such a thing as a judicial taking (reminiscent of the perplexing question how much wood would a woodchuck chuck if a woodchuck could chuck wood?)."⁴⁴ At any rate, even if the discussions in

38. 524 U.S. 498 (1998).

39. *See id.* at 537 (plurality opinion); *id.* at 546-47 (Kennedy, J., concurring in part and concurring in the judgment).

40. *See Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046, 1059 n.12 (11th Cir. 2008) ("[A] close analysis of the rationale of Justice O'Connor's plurality opinion in *Eastern Enterprises* and Justice Kennedy's concurrence reveals that the rationale employed in the two opinions is strikingly similar."); *U.S. Fid. & Guar. Co. v. McKeithen*, 226 F.3d 412, 420 (5th Cir. 2000) ("Justice Kennedy's due process analysis focuses on retroactivity and is essentially harmonious with the reasoning of the other four justices."); *Parella v. Ret. Bd. of R.I. Emps. Ret. Sys.*, 173 F.3d 46, 58 (1st Cir. 1999); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3d Cir. 1999). *But see Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254-55 (D.C. Cir. 1998).

41. *Gibson v. Am. Cyanamid Co.*, 719 F. Supp. 2d 1031, 1041 (E.D. Wis. 2010).

42. *Gibson v. Am. Cyanamid Co.*, No. 07-C-864, 2010 WL 3062145, at *3, *5 (E.D. Wis. Aug. 2, 2010) (denying motion for reconsideration in light of *Stop the Beach Renourishment*).

43. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2619 (2010) (Breyer, J., concurring in part and concurring in the judgment).

44. *Id.* at 2603 (plurality opinion).

the plurality opinion and Justice Kennedy's concurrence are dicta, "federal courts are 'bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings.'"⁴⁵

In light of all this, courts can be expected to treat *Stop the Beach Renourishment* as providing some basis for recognizing judicial takings claims, under either the Takings Clause, the Due Process Clause, or (perhaps most likely) by concluding that the two provisions provide effectively identical protection in this context. Prospective judicial takings plaintiffs will no doubt plead both takings and due process violations, which is a common tactic in ordinary takings cases in any event.⁴⁶

B. *Has There Actually Been a Taking?*

A second preliminary question to ask is whether any taking has actually occurred. This sounds obvious but is often neglected in the context of judicial takings. Not all judicial decisions that change property law will cause takings—in fact, it is very likely that most will not. A judicial taking is most commonly defined as "any judicial *change* in property rights that would be a taking if undertaken by the legislative or executive branch of government."⁴⁷ The executive and legislative branches, however, can regulate property rights extensively without creating takings liability—even if the regulations destroy most of the value of a parcel of property. For the most part, governmental action results in a compensable taking only if the government physically takes or occupies property, if it causes a permanent physical invasion of property by a third party, or if it deprives an owner of all economic value of his property.⁴⁸ The plurality opinion in *Stop the Beach Renourishment* did not expressly limit the domain of judicial takings to court decisions that meet those criteria, leading some to wonder whether the plurality intended to displace the normal takings regime in judicial takings cases.⁴⁹ But given the plurality's repeated insistence that judi-

45. *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557 (8th Cir. 1993) (quoting *McCoy v. Mass. Inst. of Tech*, 950 F.2d 13 (1st Cir. 1991)).

46. See D. Kent Safriet & Julie M. Murphy, *Returning to Pre-Hurricane Status: What Does the United States Supreme Court's Ruling in Stop the Beach Renourishment Forecast for Litigants Seeking to Protect Private Property Rights?*, 61 SYRACUSE L. REV. 261, 276 (2011) (suggesting that litigants bring "[d]ual Fifth Amendment [c]laims" that meet both the plurality's test and Justice Kennedy's test).

47. Thompson, *supra* note 2, at 1455.

48. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537-38 (2005); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321-23 (2002). Outside of these categories, courts do occasionally hold governments liable under the multifactor regulatory takings test set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), but such takings are rare. See Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 26 (1995).

49. See, e.g., Echeverria, *supra* note 25, at 480; Michael B. Kent, Jr., *More Questions than Answers: Situating Judicial Takings Within Existing Regulatory Takings Doctrine*, 29 VA. ENVTL. L.J. 143, 166 (2011).

cial takings claims should be evaluated in the same manner as alleged takings by any other branch of government,⁵⁰ litigants must assume that ordinary principles of takings law apply in judicial takings cases, absent any explicit indication to the contrary from the Court.

These principles are often fatal to judicial takings claims. For instance, in *PruneYard Shopping Center v. Robins*, the Court entertained a claim that a decision by the California Supreme Court, which held that state law requiring a privately owned shopping center to permit political protestors to circulate petitions on its premises, had effected a judicial taking.⁵¹ There was no question in the case that the California Supreme Court had overruled precedent and changed the law in the state.⁵² But the United States Supreme Court found no liability under either a takings theory or a due process theory, because that change in law did not constitute the sort of governmental action that would be a taking if it had been carried out by the other branches of government.⁵³ And in *Stop the Beach Renourishment* itself, even if the Court had determined that the Florida Supreme Court's decision had changed Florida property law, it is far from clear that such a change in law would have constituted a compensable taking.⁵⁴ While there may well be some cases in which a judicial opinion changes property law in a way that *does* amount to a taking,⁵⁵ these are likely to be a relatively narrow subset of the larger class of cases involving judicial modification of property law—a consideration that ought to temper the somewhat overblown and speculative fears that *Stop the Beach Renourishment* might turn all state property law decisions into certiorari petitions.⁵⁶

50. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2602, 2605, 2608 (2010) (plurality opinion).

51. 447 U.S. 74, 82 (1980).

52. *Id.* at 78-79.

53. *See id.* at 82-85. The Court concluded that the governmental action did not constitute a taking under *Penn Central*. *Id.* It is not clear whether the same result would obtain today, since two years after *PruneYard* was decided, the Court held in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421, 426-27 (1982), that governmental actions that cause permanent physical invasions of property (arguably present in *PruneYard*, *see* 447 U.S. at 84) categorically create takings liability.

54. *See, e.g.*, Brief for Respondents Walton Cnty. and City of Destin at 41-53, *Stop the Beach Renourishment*, 130 S. Ct. 2592 (No. 08-1151), 2009 WL 3143703. A related concern in judicial takings cases is that the factual record below will often lack sufficient information to determine whether a taking has occurred. *See id.* at 29 (citing *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1213 (1994) (Scalia, J., dissenting from denial of certiorari)).

55. This might occur, for instance, if a judicial opinion requires a property owner to submit to a physical occupation of her property by governmental employees or members of the public, eliminating a previously established right to exclude those people by bringing a trespass action. *Cf.* *Glass v. Goeckel*, 703 N.W.2d 58, 62 (Mich. 2005) (requiring lakefront landowners to permit the public to walk along the lakeshore); *State v. Shack*, 277 A.2d 369, 374-75 (N.J. 1971) (requiring farm owners to allow legal aid attorneys to enter their property to assist migrant farmworkers).

56. *See, e.g.*, *Stop the Beach Renourishment*, 130 S. Ct. at 2618-19 (Breyer, J., concurring in part and concurring in the judgment).

C. *Has There Been a Taking for Public Use?*

A third preliminary consideration involves the “public use” requirement of the Takings Clause: the government may only take property by paying compensation if the property serves a public use.⁵⁷ But the vast majority of cases in which courts change property law involve two private litigants, and a judicial opinion restricting one party’s property rights redounds to the benefit of the other private party, not to the benefit of the state or the public. For instance, in his concurring opinion, Justice Kennedy provided the example of a case in which the Virginia Supreme Court changed its test for determining whether a neighbor’s vegetation constitutes a nuisance.⁵⁸ But even if one deems that decision to have changed Virginia’s property law so as to deprive an owner of a preexisting property right, the effect will be to “increase the value of one property and decrease the value of the other,” not to provide a benefit to the public.⁵⁹ Examples abound of instances in which courts have arguably changed the law to shift the benefits and burdens of property ownership from one private party to another.⁶⁰ While, as discussed above, many of these changes in law would not constitute takings even if they had been enacted legislatively, any that would be properly classified as takings would run headlong into the “public use” requirement: since they are simply *A-to-B* transfers, they do not meet even the relatively liberal “public use” test set forth in *Kelo v. City of New London*.⁶¹ Since these so-called “private-purpose” takings are void to begin with, the proper remedy is not compensation but invalidation of the governmental action in question, at least as applied to individuals previously holding vested property rights,⁶² under either the Takings Clause or the Due Process Clause.⁶³

57. U.S. CONST. amend. V; *see also, e.g.*, *Kelo v. City of New London*, 545 U.S. 469, 477 (2005).

58. *Stop the Beach Renourishment*, 130 S. Ct. at 2615 (Kennedy, J., concurring in part and concurring in the judgment) (citing *Fancher v. Fagella*, 650 S.E.2d 519, 522 (Va. 2007)).

59. *Id.*

60. *See, e.g.*, *Johnson v. Or. Short-Line R.R. Co.*, 63 P. 112, 114 (Idaho 1900) (abandoning common law rule requiring livestock owners to prevent their animals from straying onto property of others); *Tex. Am. Energy Corp. v. Citizens Fid. Bank & Trust Co.*, 736 S.W.2d 25, 28 (Ky. 1987) (abandoning prior rule permitting an overlying landowner to drill for previously extracted oil and gas being stored in subterranean reservoirs beneath his property); *Prah v. Maretti*, 321 N.W.2d 182, 188-90 (Wis. 1982) (abandoning common law rule permitting construction blocking sunlight access on neighboring property in light of changing social norms).

61. 545 U.S. at 483.

62. An interesting question, beyond the scope of this Note, is the extent to which the opinion alleged to have effected a judicial taking would nonetheless be valid as applied to individuals who subsequently come into possession of property. *Cf. Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) (holding that a property owner retains the right to bring a regulatory takings claim even if he does not purchase the property until after the enactment of the regulation in question).

63. The Supreme Court has not made clear which constitutional provision governs private-purpose takings, likely because the remedy—invalidation—is the same either way.

This will pose no problem for plaintiffs who seek invalidation as a remedy, but those who seek compensation must be prepared to demonstrate that the judicial decision at issue not only took their property, but took it for a public use.

II. GETTING INTO FEDERAL COURT: NAVIGATING RIPENESS AND PRECLUSION DOCTRINES

Once a potential plaintiff has determined, in light of the considerations described above, that he may have a viable judicial takings claim, he will have to decide in which court to bring it. One obvious option is to follow the route taken by the plaintiffs in *Stop the Beach Renourishment* and by the petitioners who brought other judicial takings certiorari petitions after that case: to appeal the adverse property law decision all the way through the state court system, and then seek certiorari from the Supreme Court.⁶⁴ But suppose the plaintiff either was not a party to the initial state court suit that produced the adverse property law decision in question (and thus lacks the ability to seek certiorari), or would prefer to proceed initially at the trial court level (perhaps to prove the facts necessary to establish that a taking has occurred, which, as discussed above,⁶⁵ may not be in the record of the initial case).⁶⁶ Where can the plaintiff successfully bring his judicial takings suit?

Compare Mo. Pac. Ry. Co. v. Nebraska, 164 U.S. 403, 417 (1896) (invalidating a private-purpose taking under the Due Process Clause), *with* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984) (relying on the Takings Clause in analyzing an alleged private-purpose taking), and *Kelo*, 545 U.S. at 507 (Thomas, J., dissenting) (same). *See generally* Echeverria, *supra* note 25, at 483-84.

64. Since the vast majority of property law is state law, and since the Takings Clause “only protects property rights as they are established under state law,” *Stop the Beach Renourishment*, 130 S. Ct. at 2612 (plurality opinion), most judicial takings claims will involve state court decisions. It is true, as some commentators have noted, that federal courts—and indeed the U.S. Supreme Court—might effect judicial takings as well. *See* Walston, *supra* note 2, at 425-26 (listing examples of Supreme Court opinions in which the Court held that the government had arguably taken property rights); *see also* Daniel L. Siegel, *Why We Will Probably Never See a Judicial Takings Doctrine*, 35 VT. L. REV. 459, 470-71 (2010) (noting that such cases could be brought in the Court of Federal Claims). But because the ordinary judicial takings case will involve a state court opinion, my focus here will be on state cases rather than federal cases.

65. *See supra* note 54.

66. It is not certain whether the *Stop the Beach Renourishment* plurality envisioned that a party to the initial state court case would be able to bring a judicial takings claim *solely* by seeking certiorari, or whether he could instead assert the claim in a separate, subsequent lawsuit. The plurality would have held that, if a party to the initial suit sought certiorari and it were denied, “the claimant would no more be able to launch a lower-court federal suit against the taking effected by the state supreme-court opinion than he would be able to launch such a suit against a legislative or executive taking approved by the state supreme-court opinion; the matter would be *res judicata*.” 130 S. Ct. at 2609 (plurality opinion). The doctrinal basis for that statement is not clear, nor is the question of whether, or why, a party to the initial suit must seek certiorari in the first place.

Takings plaintiffs, like others alleging government violations of constitutional rights, generally prefer to proceed in federal court, for a variety of reasons. For judicial takings plaintiffs, that impulse will be even stronger than usual: since the claim is that a state court decision took their property, returning to state court can be expected to be a fool's errand. They will have an exceptionally strong desire to proceed in federal court.

But plaintiffs face a significant hurdle to bringing their claims in federal court: takings are the one type of federal constitutional claim litigated almost exclusively in state court. As the Supreme Court has recognized, "there is scant precedent for the litigation in federal district court of claims that a state [or local] agency has taken property in violation of the Fifth Amendment's Takings Clause."⁶⁷ This is thanks to a sort of catch-22 created by the Court's ripeness and preclusion doctrines in the takings realm: litigants are required to ripen their federal takings claims by first seeking compensation in state courts,⁶⁸ but if they do so and are unsuccessful, they are usually precluded from then seeking compensation in federal court.⁶⁹ In this Part, I will discuss how these ripeness and preclusion doctrines might apply in the context of judicial takings. Many have suggested that these doctrines would preclude review of judicial takings claims in federal district court—which, they often argue, counsels against recognition of judicial takings claims in the first place.⁷⁰ I conclude that judicial takings likely constitute one of the narrow classes of takings claims that can proceed in federal court because of the exception under *Williamson County* for claims that it would have been futile to bring in state court.

A. *The Williamson County-San Remo Hotel Bar to Federal Takings Litigation*

1. Williamson County ripeness

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, the Supreme Court imposed two ripeness requirements on plain-

67. *San Remo Hotel, L.P. v. City & Cnty. of S.F.*, 545 U.S. 323, 347 (2005).

68. *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-95 (1985).

69. *San Remo Hotel*, 545 U.S. at 346-48.

70. See, e.g., *Stop the Beach Renourishment*, 130 S. Ct. at 2618 (Kennedy, J., concurring in part and concurring in the judgment) (noting that "litigants will have to press most of their judicial takings claims before state courts"); John J. Delaney, "If a Local Government Legislator or Building Permit Official Must Answer to the Takings Clause, then Why Not the Judicial Branch?," *PLAN. & ENVTL. L.*, Sept. 2010, at 11-12 (contending that there is "little reason" to believe judicial takings claims could be brought in federal court); Echeverria, *supra* note 25, at 483 (suggesting that the "undeniably awkward prospect of state trial judges having to decide in the first instance whether state appellate courts have taken private property" argues in favor of "jettisoning the judicial takings idea"); Ian Fein, Note, *Why Judicial Takings Are Unripe*, 38 *ECOLOGY L.Q.* 749, 782-84 (2011).

tiffs bringing takings claims in federal court. The Court has since clarified that these are only “prudential” requirements,⁷¹ but in practice they are nearly always adhered to unless a court decides to bypass them to rule against plaintiffs on the merits.⁷²

The first requirement, often referred to as “*Williamson County* prong-one ripeness,”⁷³ is that a takings plaintiff obtain a “final decision regarding the application of the regulations to the property at issue” from the government agency implementing the regulation.⁷⁴ This usually consists of seeking a variance or other accommodation that would ease the property owner’s burden.⁷⁵ This requirement will not typically be at issue in the judicial takings context. While it would “require the claimant to appeal a claimed taking by a lower court to the state supreme court,”⁷⁶ a state supreme court’s action would seem to qualify as a final decision; courts, unlike land-use regulators, do not grant variances. Somewhat surprisingly, though, in one of the very few cases in which a federal court has found a state court decision to have effected a judicial taking,⁷⁷ the Ninth Circuit later held that the judicial takings claim was unripe under prong one of *Williamson County* because the offending decision by the Hawaii Supreme Court had not yet been implemented on the ground.⁷⁸ That conclusion was likely wrong, since in that case (and in general) a state supreme court’s decision will be “a binding determination of the scope of property rights” constituting a final decision.⁷⁹ But it nonetheless illustrates the point that judicial takings plaintiffs will have to convince a federal court that the state court decision being challenged is a final determination of their property rights.

It is the second prong of *Williamson County*’s ripeness test, however, that will likely cause plaintiffs difficulty in bringing judicial takings suits in federal court. That prong requires plaintiffs, before proceeding with a takings claim in federal court, to “seek compensation through the procedures the State has pro-

71. *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 733-34 (1997).

72. *See, e.g.*, *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1118 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2455 (2011).

73. *See, e.g.*, *Murphy v. New Milford Zoning Comm’n*, 402 F.3d 342, 348 (2d Cir. 2005).

74. *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985).

75. *See, e.g.*, *MacDonald, Sommer & Frates v. Cnty. of Yolo*, 477 U.S. 340, 351-52 & n.8 (1986).

76. *Stop the Beach Renourishment v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2609 (2010) (plurality opinion).

77. *Robinson v. Ariyoshi*, 441 F. Supp. 559, 585-86 (D. Haw. 1977), *aff’d in part and vacated in part*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986).

78. *Robinson v. Ariyoshi*, 887 F.2d 215, 218-19 (9th Cir. 1989).

79. *D. Benjamin Barros, The Complexities of Judicial Takings*, 45 U. RICH. L. REV. 903, 946 (2011); *see also Robinson v. Ariyoshi*, 676 F. Supp. 1002, 1021 (D. Haw. 1987) (pronouncing that the court could “find no light, not even the lumen of a firefly’s feeble flicker, emanating from *Williamson County* which can be applied to the facts of this case”), *rev’d*, 887 F.2d 215 (9th Cir. 1989).

vided for doing so.”⁸⁰ The rationale for this requirement is that “[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.”⁸¹ Thus, “if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.”⁸² The ordinary state law vehicle for seeking compensation is an inverse condemnation proceeding, which was formerly unavailable in some jurisdictions but may now be brought in nearly every state.⁸³

Though the *Williamson County* test was first articulated in the context of a regulatory takings challenge to a zoning law, there is no reason to believe its state-litigation requirement is limited to that setting. Courts have generally applied it in all takings cases, including suits alleging a physical taking of property,⁸⁴ and the plurality opinion in *Stop the Beach Renourishment* explicitly anticipated that prong one of *Williamson County* would apply in judicial takings cases, giving no indication that prong two would not.⁸⁵ Nor is it likely that judicial takings plaintiffs could evade the state-litigation requirement by styling their claims as arising under the Due Process Clause rather than the Takings Clause. Courts routinely apply *Williamson County* prong two to due process and equal protection claims that are brought alongside or in lieu of takings claims.⁸⁶ This approach has been criticized by some commentators,⁸⁷ but no

80. *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985).

81. *Id.* (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 n.40 (1981)).

82. *Id.* at 195.

83. For instance, California, Ohio, and Tennessee formerly failed to provide for inverse condemnation proceedings in state court, meaning that in those states plaintiffs could go directly to federal court without having to satisfy prong two of *Williamson County*. *See, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 721 (1999) (California property owner); *Hensley v. City of Columbus*, 557 F.3d 693, 696 (6th Cir. 2009) (Ohio property owner); *Arnett v. Myers*, 281 F.3d 552, 563 (6th Cir. 2002) (Tennessee property owner). Now that those states make inverse condemnation proceedings available, plaintiffs in those states must satisfy prong two of *Williamson County* before bringing suit in federal court.

84. *See, e.g., Peters v. Village of Clifton*, 498 F.3d 727, 733 & n.6 (7th Cir. 2007); *Urban Developers, LLC v. City of Jackson*, 468 F.3d 281, 294-95 (5th Cir. 2006); *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 91 (1st Cir. 2003); *Daniel v. Cnty. of Santa Barbara*, 288 F.3d 375, 382 (9th Cir. 2002); *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997); *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 380 (2d Cir. 1995).

85. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2609 (2010) (plurality opinion).

86. *See, e.g., Severance v. Patterson*, 566 F.3d 490, 497 (5th Cir. 2009); *Peters*, 498 F.3d at 730; *Daniel*, 288 F.3d at 384-85; *Von Kerksenbrock-Praschma v. Saunders*, 121 F.3d 373, 379 (8th Cir. 1997); *Bickerstaff Clay Prods. Co. v. Harris Cnty.*, 89 F.3d 1481, 1490 (11th Cir. 1996); *Bateman v. City of W. Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996).

doubt stems from courts' fear that *Williamson County* would effectively become a dead letter if plaintiffs could evade its requirements simply through creative pleading. Thus, to bring a successful judicial takings claim, a plaintiff will either have to endure the "undeniably awkward prospect" of seeking compensation from the very state court system that allegedly effected the taking,⁸⁸ or—as I discuss in Part II.B—demonstrate that some exception to the *Williamson County* requirements applies.

2. San Remo Hotel preclusion

If, as *Williamson County* requires, plaintiffs must seek compensation in state court before bringing a takings claim in federal court, do they retain the ability to proceed in federal court if they lose in state court? In *San Remo Hotel, L.P. v. City & County of San Francisco*,⁸⁹ the Supreme Court resolved a circuit split on that question⁹⁰ and answered it in the negative. When a takings plaintiff complies with prong two of *Williamson County* and unsuccessfully seeks compensation through a state inverse condemnation statute, she will generally be precluded from then seeking compensation under the Takings Clause in federal court. The federal full faith and credit statute provides, among other things, that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State."⁹¹ The adjudication of a state inverse condemnation claim will nearly always involve resolution of the same questions—regarding the nature of the government's action and its impact on the plaintiff's property—that would be at stake in a federal takings claim.⁹² Under *San Remo Hotel*, if the state court decides these factual questions in the government's favor, collateral estoppel ("issue preclusion") will prevent a federal court from resolving them differently.⁹³ And even if plaintiffs go through the state proceedings without having any relevant questions decided against them, *res judicata* ("claim preclusion") will likely still operate to keep them out of federal

87. See J. David Breemer, *Ripeness Madness: The Expansion of Williamson County's Baseless "State Procedures" Takings Ripeness Requirement to Non-Takings Claims*, 41 URB. LAW. 615, 649 (2009).

88. Echeverria, *supra* note 25, at 483.

89. 545 U.S. 323, 327 (2005).

90. Compare *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 130 (2d Cir. 2003), with *San Remo Hotel, L.P. v. City & Cnty. of S.F.*, 364 F.3d 1088, 1090 (9th Cir. 2004), *aff'd*, 545 U.S. 323 (2005), and *Dodd v. Hood River Cnty.*, 136 F.3d 1219, 1227 (9th Cir. 1998).

91. 28 U.S.C. § 1738 (2006).

92. See, e.g., *San Remo Hotel*, 545 U.S. at 332-33; *Adam Bros. Farming, Inc. v. Cnty. of Santa Barbara*, 604 F.3d 1142, 1149 (9th Cir. 2010) (noting that the substance of a state inverse condemnation claim and a federal takings claim is "nearly identical"); *Agripost, LLC v. Miami-Dade Cnty.*, 525 F.3d 1049, 1055 (11th Cir. 2008) (same).

93. 545 U.S. at 343 (citing *Allen v. McCurry*, 449 U.S. 90, 103-104 (1980)).

court,⁹⁴ since they will be obligated to bring their federal takings claims in state court concurrently with the inverse condemnation proceedings arising from the same set of events.⁹⁵ This will be just as true in the judicial takings context as in ordinary regulatory takings cases.

The combination of *Williamson County*'s state-litigation requirement and *San Remo Hotel*'s application of preclusion principles to takings claims means that "there can be no regulatory takings litigation challenging state and local land use regulation in federal district court."⁹⁶ It is not clear that the Court envisioned this result when it decided *Williamson County*, and Chief Justice Rehnquist's concurring opinion in *San Remo Hotel*, joined by three other Justices, pronounced a willingness to reconsider *Williamson County* because the case had "created some real anomalies" and "further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic."⁹⁷ Until the Court takes up that invitation and reconsiders *Williamson County*, however, takings claims against state and local governments are generally barred from federal court.

B. *Why Judicial Takings Claims Properly Belong in Federal Court*

1. *The tension between Stop the Beach Renourishment and Williamson County-San Remo Hotel*

In light of *Williamson County* and *San Remo Hotel*, do judicial takings plaintiffs have any hope of bringing their claims in federal district court—likely the only trial court where they would stand any chance of success? Justice Kennedy, sharing the view of most commentators, clearly thought not: his concurrence in *Stop the Beach Renourishment* cited *San Remo Hotel* in noting that "[u]ntil *Williamson County* is reconsidered, litigants will have to press most of their judicial takings claims before state courts," which he viewed as one more reason to favor a due process approach.⁹⁸ The plurality opinion seemed to skirt

94. See William A. Fletcher, *Keynote Address—Kelo, Lingle, and San Remo Hotel: Takings Law Now Belongs to the States*, 46 SANTA CLARA L. REV. 767, 774-75 (2006); see also *Knutson v. City of Fargo*, 600 F.3d 992, 999 (8th Cir. 2010) (dismissing takings claims on claim preclusion grounds), *cert. denied*, 131 S. Ct. 357 (2010); *Rockstead v. City of Crystal Lake*, 486 F.3d 963, 968 (7th Cir. 2007) (same).

95. See *San Remo Hotel*, 545 U.S. at 346.

96. Fletcher, *supra* note 94, at 775; accord J. David Breemer, *You Can Check Out but You Can Never Leave: The Story of San Remo Hotel—The Supreme Court Relegates Federal Takings Claims to State Courts Under a Rule Intended to Ripen the Claims for Federal Review*, 33 B.C. ENVTL. AFF. L. REV. 247 (2006); Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251 (2006).

97. 545 U.S. at 351-52 (Rehnquist, C.J., concurring in the judgment).

98. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2618 (2010) (Kennedy, J., concurring in part and concurring in the judgment).

the issue deliberately; it stated that plaintiffs “would be able to challenge in federal court the taking effected by the state supreme-court opinion to the same extent that he would be able to challenge in federal court a legislative or executive taking previously approved by a state supreme-court opinion,” without noting that, because of the *Williamson County-San Remo Hotel* barrier, most legislative and executive takings *cannot* be challenged in federal court.⁹⁹

There is an obvious tension between *Stop the Beach Renourishment* on the one hand and *San Remo Hotel* and *Williamson County* on the other. The latter cases insist that state courts can be trusted to properly adjudicate federal takings claims; the former is premised upon the notion that in some instances, state courts may go so far awry in their property law decisions that they *create* a federal takings claim. Were the Court forced to resolve this tension directly, it seems reasonable to speculate that *Williamson County* might give way. Even before *Stop the Beach Renourishment*, the vitality of *Williamson County* was in question;¹⁰⁰ now, it may well be “a dead case walking.”¹⁰¹ Were Justice Scalia—the author of the *Stop the Beach Renourishment* plurality opinion and a strong proponent of recognizing judicial takings claims—to join with the four Justices (and their replacements) who in *San Remo Hotel* signaled a desire to reconsider *Williamson County*, the state-litigation requirement established there would be a thing of the past.

But there are a variety of ways in which the Court might elide this tension, permitting judicial takings claims to proceed in federal district court without overruling *Williamson County*. First, in some cases, the initial lawsuit—the one allegedly resulting in a judicial taking—will itself be an inverse condemnation suit, and thus might be said to satisfy *Williamson County*’s state-litigation requirement. In *Stop the Beach Renourishment*, for instance, that initial case was an inverse condemnation action brought against state and local agencies.¹⁰² Arguably, when the plaintiffs were denied compensation by the Florida Supreme Court, they fulfilled their obligations under *Williamson County*—particularly since, after losing in the Florida Supreme Court, they unsuccessfully sought rehearing there, contending that a judicial taking had occurred.¹⁰³ In future cases,

99. *Id.* at 2609-10 (plurality opinion).

100. *See, e.g., San Remo Hotel*, 545 U.S. at 352 (Rehnquist, C.J., concurring in the judgment); *Braun v. Ann Arbor Charter Twp.*, 519 F.3d 564, 570 (6th Cir. 2008); *Kottschade v. City of Rochester*, 319 F.3d 1038, 1040-41 (8th Cir. 2003); Marla E. Mansfield, *Takings and Threes: The Supreme Court’s 2004-2005 Term*, 41 TULSA L. REV. 243, 288 (2005).

101. Barros, *supra* note 79, at 945.

102. *Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1105 (Fla. 2008).

103. *See Stop the Beach Renourishment*, 130 S. Ct. at 2600 & n.4, 2601. Indeed, the plaintiffs’ unsuccessful petition for rehearing was the basis for the Court’s decision to hear *Stop the Beach Renourishment* in the first place, because “where the state-court decision itself is claimed to constitute a violation of federal law, the state court’s refusal to address that claim put forward in a petition for rehearing will not bar our review.” *Id.* at 2600 n.4. The Court may well use the same logic to conclude that a petition for rehearing satisfies the *Wil-*

litigants may plead state inverse condemnation suits in the alternative as judicial takings claims—effectively saying, “We win on our legislative taking claim, but if not, the state court itself will have committed a taking.”¹⁰⁴ Second, a judicial takings claimant may argue that the state court decision in question effected a so-called “facial” taking—that is, the decision on its face physically appropriated the claimant’s property or deprived it of all economic value, without any need for state litigation to establish the factual predicates otherwise necessary to prove a taking. As the Court has recognized, facial challenges “are generally ripe the moment the challenged regulation or ordinance is passed, but face an ‘uphill battle’ since it is difficult to demonstrate” that governmental action on its face amounted to a taking.¹⁰⁵

2. *The futility exception to Williamson County*

Most promising, though, is the so-called “futility” exception to the *Williamson County* state-litigation requirement: a takings claim is ripe for adjudication in federal court, even absent state litigation, when the procedure a state provides for seeking compensation is “unavailable or inadequate.”¹⁰⁶ This futility exception to this prong of *Williamson County*’s ripeness test is admittedly narrow—a takings plaintiff cannot avail herself of it merely because she has reason to believe a state court will rule against her on the merits.¹⁰⁷ That would produce the perverse result of allowing substantively weak takings claims into federal court while relegating potentially meritorious ones to state court.¹⁰⁸ Rather, she must demonstrate that state law effectively deprives her of the chance to have her takings claim adjudicated on the merits in the first place. This test is rarely satisfied—but the judicial takings context provides one of the few instances in which the futility exception is appropriate. Federal courts have used the futility exception to reach the merits of takings claims in two main categories of cases, both of which are potentially relevant to judicial takings plaintiffs.

Williamson County ripeness requirement. Of course, this option will be available only to plaintiffs who are parties to the initial state court suit.

104. See Fein, *supra* note 70, at 777 n.187.

105. *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 736 n.10 (1997). Facial takings claims remain a conceptual oddity, particularly in the wake of *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), which limited the categories of governmental actions that qualify as takings. See, e.g., David Zhou, Comment, *Rethinking the Facial Takings Claim*, 120 YALE L.J. 967 (2011) (arguing that the concept of a facial taking is obsolete after *Lingle*). But claiming that a facial judicial taking has occurred is nonetheless one conceivable way of getting around the *Williamson County-San Remo Hotel* bar to federal takings litigation.

106. *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985).

107. See, e.g., *Severance v. Patterson*, 566 F.3d 490, 500 (5th Cir. 2009); *Holliday Amusement Co. of Charleston v. South Carolina*, 493 F.3d 404, 407-08 (4th Cir. 2007).

108. See *SGB Fin. Servs., Inc. v. Consol. City of Indianapolis-Marion Cnty.*, 235 F.3d 1036, 1039 (7th Cir. 2000).

First, the futility exception applies when state inverse condemnation statutes do not provide a mechanism for plaintiffs to recover the damages they seek from the relevant state official or agency.¹⁰⁹ In *Clajon Production Corp. v. Petera*, for instance, the Tenth Circuit allowed a takings claim to be brought in federal court, even absent state litigation, because under Wyoming law, an inverse condemnation suit could not be brought against the state Game and Fish Commission, which lacked the authority to exercise eminent domain.¹¹⁰ Thus, in Wyoming and other states that permit inverse condemnation actions only against entities with eminent domain power¹¹¹—a category which generally does not include state judges or courts—a judicial takings plaintiff would be excused from *Williamson County*'s state-litigation requirement, since further state litigation would be literally impossible.

Second, federal courts have used the futility exception to reach the merits of takings claims in which the state judicial system played a central role in the governmental action giving rise to the takings claim in the first place. Perhaps the best example is the Ninth Circuit's en banc decision in the memorably titled case of *Washington Legal Foundation v. Legal Foundation of Washington*.¹¹² There, the court entertained a claim that the state of Washington's Interest on Lawyers' Trust Account (IOLTA) program—created and operated by the state supreme court—effected an unconstitutional taking of the interest generated by clients' funds, which was redirected to pay for legal services for low-income residents of the state.¹¹³ In its *Williamson County* analysis, the Ninth Circuit reasoned:

With respect to the second [prong of *Williamson County*], we believe that the futility exception applies. The final authority on a Washington State inverse condemnation proceeding is the Washington Supreme Court. The Justices of the Washington Supreme Court, as parties to the present action, have filed briefs that argue, not just that the claim is unripe, but that there was no Fifth Amendment violation. The Justices do not point to an available state remedy,

109. See, e.g., *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 721 (1999) (allowing takings suit in federal court under 42 U.S.C. § 1983 because, at the time of the suit, California provided no “adequate procedure for obtaining just compensation”); *Suitum*, 520 U.S. at 734 n.8 (allowing takings suit in federal court under § 1983 against the Tahoe Regional Planning Agency, an intergovernmental agency not subject to state inverse condemnation proceedings); *Asociación de Suscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 17 (1st Cir. 2007); *Daniels v. Area Plan Comm'n of Allen Cnty.*, 306 F.3d 445, 457 (7th Cir. 2002); *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514, 1518 (11th Cir. 1987); *Dakota, Minn. & E. R.R. Corp. v. Rounds*, 422 F. Supp. 2d 1073, 1078 (D.S.D. 2006).

110. 70 F.3d 1566, 1575 (10th Cir. 1995).

111. See WYO. STAT. ANN. § 1-26-516 (West 2011).

112. 271 F.3d 835 (9th Cir. 2001) (en banc), *aff'd sub nom.* *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003).

113. *Id.* at 841. For an overview of the ongoing legal battles surrounding IOLTA, see Tarra L. Morris, Note, *The Dog in the Manger: The First Twenty-Five Years of War on IOLTA*, 49 ST. LOUIS U. L.J. 605 (2005).

nor do they suggest that one is needed. Thus, we conclude that requiring Brown and Hayes to seek compensation from the State—a decision reviewable by the State Supreme Court—would be futile, and hold that the Fifth Amendment challenges to the IOLTA program raised by Brown and Hayes are ripe for review.¹¹⁴

In other words, because any state inverse condemnation suit would ultimately be reviewed by the very same state court system responsible for the alleged taking, such a proceeding would be futile—it would fall into the class of “unavailable or inadequate” state procedures that, under *Williamson County*, plaintiffs are not required to pursue before bringing their takings claims in federal court.¹¹⁵ Similarly, federal courts in California have permitted takings claims challenging the validity of rent control ordinances to be brought directly in federal court under the futility exception because the state law remedy fashioned by California “would remand [the plaintiff] to the very administrative body . . . that has squarely rejected a resolution of [his] claim.”¹¹⁶

These cases are directly analogous to actions alleging judicial takings. In both instances, *Williamson County*’s state-litigation requirement would direct plaintiffs to the same decisionmaking body whose action gave rise to the takings claim initially. “Futile” is the first word that comes to mind to describe such a claim, which would be “dead on arrival” in state court, regardless of its strength on the merits.¹¹⁷ *Williamson County*’s state-litigation requirement has been stretched far enough—indeed, perhaps too far—already; there is no good reason to interpret it to require a state supreme court to ask whether *it itself* effected a taking in interpreting property law. If a judicial takings claim, or a due process claim arising from a state court decision, is to be cognizable at all—and *Stop the Beach Renourishment* dictates that it must be—the proper place for that claim to be heard is in federal court.

C. *A Brief Word on the Rooker-Feldman Doctrine*

Even if the *Williamson County-San Remo Hotel* bar does not operate to keep judicial takings claims out of federal court, there is a second flavor of preclusion jurisprudence that might: the *Rooker-Feldman* doctrine, which generally prohibits federal district courts from reviewing judgments of state

114. *Wash. Legal Found.*, 271 F.3d at 851.

115. *See Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985).

116. *MHC Fin., Ltd. v. City of San Rafael*, No. C-00-03785 VRW, 2008 WL 440282, at *31 (N.D. Cal. Jan. 29, 2008); *see also Carson Harbor Vill., Ltd. v. City of Carson*, 353 F.3d 824, 830 (9th Cir. 2004) (expressing “serious concerns about the adequacy” under *Williamson County* of such a compensation procedure).

117. *Petition for Writ of Certiorari at 36, PPL Mont., LLC v. Montana*, 131 S. Ct. 3019 (2011) (No. 10-218), 2010 WL 3236721; *see also Barros, supra* note 79, at 947 (noting that state court litigation would be “almost certainly futile”).

courts.¹¹⁸ A number of commentators have argued that the *Rooker-Feldman* doctrine would likely prevent federal courts from hearing judicial takings claims,¹¹⁹ and the plurality opinion hinted at that possibility.¹²⁰ But closer inspection belies that view.

First, the *Rooker-Feldman* doctrine “is confined to . . . cases brought by state-court losers,”¹²¹ and “has no application to a federal suit brought by a non-party to the state suit.”¹²² It thus could never bar a plaintiff who was not party to the initial state court suit from bringing his judicial takings claim in federal court. Second, the Supreme Court’s recent *Rooker-Feldman* cases—in which the Court has narrowed the doctrine to the point where some question its continued existence¹²³—make clear that it would not apply even to a judicial takings plaintiff who *was* party to the initial state court suit. The Court now recognizes that *Rooker-Feldman* reaches only suits “complaining of injuries caused by state-court judgments . . . and inviting district court review and rejection of those judgments.”¹²⁴ It also only applies in circumstances where a plaintiff presents in federal court precisely the same claim that was rejected in state court. “‘If a federal plaintiff present[s] [an] independent claim,’ it is not an impediment to the exercise of federal jurisdiction that the ‘same or a related question’ was earlier aired between the parties in state court.”¹²⁵

A judicial takings claim falls outside these tight parameters. A judicial takings plaintiff does not seek to have the federal district court reverse or reject the state court judgment. On the contrary, the federal court suit assumes that the state court judgment is now an accurate statement of the state’s property law. Rather, the plaintiff’s claim is that by changing the state’s property law in the manner that it did, the state court effected an uncompensated taking of a property right that the plaintiff held under the previous formulation of the state’s property law.¹²⁶ Unless the plaintiff voluntarily pursued his judicial takings claim in state court—a route which, as discussed above, should not be a prere-

118. See *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923).

119. See, e.g., Timothy M. Mulvaney, *Uncertainties Remain for Judicial Takings Theory*, PROB. & PROP., Nov./Dec. 2010, at 11, 13; Siegel, *supra* note 64, at 468; Robert H. Thomas et al., *Of Woodchucks and Prune Yards: A View of Judicial Takings from the Trenches*, 35 VT. L. REV. 437, 445 (2010); Thompson, *supra* note 2, at 1511.

120. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot.*, 130 S. Ct. 2592, 2609 (2010) (plurality opinion).

121. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005).

122. *Id.* at 287 (citing *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994)).

123. See Samuel Bray, *Rooker Feldman (1923-2006)*, 9 GREEN BAG 2d 317 (2006) (a tongue-in-cheek obituary).

124. *Exxon Mobil*, 544 U.S. at 284.

125. *Skinner v. Switzer*, 131 S. Ct. 1289, 1297 (2011) (alteration in original) (quoting *Exxon Mobil*, 544 U.S. at 282) (internal quotation marks omitted) (citing *In re Smith*, 349 F. App’x 12, 18 (6th Cir. 2009) (Sutton, J., concurring in part and dissenting in part)).

126. See *Barros*, *supra* note 79, at 949-50.

quisite to bringing that claim in federal court—then *Rooker-Feldman* simply has no bearing on the matter.

III. REMEDIES

If my argument in Part II is correct, ripeness and preclusion doctrines should pose no bar to prospective judicial takings plaintiffs who desire to bring their claims in federal court. But even if that is so, and even if a plaintiff has a strong judicial takings claim on the merits, there remains a third significant question confronting her: what remedies are available? There are two obvious possibilities: compensation and invalidation of the offending judicial decision. I address each in turn. While compensation is the ordinary remedy for a taking, the Eleventh Amendment likely bars plaintiffs in federal court from obtaining compensation from a state. Invalidation is normally *not* available as a takings remedy, but given the Eleventh Amendment barrier to obtaining compensation, it should be available in the judicial takings context, as the plurality suggested in *Stop the Beach Renourishment*.

A. Compensation

1. Compensation as the ordinary takings remedy

As the Supreme Court has repeatedly observed, the Fifth Amendment “does not proscribe the taking of property; it proscribes taking without just compensation.”¹²⁷ The Takings Clause “is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.”¹²⁸ As a result, the Court held in *First English Evangelical Church of Glendale v. County of Los Angeles* that “the compensation remedy is required by the Constitution” whenever the government effects a taking.¹²⁹ Before *Stop the Beach Renourishment*, it seemed natural to conclude that this logic would extend to judicial takings, were they to be recognized.

127. *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985); *accord* *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 (1997); *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 314 (1987); *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 n.40 (1981); *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932).

128. *First English*, 482 U.S. at 315.

129. *Id.* at 316. *First English* was a response to holdings, by the California Supreme Court and other state courts, that the government could abandon any regulation held to effect a regulatory taking without paying compensation for the period of time during which the regulation was in effect. The Court held that while the government retained discretion to abandon its regulation at any time, it was still required to pay compensation for the lost value of the property while the regulation was in force. *See id.* at 322; Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 244 (2004).

The plurality opinion in *Stop the Beach Renourishment* sheds little light on the question of whether compensation is available as a remedy in judicial takings cases. On the one hand, the plurality sought to dispel the notion that there are meaningful constitutional differences between takings effected by courts and by other branches of government. It emphasized that “the particular state actor is irrelevant” to the takings analysis, and that “the existence of a taking does not depend upon the branch of government that effects it.”¹³⁰ If that is true, it would seem to follow that compensation—the ordinary remedy for a taking—should be available in a judicial takings suit. On the other hand, in a passage that is charitably described as puzzling,¹³¹ the plurality opined:

Justice KENNEDY has added “two additional practical considerations that the Court would need to address before recognizing judicial takings.” One of them is simple and simply answered: the assertion that “it is unclear what remedy a reviewing court could enter after finding a judicial taking.” Justice KENNEDY worries that we may only be able to mandate compensation. *That remedy is even rare for a legislative or executive taking, and we see no reason why it would be the exclusive remedy for a judicial taking. If we were to hold that the Florida Supreme Court had effected an uncompensated taking in the present case, we would simply reverse the Florida Supreme Court’s judgment that the Beach and Shore Preservation Act can be applied to the property in question.*¹³²

It is difficult to discern what the plurality’s point is here—indeed, this passage has already begun to cause some confusion in the lower courts.¹³³ It is true that courts only rarely award compensation in takings suits—but that “merely reflects the high threshold for a successful taking claim and has no bearing on the appropriate remedy if and when a taking actually occurs.”¹³⁴ When a taking does occur, compensation is nearly always the plaintiff’s exclusive remedy.¹³⁵

The plurality’s reluctance to embrace compensation as a remedy for a judicial taking may stem from a fear, shared by some commentators, that there are a variety of practical difficulties involved with ordering compensation in such cases. For instance, some commentators note that state courts do not have mon-

130. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2602, 2608 (2010) (plurality opinion).

131. Or less charitably described as “self-evidently obscure,” Echeverria, *supra* note 25, at 482, or “obviously inconsistent” with the rest of the opinion, *2009 Leading Cases*, *supra* note 19, at 308.

132. *Stop the Beach Renourishment*, 130 S. Ct. at 2607 (plurality opinion) (emphasis added) (citations omitted).

133. See *Sagarin v. City of Bloomington*, 932 N.E.2d 739, 745 n.2 (Ind. Ct. App. 2010) (responding to a party’s argument that after *Stop the Beach Renourishment*, equitable relief should be available in addition to just compensation).

134. Echeverria, *supra* note 25, at 483.

135. See Part III.B for further discussion.

ey in their budgets to pay compensation in takings cases.¹³⁶ Others note, relatedly, that eminent domain is a legislative rather than a judicial function, and that state courts generally lack the statutory authority to exercise eminent domain power, calling into question the possibility of their paying compensation.¹³⁷ These practical difficulties, however, are significantly overstated. Most governmental agencies that lose takings claims do not have money set aside in their budgets to pay compensation; rather, the funds come from the general treasury of the state or local government. And both federal and state courts have long held that the mere fact that an agency lacks the statutory power of eminent domain does not immunize the government from having to pay compensation when that agency nonetheless exceeds its mandate and effects a taking.¹³⁸ For a court to hold otherwise would be to deliver a distinctly Kafkaesque message to plaintiffs—that, regardless of what has actually happened to them, they have suffered no taking because the agency in question cannot take their property.

Indeed, it is difficult to see what is particularly problematic about requiring states to pay compensation if their courts depart so far from established property law precedent as to cause a taking. As Justice Brennan once observed in the context of requiring a city to pay compensation for a taking, “[I]f a policeman must know the Constitution, then why not a planner?”¹³⁹ And if a planner, why not a court? If anything, extending the compensation remedy to courts seems *less* troubling than extending it to agencies less familiar with property law than state supreme court justices.

2. *The Eleventh Amendment*

Even if there is no basis in policy or the Court’s takings doctrine for making compensation unavailable as a judicial takings remedy, the Eleventh

136. See, e.g., 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, 332 (1988).

137. See, e.g., Thompson, *supra* note 2, at 1514; 2009 *Leading Cases*, *supra* note 19, at 307.

138. See, e.g., *Cowell v. Palmer Twp.*, 263 F.3d 286, 291 (3d Cir. 2001) (determining that plaintiff can seek compensation through inverse condemnation even though township lacked the authority to exercise eminent domain); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 911 F.2d 1331, 1341 (9th Cir. 1990) (noting that “any government entity” that effects a taking has to pay compensation, regardless of statutory eminent domain power); *Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 705 P.2d 866, 868 (Cal. 1985) (“A landowner whose property has been invaded by a public entity that lacks eminent domain power suffers no less a taking merely because the defendant was not authorized to take.”); *Manning v. Energy, Minerals & Natural Res. Dep’t*, 144 P.3d 87, 91 (N.M. 2006) (denying compensation to property owners because state agency lacked eminent domain power is a “radical position that creates a paradox”).

139. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting).

Amendment likely still achieves that result—at least in federal court.¹⁴⁰ None of the ordinary paths around the Eleventh Amendment will aid a judicial takings plaintiff. Compensation cannot be viewed as a species of equitable relief available under *Ex parte Young*,¹⁴¹ since it “is, like ordinary money damages, a compensatory remedy” at law, not an equitable one.¹⁴² Nor, for a variety of reasons, is relief available under 42 U.S.C. § 1983; relief against a state is not available under that provision¹⁴³ (and, in any event, § 1983 does not abrogate a state’s sovereign immunity¹⁴⁴), and individual state judges and state courts enjoy judicial immunity from suit.¹⁴⁵

The relevant questions then become whether a plaintiff can recover damages by bringing suit directly under the Fifth Amendment, and, if so, whether that provision overrides the limitations of the Eleventh Amendment. Some commentators have argued that the answer to both questions is yes—that “the Takings Clause . . . trump[s] state sovereign immunity by automatically abrogating—or stripping—the immunity that states usually enjoy in actions at law.”¹⁴⁶ The most common source of Supreme Court case law cited for this proposition is a footnote from *First English*, in which the Court, responding to an argument made in an amicus curiae brief by the Solicitor General, observed that its cases “refute[d] the argument of the United States that ‘the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government.’”¹⁴⁷ Rejecting the view that “principles of sovereign immunity” prevented the Takings Clause from operating as a remedial provision, the Court held that “the Constitution . . . dictates” that compensation be available as “the remedy for interference with property rights amounting to a taking.”¹⁴⁸ On the

140. U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

141. 209 U.S. 123 (1908).

142. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999).

143. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989).

144. *Quern v. Jordan*, 440 U.S. 332, 340-41 (1979).

145. *Mireles v. Waco*, 502 U.S. 9, 11 (1991) (per curiam).

146. Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 498 (2006); accord Jesse H. Choper & John C. Yoo, *Who’s Afraid of the Eleventh Amendment? The Limited Impact of the Court’s Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 243 (2006) (arguing that because the Takings Clause is a “self-executing constitutional provision,” it overrides state sovereign immunity); Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 485 (2002) (noting that takings claims appear to be one of two instances in which “state sovereign immunity must yield” to constitutionally mandated compensation provisions—the other instance being claims for reimbursement of illegally levied taxes).

147. *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 316 n.9 (1987) (quoting Brief for the United States as Amicus Curiae Supporting Appellee at 14, *First English*, 482 U.S. 304 (No. 85-1199), 1986 WL 727420).

148. *Id.*

other hand, the *First English* footnote was dicta—since the defendant in that case was a county, not a state, rendering the Eleventh Amendment inapplicable in any event—and other commentators have noted that elsewhere the Court has embraced the “seemingly contradictory” position that the federal government cannot be sued for compensation under the Takings Clause without a waiver of sovereign immunity.¹⁴⁹ Most recently, a plurality opinion authored by Justice Kennedy indicates that the question remains open,¹⁵⁰ and the Court has held that sovereign immunity does not apply in cases where “the States agreed in the plan of the [Constitutional] Convention not to assert that immunity.”¹⁵¹

Whatever the state of this debate in academic circles, however, judicial takings plaintiffs are not likely to find a receptive audience in the federal courts. “[E]very court of appeals to have faced this question has expressly or implicitly . . . held that the Eleventh Amendment bars Fifth Amendment reverse condemnation claims brought in federal district court.”¹⁵² Until and unless the Supreme Court holds to the contrary, judicial takings plaintiffs cannot expect to obtain compensation in federal court.

Interestingly, the overwhelming weight of authority suggests that compensation *would* be available for a judicial takings claim in state court. For reasons discussed in Part II above, no judicial takings claim is likely to succeed on the merits in state court. But if one did, the Eleventh Amendment would not likely bar compensation. This result may seem a somewhat surprising conclusion: the Court held in *Alden v. Maine* that states generally retain sovereign immunity in their own courts.¹⁵³ But the *Alden* Court was careful to emphasize that its holding meant only that *Congress* could not, under its Article I powers, subject nonconsenting states to suit in their own courts. States may not assert sovereign immunity in state court to shield themselves from “obligation[s] aris[ing] from the Constitution itself.”¹⁵⁴ The Court thus reaffirmed its holding from five years earlier in *Reich v. Collins*, which required states to provide a state law remedy for recovering unconstitutionally levied taxes, notwithstanding their

149. Carlos Manuel Vázquez, *Sovereign Immunity, Due Process, and the Alden Trilogy*, 109 YALE L.J. 1927, 1952-53 (2000) (citing *Lynch v. United States*, 292 U.S. 571, 579, 580-82 (1934); *Schillinger v. United States*, 155 U.S. 163, 168 (1894)).

150. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 714 (1999) (“Even if the sovereign immunity rationale retains its vitality in cases where [the Fifth] Amendment is applicable, cf. *First English*, 482 U.S., at 316, n.9, it is neither limited to nor coextensive with takings claims.”).

151. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 373 (2006) (addressing state sovereign immunity in bankruptcy proceedings).

152. *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 955 (9th Cir. 2008); see *DLX, Inc. v. Kentucky*, 381 F.3d 511, 528 (6th Cir. 2004); *John G. & Marie Stella Kenedy Mem’l Found. v. Mauro*, 21 F.3d 667, 674 (5th Cir. 1994); *Robinson v. Ga. Dep’t of Transp.*, 966 F.2d 637, 640 (11th Cir. 1992); *Citadel Corp. v. P.R. Highway Auth.*, 695 F.2d 31, 34 n.4 (1st Cir. 1982); *Garrett v. Illinois*, 612 F.2d 1038, 1040 (7th Cir. 1980).

153. 527 U.S. 706, 707 (1999).

154. *Id.* at 740.

Eleventh Amendment immunity in federal court.¹⁵⁵ In the wake of *Alden* and *Reich*, federal and state courts have unanimously concluded that the Constitution requires states to provide compensation for takings claims brought in state court, even though they enjoy Eleventh Amendment immunity from such claims in federal court.¹⁵⁶ Richard H. Seamon has written a lengthy theoretical defense of this “asymmetrical” approach, in which states enjoy sovereign immunity from takings suits in federal court but not in their own courts.¹⁵⁷

In sum, then, a prospective judicial takings plaintiff is likely to face a choice. She may bring her judicial takings claims in state court, and could obtain compensation as a remedy if she were to prevail—but, because it is difficult to imagine a state supreme court holding itself liable for a judicial taking, her odds of success are minimal. A judicial takings plaintiff determined to obtain compensation probably has but one option: to take her lumps in state court and seek certiorari from the U.S. Supreme Court. If the Court found her claim meritorious, it might be inclined to reexamine the puzzling language in the *Stop the Beach Renourishment* plurality opinion ruling out money damages as a takings remedy. On the other hand, a judicial takings plaintiff could proceed in federal court, but the Eleventh Amendment is likely to bar her from obtaining compensation as a remedy. Would she be able to obtain any other remedy—namely, invalidation of the offending state court property law opinion? I turn to that question next.

B. *Invalidation*

A takings plaintiff seeking not compensation but invalidation of the offending state court decision will face no Eleventh Amendment problem, since prospective equitable relief will be available under *Ex parte Young*.¹⁵⁸ Rather, the problem she faces is that a takings plaintiff generally cannot obtain invalidation of the governmental action at issue. Because the Fifth Amendment “does not proscribe the taking of property; it proscribes taking without just compensation,”¹⁵⁹ it is often assumed that the most a court can do in response to an uncompensated taking is to order the government to pay compensation—in effect, retroactively transforming the government’s action into a valid exercise of its

155. 513 U.S. 106, 109-10 (1994).

156. *Seven Up Pete Venture*, 523 F.3d at 955-56; *DLX*, 381 F.3d at 528; *Manning v. Energy, Minerals & Natural Res. Dep’t*, 144 P.3d 87, 94 (N.M. 2006); *Boise Cascade Corp. v. State*, 991 P.2d 563, 569 (Or. Ct. App. 1999); *SDDS, Inc. v. State*, 650 N.W.2d 1, 9 (S.D. 2002).

157. Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067 (2001).

158. 209 U.S. 123 (1908); see also *Severance v. Patterson*, 566 F.3d 490, 491, 495 (5th Cir. 2009); *Asociación de Suscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 24-25 (1st Cir. 2007).

159. *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985).

eminent domain power. Justice Kennedy's concurring opinion in *Stop the Beach Renourishment* thus pronounced it "questionable whether reviewing courts could invalidate judicial decisions deemed to be judicial takings; they may only be able to order just compensation."¹⁶⁰ While some cases in the early days of regulatory takings jurisprudence presumed that invalidation of the offending regulation would be available as a remedy,¹⁶¹ the modern presumption is that compensation, rather than invalidation, is the preferred remedy for a taking.¹⁶² This is particularly true since many of the takings cases in which courts awarded injunctive relief were decided on the grounds that the regulation in question failed to "substantially advance legitimate state interests"—a formulation which the Supreme Court in 2005 held constitutes only a due process violation, not a taking.¹⁶³ State and federal courts have occasionally declared that compensation through an inverse condemnation action is the sole remedy available to a plaintiff claiming an uncompensated taking,¹⁶⁴ though other courts have held that inverse condemnation is the exclusive remedy only when it is "adequate."¹⁶⁵

Though it is a close question, the better view is that reviewing courts may employ invalidation as a remedy when just compensation is either impractical or unavailable. The Court has held that "[e]quitable relief is not available to enjoin an alleged taking of private property . . . when a suit for compensation can

160. 130 S. Ct. 2592, 2617 (2010) (Kennedy, J., concurring in part and concurring in the judgment).

161. See *Williamson Cnty.*, 473 U.S. at 199 (discussing early cases); *Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 355 (1908); *Tindal v. Wesley*, 167 U.S. 204, 223-24 (1897).

162. See, e.g., *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 315-16 (1987). For a general history of the trend away from invalidation and toward compensation as a remedy, see Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57 (1999).

163. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 529 (2005) (quoting *Agains v. City of Tiburon*, 447 U.S. 255, 260 (1980)). Since these cases are no longer properly characterized as takings actions at all, it is somewhat misleading to cite them—as some commentators do, see Barros, *supra* note 79, at 955 & n.230—as evidence that invalidation is, or should be, widely available as a takings remedy.

164. See, e.g., *Bensch v. Metro. Dade Cnty.*, 952 F. Supp. 790, 793 & n.7 (S.D. Fla. 1996); *Murray v. City of Lawrenceburg*, 925 N.E.2d 728, 733 (Ind. 2010); *Cent. Carolina Developers, Inc. v. Moore Water & Sewer Auth.*, 559 S.E.2d 230, 232 (N.C. Ct. App. 2002); *Cox v. State*, 399 S.W.2d 776, 779 (Tenn. 1965).

165. *Curtis v. WFEC R.R. Co.*, 1 P.3d 996, 1000 (Okla. 2000); see also *Transcapital Fin. Corp. v. Dir., Office of Thrift Supervision*, 44 F.3d 1023, 1025 (D.C. Cir. 1995) (per curiam) (holding that injunctive relief is available for a takings claim when monetary compensation would be "wholly inadequate to compensate the complainant for the alleged taking"); *Alto Eldorado Partners v. City of Santa Fe*, 644 F. Supp. 2d 1313, 1344 (D.N.M. 2009) (noting that while the court "cannot comfortably go [so] far" as to declare compensation the "sole remedy" available, a court should generally order compensation as a remedy rather than invalidate the regulation at issue).

be brought against the sovereign subsequent to the taking,¹⁶⁶ but the Court has read this requirement narrowly to permit suits for injunctive relief in a variety of circumstances when the practical availability (or advisability) of compensation can reasonably be questioned. For instance, in *Eastern Enterprises v. Apfel* the Court invalidated, under the Takings Clause, a provision of the Coal Industry Retiree Health Benefit Act of 1992 requiring coal companies to contribute money to a retiree health benefit fund.¹⁶⁷ It explained that injunctive relief, rather than compensation, was appropriate, because “a claim for compensation ‘would entail an utterly pointless set of activities’” in which the coal companies would pay money to the government but would receive an equal amount in takings compensation.¹⁶⁸ The Court has ordered equitable relief in a variety of other settings in which it apparently believed that monetary damages were not contemplated by the regulatory statute or would not adequately redress the plaintiff’s injury.¹⁶⁹ In these instances, the federal government has suggested, the Court “should decide whether, in light of the statute’s language, context, and history, Congress intended to pay compensation . . . or whether Congress intended rather to have the legislation enjoined if it were found to constitute a taking.”¹⁷⁰

An alleged judicial taking bears enough similarity to these situations that equitable relief is merited. First, because the Eleventh Amendment leaves federal courts unable to award damages, invalidation of the offending state court opinion is functionally the only remedy available to judicial takings plaintiffs in federal court. In past cases in which the Eleventh Amendment would have barred federal courts from awarding damages, the courts have apparently considered equitable relief to be available.¹⁷¹ If judicial takings cases are able to

166. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984); *accord* *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-28 (1985).

167. 524 U.S. 498, 503-04 (1998).

168. *Id.* at 521 (quoting *Student Loan Mktg. Ass’n v. Riley*, 104 F.3d 397, 401 (D.C. Cir. 1997)).

169. *See, e.g.*, *Babbitt v. Youpee*, 519 U.S. 234, 243-45 (1997); *Hodel v. Irving*, 481 U.S. 704, 716-18 (1987); *see also* *Duke Power Co. v. Carolina Env’tl. Study Grp.*, 438 U.S. 59, 71 n.15 (1978) (permitting “individuals threatened with a taking to seek a declaration [under the Declaratory Judgments Act] of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained”).

170. Brief for the Federal Respondent at 38 n.30, *E. Enters.*, 524 U.S. 498 (No. 97-42), 1998 WL 25533.

171. For instance, in *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987), the Court entertained a takings challenge, in which the plaintiff sought only injunctive relief, to a Pennsylvania statute limiting coal mining in areas at risk of land subsidence. *See id.* at 474; *see also* *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 719 (1999) (describing *Keystone Coal* as a suit “seeking only injunctive relief”). The case was litigated in federal court, which may well explain why the plaintiff sought only injunctive relief and not damages. *See* *Keystone Bituminous Coal Ass’n v. Duncan*, 771 F.2d 707 (3d Cir. 1985); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 581 F. Supp. 511 (W.D. Pa. 1984).

proceed in federal court at all, the possibility of an injunction must be on the table. Second, a judicial takings case likely meets the *Eastern Enterprises* criteria as a circumstance in which the relevant legislative authority—the state legislature—would prefer invalidation of the state court opinion in question to compensation, since if the legislature preferred to pay compensation, it could simply use its eminent domain power to achieve the same end.¹⁷² Third, recall that, because of the fractured decision in *Stop the Beach Renourishment*, plaintiffs are likely to rely on a judicial takings theory in tandem with the due process approach endorsed by Justices Kennedy and Sotomayor.¹⁷³ To the extent courts rely upon this due process approach in judicial takings cases, it makes sense for equitable relief to be available, since that would be the ordinary remedy for a due process violation.¹⁷⁴ Indeed, contrary to what some commentators have suggested,¹⁷⁵ this may make a due process theory *more* attractive to plaintiffs than a judicial takings theory, rather than less—since due process, unlike takings, could provide the basis for the equitable relief they seek. Fourth, in cases like *Stop the Beach Renourishment* where the initial lawsuit is a state court action seeking just compensation, the distinction between the two remedies effectively vanishes: the federal court presumably could, consistent with the Eleventh Amendment, invalidate the state court judgment and remand the case for the state court to award damages.

Most importantly, allowing judicial takings plaintiffs to seek in federal court the invalidation of the offending state court decision does not run afoul of the basic rationale the Court has articulated for limiting plaintiffs to damages as a remedy in most takings cases. The Court has emphasized that in an ordinary takings case, the essence of the plaintiff's claim is that the government's action was entirely legitimate *except for its failure to pay compensation*—leading naturally to the conclusion that only compensation should be available as a remedy. In a judicial takings claim, by contrast, a plaintiff's complaint will usually not be limited to that ground. Instead, as Justice Kennedy recognized, the essence of a judicial takings claim will include a second charge: that the state court lacked the authority to undertake the change in law that its decision

172. A variation on this theme is the “legislative choice” approach proposed by Thompson, in which a state legislature, confronted with a judicial taking, would be given the choice whether to pay compensation or invalidate the judicial opinion. Thompson, *supra* note 2, at 1520-21. While it is likely beyond the Supreme Court's power to explicitly adopt this “legislative choice” approach, making invalidation available as a remedy to judicial takings plaintiffs would serve largely the same purpose, since the legislature would remain free to use its eminent domain power to take the property and pay just compensation.

173. *See supra* note 14 and accompanying text.

174. *See supra* notes 38-42 and accompanying text; *see also E. Enters.*, 524 U.S. at 538 (granting injunctive relief in a case combining takings and due process theories); *Gibson v. Am. Cyanamid Co.*, 719 F. Supp. 2d 1031 (E.D. Wis. 2010) (same).

175. *See, e.g., Shapiro & Burrus, supra* note 17, at 431-34.

caused.¹⁷⁶ While an award of monetary damages would remedy the plaintiff's first injury—a loss of her property without just compensation—there is no reason damages should be the *exclusive* remedy, since it fails to address the plaintiff's second grievance, that the state court lacked the power to do what it did in the first place.¹⁷⁷ Thus, the plurality opinion in *Stop the Beach Renourishment* was right to envision that invalidation of the offending state court decision would be available as a remedy to plaintiffs.¹⁷⁸

CONCLUSION

Any discussion of judicial takings runs the risk of seeming like an academic exercise. How often, after all, are state supreme courts likely to issue opinions eliminating established property rights in a manner that amounts to a taking? In truth, rarely. But the fact that few successful actions are brought under a particular legal provision or doctrine says little about its actual importance.¹⁷⁹ And in the wake of *Stop the Beach Renourishment*, the idea of judicial takings is already beginning to demonstrate its importance. A number of certiorari petitions claiming judicial takings have been filed,¹⁸⁰ and the Supreme Court has granted certiorari in one such case, to be argued during the October 2011 Term.¹⁸¹ In addition, the specter of judicial takings liability—sometimes expli-

176. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2614 (2010) (Kennedy, J., concurring in part and concurring in the judgment) (noting that there is “no clear authority” for the proposition that “a judicial decision eliminating established property rights is otherwise constitutional so long as the State compensates the aggrieved property owners” (internal quotation marks omitted)).

177. *Cf. Barros, supra* note 79, at 956 (“The Court’s case law, therefore, is best read as reflecting support for both invalidation and compensation remedies in legislative and executive takings cases that do not involve eminent domain . . .”). Of course, if one regards this second grievance as seeking to “impose judicially crafted separation-of-powers limitations upon the States,” *Stop the Beach Renourishment*, 130 S. Ct. at 2605 (plurality opinion), then it becomes more difficult to see why invalidation, rather than compensation, should be available.

178. 130 S. Ct. at 2607 (plurality opinion).

179. *Cf. Crawford-El v. Britton*, 93 F.3d 813, 838 (D.C. Cir. 1996) (Silberman, J., concurring) (citing R. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1122 (4th ed. 1996)) (noting that actions brought under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), rarely succeed), *vacated* 523 U.S. 574 (1998); Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337 (1989) (same). *But cf.* Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809 (2010) (arguing that *Bivens* actions are more successful than is commonly believed).

180. *See supra* notes 28-30.

181. *PPL Mont., LLC v. Montana*, 131 S. Ct. 3019 (2011) (granting certiorari); *see* Petition for Writ of Certiorari at 36, *PPL Mont.*, 131 S. Ct. 3019 (2011) (No. 10-218), 2010 WL 3236721 (raising judicial takings issue, citing *Stop the Beach Renourishment*, and urging the Court to take the case because a judicial takings claim “would be dead on arrival in state court given the Montana Supreme Court’s decision”). The question presented in *PPL*

citly raised by parties or amici in their briefs, as in the climate change public nuisance suit recently decided by the Court¹⁸²—may well deter courts from issuing decisions that eliminate property rights.¹⁸³

It is thus important for both government agencies and potential judicial takings plaintiffs to know whether and where judicial takings claims may be brought, and what remedies are available. *Stop the Beach Renourishment* was only minimally helpful in resolving these questions, which are likely to linger in state and federal courts. The lodestar that courts should follow is the central principle of both the plurality opinion and Justice Kennedy's concurrence in *Stop the Beach Renourishment*: that the Constitution does not permit a state court to redefine property in a manner that deprives someone of a property right she formerly held under state law. That happens infrequently, but when it does, the injured party ought to be able to vindicate her rights in federal court, with equitable relief available in lieu of monetary damages. Such an approach is consistent both with the Court's takings jurisprudence and with the structure of our federalist system—a system in which the states bear the primary responsibility for defining property rights, but the Federal Constitution ensures that property rights are not eliminated by any governmental entity except upon payment of just compensation.

Montana is whether sections of the Missouri River and two tributaries were navigable at the time Montana entered the Union—in which case the underlying riverbeds would belong to the state as a public trust resource, instead of being susceptible to private ownership. See *PPL Mont., LLC v. State*, 229 P.3d 421, 431 (Mont. 2010). The Court is likely to resolve that question as a matter of federal law, rendering it unnecessary to reach the judicial takings issue. See *Utah v. United States*, 403 U.S. 9, 10 (1971) (“The question of navigability is a federal question.”). But that avenue for avoiding a judicial takings question will not be available in the vast majority of property law cases.

182. See Brief for Consumer Energy Alliance et al. as Amici Curiae Supporting Petitioners at 11, *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) (No. 10-174), 2011 WL 465740.

183. See, e.g., *Bell v. Town of Wells*, 557 A.2d 168, 169 (Me. 1989) (reaching a similar result using a similar rationale with respect to claimed public easement in oceanfront land); *Severance v. Patterson*, 345 S.W.3d 18, 34 (Tex. 2010) (declining to recognize a “rolling” public beachfront access easement” in part on the grounds that judicial recognition of such an easement would unconstitutionally eliminate rights of property owners); Thompson, *supra* note 2, at 1471 n.91 (collecting other cases).