March 1999

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Kathryn E. Kovacs

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Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38BC2G

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ACCEPTING THE RELEGATION OF TAKINGS CLAIMS TO STATE COURTS: THE FEDERAL COURTS’ MISGUIDED ATTEMPTS TO AVOID PRECLUSION UNDER WILLIAMSON COUNTY

Kathryn E. Kovacs*

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* Assistant Solicitor, Baltimore City Department of Law; B.A. 1990, Yale University; J.D. 1995, Georgetown University Law Center. The author wishes to thank Hope M. Babcock and David J. McCarthy, Jr. for their advice and encouragement, as well as John D. Echeverria, Richard J. Lazarus, Burton H. Levin, and Frank C. Derr for reviewing drafts of this Article.
INTRODUCTION

In Williamson County Regional Planning Commission v. Hamilton Bank,¹ the Supreme Court held that takings claims are not ripe until the claimant has sought compensation from the state and been denied.² The majority of cases in the federal courts of appeals applying that rule have dismissed federal takings claims and required plaintiffs to litigate state inverse condemnation claims in state court first. Upon returning to federal court, however, preclusion doctrines usually prevent takings' plaintiffs from relitigating claims that were or could have been raised in an earlier proceeding. Thus, while the majority approach is true to Williamson County, in combination with preclusion doctrines, it effectively bars plaintiffs from raising federal takings claims in federal court. In this Article, this outcome is referred to as the "preclusion problem."

Many bemoan this state of affairs. Initially viewed as merely a time-wasting hurdle, the "ripeness" dodge is transmuting into a shell game which could end federal court litigation of takings issues. . . . The federal judiciary is the guy in the fancy shirt with the smooth patter who is moving the shells around and property owners are the rubes standing in front of the table thinking they know where the pea went.³

Some federal courts of appeals have attempted to avoid the shell game, or preclusion problem, in various ways. While these courts' approaches are creative, none effectively guarantees a federal forum for the resolution of takings claims, and most re-

² The Takings Clause of the Fifth Amendment provides: "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V. The clause applies to state and local governments through the Fourteenth Amendment. See Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226, 239 (1897).
place the preclusion problem with other difficulties. Given the failures and complications of the judiciary's attempted solutions to the preclusion problem, this Article ultimately questions whether forcing takings plaintiffs to litigate their claims in state court is really a problem at all.

In Williamson County, the Supreme Court required takings plaintiffs to raise inverse condemnation claims in state court first. Two years later, in First English Evangelical Lutheran Church v. County of Los Angeles, the Supreme Court held that every state must provide compensation remedies in such cases. These two cases evince the Supreme Court's view that state courts are the appropriate forum for resolving takings claims. Furthermore, relegating takings claims to state courts is not as grievous as many courts, commentators, and members of Congress assume. Not only are inverse condemnation remedies mandated by First English, but plaintiffs' property rights are often determined by state law; 42 U.S.C. § 1983 does not provide a federal remedy in all cases implicating federal rights; and state courts may provide the more capable and sympathetic forum for takings cases. Simply stated, takings claims belong in state courts.

Part I of this Article reviews the Williamson County decision and ripeness doctrine. Part II then presents cases dismissing federal takings claims where a state court has not previously denied the plaintiff's claim for compensation. These cases raise the preclusion problem, which is detailed in Part II.B.

Part III analyses the federal courts of appeals' attempts to avoid the preclusion problem. For example, while proclaiming to follow England v. Louisiana State Board of Medical Examiners, the Eleventh Circuit allows plaintiffs to reserve their federal claims and return to federal court after the conclusion of state-court litigation. This approach, discussed in Part III.A, is actually inconsistent with England, which allows plaintiffs to avoid preclusion only where they file their claims initially in federal court—a prerequisite that cannot be met in takings cases. Furthermore, England does not prevent issue preclusion from barring adjudication of federal takings claims in federal court. Thus, the England reservation approach does not solve the pre-

6. Most takings claims raised against state and local governments in federal court are brought under § 1983.
clusion problem.

Another response to the preclusion problem, outlined in Part III.B. of this Article, focuses on an exception to Williamson County that excuses takings plaintiffs from utilizing state compensation procedures to ripen their federal claims where state procedures are inadequate. The difficulty with this approach is that since First English requires states to provide inverse condemnation remedies for takings, claims that state remedies are inadequate should not arise often. While the inadequate state procedures exception may allow a small number of cases to slip through the cracks and reach federal court, it does not provide a solution to the preclusion problem for the vast majority of takings' plaintiffs.

The final judicial response to Williamson County, examined in Part III.C. of this Article, is simply not to address Williamson County's state procedures requirement at all. The Fourth and Sixth Circuits, in particular, have held that a takings case becomes ripe upon enactment of the offending ordinance and thus have avoided applying Williamson County's ripeness analysis altogether. The obvious problem with this approach is that it is contrary to established Supreme Court precedent.

Finally, Part IV discusses why relegating takings claims to state courts is not as problematic as is generally assumed. On the contrary, state courts offer takings plaintiffs several advantages: states must provide adequate inverse condemnation procedures, state law generally determines the property law issues that are central to takings cases, and state courts may provide a more appropriate forum for takings determinations.

I. THE WILLIAMSON COUNTY STATE PROCEDURES REQUIREMENT

A. The Williamson County Decision

In Williamson County, the Williamson County Regional Planning Commission approved a developer's preliminary plat for a residential subdivision and gave final approval for several sections of the project. The County then changed the density requirements in the local zoning ordinance. The developer submitted a revised preliminary plat, but the Commission rejected the submission for noncompliance with the new density re-

8. See 473 U.S. at 177-78.
quirements and slope grades.\textsuperscript{9}

The developer appealed the rejection of its revised preliminary plat to the Board of Zoning Appeals, which determined that the Commission should have applied the earlier ordinance's density requirements and should have "define[d] the slope in a manner more favorable to the developer."\textsuperscript{10} The Commission, however, declined to follow the Board, claiming that the Board did not have jurisdiction to review its decisions.\textsuperscript{11}

Hamilton Bank acquired the property through foreclosure and filed suit in the United States District Court for the Middle District of Tennessee under 42 U.S.C. § 1983, alleging that the Commission had taken its property without just compensation and was estopped under state law from enforcing the newer density requirements. A jury found in favor of the Bank and awarded $350,000 in damages. The court entered a permanent injunction requiring the Commission to approve the plat, but granted judgment notwithstanding the verdict against the Bank on the takings claim because the deprivation was only temporary.\textsuperscript{12} The United States Court of Appeals for the Sixth Circuit reversed, holding that a temporary denial of property could constitute a taking.\textsuperscript{13}

The Supreme Court granted a writ of certiorari to determine whether temporary takings are compensable.\textsuperscript{14} The Court declined to address that question, however, finding instead that the Bank's claim was premature because it had "not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, nor utilized the procedures Tennessee provides for obtaining just compensation."\textsuperscript{15}

The Court first held that takings claims are not ripe until the government agency has reached a final decision on the application of its regulations to the plaintiff's property.\textsuperscript{16} Because the Bank had not applied for a variance from the zoning ordinance, it had "not yet obtained a final decision regarding how it [would] be allowed to develop its property."\textsuperscript{17} In the absence of a final decision, a court would be unable to determine whether the

\textsuperscript{9} See id. at 178-80.
\textsuperscript{10} Id. at 180-81.
\textsuperscript{11} See id. at 181-82.
\textsuperscript{12} See id. at 181-83.
\textsuperscript{13} See 729 F.2d 402 (6th Cir. 1984).
\textsuperscript{14} See Williamson County, 473 U.S. at 185.
\textsuperscript{15} Id. at 186. The Court later held that temporary takings are compensable. See First English, 482 U.S. 304.
\textsuperscript{16} See Williamson County, 473 U.S. at 185.
\textsuperscript{17} Id. at 190.
property had been taken because it would be "impossible to tell whether the land retained any reasonable beneficial use or whether [the Bank's] expectation interests had been destroyed."18 This portion of the Court's decision has been referred to as the first or "final decision" prong of the Williamson County ripeness doctrine19 and is not addressed in this Article.

Second, the Court held that the Bank's claim was not ripe because the Bank had not sought compensation through the state's inverse condemnation procedures. A taking, the Court explained, is the deprivation of property without just compensation and is not, therefore, complete until compensation has been denied.20 Since the Takings Clause does not require pre-taking compensation, a taking is only complete when the state has failed to provide an adequate post-deprivation remedy. Thus, a takings claim is not ripe until the plaintiff has unsuccessfully utilized the state's "reasonable and adequate provision for obtaining compensation," or shown that such a provision does not exist.21 Because Tennessee provided a statutory inverse condemnation procedure, and because the Bank had not proven that procedure to be "unavailable or inadequate," the Bank's claim was not ripe.22 This Article will focus on this second or "state procedures"23 prong of the Williamson County ripeness doctrine.

B. The Purpose of the Williamson County State Procedures Requirement

Before examining the applications of Williamson County, a basic understanding of ripeness doctrine is essential. Ripeness concerns the timing of lawsuits. "The central concern [of ripeness] is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all."24 While standing focuses on the interest of the party bringing the action,25 and mootness focuses on whether the need

18. Id. at 189 n.11.
20. See Williamson County, 473 U.S. at 194-95 & n.13.
21. Id. at 195-96.
22. See id. at 196-97.
23. See Sultum, 520 U.S. at 735 n.8.
for adjudication has passed, "ripeness asks whether there yet is any need for the court to act."[26]

The primary function of ripeness doctrine is to maintain "the limits on judicial power appropriate in a democratic society."[27] Ripeness doctrine prevents courts, "through avoidance of premature adjudication, from entangling themselves in abstract disagreements";[28] promotes judicial economy;[29] and ensures the development of a factual record adequate to decide the case.[30] Further, ripeness "serves the salutary objective of ensuring that only those individuals who cannot resolve their disputes without judicial intervention wind up in court."[31]

In determining whether a case is ripe, courts generally balance the danger of deciding the case against the need for deciding the case.[32] In other words, "[t]he problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[33] The danger of deciding the case or fitness of the issues for review is a function of "the difficulty and sensitivity of the issues presented, and . . . the need for further factual development to aid decision."[34] Purely legal issues, final agency actions, and cases that will not benefit from further delay are deemed fit for review.[35] The necessity of decid-

26. Wright, supra note 24, § 3532.1, at 130.
27. Navegar, 103 F.3d at 998; see also Flast v. Cohen, 392 U.S. 83, 96-97 (1968); Stein, supra note 24, at 42 ("The ripeness requirement serves to weed the field of potential plaintiffs, removing those owners whose takings claims are seen as tenuous or distant.").
29. See Cedars-Sinai Med. Ctr. v. Watkins, 11 F.3d 1573, 1582 (Fed. Cir. 1993), cert. denied, 512 U.S. 1235 (1994); Wright, supra note 24, § 3532.1, at 114 ("Unnecessary decisions dissipate judicial energies better conserved for litigants who have a real need for official assistance.").
30. See Navegar, 103 F.3d at 998.
31. Madsen v. Boise State Univ., 976 F.2d 1219, 1221 (9th Cir. 1992); see also Hendrix v. Poonai, 662 F.2d 719, 722 (11th Cir. 1981) ("Furnishing such guidance prior to the making of the decision, however, is the role of counsel, not of the courts."). One writer has commented:
As to the parties themselves, courts should not undertake the role of helpful counselors, since refusal to decide may itself be a healthy spur to inventive private or public planning that alters the course of possible conduct so as to achieve the desired ends in less troubling or more desirable fashion.
Wright, supra note 24, § 3532.1, at 114.
32. See Wright, supra note 24, § 3532.1, at 115.
33. Abbot Lab., 387 U.S. at 149; see also Thomas, 473 U.S. at 581; Navegar, 103 F.3d at 998; Armstrong World Indus. v. Adams, 961 F.2d 405, 411 (3d Cir. 1992).
34. Wright, supra note 24, § 3532.1, at 115.
ing the case or hardship to the parties is determined by the risk and severity of injury to the parties that may result from a refusal to exercise jurisdiction.\textsuperscript{36}

Ripeness, like other justiciability doctrines, is based upon Article III of the U.S. Constitution, which limits federal court jurisdiction to "cases" or "controversies."\textsuperscript{37} Justiciability doctrines, however, serve to limit federal court jurisdiction not only to cases consistent with the constitutional role of the judiciary, but also to those capable of judicial resolution.\textsuperscript{38} Justiciability doctrines have "become a blend of constitutional requirements and policy considerations."\textsuperscript{39} Thus, although courts often attribute their refusal to exercise jurisdiction to Article III's case or controversy requirement,\textsuperscript{40} both constitutional and prudential concerns may play a part in ripeness determinations.\textsuperscript{41}

In holding that the plaintiff's failure to seek compensation through state procedures rendered its claim "premature"\textsuperscript{42} or "not yet ripe,"\textsuperscript{43} the Supreme Court in \textit{Williamson County} relied not on prudential ripeness principles, but on substantive constitutional law. Unlike other provisions in the Bill of Rights, "the Takings Clause provides both the cause of action and the remedy."\textsuperscript{44} Accordingly, in \textit{Williamson County}, the Supreme Court

\begin{itemize}
\item \textsuperscript{36} See \textsc{Wright}, supra note 24, § 3532.1, at 115.
\item \textsuperscript{37} U.S. CONST. art. III, § 2.
\item \textsuperscript{38} See \textit{Flast}, 392 U.S. at 95.
\item \textsuperscript{39} \textit{Id.} at 97. In \textit{Suitum}, the Supreme Court "noted that ripeness doctrine is drawn from both Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." 520 U.S. at 733 n.7 (quoting \textit{Reno v. Catholic Social Serv., Inc.}, 509 U.S. 43, 57 n.18 (1993)). The Court only addressed the prudential aspects of the \textit{Williamson County} ripeness requirements, however, because the agency conceded the sufficiency of the appellant's assertions under Article III.
\item \textit{In \textit{Action Alliance}}, 789 F.2d at 940 n.12, the court discussed the dual sources of ripeness doctrine:
\begin{quote}
Even when the constitutional minimum has been met, however, prudential considerations may still counsel judicial restraint. The point at which the constitutional constraint fades into persuasive practicalities is difficult to discern and unnecessary to identify; the claim is unripe whether the balance is so lopsided as to raise constitutional questions or is only weighty enough to generate prudential concerns.
\end{quote}
\item \textsuperscript{40} See, e.g., \textit{Lewis v. Continental Bank Corp.}, 494 U.S. 472 (1990).
\item \textsuperscript{41} See \textit{Molins PLC v. Quigg}, 837 F.2d 1064, 1068 (Fed. Cir. 1988), ("A case or controversy may be constitutionally ripe for review but that does not automatically invoke review. Prudential considerations must also be satisfied.") \textit{cert. denied}, 486 U.S. 1055 (1988); \textsc{Wright}, supra note 24, § 3532.1, at 114-15. \textit{But see} \textit{Gene R. Nichols, Ripeness and the Constitution}, 54 U. CHI. L. REV. 153 (1987) (criticizing the "constitutionalization" of ripeness doctrine).
\item \textsuperscript{42} \textit{Williamson County}, 473 U.S. at 197.
\item \textsuperscript{43} \textit{Id.} at 194.
\item \textsuperscript{44} \textit{Wisconsin Cent. Ltd. v. Pub. Serv. Comm'n of Wisconsin}, 95 F.3d 1359, 1368 (7th Cir. 1996); see also \textit{Stein}, supra note 24, at 15.
\end{itemize}
held that the state procedures requirement is mandated by the text of the Constitution. The Court explained that, "because the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action." The plaintiff's taking claim is not "complete" until the state has failed to provide "adequate compensation." Thus, although ripeness decisions are often based on prudential considerations, the Court in *Williamson County* held that the state procedures requirement is based on the text of Article III and the Fifth Amendment of the U.S. Constitution.

46. *Id.* at 195. Nichols points out that *Williamson County* could have been dismissed on the merits for failure to state a claim. "[R]ipeness decisions are often substantive rulings in another form." Nichols, supra note 41, at 169. That the Supreme Court based its decision on "ripeness" indicates that timing and factual development were at issue, but also that the plaintiff's claim may have matured at some later date. *Id.*
47. See, e.g., *Suitum*, 520 U.S. at 733. *But cf* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1012-13 (1992) (declining to apply prudential principles and holding that the petitioner's taking claim was ripe under Article III).
48. Since *Williamson County* is based upon the Supreme Court's interpretation of the text of the Fifth Amendment rather than prudential considerations, it is beyond Congress' authority to override that decision, regardless of which constitutional provision provides the authority for its enactment. Consequently, Congressional bills that would solve the preclusion problem in the most direct manner possible, by reversing *Williamson County*, see, e.g., The Private Property Rights Implementation Act of 1997, H.R. 1534, 105th Cong. (1997), are unconstitutional. While abandoning the second prong of *Williamson County* is a possible solution to the preclusion problem, it is a solution that only the Supreme Court may impose. *See* City of Boerne v. Flores, 521 U.S. 507 (1997). *Compare* Safir v. Dole, 718 F.2d 475, 479 (D.C. Cir. 1983) (Congress may not confer standing where Article III requirements are not met), *cert. denied*, 467 U.S. 1206 (1984) with *Crt. for Auto Safety v. N.H.T.S.A.*, 793 F.2d 1322, 1335 (D.C. Cir. 1986) (Congress may eliminate prudential limitations on standing). *But see* Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 171-74 (1997) (discussing the historical basis for Congress' authority to interpret the Constitution and judicial deference thereto). H.R. 1534 passed the House and died in the Senate, but similar legislation is likely to be introduced in the future.

State statutory enactments accomplish even less with regard to the preclusion problem, since they do not confer federal jurisdiction, see Burford v. Sun Oil Co., 319 U.S. 315, 317 (1943), but merely define the state remedy that is already required by *First English*, 482 U.S. 304. For an overview of recent state takings legislation, see Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 ECOLOGY L.Q. 187 (1997). State and federal legislative proposals are beyond the scope of this Article.
THE PRECLUSION PROBLEM

A. Cases Dismissing Federal Takings Claims

The majority of cases in the federal courts of appeals addressing the second prong of *Williamson County* have dismissed the federal takings claims and required the plaintiffs first to file state inverse condemnation claims in state court.\textsuperscript{49} In *Southview Associates, Ltd. v. Bongartz*,\textsuperscript{50} for example, the Second Circuit Court of Appeals affirmed the district court's holding that the plaintiff's takings claim was premature. The plaintiff had filed due process, equal protection, and takings claims against members of the Vermont Environmental Board for denial of a permit.\textsuperscript{51} The plaintiff argued that since Vermont did not provide a statutory compensation procedure and the state courts had not recognized regulatory takings under the state constitution, its complaint should not be dismissed. The court disagreed and held that even though Vermont's compensation procedures were "unsure and undeveloped," the plaintiff had not established that the state procedures were "unavailable or inadequate."\textsuperscript{52} The court accordingly held that the plaintiff's takings claim was un-


State courts, following the second prong of *Williamson County*, have also dismissed federal taking claims filed simultaneously with state inverse condemnation claims. See, e.g., Bakken v. City of Council Bluffs, 470 N.W.2d 34, 37 (Iowa 1991); Impink v. City of Indianapolis, 612 N.E.2d 1125, 1127 (Ind. 1993); Drake v. Town of Sanford, 643 A.2d 367, 369 (Me. 1994).

The same rule applies to taking claims against the federal government, which are premature until the plaintiff pursues compensation under the Tucker Act in the Court of Federal Claims, a process commonly known as the "Tucker Act shuffle." Presault v. I.C.C., 494 U.S. 1, 17 (1990); *Williamson County*, 473 U.S. at 195.

\textsuperscript{50} 980 F.2d 84 (2d Cir. 1992).

\textsuperscript{51} Id. at 87.

\textsuperscript{52} Id. at 99-100.
ripe.53

B. Preclusion under Williamson County

While the majority approach utilized in *Bongartz* accurately implements the command of *Williamson County*, when combined with preclusion doctrines and 28 U.S.C. § 1738, it effectively forecloses the option of filing federal takings claims in federal court. The federal Full Faith and Credit statute, 28 U.S.C. § 1738, provides in part that records and judicial proceedings of any state court “shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.”54 This statute requires federal courts to “give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.”55 Thus, if a state court would hold an action precluded by prior litigation, the federal court must do the same. As a result, the combination of *Williamson County* and § 1738 effectively mandates the dismissal of nearly all takings claims filed in federal court.

Since § 1738 applies both to issue and claim preclusion, a brief review of those doctrines is warranted. Issue preclusion bars the relitigation of any issue actually determined in a prior action between the parties.56 The Restatement of Judgments states:

When an issue of fact or law is actually litigated and deter-

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53. See id. at 100. The court also held that the plaintiff's substantive due process claim was unripe for the same reason. Id.
54. The statute, 28 U.S.C. § 1738, in its entirety, reads:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, 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, Territory or Possession from which they are taken.
56. See id. at 77 n.1.
mined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.57

Claim preclusion, on the other hand, bars the litigation of any claim that could have been raised in a prior action between the parties.58 While definitions of “claim” vary amongst the states, most require the parties, facts, and issues in the two actions to be identical for the first action to bar litigation in a second action.59 For example,

In Rhode Island, the doctrine of res judicata operates as an absolute bar to the relitigation of the same cause of action between the same parties, when a final judgment has been rendered on the merits. Under this doctrine, a judgment rendered on the merits in the first case is conclusive not only as to the issues that were actually raised and determined, but also as to all matters that could have been raised and determined. In order for res judicata to bar a cause of action in Rhode Island there must be (1) identity of parties, (2) identity of issues, and (3) finality of judgment.60

In Allen v. McCurry,61 the Supreme Court held that 28 U.S.C. § 1783 applies to actions filed under 42 U.S.C. § 1983.62 At his criminal trial in a Missouri state court, McCurry filed a motion to suppress contraband evidence, claiming that its seizure violated the Fourth and Fourteenth Amendments to the U.S. Constitution. The trial court denied the motion and McCurry was convicted.63 McCurry then filed an action in federal court under § 1983 against the police officers who had seized the evidence.

57. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).
58. See Migra, 465 U.S. at 77 n.1; see also Palomar Mobilehome Park v. City of San Marcos, 989 F.2d 362, 364 (9th Cir. 1993) (applying California law); Fields v. Sarasota Manatee Airport Auth., 953 F.2d 1299, 1307-8 (11th Cir. 1992) (applying Florida law); Peduto, 878 F.2d at 727 (applying New Jersey law); American Nat. Bank & Trust Co. v. City of Chicago, 826 F.2d 1547, 1553 (7th Cir. 1987) (applying Illinois law), cert. denied, 484 U.S. 977 (1987); Norco Const., Inc. v. King County, 801 F.2d 1143, 1146 (9th Cir. 1986) (applying Washington law); Griffin v. State of Rhode Island, 760 F.2d 359, 360 (1st Cir. 1985) (applying Rhode Island law), cert. denied, 474 U.S. 845 (1985).
59. See, e.g., Fields, 953 F.2d at 1307-08 (applying Florida law). The Restatement rule concerning “splitting” dictates that a precluded claim “includes all rights of the plaintiff to remedies against the defendant with respect to any part of the transaction, or series of connected transactions, out of which the action arose.” RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982).
60. Griffin, 760 F.2d at 360.
62. Most takings claims against state and local governments are brought under § 1983.
63. See 449 U.S. at 91.
The federal district court dismissed McCurry's complaint, holding that the action was precluded by the prior state-court litigation, and the appellate court reversed.\textsuperscript{64}

In reinstating the district court's ruling, the Supreme Court explained that both issue preclusion and claim preclusion prevent vexatious lawsuits, conserve judicial resources, and encourage reliance on adjudication by preventing inconsistent decisions.\textsuperscript{65} Furthermore, the doctrines "promote the comity between state and federal courts that have been recognized as a bulwark of the federal system."\textsuperscript{66} The Court then found that:

nothing in the language or legislative history of § 1983 proves any congressional intent to deny binding effect to a state-court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights. . . . There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.\textsuperscript{67}

The Court therefore held that, in a § 1983 action in federal court, § 1738 bars a plaintiff from relitigating an issue already decided in a state court.\textsuperscript{68}

In Allen, the Supreme Court reserved the issue of whether § 1738 bars the litigation in federal court of issues that could have been raised in prior state-court litigation but were not.\textsuperscript{69} The Court addressed that issue four years later in Migra v. Warren City School District Board of Education.\textsuperscript{70} In that case, according to the Supreme Court's opinion, Ethel Migra filed suit in state court for breach of contract and wrongful interference with contract when the Board of Education refused to renew her employment contract. The state court ordered reinstatement and compensatory damages. Migra then filed a complaint in federal court alleging violations of the First Amendment and Due Process and Equal Protection Clauses under § 1983 and § 1985. The federal district court dismissed the action based on claim preclu-

\textsuperscript{64} See Allen, 449 U.S. at 93.
\textsuperscript{65} See id. at 94.
\textsuperscript{66} Id. at 96.
\textsuperscript{67} Id. at 103-04.
\textsuperscript{68} See id. at 104.
\textsuperscript{69} See id. at 97 n.10.
The Supreme Court held that if, as decided in Allen, § 1983 "did not open the way to relitigation of an issue that had been determined in state court," then the same is true for issues that could have been decided in state court. The Court therefore remanded the case for a determination of whether Ohio law would preclude the litigation of Migra's claims.

In summary, § 1738, as interpreted in Allen and Migra, requires federal courts to apply state preclusion rules to § 1983 actions. Combined with Williamson County, § 1738 effectively mandates the dismissal of nearly all federal takings claims filed in federal court. A plaintiff who first files in federal court will usually be dismissed on ripeness grounds as required by Williamson County. On the other hand, a plaintiff who first files a state inverse condemnation claim in state court will be barred under § 1738 from relitigating in federal court any issues decided in the state court proceeding. Since the legal and factual issues in the state and federal takings cases are often similar, if not identical, the plaintiff who files first in state court is usually precluded from litigating a federal takings claim in federal court. It is the rare § 1983 takings case, therefore, that comes to judgment on the merits in federal court.

For example, in Dodd v. Hood River County, many of the issues raised in federal court were held to be barred by prior state-court litigation. The plaintiffs in Dodd appealed the denial of permits that would have allowed them to build a residence on their land under the takings clause of the Oregon Constitution. The Oregon Land Use Board of Appeals considered written appraisals of the value of the plaintiffs land submitted by the plaintiffs and by the County forester, and found that "the land could 'produce a net profit if properly managed for timber production'... [T]hus the Plaintiffs were not denied a 'substantial beneficial use of the property'” so as to work a taking under Ore-

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71. See Migra, 465 U.S. at 78-80.
72. Id. at 84.
73. See id. at 87.
75. 136 F.3d 1219 (9th Cir. 1998).
76. See id. at 1223 (citing Oregon Const. art. I, § 18).
Oregon law. The state Court of Appeals and Supreme Court affirmed. The plaintiffs filed suit in federal district court under § 1983 alleging that the permit denials constituted takings under the U.S. Constitution. The district court held that the plaintiff's federal claim was barred by issue preclusion, and the Ninth Circuit affirmed.

Oregon law bars subsequent litigation where the issue in the two proceedings is identical; the issue was actually decided and was essential to the judgment in the first proceeding; the plaintiff was a party to, and had a full and fair opportunity to litigate the issue in, the first proceeding; and the first proceeding was of a type given preclusive effect. The Court of Appeals held that the issue decided in state courts was identical to part of the issue presented in the federal action. "As the district court described the federal and state takings analyses, 'if either test, the underlying factual issue is identical: what is the value of the property after the regulation is in place?" Since the other factors for preclusion were satisfied, the plaintiffs' prior state-court litigation precluded the part of their takings claim that required the court to determine whether the County had prohibited all "economically beneficial uses" of their property. The court referred to this part of the takings claim as a "categorical taking" following the Supreme Court's decision in Lucas v. South Carolina Coastal Council.

The court of appeals held, however, that the state action did not preclude the federal takings claim entirely. Under the Fifth and Fourteenth Amendments, a "government regulation [that] prohibits something less than all economically beneficial use" may still constitute a taking. The court observed that, under Penn Central Transportation Co. v. City of New York, courts must balance several factors, including "the extent to which the regu-

77. Id. at 1224.
79. See Dodd, 136 F.3d 1219. Initially, the federal district court had dismissed the case on ripeness grounds. The Court of Appeals reversed, holding that the plaintiffs had expressly reserved their federal takings claim in the state action, and remanded for a determination regarding issue preclusion. See Dodd v. Hood River County, 59 F.3d 852 (9th Cir. 1995).
80. See Dodd, 136 F.3d at 1225.
81. Id.
82. Id. at 1225-28.
83. See id. at 1228 (citing Lucas, 505 U.S. at 1015) ("The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.").
84. See Dodd, 136 F.3d at 1228.
lation has interfered with [the property owner's] distinct investment-backed expectations" and "the character of the government action." Since neither the state nor the federal district court had addressed either of those factors, the court held that the federal takings claim had yet to be fully determined. Rather than remanding the case, however, the court of appeals itself applied the *Penn Central* balancing test and concluded that the County had not taken the plaintiff's property.

The application of Florida preclusion rules in *Fields v. Sarasota Manatee Airport Authority*, in contrast, barred the plaintiffs from litigating their federal claims entirely. The plaintiffs in *Fields* filed a state inverse condemnation claim in state court alleging that noise and pollution from the Tampa airport had depressed the values of their homes. When the state court ruled in favor of the defendant, the plaintiffs filed a § 1983 takings claim in federal court. The district court granted the defendant's motion for summary judgment, holding that the plaintiffs' federal claim was barred by the prior state-court action.

Similar to the Oregon preclusion rules applied in *Dodd*, Florida preclusion rules also bar subsequent litigation where there is identity of the thing sued for, the cause of action, the parties, and the parties' capacities. Although different standards applied to the plaintiffs' state and federal causes of action, the court of appeals held that the suits were identical because they were based on the same facts, namely, the "airport operations' interference with the homeowners' enjoyment of their property." Thus, the plaintiffs were unable to litigate their federal takings claim in federal court.

Likewise, the plaintiff in *Griffin v. State of Rhode Island* first instituted an action in state court, alleging that the State's condemnation of her property violated state constitutional and statutory provisions. The plaintiff asserted that the state's ac-

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85. *Id.* (citing *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104 (1978)).
86. *See Dodd*, 136 F.3d at 1229-30.
90. *See Fields*, 953 F.2d at 1307-08.
91. The Florida claim, unlike the federal claim, required the plaintiffs to prove an absolute decrease in the value of their properties. *See id.* at 1308.
92. *Id.*
93. The Eleventh Circuit also held, however, that the plaintiffs could have "reserved" their right to litigate their federal claims in federal court. *See id.* at 1306, 1309 n.10. *See infra Part III.A.*
tion lacked a public purpose and was "unreasonable, arbitrary, capricious, and in bad faith" in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. The state court entered judgment for the State. The plaintiff then filed a § 1983 takings claim in federal court. The district court dismissed the action on preclusion grounds, and the First Circuit affirmed. Following Rhode Island preclusion law, the court held that since the claims raised in the federal action were "essentially the same" as those litigated in the state action, they were barred entirely by issue preclusion.

Indeed, appellant has alleged no facts in the federal court which would differentiate the state and federal court actions. She has also alleged in each case the same relationship between the parties. Moreover, both the state and federal court actions involve the same subject matter, arise out of the same common contention that the condemnations in question lacked a public purpose and, therefore, deprived Griffin of her property in violation of the guarantees established in the Constitution.

Thus, the plaintiff's attempt "to make § 1983 a vehicle for relitigating matters that were put before the consideration of state courts" failed.

Some courts and authors suggest that to avoid the preclusion problem, plaintiffs should raise both state and federal claims in state court simultaneously. For example, in Palomar Mobilehome Park v. City of San Marcos, the plaintiff challenged a rent control ordinance in state court. Although the plaintiff claimed that it did not raise any federal issues in the state-court action, the state court nonetheless addressed the federal takings issue "at length," and held that the ordinance was constitutional. The plaintiff then filed a § 1983 action in federal court based on the same facts, and the district court dismissed on preclusion grounds. The plaintiff argued on appeal that its federal claim should not be precluded because it had not raised the

94. Griffin, 760 F.2d at 360.
95. See id. at 361.
96. Id.
97. Id.
98. See, e.g., Thomas E. Roberts, Ripeness and Forum Selection in Fifth Amendment Takings Litigation, 11 J. LAND USE & ENVT'L. L. 37, 65 (Fall, 1995).
99. 989 F.2d 362 (9th Cir. 1993).
101. See Palomar, 989 F.2d at 363-4.
federal claim in state court. The court of appeals held that since the plaintiff could have raised the federal claim in state court, its action was barred by claim preclusion.

This approach of raising state and federal claims simultaneously in state court is flawed on two levels. First, while it allows plaintiffs to litigate federal takings claims, it does not provide a federal forum for such claims and does not, therefore, solve the preclusion problem caused by the confluence of § 1738 and prong two of Williamson County. Second, this approach is contrary to Williamson County's holding that "no [federal] constitutional violation occurs until just compensation has been denied [by the state]." The federal takings claim simply does not exist before the state inverse condemnation claim is resolved, and may not, therefore, be considered alongside the state claim in state court. Nonetheless, even if the courts had recognized that, under Williamson County, the plaintiff could not raise federal takings claims in state court, the outcome in Palomar would likely have been the same since issue preclusion probably would have barred litigation of the federal claims anyway.

The combination of Williamson County and § 1738, therefore, effectively precludes adjudication of federal takings claims in federal court. Even if plaintiffs raise both federal and state claims in state court, they still do not have access to a federal forum, regardless of whether the court properly labels the type of preclusion in operation. The defendant's interest in a federal forum is also harmed; if a defendant were to remove a takings case raising state and federal claims to federal court, many federal courts would dismiss the federal claim as unripe and refuse to exercise pendent jurisdiction over the state claim. In this way,

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102. See id. at 364.
103. See id. at 365: see also Springer v. City of Bend, 65 F.3d 176 (table), 1995 WL 502882 (9th Cir. 1995), cert. denied, 517 U.S. 1209 (1996) (holding plaintiffs' federal claims barred by claim preclusion); American Nat. Bank & Trust Co., 826 F.2d 1547, 1550-51 (7th Cir. 1987) (same).
105. See, e.g., Bakken v. City of Council Bluffs, 470 N.W.2d 34, 37 (Iowa 1991); Impink v. City of Indianapolis, 612 N.E.2d 1125, 1127 (Ind. 1993); Drake v. Town of Sanford, 643 A.2d 367, 369 (Me. 1994).
106. In Norco Const., Inc. v. King County, 801 F.2d 1143, 1146 (9th Cir. 1986), the Ninth Circuit held that a state mandamus action did not bar the plaintiff's § 1983 taking claim because damages were not available in the prior mandamus proceeding. See id. at 1146. The court's preclusion analysis was dicta, however, because the lower federal court had not addressed the second prong of Williamson County. The court of appeals remanded the case for a determination of that issue. See id. at 1147.
107. See, e.g., Macri v. King County, 126 F.3d 1125, 1129 (9th Cir. 1997). Cf. Samaad, 940 F.2d at 934 (refusing to exercise jurisdiction over claims pendent to un-
ripeness trumps the litigants' interest in a federal forum.108

III.

ATTEMPTING TO AVOID THE PRECLUSION PROBLEM

Many courts and commentators find the preclusion problem to be unacceptable.109 Addressing the complete denial of a federal forum to takings plaintiffs mandated by Williamson County,
one commentator states simply, "[obviously, this cannot be the case."\textsuperscript{110} Another opines that if the Supreme Court had intended to banish federal takings claims from federal court, "Williamson County could have said so directly. Its holding could have been simple and straightforward: 'All takings litigation must be brought in state courts; federal courts have no jurisdiction to entertain it.' Period. Plainly, the Court that wrote Williamson County did not have that in mind."\textsuperscript{111}

The Ninth Circuit in \textit{Dodd v. Hood River County} was "satisfied that Williamson County may not be interpreted to command such a revolutionary concept and draconian result."\textsuperscript{112} The Eleventh Circuit similarly labeled the denial of a federal forum in takings cases an "odd result"\textsuperscript{113} and an "unfortunate effect."\textsuperscript{114} Professor Roberts finds the Supreme Court's ripeness language to be "misleading"\textsuperscript{115} and suggests that, for "more accuracy and safety," the state compensation requirement should be viewed "as a forum restricting rule, rather than a ripeness rule."\textsuperscript{116} He also finds it ironic that "an unripe suit is barred at the moment it comes into existence. Like a tomato that suffers vine rot, it goes from being green to mushy red overnight. It is never able to be eaten."\textsuperscript{117}

These assumptions about the intent of the Supreme Court, the right of takings plaintiffs to a federal forum, and the ability of state courts to handle takings cases have led federal courts of appeals to fashion various methods of avoiding preclusion under Williamson County. Their attempts, however, have not only failed to solve the preclusion problem, but have also ignored or distorted Supreme Court precedents and established legal doctrines.


\textsuperscript{111} Berger, supra note 24, at 60.

\textsuperscript{112} 59 F.3d at 861.

\textsuperscript{113} \textit{Fields}, 953 F.2d at 1307 n.8.

\textsuperscript{114} \textit{Id.} at 1306 n.5

\textsuperscript{115} Roberts, \textit{Ripeness and Forum Selection}, supra note 98, at 71.

\textsuperscript{116} \textit{Id.} at 39.

\textsuperscript{117} \textit{Id.} at 72. Commentators also describe the denial of a federal forum as "paradoxical." \textit{Id.} at 71; see also Stein, supra note 24, at 93.
A. The England Approach

1. Cases Allowing Reservation of Federal Takings Claims

To avoid the preclusion problem and ensure that takings plaintiffs have access to federal courts, the Eleventh Circuit allows plaintiffs to "reserve" their right to litigate federal claims in federal court while proceeding on state claims in state court. The Eleventh Circuit's approach is based on England v. Louisiana State Board of Medical Examiners. The plaintiff chiropractors in England filed a complaint in federal district court challenging the constitutionality of a Louisiana statute pursuant to which they were denied licenses to practice medicine. The federal court entered a Pullman abstention on the ground that a state-court determination that the statute did not apply to chiropractors would preclude the need for a constitutional determination. The state court held that the statute applied to chiropractors and did not violate the Fourteenth Amendment. When the plaintiffs attempted to return to federal court for resolution of their federal claim, the district court dismissed their claim on issue preclusion grounds.

The Supreme Court reversed. Federal courts have a duty, the Court said, to exercise their jurisdiction where it is properly invoked and may not deny litigants the right to proceed in federal court on their federal claims. Abstention merely allows federal courts to postpone their review of federal claims pending state court determinations of state law issues, but does not allow federal courts to abdicate their jurisdictional responsibility altogether. In particular, the Court continued, litigants have a right to have factual determinations made in federal district court; Supreme Court review of state-court determinations does not satisfy the parties' right to federal court jurisdiction.

To preserve the right to return to federal court following a

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118. See Fields, 953 F.2d at 1306.
119. 375 U.S. 411.
120. See id. at 412.
121. See Railroad Comm'n v. Pullman, 312 U.S. 496 (1941) (federal district court should abstain from deciding an unsettled question of state law to avoid deciding federal constitutional questions; district court should retain jurisdiction while the parties seek resolution of the state law question in the appropriate state court).
122. See England, 375 U.S. at 413.
123. See id. at 414 (citing 126 So. 2d 51 (1961)).
124. See id. at 414.
125. See id. at 415-16.
126. See id. at 416-17.
Pullman abstention and state-court adjudication, the Supreme Court held that a party must enter a reservation in the state-court record.

That is, he may inform the state courts that he is exposing his federal claims there only for the purpose of complying with Windsor, and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions.\textsuperscript{127}

Unless the party has fully and voluntarily litigated his federal claims in state court, such a reservation will ensure his right to return to federal district court following the state-court adjudication.\textsuperscript{128} Although the rule announced in England would normally demand affirmance of the district court's dismissal, since the plaintiffs had not reserved the federal claim, the Supreme Court refused to apply the new rule against the England plaintiffs and remanded for adjudication on the merits.\textsuperscript{129}

The Eleventh Circuit applied England to a federal takings claim in Fields v. Sarasota Manatee Airport Authority.\textsuperscript{130} There, the plaintiffs filed an action in state court raising only state inverse condemnation claims. When the state court held that they were not entitled to compensation, the plaintiffs filed a § 1983 takings claim in federal court. The district court dismissed the action on claim preclusion grounds.\textsuperscript{131} On appeal, the Eleventh Circuit held that the plaintiffs could have reserved their right to litigate their federal claims in federal court by filing an England reservation with their state-court complaint.\textsuperscript{132} However, since the plaintiffs had failed to file such a reservation, their federal action was precluded.\textsuperscript{133}

The Sixth Circuit has also endorsed this approach. In an unpublished opinion in Slyman v. City of Willoughby, Ohio, the court of appeals ordered the district court to abstain but retain jurisdiction where the plaintiffs had filed federal and state takings claims initially in federal court, and recommended that the

\textsuperscript{127} England, 375 U.S. at 421. Government Employees v. Windsor, 353 U.S. 364, (1957), held that in cases of Pullman abstention, the federal court "should retain jurisdiction until a definitive determination of local law questions is obtained from the local courts" and that the plaintiff should ask the state court to resolve the state-law issues "in light of the constitutional objections presented to the District Court." Id. at 366.

\textsuperscript{128} See England, 375 U.S. at 421-22.

\textsuperscript{129} See id. at 415, 422-23.

\textsuperscript{130} 953 F.2d 1299 (11th Cir. 1992).

\textsuperscript{131} Id. at 1302 (citing 755 F. Supp. 377 (M.D. Fla. 1991)).

\textsuperscript{132} See Fields, 953 F.2d at 1306, 1309 n.10.

\textsuperscript{133} See id. at 1308-09.
plaintiffs reserve their federal claims under *England*.\(^{134}\) Similarly, the Ninth Circuit, while claiming to have not reached the *England* issue, allowed the takings plaintiffs in *Dodd* to reserve their right to return to federal court on their federal takings claim after litigating their state claims in state court.\(^{135}\) In a subsequent opinion following remand, the Ninth Circuit in *Dodd* referred to the plaintiffs' reservation as occurring "under the doctrine of *England*."\(^{136}\) Finally, in *Front Royal & Warren Co. Industrial Park v. Town of Front Royal*, the Fourth Circuit in dicta indicated its support of the Eleventh Circuit's allowance of *England* reservations in takings cases, calling the *Fields* opinion "a cogent analysis."\(^{137}\)

2. Misreading Supreme Court Precedent and Failing to Solve the Preclusion Problem

The Eleventh Circuit's approach in *Fields* is based on two faulty premises. First, the *Fields* court mistakenly identified the type of preclusion at work as claim preclusion, rather than issue preclusion.\(^{138}\) Since federal takings claims are not ripe until state litigation is concluded,\(^{139}\) they may not be filed in state court alongside the state claim.\(^{140}\) Therefore, claim preclusion should not operate in takings cases. *England*, on the other hand, provides a method of avoiding claim preclusion, but does not affect the operation of issue preclusion.\(^{141}\) Even if a takings plaintiff is allowed to proceed in federal court following an *England* reservation and unsuccessful state-court adjudication, issue preclusion may bar litigation of the federal takings claim.\(^{142}\)

Under *England*, there still can be issue preclusive effect accorded to both state court findings of law and findings of fact, which were not only necessarily involved in the state law conclusion but were in fact decided by the state court under circumstances in which the parties received a full and fair opportunity to litigate the

\(^{134}\) 134 F.3d 372 (6th Cir. 1998) (table, text in WL, No. 96-4028).
\(^{135}\) See 59 F.3d at 862; see also *Macri*, 126 F.3d at 1129-30.
\(^{136}\) 136 F.3d at 1227.
\(^{137}\) 135 F.3d 275, 283 (4th Cir. 1998).
\(^{138}\) See 953 F.2d at 1303.
\(^{139}\) See *Williamson County*, 473 U.S. at 194 n.13.
\(^{140}\) See supra note 105 and accompanying text.
\(^{141}\) See 375 U.S. at 419.
issue.\textsuperscript{143}

Thus, the Eleventh Circuit's reliance on \textit{England} in the context of a federal takings claim was misplaced and will not solve the preclusion problem in most cases.

Second, the Fields court erroneously held that \textit{England} allows plaintiffs who initiate their actions in state court to later proceed in federal court. As the Supreme Court reiterated in \textit{Allen}, \textit{England} only applies where the action is first filed in federal court.

The holding in \textit{England} depended entirely on this Court's view of the purpose of abstention in such a case: Where a plaintiff properly invokes federal-court jurisdiction in the first instance on a federal claim, the federal court has a duty to accept that jurisdiction. Abstention may serve only to postpone rather than to abdicate jurisdiction.\textsuperscript{144}

Most federal courts of appeal faced with attempted \textit{England} reservations have likewise held that the plaintiff must file initially in federal court.\textsuperscript{145}

\begin{footnotesize}
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\item[144.] \textit{Allen}, 449 U.S. at 101 n.17 (citations omitted).
\item[145.] Donovan v. Thames, 105 F.3d 291, 294 (6th Cir. 1997) (Fourth Amendment claims); Duty Free Shop Inc. v. Administracion De Terrenos De Puerto Rico, 889 F.2d 1181, 1183 (1st Cir. 1989) (claim that Puerto Rico's eminent domain procedures violate Fifth Amendment); \textit{Peduto}, 878 F.2d at 729 n.5 (taking claim); Schuster v. Martin, 861 F.2d 1369, 1373-74 & n.10 (5th Cir. 1988) (procedural due process claims); Tarpley v. Salerno, 803 F.2d 57, 59-60 (2d Cir. 1986) (First, Fourteenth, and Fifteenth Amendment claims); Fuller Co. v. Raymond I. Gil, Inc., 782 F.2d 306, 312 (1st Cir. 1986) (full faith and credit claim); \textit{Griffin}, 760 F.2d at 360 n.1 (taking claim); \textit{cf. Wicker}, 826 F.2d 451 (substantive and procedural due process and First Amendment claims; holding \textit{England} reservation to be valid where plaintiff filed first in federal court and then in state court before receiving abstention order from federal court).

Nonetheless, a minority of the federal courts of appeals have indicated a willingness to expand the application of \textit{England} to cases in which the plaintiff files first in state court and to other cases outside the \textit{Pullman} abstention context. \textit{Compare} United Parcel Serv. v. California Pub. Utilities Comm'n, 77 F.3d 1178, 1185 (9th Cir. 1996) ("We decline to limit \textit{England}'s application to cases where the litigant files first in federal court and is remitted to state court pursuant to \textit{Pullman}"). \textit{with} Beltran v. State of California, 871 F.2d 777, 783 n.8 (9th Cir. 1988) (plaintiff cannot reserve federal claims in \textit{Younger} abstention case because \textit{Younger} requires federal court to dismiss case entirely). \textit{Compare} Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064, 1071 (3d Cir. 1990), (commenting that \textit{England} may not be limited to \textit{Pullman} abstention cases with \textit{Ivy Club} v. Edwards, 943 F.2d 270 (3d Cir. 1991) (recognizing \textit{England} reservation where federal court's abstention should have been based on \textit{Younger} rather than \textit{Pullman}, \textit{cert. denied}, 503 U.S. 914 (1992). \textit{See also} \textit{Front Royal}, 135 F.3d at 283 (presuming that \textit{England} reservation procedure would apply in \textit{Burford} abstention context). These cases indicate that expansive interpretation of \textit{Eng-
The Eleventh Circuit itself recognized in *Fields* that *England* only applies where the plaintiff files first in federal court. A takings plaintiff, however, cannot file in federal court under *Williamson County* until state procedures have been exhausted. Thus, the *Fields* court acknowledged that since "lack of ripeness deprives the federal courts of subject matter jurisdiction over a takings clause claim prior to the completion of the requisite state court proceedings . . . a takings claim litigant cannot comply with the first step of the *England* process," namely, filing in federal court. The second prong of *Williamson County*, therefore, makes *England* inapplicable in takings cases.

Despite its understanding of *England*, the *Fields* court, following an earlier decision in *Jennings v. Caddo Parish School Board*, nevertheless held that takings plaintiffs may reserve the right to litigate federal claims in federal court under *England* even if they file in state court first. The court reasoned that the Supreme Court in *Migra* had established an "exception to generally applicable res judicata principles" and § 1738 whereby a "would-be federal court litigant" who is forced "involuntarily" to file state claims in state court initially is not precluded from later filing federal claims in federal court, even though the federal claims could have been raised in the earlier state-court proceeding. In other words, the court held that "[t]he *Migra* Court made clear that *England* could apply when a litigant with a federal constitutional claim is involuntarily in state court." *Migra* does not, however, create an exception for involuntary state-court litigants. *Migra*'s footnote seven, on which the Eleventh Circuit principally relied, is merely Justice Blackmun's ex-

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146. See 953 F.2d at 1305.
147. See id. The Sixth Circuit erred in *Slyman*, 134 F.3d 372, for example, by exercising jurisdiction where it should have dismissed the claim as unripe.
149. See Roberts, *Fifth Amendment Taking Claims*, supra note 107, at 504 ("Without resort to state court, a filing in federal court is premature, and this premature filing makes *England* inapplicable since the *England* rule requires one to 'properly invoke' federal jurisdiction. Since ripeness is jurisdictional, the invocation is improper." (footnotes omitted)); cf. *Quackenbush*, 517 U.S. 706 (1996) (requiring federal courts to retain jurisdiction when abstaining in cases seeking damages).
150. 531 F.2d 1331 (5th Cir.), cert. denied, 429 U.S. 897 (1976).
151. See *Fields*, 953 F.2d at 1305.
152. See id. at 1306.
153. Id. (citing *Migra*, 465 U.S. at 84-85 & 85 n.7).
planation for joining the majority in Migra, which held that issue preclusion under § 1738 applies to § 1983 claims, when he had dissented in Allen, arguing that claim preclusion under § 1738 should not apply to § 1983 claims. In Migra, Justice Blackmun noted that he dissented in Allen because the plaintiff there had been a criminal defendant in the prior state-court proceeding. In Allen, Justice Blackmun had argued that such a litigant should not be precluded from raising his federal claim in federal court because he "cannot be held to have chosen 'voluntarily' to litigate" his claim in the state court. Blackmun contrasted the plaintiff in Allen with Ethel Migra, who "was in an offensive posture in her state court proceeding," and could have brought her breach of contract claim in federal court initially. Thus, according to Blackmun's reasoning, Migra's federal claim was precluded by her earlier state-court proceeding because the earlier action was voluntary.

Migra's footnote seven, on which the Eleventh Circuit principally relied, is merely dicta reflecting one justice's reasoning and does not create an involuntariness exception to the Federal Full Faith and Credit statute, § 1738. Such an exception would, in effect, overrule Allen in which the Court expressly held that § 1983 does not allow relitigation of federal claims even where "the issue arose in a state proceeding in which [the litigant] would rather not have been engaged at all." If the Court had intended to create such an exception and overrule Allen, it would not have done so in a footnote. Thus, the Eleventh Circuit

154. See Migra, 465 U.S. at 85 n.7 (citing Allen, 449 U.S. at 115 (Blackmun, J., dissenting)).
156. See Migra, 465 U.S. at 85 n.7.
157. Although federal courts of appeals generally consider Supreme Court dicta binding, see, e.g., United States v. Baird, 85 F.3d 450, 453 (9th Cir.1996), cert. denied, 519 U.S. 995 (1996); Alston v. Redman, 34 F.3d 1237, 1246 (3d Cir. 1994), cert. denied, 513 U.S. 1160 (1995); Reich v. Continental Cas. Co., 33 F.3d 754, 757 (7th Cir. 1994), cert. denied, 513 U.S. 1152 (1995), they do not defer to such dicta where it is inconsistent with the body of the opinion or another Supreme Court opinion. See Wright v. Morris, 111 F.3d 414, 419 (6th Cir. 1997), cert. denied, 522 U.S. 906 (1997) ("Where there is no clear precedent to the contrary, we will not simply ignore the Court's dicta."); Gaylor v. U.S., 74 F.3d 214, 217 (10th Cir. 1996), cert. denied, 517 U.S. 1211 (1996) ("This court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly where the dicta is recent and not enfeebled by later statements."); Pierce v. Texas Dept. of Criminal Justice, 37 F.3d 1146, 1149 n.1 (5th Cir. 1994), cert. denied, 514 U.S. 1107 (1995) (literal reading of Supreme Court dicta is a "serious mistake" where inconsistent with body of opinion).
158. Allen, 449 U.S. at 104.
erred in attributing Migra's footnote seven to the entire Supreme Court.

Furthermore, since Migra, the Supreme Court has consistently refused to recognize judicial exceptions to § 1738, holding that such exceptions may only be created by later statutes. The Court has also rejected arguments relying on the involuntariness of earlier proceedings to avoid preclusion. Thus, Migra's footnote seven has little precedential value. The Eleventh Circuit's willingness to improperly extend dicta in a footnote that directly conflicts with other Supreme Court holdings aptly reflects the lengths to which the federal courts will go to avoid the procedure mandated by Williamson County.

The Eleventh Circuit's reasoning in Fields is contrary not only to England and Allen, but also to the very language from Migra on which it relies. England simply does not apply where the plaintiff files in state court first and cannot, therefore, apply in takings cases. Thus, the Eleventh Circuit's attempt to provide a federal forum for takings plaintiffs fails in its effort and distorts Supreme Court precedent in the process.

B. The Inadequacy Exception

1. Relitigating in Cases of Inadequate State Procedure

The Supreme Court in Williamson County held that where a state does not provide "an adequate procedure for seeking just note in prior case did not create preclusion exception to rule that defendant may not remove action to federal court based on a federal defense); Overstreet, supra note 110, at 101.


161. See McDonald v. City of West Branch, Mich., 466 U.S. 284, 292 n.12 (1984) (voluntariness of arbitration pursuant to collective bargaining agreement not relevant in determining preclusive effect); cf. University of Tenn. v. Elliott, 478 U.S. at 796 n.5 (Under Title VII, "[t]he fact that respondent requested the administrative hearing rather than being compelled to participate in it does not weigh in favor of preclusion.").

162. Even if Migra's footnote seven can be said to create an exception for involuntary state-court litigants, it should be read narrowly and limited to state-court criminal defendants. A party to a takings case cannot be said to be in state court involuntarily any more than a party to a common-law tort case. Since the federal cause of action does not yet exist, proceeding in federal court is not an option that may be foreclosed against the litigants' will. Therefore, Justice Blackmun himself might not have considered a civil plaintiff who is forced to litigate a takings claim first in state court to be appearing there involuntarily in the same sense that a criminal defendant involuntarily appears in state court.
compensation,” the plaintiff need not file an inverse condemnation action in state court to ripen his federal takings claim. Several federal courts of appeals have used this exception to avoid the preclusion problem and have allowed takings cases to proceed despite the plaintiffs' failure to utilize state compensation procedures on the grounds that those procedures were inadequate.

The Sixth Circuit in Kruse v. Village of Chagrin Falls, Ohio, held that the plaintiffs' physical takings claim was ripe even though they had not filed an inverse condemnation action in state court. Before proceeding in federal court, the plaintiffs had filed a state trespass action and had been denied compensation because the defendant enjoyed governmental immunity. The plaintiffs could have filed for a writ of mandamus to compel the institution of appropriation proceedings. Although the Sixth Circuit had previously held a takings claim to be unripe where the plaintiff had failed to resort to the same mandamus procedure, in this case the court held that Ohio's mandamus procedure was inadequate under Williamson County. Since Ohio provided no “reasonable, certain, and adequate” compensation procedure, the plaintiffs' claim was ripe.

Similarly, the Tenth Circuit found that Wyoming law provided no adequate compensation procedure in Clajon Production Corp. v. Petera. There, the court held that the defendant agency did not have the power of eminent domain, and therefore was not covered by the state inverse condemnation statute. Since the statutory procedure was unavailable, the plaintiffs' claim was deemed ripe.

In Front Royal, the defendant failed to provide sewers for newly annexed land as ordered by a Virginia annexation court. In contrast to both Clajon and Petera, the Fourth Circuit initially ordered the district court to retain jurisdiction and to enter a Burford abstention to avoid federal court interference in a “complex state regulatory scheme,” namely, Virginia's land-
annexation process. The plaintiff then filed a claim for damages in state court, but the state court denied the claim because Virginia law does not provide damages for denial of a benefit. Since the plaintiff's resort to state remedies was unsuccessful, its federal takings claim was held to be ripe.

2. Misapplying the Inadequacy Exception and Only Partially Solving the Preclusion Problem

Federal courts of appeals have generally held that takings plaintiffs must seek compensation in state court even where there is no statutory procedure and the entitlement to compensation is unsure or undeveloped. Rather, "it must be certain that the state would deny that claimant compensation were he to undertake the obviously futile act of seeking it." These rulings accord with Williamson County, in which the Supreme Court said that a takings claim is not "complete" until the state has failed to provide "adequate compensation." Kruse and Clajon conflict with these rulings and with Williamson County. In Kruse, mandamus was available to the plaintiffs for recovery of damages, and in Clajon, a common law inverse condemnation cause of action may have been available. Thus, the claims in those cases never ripened under Williamson County because the state courts were not given the opportunity to deny just compensation.

In fact, First English Evangelical Lutheran Church v. County of Los Angeles held that the Fifth Amendment requires states to provide inverse condemnation remedies for takings. Thus, a common law claim in the Wyoming state courts should have been available to the Clajon plaintiffs. Indeed, after First English,

172. Id. at 763-65 (citing Burford, 319 U.S. 315 (1943), under which federal district courts may abstain from interpreting complex state laws to avoid conflicting with state court interpretations).
173. See Front Royal, 135 F.3d at 280.
174. See id. at 283.
175. See, e.g., Liberty Mutual Ins. Co. v. Louisiana Dept. of Ins., 62 F.3d 115, 117-18 (5th Cir. 1995); Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 380 (2d Cir. 1995), cert. denied, 519 U.S. 808 (1996); Southview Assoc., 980 F.2d at 99-100; Samaad, 940 F.2d at 934; Austin v. City and County of Honolulu, 840 F.2d 678, 681 (9th Cir. 1988), cert. denied, 488 U.S. 852 (1988); Roberts, Fifth Amendment Taking Claims, supra note 107, at 495-96.
176. Samaad, 940 F.2d at 934 (emphasis in original); see also Austin, 840 F.2d at 681 (Plaintiff must show that he "may not obtain just compensation through an inverse condemnation action under any circumstances. . .").
177. 473 U.S. at 195.
178. See 74 F.3d at 699.
179. See 70 F.3d at 1569.
180. 482 U.S. 304; see also sources cited infra note 220.
arguments that it would be futile to proceed in state court on a meritorious takings claim should no longer be viable. By holding that states must provide adequate remedies for takings, First English essentially nullified the Williamson County inadequacy exception. The Virginia courts in Front Royal provided compensation remedies as required by First English, but rejected, or would have been certain to reject, the plaintiffs' claims because the denial of a benefit cannot constitute a taking under Virginia law. The Rooker-Feldman doctrine holds that the lower federal courts "have no authority to review final judgments of a state court even when federal constitutional principles are involved." Applying that doctrine to Front Royal, the plaintiff should have appealed the state court's ruling to the U.S. Supreme Court, arguing that the Virginia courts' refusal to recognize benefits as a species of property violates the Fifth Amendment and First English, and the federal district court should have refused to exercise jurisdiction.

The Rooker-Feldman doctrine, however, presupposes that Supreme Court review is available and that the federal constitutional claim was or could have been raised in the state court. In Front Royal, Supreme Court review may not have been available because the state court's ruling rested upon independent and adequate state grounds, and the federal claim could not have been raised in the state court because it was not ripe. Arguably, then, in a case like Front Royal, the Rooker-Feldman doctrine should not bar federal district court jurisdiction. Assuming that the federal claim was not barred by issue preclusion.

182. See Overstreet, supra note 110, at 121:

First English establishes a federal right to receive compensation once a temporary taking is found. Through the doctrine of incorporation, this federal right becomes a mandatory floor at the state level. As a result, property owners can no longer claim that the state does not have procedures to award just compensation. Therefore, First English extinguishes the futility exception as applied to the second prong of the ripeness analysis.

183. See Front Royal, 135 F.3d at 280.
185. See Feldman, 460 U.S. at 482 n.16.
186. See Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487, 491-92 (1965) (dismissing writ of certiorari as improvidently granted where state supreme court held that ordinance did not constitute a taking under state constitution).
187. See Williamson County, 473 U.S. 172.
188. See Gooden v. Faulkner County Sheriff's Dept., 129 F.3d 121 (8th Cir. 1997) (table, text in WL No. 97-1449) (holding § 1983 taking claim, following state-court dismissal of state claim, not barred by Rooker-Feldman doctrine, but not ripe).
sion, the federal court in *Front Royal* properly adjudicated the plaintiff's federal claim.\textsuperscript{189}

Some takings claims may properly reach federal court in this manner. The Ninth Circuit in *Dodd*, for example, reached the merits of the plaintiffs' takings claim because the state-court litigation did not entirely preclude the federal claim.\textsuperscript{190} The state court ruled that the Dodds' property retained value after their development permits were denied.\textsuperscript{191} That holding precluded a *Lucas* claim of denial of all economically beneficial use, but did not preclude a *Penn Central* claim requiring a balancing of public and private interests.\textsuperscript{192} The number of cases that slip through the cracks will be small, however, because relitigation of most issues will be barred under § 1738, as was the issue of the plaintiffs' property value in *Dodd*.\textsuperscript{193}

Likewise, federal courts generally look to state law to determine what constitutes property under the Fifth Amendment, further limiting their ability to reach independent judgment in a takings cases.\textsuperscript{194} For example, the Fourth Circuit in *Front Royal* deferred to the Virginia Supreme Court's ruling that benefits are not a species of property under Virginia law. Nonetheless, instead of declining to engage in further analysis under § 1738, the federal court held that the failure to provide sewer service did not constitute a taking under the Fifth Amendment.\textsuperscript{195} Rather than relitigating the issue, the court could have declined to reach the takings issue under § 1738.\textsuperscript{196} *Front Royal* demonstrates that even when a federal court will not withhold its analysis due to § 1738, state court determinations of what constitutes property under state law will almost inevitably control the final judgment nonetheless. The inadequate state procedures exception to *Williamson County* does not, therefore, adequately overcome the preclusion problem created by the intersection of *Williamson County* and § 1738, even in cases where federal courts adjudicate, or re-adjudicate, issues in takings cases.

\textsuperscript{189} Cf. Roberts, *Fifth Amendment Taking Claims*, supra note 107, at 499 ("[W]hen the property owner knows the state court's answer without filing suit, and until the Supreme Court resolves the matter, another litigant should be able to obtain a federal court's view of the issue.").

\textsuperscript{190} See 136 F.3d at 1228-30.

\textsuperscript{191} See id. at 1224.

\textsuperscript{192} See id. at 1228.

\textsuperscript{193} See 136 F.3d at 1225-27.

\textsuperscript{194} See infra Part IV.C.

\textsuperscript{195} See *Front Royal*, 135 F.3d at 286-87.

\textsuperscript{196} See *Kovats*, 749 F.2d at 1048.
C. The Blind-Eye Approach: Cases Disregarding Williamson County

In a handful of cases, federal courts of appeals have solved the preclusion problem by simply not addressing Williamson County's second prong. The Fourth and Sixth Circuits in particular have repeatedly avoided dismissing cases for failure to seek compensation through state courts as a prerequisite to federal action. In Georgia Outdoor Advertising v. City of Waynesville, for example, the lower court granted the defendant's motion for summary judgment in a case challenging a billboard ordinance on First Amendment, due process, and takings grounds.\(^\text{197}\) The Fourth Circuit affirmed the dismissal of the First Amendment and due process claims,\(^\text{198}\) but held that the lower court erred in refusing to reach the takings claim. According to the court, the takings claim presented a federal question that the district court could not refuse to address simply because the plaintiff had the option of pursuing a remedy in state court.\(^\text{199}\)

In Front Royal, the district court awarded the plaintiffs damages for equal protection and takings violations arising from the defendants' failure to provide sewer service as ordered by a state annexation court.\(^\text{200}\) The Fourth Circuit, however, ordered the district court to enter a Burford abstention.\(^\text{201}\) Although the court recognized that damages remedies might have been available in the state courts, the court of appeals ordered the district court to retain jurisdiction in case the state litigation did not resolve all the federal claims.\(^\text{202}\)

Similarly, in Slyman v. City of Willoughby, Ohio, the plaintiffs filed federal and state takings claims in federal court. The district court dismissed the federal takings claims on ripeness grounds, but the Sixth Circuit ordered the lower court to abstain under Pullman and retain jurisdiction over the federal claim for further adjudication in the event that the state court did not resolve all the issues.\(^\text{203}\)

In National Advertising Co. v. City of Raleigh, the Fourth Circuit held that the plaintiff's First Amendment and takings challenges to a billboard ordinance both "arose when the ordinance

\(^{197}\) 833 F.2d 43, 44 (4th Cir. 1987).
\(^{198}\) See id. at 45-46.
\(^{199}\) See id. at 47.
\(^{201}\) 945 F.2d at 765 (citing Burford, 319 U.S. 315 (1943)).
\(^{202}\) See id.
\(^{203}\) 134 F.3d 372 (citing Pullman, 312 U.S. 496).
was enacted because it was then, if at all, that [the plaintiff] suffered the regulatory interference with the primary uses of its property."\(^{204}\) The court held that the first prong of *Williamson County* was inapposite and did not mention the second prong at all.\(^{205}\)

In a case challenging an ordinance banning truck traffic on county roads, the Sixth Circuit, in *Kuhnle Brothers v. County of Geauga*, also held that the plaintiff's cause of action accrued upon enactment of the ordinance.\(^{206}\) Although the court recognized that the case might not be ripe under *Williamson County*, it did not address that issue because it was unclear whether Ohio law provided for inverse condemnation actions and because, even if the case were ripe, it would have been barred by the statute of limitations.\(^{207}\)

There are perhaps more cases that should have been dismissed but were not because the federal court did not consider *Williamson County*'s state procedures requirement.\(^{208}\) The obvious difficulty with these cases is that they turn a blind eye toward controlling Supreme Court precedent. A less drastic alternative would be to limit *Williamson County*'s applicability to the specific circumstances of that case and require resort only to state statutory inverse condemnation procedures, as opposed to common law causes of action.\(^{209}\) While that approach would

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\(^{205}\) See id. at 1166. The Fourth Circuit may have intended merely to allow a taking claim to accrue for statute of limitations purposes before it becomes ripe. That conclusion, however, is contrary to precedents from other federal circuits, which hold that a taking cause of action accrues when it becomes ripe. See, e.g., *Biddison*, 921 F.2d at 728; *Corn v. City of Lauderdale Lakes*, 904 F.2d 585, 588 (11th Cir. 1990); *Norco*, 801 F.2d at 1145-46; cf. *New Port Largo v. Monroe County*, 985 F.2d 1488, 1493 (11th Cir.), cert. denied, 510 U.S. 964 (1993); *McMillan v. Goleta Water Dist.*, 792 F.2d 1453, 1457 (9th Cir. 1986), cert. denied, 480 U.S. 906 (1987).

\(^{206}\) 103 F.3d 516, 520 (6th Cir. 1997).

\(^{207}\) See id. at 520-21.

\(^{208}\) See, e.g., *Jackson Court Condos., Inc. v. City of New Orleans*, 874 F.2d 1070 (5th Cir. 1989) (refusing to address *Williamson County* because there was no taking on the merits).

\(^{209}\) In some circumstances it is best to read Supreme Court precedents narrowly.

To say that a decision is so thoroughly embedded in our national life that it should not be overruled, even though clearly wrong, is not necessarily to say that its principle should be followed in the future. . . . The past decisions are beyond reach, but there remains a constitutional principal . . . that should be regarded as law more profound than the implications of the past decisions. They cannot be overruled, but they can be confined to the subject areas they concern. . . . A case like *Shelley v. Kraemer*, has generated no subsequent decisions and is most unlikely to. The Supreme Court has refused to follow its rationale, and there would be no point in overruling the decision. There are times when we cannot recover the transgressions of the
avoid the preclusion problem in states that provide no statutory remedy, it also would impose an excessively narrow interpretation on broadly-worded Supreme Court pronouncements. Nonetheless, if the preclusion problem must be solved, abandoning *Williamson County*'s state procedures requirement altogether must be considered a viable alternative, especially in light of the difficulties associated with other solutions discussed herein. As the following part of this Article explains, though, the so-called preclusion problem may not require a solution at all.

IV.

ACCEPTING THE RELEGATION OF TAKINGS CLAIMS TO STATE COURT

Given the difficulties associated with fashioning new judicial doctrines to avoid the preclusion problem, it is worth re-examining whether the lack of a federal forum in takings cases is really a problem at all. This Part presents four reasons for accepting the relegation of takings claims to state court. First, all states provide a compensation remedy for regulatory takings. Second, § 1983, on the other hand, was never intended to provide a federal forum for the vindication of all federal rights. Third, since state law often defines property, an issue critical to many takings cases, the determination of what constitutes property in a given case is best handled by state courts. And fourth, federal courts are reluctant to decide takings cases and therefore may not be the appropriate forum for the resolution of those claims.

A. The Availability of State Compensation Remedies

Following the Supreme Court's decision in *First English*,210 all states must provide just compensation remedies for takings. In *First English*, the plaintiff church operated a campground in the drainage channel of a national forest watershed area. Following a forest fire upstream, flooding destroyed the camp. In response to the flooding, the county passed an ordinance, effective immediately, that prohibited construction in the flood area, including the camp. The church filed a complaint in California state court alleging that it had been denied all use of the camp and seeking damages in tort and inverse condemnation.211 The California

210. 482 U.S. 304.
211. See id. at 307-08.
state courts held that, under California law, the plaintiff could not maintain an inverse condemnation action based upon a regulatory taking, but was limited to declaratory relief or mandamus.\textsuperscript{212}

The U.S. Supreme Court reversed the California courts' denial of an inverse condemnation remedy.\textsuperscript{213} The Court held that the Fifth Amendment requires governments to pay compensation for takings and entitles landowners to bring inverse condemnation actions.\textsuperscript{214} "[C]laims for just compensation," the Court said, "are grounded in the Constitution itself."\textsuperscript{215} The Court then held that temporary regulatory takings must be compensated as are permanent takings.\textsuperscript{216} "Invalidation of the ordinance[,],... though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause."\textsuperscript{217} When a court determines that an ordinance works a taking, the government has the option of invalidating the offending ordinance or retaining it and exercising eminent domain.\textsuperscript{218} However, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."\textsuperscript{219} Thus, state courts must provide inverse condemnation remedies to compensate takings.\textsuperscript{220}

Given the constitutionally mandated availability of state compensation remedies, the lack of a federal forum for takings claims does not deny landowners their right to compensation, it merely deprives them of the opportunity to forum shop. Furthermore, the Supreme Court in \textit{First English} envisioned the state judiciary enforcing the Takings Clause. If a state court re-

\begin{itemize}
\item \textsuperscript{212} See \textit{First English}, 482 U.S. at 308-09.
\item \textsuperscript{213} See id. at 311.
\item \textsuperscript{214} See id. at 315.
\item \textsuperscript{215} \textit{id}. The Court also said that "in the event of a taking, the compensation remedy is required by the Constitution," \textit{id}. at 316, and "it is the Constitution that dictates the remedy for interference with property rights amounting to a taking." \textit{id}. at 316 n.9.
\item \textsuperscript{216} See id. at 318.
\item \textsuperscript{217} \textit{id}. at 319.
\item \textsuperscript{218} See id. at 321.
\item \textsuperscript{219} \textit{id}.
\item \textsuperscript{220} See Tari v. Collier County, 56 F.3d 1533, 1537 n.12 (11th Cir. 1995); Carson Harbor Village, Ltd. v. City of Carson, 37 F.3d 468, 475 (9th Cir. 1994); Schnuck v. City of Santa Monica, 935 F.2d 171, 173 (9th Cir. 1991); Executive 100, Inc. v. Martin County, 922 F.2d 1536, 1542 (11th Cir.), \textit{cert. denied}, 502 U.S. 810 (1991); 8A NICHOLS ON EMINENT DOMAIN § 24.05[3][c] (3d. ed. 1997); Overstreet, supra note 110, at 120-21; Roberts, \textit{Ripeness and Forum Selection}, supra note 98, at 56-57; Stein, supra note 24, at 38 n.146; Carlos Manuel Vazquez, \textit{What is Eleventh Amendment Immunity?}, 106 YALE L. J. 1683, 1709-12 (1997). But see Kruse, 74 F.3d at 699 n.2.
\end{itemize}
fuses to provide an adequate remedy under First English, the Supreme Court may correct the error on appeal. The Supreme Court did not intend for the lower federal courts to step in. Their recent attempts to bypass state jurisdiction in takings cases are therefore inconsistent with First English.

B. The § 1983 Remedy

Section 1983 does not necessarily ensure a federal forum for the vindication of all federal rights. Originally enacted as section 1 of the Ku Klux Klan Act of April 20, 1871, § 1983 was intended to provide a federal remedy, supplementary to the state remedy, only (1) "where state substantive law was facially unconstitutional"; (2) "where state law was inadequate"; and (3) "where the state remedy, though adequate in theory, was not available in practice." The primary problem addressed by § 1983 was the states' failure to enforce their laws even-handedly.

The Supreme Court has determined that "claimants are not always entitled to vindicate federal rights in federal court." Article III, § 1 of the U.S. Constitution "left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe." Congress has never granted federal courts the full scope of Article III jurisdiction and did not confer general federal question jurisdiction until 1875. Even then, jurisdictional amount requirements relegated many cases raising federal claims to the state courts.

222. See id. at 183; see also Allen, 449 U.S. at 99.
223. Allen, 449 U.S. at 100.
225. See id. at 174-75; Allen, 449 U.S. at 98 ("The main goal of the Act was to override the corrupting influence of the Ku Klux Klan and its sympathizers on the governments and law enforcement agencies of the Southern States, and of course the debates show that one strong motive behind its enactment was grave congressional concern that the state courts had been deficient in protecting federal rights." (citations omitted)).
226. Dodd, 59 F.3d at 866 (Tang, J., dissenting); see also Peduto, 878 F.2d at 729.
227. "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.
229. See Palmore v. U.S., 411 U.S. 389, 401-02 (1973); Wright, supra note 24, §
Section 1983 does not entitle plaintiffs to a federal remedy "regardless of the legal posture" of the claims. For example, in *Harlow v. Fitzgerald*, the Supreme Court held that suits against government officials may not always be heard in federal court under § 1983. The Court recognized that, when a government official abuses his office, "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." Nevertheless, the Court held that public officials are shielded from litigation by qualified immunity where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Even if the official's conduct violated the plaintiff's constitutional rights, the plaintiff has no federal remedy unless the official knew or should have known that his conduct was unlawful. The Supreme Court reasoned that allowing litigation against public officials entails "substantial social costs," including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." Thus, in suits against government officials, these amorphous social costs trump the plaintiff's interest in vindicating constitutional rights in federal court.

Likewise, a criminal defendant may not challenge a valid conviction or sentence in federal court under § 1983. In *Heck v. Humphrey*, the Supreme Court held that to bring such a claim, "a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." In that case, Roy Heck challenged his conviction for voluntary manslaughter by filing a § 1983 claim in federal court, alleging that the prosecution had destroyed exculpatory evidence and used an unlawful voice identification procedure at trial. The Supreme Court drew a parallel between Heck's claim and common law malicious prosecution

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3526 at 234-35.
232. *Id.* at 814.
233. *Id.* at 818.
234. *See id.* at 815.
235. *Id.* at 816.
236. *Id.* at 814.
239. *See id.* at 479.
claims, which, in order to avoid parallel litigation, do not accrue until the criminal defendant prevails in the criminal proceeding.\textsuperscript{240} The Supreme Court affirmed the dismissal of Heck's claim, holding that it was not cognizable under § 1983 because his conviction had not been invalidated.\textsuperscript{241} Thus, Heck was denied the opportunity to litigate his constitutional rights in federal court under § 1983 to avoid the possibility that he might win, thereby creating a conflict with his state conviction.\textsuperscript{242} Relegating takings claims to state court does not, therefore, flout the intent of § 1983 any more than does relegating the claims of victims of official misconduct or criminal defendants to state court.\textsuperscript{243}

\textbf{C. The Definition of Property}

Before determining whether property has been taken in violation of the Fifth Amendment, courts must identify the property at issue.\textsuperscript{244} Since that question is generally determined by reference to state law, it is appropriate that takings cases be heard in state courts.

The Supreme Court discussed the origin of property rights in \textit{Board of Regents v. Roth}.\textsuperscript{245}

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.\textsuperscript{246}

Whether the definition of property is a state or federal question appeared to be settled in \textit{United States ex rel. T.V.A. v. Pow-
In which the Supreme Court said, "[t]hough the meaning of 'property' as used in... the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law." Nevertheless, some disagreement persists among the federal courts over this question. For the purposes of this analysis, however, it does not matter whether the issue is characterized as a state or federal question, since the outcome is often determined by reference to state law in either case. In evaluating takings claims, therefore, federal courts generally look to state law to define property. The Supreme Court has often examined state law to determine whether a challenged provision effected a taking of property under the Fifth Amendment. For

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247. 319 U.S. 266 (1943).
248. Id. at 279.

As a general rule, the courts have recognized that what constitutes property in a condemnation proceeding by the United States must ultimately be determined by reference to state law. Most courts reach this conclusion on the ground that what is real or personal property is a question of real-estate law which must be determined by the law of the state in which the property is located. Other courts, while maintaining that what is property in a federal condemnation proceeding is a federal question, reach the same result by holding that the term "property" will normally be given the same content as in state law.


250. See, e.g., Washington Legal Found. v. Texas Equal Access, 94 F.3d 996, 1000 (5th Cir. 1996) ("State law defines 'property' and the United States Constitution protects private property from government encroachment."); United States v. 131.68 Acres of Land, More or Less, 695 F.2d 872, 875 (5th Cir. 1983), cert. denied, 464 U.S. 817 (1983) ("Louisiana law here governs what is a property interest compensable under the Fifth Amendment."); Milens of California v. Richmond Redevelopment Agency, 665 F.2d 906, 909 (9th Cir. 1982) ("We look to local state law to determine what property rights exist and who is entitled to recover for a taking.").

251. See, e.g., Phillips, 524 U.S. at 156 (looking to Texas law to determine whether interest on IOLTA accounts is private property under the Takings Clause): Nollan v. California Coastal Comm'n, 483 U.S. 825, 857 (1987) (Brennan, J., dissenting) ("It is axiomatic, of course, that state law is the source of those strands that constitute a property owner's bundle of property rights."); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130-31 (1978) ("In deciding whether a particular government action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the 'landmark site.'"); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) ("[T]he extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land, a very valuable estate . . . .").
example, the petitioner in *Ruckelshaus v. Monsanto Co.* asked the Court whether applicants for pesticide permits had property interests in trade secrets submitted to the Environmental Protection Agency in their applications. Property, the Supreme Court said, is defined by state law. Thus, Monsanto was entitled to Fifth Amendment protection to the extent that its submissions were recognized as property under Missouri law. The Court rejected the agency's argument that the federal pesticide statute preempts Missouri law, reasoning that "[i]f Congress can 'pre-empt' state property law in the manner advocated by EPA, then the Taking Clause has lost all vitality." 

With its decision in *Lucas v. South Carolina Coastal Council*, the Supreme Court ensured that inquiries into state property law will often be necessary in takings cases. The South Carolina trial court found that the state's Beachfront Management Act of 1988 left David Lucas' beachfront property entirely valueless. The Supreme Court held that such a deprivation of all economically beneficial use of property constitutes a taking. A state may, nonetheless, "resist compensation" in such a case, the Court said, if the challenged law merely duplicates "the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." The Court therefore remanded the case for a determination of whether South Carolina property law would have prevented the development of Lucas' property.

On the other hand, the Supreme Court has occasionally refused to "accept every local idiosyncrasy or artificiality in a state's concepts" of property. In *Keystone Bituminous Coal As-

253. *See id.* at 1001 (quoting Roth, 408 U.S. at 577).
254. *See Monsanto,* 467 U.S. at 1003-04.
255. *Id.* at 1012.
257. *See, e.g., Front Royal,* 135 F.3d at 286-87.
258. *See Lucas,* 505 U.S. at 1009.
259. *See id.* at 1019.
260. *Id.* at 1027.
261. *Id.* at 1029.
262. *See id.* at 1031.
263. *See 27 Am. Jur. 2d Eminent Domain § 492 at 57 (1996):*

Although state law will normally be consulted when a federal court attempts to define the property interests involved in a condemnation case— that is, federal law in this area will derive its content from state law—a federal court will not necessarily accept every local idiosyncrasy or artificiality in a state's concepts, or the incidents thereof, and where no state decision is directly in point or where the state decisions are numerous and in hopeless conflict, the court will look to federal law.
sociation v. DeBenedictis, for example, the petitioners, challenging a state law designed to prevent subsidence over mines, attempted to define the property at issue as the "support estate." Although the "support estate" is a unit of property recognized by Pennsylvania law, the Supreme Court nonetheless refused to divide up the petitioners' "bundle of property rights." The Court rejected the "legalistic distinctions" of Pennsylvania property law, since "in practical terms, the support estate has value only insofar as it protects or enhances the value of the estate with which it is associated."

Keystone departs from the traditional practice of defining the term "property" in the Fifth Amendment by reference to state law. Even though the Court refused to follow state property law precisely, however, it still analyzed the state law in depth. Thus, Keystone again demonstrates that examinations of state property law are often central in takings cases, especially in light of the prominence given such inquiries in the Lucas decision.

Since the property at issue in takings cases is generally created and defined by state law, it is appropriate that takings claims be heard initially in state courts. In Pullman, the Supreme Court held that federal courts should abstain where a state court ruling on an issue of state law might terminate the controversy. Federal courts should allow state courts to determine questions of state law, the Supreme Court cautioned, to "avoid the waste of a tentative decision" that may be "supplanted by a controlling decision of a state court"; to avoid "premature constitutional adjudication"; and to avoid "needless friction with state policies." Pullman abstention is usually not an option in takings cases because it requires the federal court to retain jurisdiction rather than dismiss the action as required by Williamson County. Nevertheless, the interests protected by that doctrine apply in takings cases as well. The Supreme Court has ensured that the property issue will continue to be central in takings cases and will be determined by state law. State court adjudication of takings claims, therefore, is consistent with the Supreme Court's view of the proper role of the federal judiciary.

265. Id. at 496-97.
266. Id. at 500.
267. Id.
268. Id. at 501.
269. See Pullman, 312 U.S. at 498.
270. Id. at 500.
271. See supra Part III.A.2.
D. The Appropriateness of the State Forum

State court may be the more appropriate forum for takings cases. The traditional assumption that federal court is the preferable forum for resolving federal constitutional claims may not be correct in the takings context. In a 1977 article entitled The Myth of Parity, Burt Neuborne questions the Supreme Court's "uncritical assumption of parity" between the state and federal courts. Professor Neuborne concludes that differences between the two court systems, namely, technical competence, psychological set, and insulation from majoritarian pressures, make federal courts "institutionally preferable" for adjudicating constitutional cases. Federal courts ought to hear constitutional claims, according to Neuborne, not only because they are better able to resolve complex issues, but also because they are more likely to vindicate plaintiffs' federal rights.

Many commentators adopt this view with regard to the ripeness of takings claims. Blaesser, for example, summarizes the benefits of a federal forum in § 1983 takings cases.

First, where there are allegations that a wrong was committed under color of state law, there is "an inherent potential for bias" in the state court. Second, judicial review of allegations involving activities that are unpopular locally is best conducted by life-tenure federal judges whose jobs are not subject to parochial pressures. Finally, because the essence of a section 1983 action is the assertion of a national right, federal judges may have a greater understanding of and sympathy with constitutional goals. Review of their decisions through the federal appellate system will help ensure the uniform application of civil rights principles.

Additionally, Overstreet argues that "[i]t is extremely important that property owners have access to federal courts" because "an almost certain prejudice is created by having an elected or appointed judge, sitting in the same local area as the alleged taking, decide the case."

Others have come to realize, however, that the parity debate is "futile." Erwin Chemerinsky comments that "[t]he debate over parity is the legal equivalent of the Lite Beer commercials where the one side yells, 'tastes great,' and the other screams,

273. See id. at 1115-30.
274. Blaesser, supra note 109, at 74.
275. Overstreet, supra note 110, at 92-93.
Like Chemerinsky, Neuborne acknowledges that the debate is at an impasse because a comparison of the two court systems requires empirical measures that are not available. The wide variety of courts and constitutional issues make comparisons of entire court systems impossible. The institutional factors that make federal court the preferred forum in some types of constitutional cases may make state court the preferred forum in others. Indeed, in Stone v. Powell, the Supreme Court explicitly rejected the assumption that federal courts are more competent or sympathetic toward federal constitutional claims.

In cases raising a federal takings claim, state court may provide a more sympathetic forum for the local landowner turned plaintiff. Professor Neuborne posits that federal judges' elite tradition and class biases cause them to favor plaintiffs in constitutional cases. These same judges, however, are often unenthusiastic about resolving local land use disputes. Many refuse "to sit as a zoning board of appeals," or to become "the Grand Mufti of local zoning boards," for fear that "availability of federal review of every zoning decision would only serve to further congest an already overburdened federal court system." One commentator surmised that the ripeness doctrine may simply be

277. See id.
279. See Chemerinsky, supra note 276, at 259.
281. 428 U.S. 465, 494 n.35 (1976); see also Allen, 449 U.S. at 105 (observing that in Stone v. Powell, the Court expressed its "emphatic reaffirmation... of the constitutional obligation of the state courts to uphold federal law, and its... confidence in their ability to do so.").
283. Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J. dissenting); see also Gardner v. Baltimore Mayor and City Council, 969 F.2d 63, 69 (4th Cir. 1992) ("Section 1983 does not empower us to sit as a super-planning commission or a zoning board of appeals, and it does not constitutionalize every 'run of the mill dispute between a developer and a town planning agency.'"); Spence v. Zimmerman, 873 F.2d 256, 262 (11th Cir. 1989) ("We stress that federal courts do not sit as zoning boards of review and should be most circumspect in determining that constitutional rights are violated in quarrels over zoning decisions."); Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1982), cert. denied, 459 U.S. 989 (1982) ("Such a claim is too typical of the run of the mill dispute between a developer and a town planning agency... to rise to the level of a due process violation... A federal court, after all, 'should not... sit as a zoning board of appeals.'").
284. Hoehne v. County of San Benito, 870 F.2d 529, 532 (9th Cir. 1989).
285. Scudder v. Town of Greendale, Ind., 704 F.2d 999, 1003 (7th Cir. 1983); see also Gardner, 969 F.2d at 69.
a tool federal judges use to maintain manageable dockets.\textsuperscript{286} Since the ripeness doctrine is intended to promote both comity and judicial economy, it is neither surprising nor inappropriate that federal judges use it to prevent the federal court system from swelling beyond its capacity and from intruding into areas of local concern.

Furthermore, despite the Supreme Court's admonition that the Takings Clause "should not be relegated to the status of a poor relation,"\textsuperscript{287} federal courts often treat property rights as secondary to other constitutional rights.\textsuperscript{288} The Seventh Circuit, for example, refused to review what it deemed to be "a garden-variety zoning dispute dressed up in the trappings of constitutional law... there to displace or postpone consideration of some worthier object of federal judicial solicitude."\textsuperscript{289} The Ninth Circuit opined that "even the framers of the fifth amendment saw the wisdom of enumerating life, liberty, and property separately, and few of us would put equal value on the first and third."\textsuperscript{290} Even the Supreme Court has tended to give other constitutional rights more attention than property rights.\textsuperscript{291} Professor Stein

\textsuperscript{286} See Stein, supra note 24, at 96-97. Kanner goes so far as to suggest that "[o]ne need not be clairvoyant or paranoid to conclude that the Court was intent not so much on deciding the issue properly before it, as it was on barring the federal courthouse door to landowners seeking relief from confiscatory land-use regulations." Kanner, supra note 108, at 331.

\textsuperscript{287} Dolan v. City of Tigard, 114 S.Ct. 2309, 2320 (1994).

\textsuperscript{288} See Kanner, supra note 108, at 328 ("Shades of Orwell's Animal Farm, where all animals are equal, except that some are less equal than others.").

\textsuperscript{289} Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988) (opinion by Judge Posner.).

\textsuperscript{290} Tahoe-Sierra Preserv. v. Tahoe Reg. Planning Agency, 911 F.2d 1331, 1338 n.5 (9th Cir. 1990), cert. denied, 499 U.S. 943 (1991). But see id. at 1346-47 (Kozinski, J., dissenting):

[Life, liberty, and property] are protected by the Bill of Rights and for that reason alone deserve solicitude—rather than thinly disguised contempt—from members of the judiciary. The fact is, the Constitution protects a variety of rights and liberties and reasonable minds differ as to the relative importance of each. When we relegate certain of these to collateral status by refusing to give them the full measure of constitutional protection, we undermine the integrity of the constitutional structure and hand a potent weapon to those who may not share our vision as to which rights trump which.

\textsuperscript{291} See, e.g., United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); see also Neuborne, The Myth of Parity, supra note 272, at 1119 (highlighting the particular fragility of first amendment rights); James D. Smith, Ripeness for the Takings Clause: Finality and Exhaustion in Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 13 ECOLOGY L.Q. 625, 639-40 (1986) (lesser treatment of property rights may be justified because § 1983 was intended to redress injuries to under-represented minorities); Stein, supra note 24, at 14 n.47 ("[T]hese state-level infringements are unlikely to rival the institutional deprivations experienced by former slaves and their descendants.").
suggests that this difference in treatment does not "reflect[] a second-class status for property rights as opposed to other civil rights," but rather "reflects a greater level of trust in the ability of local officials who face these issues to act fairly. . . . Or this trend may simply reflect federal judges' goals of maintaining manageable dockets." 292 Thus, if federal judges have a "psychological set," 293 that causes them to prefer plaintiffs in most constitutional cases, that same psychological set may cause them to avoid deciding takings cases. Regardless of whether federal judges are justified in refusing to resolve takings claims, their hesitation undermines the assumption that the federal courts provide a more beneficial forum for takings plaintiffs.

State courts, on the other hand, may be better suited to handle takings claims for some of the very reasons that they have long been considered ill-suited for adjudicating other constitutional claims. The Fourth Circuit emphasized the superiority of state courts in adjudicating local land use cases in Gardner v. Baltimore Mayor and City Council.

Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the federal courts. There is no sanction for casual federal intervention into what "has always been an intensely local area of the law." 294 "Federal judges lack the knowledge of and sensitivity to local conditions necessary to a proper balancing of the complex factors" that are inherent in municipal land-use decisions. 295 Accordingly, federal courts should be extremely reluctant to upset the delicate political balance at play in local land-use disputes. 296 In most instances, therefore, decisions regarding the application of subdivision regulations, zoning ordinances, and other local land-use controls properly rest with the community that is ultimately—and intimately—affected. 297

The fact that state court judges are often elected is traditionally seen as favoring defendants in constitutional cases. 298 A state judge's constituency, however, is not the local government, but rather the local landowner and possible takings plaintiff. In Chisom v. Roemer, the Supreme Court, recognizing that elected state judges must respond to "the popular will," held that such

292. Stein, supra note 24, at 96-97.
294. Gardner, 969 F.2d at 67-68 (substantive due process claim) (citations omitted).
judges are "representatives" of their districts under the Voting Rights Act. As the Fourth Circuit acknowledged, land use cases often involve a "delicate political balance" with which a state judge is likely to be more familiar. Thus, judicial elections may benefit takings plaintiffs. Likewise, state judges' responsibility for "the day to day implementation of constitutional rights," while traditionally considered a factor detracting from the ability of state courts to fairly resolve constitutional claims, may aid in the adjudication of takings claims.

It is doubtless impossible to determine which forum will be more sympathetic to the takings plaintiff in every case, and consideration of that factor in forum allocation decisions is questionable. Nevertheless, the federal bench's reluctance to decide takings cases and treatment of property rights as secondary to other constitutional rights indicate that the usual assumptions regarding federal courts' sympathies in constitutional cases may not apply in takings cases. In addition, the state judiciary's familiarity with local politics and administrative procedures, as well as its sensitivity to local landowners' concerns, may make state court the more sympathetic and better-equipped forum for the resolution of takings claims.

The Supreme Court has repeatedly expressed its confidence in the ability of state courts "to safeguard personal liberties and to uphold federal law." The doctrines of concurrent jurisdic-
tion and Younger abstention, among others, are premised on the Supreme Court's belief that state courts can handle complex federal actions. State court enforcement of federal law is also central to the principle of federalism. The Supreme Court has gone so far as to dub the state courts "the primary protectors of criminal defendants." If state courts can be trusted to protect the interests of criminal defendants, surely they can be trusted to fairly resolve the claims of property owners.

CONCLUSION

Courts, commentators, and many members of Congress consider the preclusion problem to be a serious intrusion on federal property rights and go to great lengths to ensure that takings plaintiffs have access to federal courts. The federal judiciary's attempts not only fall short of their goal, but also misapply Supreme Court precedents and create new complications. More importantly, the federal courts' attempts to wrest takings cases from the state judiciary conflict with the Supreme Court's vision set forth in Williamson County and First English, wherein the Court entrusted the state courts with the responsibility of enforcing the Takings Clause. Moreover, common assumptions about the harm of this forum-allocation rule may be incorrect. Thus, the federal courts would be well advised to accept the jurisdictional scheme that the Supreme Court has devised for takings claims, rather than to further complicate the already muddled jurisprudence of the Takings Clause.

304. See Idaho v. Coeur d'Alene Tribe, 521 U.S. at 276 (Kennedy, J., concurring); Tafflin, 493 U.S. at 466.