Why Judicial Takings Are Unripe

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In Stop the Beach Renourishment v. Florida Department of Environmental Protection, the Supreme Court considered without resolving whether a judicial decision interpreting property law could violate the Takings Clause of the Fifth Amendment. This Note focuses on ripeness and other procedural implications of the judicial takings concept because they present practical and doctrinal problems. First, ripeness is important on a practical level because it presents a threshold justiciability hurdle for potential judicial taking claims. Second, the judicial takings concept appears fundamentally at odds with the judicial federalism principles that underpin the Court’s special ripeness and preclusion rules for takings claims. The Court has essentially forced all federal takings claims into state courts on the premise that they offer an adequate forum, but now the judicial takings theory would reopen federal courthouse doors to check purported state court abuses. This Note concludes that, until the Supreme Court reconsiders Williamson County Regional Planning Commission v. Hamilton Bank, lower courts should strictly apply the state litigation requirement and limit judicial takings claims to state courts, with the possibility of certiorari review when parties properly raise those claims below. This approach would achieve the desired outcomes of a judicial takings doctrine—forcing state courts to recognize the risk of altering property rules and to improve the quality of their decisions—while remaining faithful to the practical requirements and policy rationales of the Court’s current ripeness jurisprudence.

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INTRODUCTION

The Supreme Court's takings jurisprudence generally evolves like sand along the shore, slowly ebbing and flowing as the majorities shift and the case law unfolds. But occasionally, the Court makes an avulsive change in the law.
by recognizing a new per se test or overruling prior precedent.2 In Stop the Beach Renourishment v. Florida Department of Environmental Protection (Stop the Beach), the first takings case to come before the Roberts Court, a plurality of four conservative Justices tried to do just that. The group fell only one vote shy of recognizing for the first time the concept of judicial takings, wherein a court decision interpreting property law might violate the Takings Clause of the Fifth Amendment.3

The Takings Clause has long applied to legislative and executive actions, but whether it applies to the judicial branch remains “one of the great unanswered questions” in constitutional law.4 The question raises important issues of federalism, separation of powers, and the common law development of property law.5 It also poses significant implications for the environment because a judicial takings doctrine would limit the ability of state courts to modify existing property rules to adapt to changed conditions and understandings about natural resources—something that will likely become even more important as freshwater resources and coastal boundaries continue to evolve in a warming world.6

In Stop the Beach, the Court unanimously held that the Florida Supreme Court properly interpreted its state property law in a coastal boundary dispute and thus did not run afoul of the Fifth Amendment.7 But the unanimity belied stark disagreement: though the Justices agreed on the end result, they divided

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5. See W. David Sarratt, Note, Judicial Takings and the Course Pursued, 90 VA. L. REV. 1487, 1495 (2004); Brief for the United States as Amicus Curiae Supporting Respondents at 9, Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot., 130 S. Ct. 2592 (2010) (No. 08-1151) [hereinafter USG Amicus Brief] (arguing that judicial takings “could unduly cabin the discretion of state courts to adapt the State’s property law to new circumstances” and “upset the federal-state balance”).
6. See, e.g., Julia B. Wyman, In States We Trust: The Importance of the Preservation of the Public Trust Doctrine in the Wake of Climate Change, 35 VT. L. REV. 507, 507 (2010) (suggesting that Stop the Beach has important repercussions “for states in maintaining their sovereignty and ability to best protect their lands and waters,” especially “as states begin to grapple with impacts of climate change on their coastlines”); JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS 384–85 (4th ed. 2006) (discussing the judicial takings theory and noting that “courts have frequently modified water law in response to changing needs and policies” and “[t]he changes continue today”).
7. Stop the Beach, 130 S. Ct. at 2612–13, aff’g Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102 (Fla. 2008).
sharply on the underlying question of judicial takings. The Court’s conservative wing embraced the concept without hesitation, while four concurring Justices raised concerns about the theory and criticized the plurality for announcing an unnecessary new rule. The case’s inconclusive outcome invites increased debate and litigation over the issue. Within months, it sparked several certiorari petitions raising judicial takings claims from state court property decisions, and it will also likely result in collateral attacks in lower federal or state courts.

This Note focuses on ripeness and other procedural implications of judicial takings because they present both practical and theoretical problems for the doctrine. First, ripeness is important on a practical level because it presents a threshold justiciability question for judicial taking claims. Any such claim will face an initial hurdle under the Court’s state litigation requirement from Williamson County Regional Planning Commission v. Hamilton Bank (Williamson County), which held that a federal takings claim is not ripe until the property owner has pursued available remedies through the state court system. The Justices’ Stop the Beach opinions offered widely divergent, if not diametrically opposed, views on how this rule would apply to judicial takings claims.

Second, ripeness provides broader doctrinal insight into the soundness of judicial takings because the theory is fundamentally at odds with the judicial federalism principles that appear to underlie application of Williamson County—namely, respect for the competence of state courts, concern about the federal court workload, and recognition that property law is a core function of the states. The Court’s ripeness and preclusion rules essentially forced all federal takings claims into state courts with the premise that they offered an

11. At times, this Note uses the term “ripeness” as shorthand to refer to other procedural and jurisdictional issues, such as exhaustion, finality, and preclusion, that are encompassed by the Court’s holdings in Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) and San Remo Hotel, L.P. v. City & County of San Francisco, 545 U.S. 323 (2005). Indeed, some critics have argued that the so-called ripeness rules from those cases use “ripeness” as a misnomer. See infra text accompanying note 158.
13. See infra Part III.C.
adequate forum,¹⁴ but now the plurality’s judicial takings theory would reopen federal courthouse doors to check purported state court abuses.¹⁵ In a sense, ripeness and judicial takings are opposite answers to the question of whether we trust state courts to handle takings claims.

This Note proceeds in three parts. Part I begins with a short historical synopsis of the judicial takings debate, while Part II summarizes the factual background and Court opinions in Stop the Beach. Part III examines interconnections between judicial takings and ripeness, first analyzing the practical implications that ripeness hurdles pose to judicial takings claims and then comparing the theoretical underpinnings behind the two doctrines. Finally, Part IV concludes that, until the Supreme Court reconsiders Williamson County, lower courts should strictly apply the state litigation requirement and limit judicial takings claims to state courts, with the possibility of certiorari review when parties properly raise those claims below. This approach would achieve the desired outcomes of a judicial takings doctrine—forcing state courts to recognize the risk of altering property rules and to improve the quality of their decisions—while remaining faithful to the practical requirements and policy rationales of the Court’s current ripeness jurisprudence. It would also avoid overloading the lower federal court docket with awkward, intrusive reviews of property law decisions, which are traditionally a core function of the states.

Ultimately, this Note shows that judicial takings and ripeness are so intertwined that the Court must treat the issues together and not gloss over problematic implications as the plurality did in Stop the Beach. One commentator who supports the concept of judicial takings described the plurality’s cursory treatment of ripeness as “an object left protruding in the sand at low tide.”¹⁶ Allowing adjudication of judicial takings claims in lower federal courts while Williamson County remains good law would throw the Court’s notoriously muddled takings law into further confusion.¹⁷ It would be like building one sand castle on top of another while the tide threatens to sweep the first out to sea.

¹⁴. See infra text accompanying note 247.
¹⁷. See USG Amicus Brief, supra note 5, at 17 (“[A]pproval of a judicial takings theory could ‘throw one of the most difficult and litigated areas of law into confusion.’” (quoting E. Enters. v. Apfel, 524 U.S. 498, 542 (1998) (Kennedy, J., concurring))). For a representative characterization of the takings case law, see Jed Rubenfeld, Usings, 102 YALE L.J. 1077, 1078 n.2 (1993) (collecting literature referring to the field as a “crazy-quilt pattern,” “liberally salted with paradox,” and “a farrago of fumblings,” among other things).
I. A BRIEF HISTORY OF JUDICIAL TAKINGS

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation."\(^{18}\) Originally, the clause likely referred only to the traditional exercise of eminent domain,\(^{19}\) but in the early twentieth century the Supreme Court extended its reach to cover government regulation that affects property owners in a similar fashion.\(^{20}\) The Court has developed some categorical rules for per se regulatory takings,\(^{21}\) but also has carved out major exceptions to those rules. For example, a government need not compensate landowners for regulations that rely on "background principles" of state property law that "inhere in the title itself," such as common law nuisance.\(^{22}\)

Outside of the rarely satisfied categorical rules, the Court has acknowledged it cannot develop a "set formula" for determining regulatory takings and instead must engage in "essentially ad hoc, factual inquiries."\(^{23}\) The Justices have explained that the Takings Clause "does not prohibit the taking of private property" or limit government's power to regulate property, but merely "places a condition on the exercise of that power"—the condition being payment of just compensation.\(^{24}\) The Court also developed ripeness and preclusion rules that require property owners to litigate almost all federal

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18. U.S. CONST. amend. V. The Supreme Court construed the Due Process Clause of the Fourteenth Amendment to incorporate the Takings Clause such that it also applies to the states. Chi., Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 233-34 (1897).


20. See Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (Holmes, J.) ("[W]hile property may be regulated to a certain extent," such regulation constitutes a taking if it "goes too far."). In the ensuing eight decades, the Court has struggled to clarify Justice Holmes's vague pronouncement. See William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 COLUM. L. REV. 782, 782, 798 (1995) [hereinafter Treanor, Original Understanding]. The Justices often describe the Takings Clause as turning on notions of "fairness and justice." See Armstrong v. United States, 364 U.S. 40, 49 (1960) ("[The Takings Clause] was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). Thus, takings cases are often politically fraught because they "evok[e] different judicial visions" about the balance between public goals and private rights in America. Roderick E. Walston, The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings, 2001 UTAH L. REV. 379, 380.


22. Lucas, 505 U.S. at 1029 ("[T]he owner of a lake-bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land.").


takings claims in state court. The Court has long applied the Takings Clause to actions of the legislative and executive branches, but it remains unclear whether the takings protections also apply to actions of the judicial branch.

A. Judicial Takings Dicta

Although the Court never squarely addressed the judicial takings question until Stop the Beach, it touched on the subject in several prior decisions, many of which point in opposite directions. Early cases on the Takings Clause did not distinguish between the branches. However, a trio of cases from the 1920s and 1930s appeared to "flatly reject" the judicial takings theory, holding that state court decisions redefining property law raised no federal constitutional questions, so long as property owners have an opportunity to be heard. In a footnote in one case, Justice Brandeis mused that constitutional


26. Textually, the Takings Clause—indeed, the entire Fifth Amendment—is phrased in the passive voice, whereas other clauses in the Constitution expressly address their application to the legislature. See, e.g., U.S. CONsT. amend. I ("Congress shall make no law . . . ."). This suggests the Framers knew how to place limitations on specific branches when they so intended. Sarratt, supra note 5, at 1499. Moreover, the Due Process Clause of the Fourteenth Amendment does not distinguish among the branches and has long applied to state judicial action in contexts other than takings. Barton H. Thompson, Jr., Judicial Takings, 76 VA. L. REV. 1449, 1455-56 (1990). However, to the extent that the Takings Clause initially referred only to the traditional exercise of eminent domain, it likely did not apply to the courts, which lack the power to take property by eminent domain. See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2616 (2010) (Kennedy, J., concurring).

27. Judicial Takings, The Supreme Court 2009 Term, 124 HARV. L. REV 299, 300 (2010) (noting the Court "has never directly addressed" the judicial takings concept, though "scattered throughout the U.S. Reports in dicta and concurrences [is] language both rejecting and declaring" the possibility). For thorough summaries of these prior cases, see Sarratt, supra note 5, at 1503-11; Thompson, supra note 26, at 1463-72; Walston, supra note 20, at 425-33.

28. In Chicago, Burlington & Quincy Railroad v. City of Chicago, the first case in which the Court enforced the clause against the states, Justice Harlan wrote that the Fourteenth Amendment applies "to all the instrumentalities of the state—to its legislative, executive, and judicial authorities." Chi., Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 233, 241 (1897). A decade later, the Court held that another part of the Constitution, the Contract Clause, prevented state courts from overruling prior precedent to deprive a litigant of property rights without just compensation. Muhlker v. N.Y. & Harlem R.R., 197 U.S. 544, 570 (1905) (plurality opinion). In dissent, Justice Holmes characterized the case as not being about contract law, but rather being about property law—which is "wholly a construction of the [state] courts . . . ." Id. at 575 (Holmes, J., dissenting).

29. Thompson, supra note 26, at 1465; Walston, supra note 20, at 430; Tidal Oil Co. v. Flanagan, 263 U.S. 444, 450 (1924) ("[T]he mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law,"); Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 680-82 & n.8 (1930) (holding that state courts have "supreme power" over questions of state law and can overrule them without raising federal constitutional issues so long as parties are accorded procedural due process); Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364-66 (1932) (upholding a state court's prospective overruling of property law precedent and suggesting that retrospective overruling would be constitutional as well); accord Petition for Writ of Certiorari at 24, Stop the Beach, 130 S. Ct. 2592 (2010) (No. 08-1151) [hereinafter STBR Certiorari]
restrictions on changes in property law would be inconsistent with the very nature of the common law.\footnote{Brinkerhoff, 281 U.S. at 681 n.8 (“The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is. State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions.”).}

The judicial takings concept “seemed dead” by the end of the New Deal, but one Justice “single-handedly revived the idea” in a concurrence three decades later.\footnote{Thompson, supra note 26, at 1467–68; Sarratt, supra note 5, at 1510.} Foreshadowing future judicial takings debates, Hughes v. Washington involved a title dispute between the state and adjacent private property owners to accretions along the shore.\footnote{Hughes v. Washington, 389 U.S. 290, 291 (1967).} The Supreme Court held that property ownership in the case was an issue of federal rather than state law, and thereby avoided the constitutional question whether a prior state court decision took private property without just compensation.\footnote{Id at 292–94.} But Justice Stewart addressed the question head-on in his concurrence, arguing that the Takings Clause prevented state courts from making sudden, unpredictable changes in property law without providing just compensation.\footnote{Id. at 329–37 (Stewart, J., concurring) (“To the extent that the decision of the Supreme Court of Washington . . . arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a state cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.”).}

In two subsequent cases, the Court again dodged the issue while declining to foreclose altogether the possibility of a judicial taking. In Bonelli Cattle Co. v. Arizona, the Court resolved a tidelands boundary dispute by relying on federal rather than state law.\footnote{Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 317 (1973). Notably, the Court overruled Bonelli on other grounds four years later in Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977), but did not address whether its reversal might constitute a judicial taking. Thompson, supra note 26, at 1469 n.85.} But, citing Justice Stewart’s Hughes concurrence, the Court noted in dicta that affirming the state court decision “would raise a serious constitutional issue” that the Court found “unnecessary to decide on [its] view of the case.”\footnote{Bonelli, 414 U.S. at 331. Notably, Justice Stewart dissented in Bonelli and distinguished his view of the Arizona Supreme Court’s decision from that of the Washington Supreme Court in Hughes. Id. at 337 n.2 (Stewart, J., dissenting).} In the second case, Prune Yard Shopping Center v. Robins, the plaintiff challenged a California Supreme Court decision that expressly overruled its own prior interpretation of the state constitution.\footnote{Prune Yard Shopping Ctr. v. Robins, 447 U.S. 74, 78–79 (1980).} Upon review, the Justices denied the takings claim but “entirely ignored” the
threshold question of whether the Takings Clause even applied to judicial
to the law. Instead, the Court simply applied a conventional
regulatory takings analysis, concluding that the state court decision did not
constitute a taking because it did not unreasonably impair the use or value of
the plaintiff's property.

That same Term, in Webb's Fabulous Pharmacies v. Beckwith, the Court
unanimously overturned a Florida Supreme Court decision on the grounds that
the underlying state statute, and not the state court's decision, improperly took
private property without just compensation. But the opinion included
language that lent support to the judicial takings concept. "Neither the Florida
Legislature by statute, nor the Florida courts by judicial decree," may simply
recharacterize private property as publicly owned, the Justices wrote. The
Court described such action as "the very kind of thing that the Taking Clause of
the Fifth Amendment was meant to prevent."

B. Lower Court and Academic Endorsements

While the Supreme Court consistently avoided answering the judicial
takings question, a few lower courts directly addressed the theory. Twice in two
years, lower federal courts characterized Hawaii Supreme Court decisions as
unconstitutional takings. Other lower federal courts recognized the possibility
of judicial takings in dicta, but either found no taking on the facts presented or

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38. Thompson, supra note 26, at 1469–70 (describing PruneYard as a "judicial takings case"); see also Walston, supra note 20, at 427 (same); The Supreme Court, 1979 Term, 94 Harv. L. Rev. 77, 175–
76 (1980) (criticizing the PruneYard Court's failure to distinguish between judicial and legislative
action).
41. Id. at 164 (emphasis added).
42. Id. at 164. Twenty years later, when the Court infamously reviewed another Florida Supreme
Court decision in Bush v. Gore, dicta in Chief Justice Rehnquist's concurrence also supported the
(suggesting the Takings Clause would "afford no protection against state power" if "a state supreme
court decision holding that state property law accorded the plaintiff no rights" could preclude the
Court's inquiry into background principles of state property law); accord Polly J. Price, A Constitutional
Takings Clause by determining, contrary to precedent, that vested water rights belonged to the state
instead of private parties), aff'd in relevant part, 753 F.2d 1468, 1474–75 (9th Cir. 1985); Sotomura v.
redrawing the dividing line between private and public beach). But see Sarratt, supra note 5, at 1495
(describing these cases as "outliers at best"). As will be discussed later, the Ninth Circuit eventually
dismissed Robinson on ripeness grounds. Robinson v. Ariyoshi (Robinson II), 887 F.2d 215, 216, 219
(9th Cir. 1989); see infra text accompanying note 139. For detailed, critical accounts of the Robinson
opinions, see Bradford H. Lamb, Robinson v. Ariyoshi: A Federal Intrusion upon State Water Law, 17
Env'tl. L. 325 (1987), and Williamson B.C. Chang, Unraveling Robinson v. Ariyoshi: Can Courts
dismissed the case for lack of jurisdiction. In addition, some state courts declined to overrule prior precedent out of concern that it might be unconstitutional to do so.

The judicial takings concept also attracted increasing attention in academic literature. Initially, scholars seemed "skeptical" or "hostile" to the theory. But other academics assumed that takings protections applied to the courts, and a series of more recent articles have made arguments in favor of the concept. The "seminal" article on the subject by Professor Barton Thompson concluded there was "no justification for exempting the judiciary" from the reach of the Takings Clause. Subsequently, concern about state courts' exploitation of the "background principles" exception from Lucas v. South Carolina Coastal Council fueled more judicial takings literature, and

44. Thompson, supra note 26, at 1471 & n.97 (citing several cases); see also Corp. of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Hodel, 830 F.2d 374, 381 (D.C. Cir. 1987), cert. denied, 486 U.S. 1015 (1988) (noting that judicial takings are "an interesting and by no means a settled issue of law" but finding it unnecessary to address the question on the facts of the case); Reynolds v. Georgia, 640 F.2d 702, 705-06 (5th Cir.) cert. denied, 454 U.S. 865 (1981) (recognizing that a state court decision that violates settled legal principles might run afoul of the Fourteenth Amendment, but refusing to entertain such a claim because lower federal courts lack jurisdiction to review the constitutionality of state court decisions); Ultimate Sportsbar, Inc. v. United States, 48 Fed. Cl. 540, 550 (2001) (finding no need to decide the judicial takings claim because the plaintiff withdrew it, but noting the "present decision is in no way intended to preclude such claims from being cognizable in this tribunal in the future"). But see Brace v. United States, 72 Fed. Cl. 337, 359 & n.35 (2006) (rejecting plaintiff's judicial takings claim and criticizing the Ultimate Sportsbar court for "not discuss[ing] any of the considerable precedent to the contrary").

45. Thompson, supra note 26, at 1471 & n.91 (citing three cases).

46. Id. at 1451, 1453 & nn.15-16 (citing, for example, Louis Kaplow, An Economic Analysis of Legal Transitions, 99 Harv. L. Rev. 509, 517 n.10 (1986) (deeming it "well accepted that no right to compensation exists" for changes in the common law) and Joseph L. Sax, Takings and the Police Power, 74 Yale L.J. 36, 51 (1964) (suggesting that common law changes "may have very substantial economic import; yet we invariably deny compensation on the ground that there was no property interest in maintenance of the status quo").


49. Thompson, supra note 26, at 1541; see also Sarratt, supra note 5, at 1494–95 & n.32 (describing Thompson's article as "seminal" to the doctrine); Brief for Pacific Legal Foundation as Amicus Curiae Supporting Petitioners for Writ of Certiorari at 12, Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot., 130 S. Ct. 2592 (2010) (No. 08–1151) [hereinafter PLF Amicus Certiorari Petition] (same). Notably, Thompson as a law clerk helped Justice Rehnquist pen his Penn Central dissent. John D. Echeverria, Stop the Beach Renourishment: Why the Judiciary Is Different, 35 VT. L. Rev. 475, 481 n.43 (2010) [hereinafter Echeverria, Different] (citing Transcript, Looking Back on Penn Central: A Panel Discussion with the Supreme Court Litigators, 15 Fordham Envtl. L. Rev. 287 (2004) (discussing Professor Thompson's experience with the case as a Rehnquist clerk)).

50. See supra text accompanying note 22 (discussing the "background principles" exception). The most prominent such article was by David Bederman, who served as plaintiff's counsel in Lucas and represented property owners in an unsuccessful judicial takings certiorari petition in Stevens v. Cannon Beach, discussed infra text accompanying note 53. David J. Bederman, The Curious Resurrection of
several student notes voiced support for enforcing takings protections against the courts.\footnote{51}{See, e.g., D. Benjamin Barros, Note, Defining "Property" in the Just Compensation Clause, 63 FORDHAM L. REV. 1853, 1869 (1995) (concluding that "to protect individual liberty, state court property determinations should be subject to federal takings scrutiny"); Sarratt, supra note 5, at 1489 (describing the Lucas exception as a "loophole" wherein states can avoid compensation requirements by creatively defining background legal principles); J. Nicholas Bunch, Note, Takings, Judicial Takings, and Patent Law, 83 TEX. L. REV. 1747, 1757-74 (2005) (arguing in favor of a judicial takings doctrine, both generally and specifically in the patent law context).}

Despite a growing momentum among property rights advocates, the Court consistently declined invitations to address judicial takings.\footnote{52}{Thompson, supra note 26, at 1469 & n.84 (citing twelve unsuccessful certiorari petitions between 1974 and 1987).} In 1994, Justices Scalia and O’Connor dissented from the Court’s denial of certiorari in Stevens v. City of Cannon Beach, a case where the Oregon Supreme Court applied customary law as a "background principle" to redefine beachfront access and private property rights.\footnote{53}{Stevens v. City of Cannon Beach, 510 U.S. 1207, 1212 (1994) (denial of writ of certiorari) (Scalia, J., dissenting) ("To say that this case raises a serious Fifth Amendment takings issue is an understatement.").} And over the next fifteen years, the Court passed over about one certiorari petition per year that sought to raise a judicial takings claim.\footnote{54}{STBR Certiorari Petition, supra note 29, at 31 ("Since 1994, this Court has been presented with no less than 15 petitions for writs of certiorari asserting a judicial taking."); see also D. Kent Saffiet & Julie M. Murphy, Returning to Pre-Hurricane Status: What Does the United States Supreme Court's Ruling in Stop the Beach Renourishment Forecast for Litigants Seeking to Protect Private Property Rights?, 61 SYRACUSE L. REV. 261, 274 n.66 (2011) (listing several such petitions).}

Finally, in 2009, a judicial takings claim washed ashore from Florida that caught the eyes of at least four Justices.\footnote{55}{Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, (Fla. 2008), cert. granted, 129 S. Ct. 2792 (2009).} A city and county’s attempt to address hurricane-induced erosion sparked claims that the government-sponsored beach restoration project, and subsequent state supreme court decision, unconstitutionally turned private oceanfront property into ocean-view property.\footnote{56}{Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot., 130 S. Ct. 2592, 2600 (2010).} Aided by an impassioned dissent from a state supreme court justice and an amicus brief from the Pacific Legal Foundation, the coastal property owners sought Supreme Court review. To great surprise, the Court agreed to take the case.\footnote{57}{See Andrew Rice, Property Lines: A Stake in the Sand, N.Y. TIMES MAG., Mar. 21, 2010, at MM64, available at http://www.nytimes.com/2010/03/21/realestate/keymagazine/21KeyBeachfront.html.}

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II. CASE SUMMARY: STOP THE BEACH

A. Factual Background

Located in the Florida Panhandle on the Gulf Coast, the city of Destin is known primarily for its beaches—or, more accurately, its quartz sand, which the national press has described as “sugary,” “mountainous,” “blindingly white,” and “so fine that it squeaks underfoot.” In 1995, Hurricane Opal “wiped out” twenty-foot-high dunes in Destin and “cut into the beach like a knife.” Over the next decade, a steady stream of hurricanes and tropical storms battered the panhandle coast, eroding the Destin beaches landward at a rate of roughly five feet per year. Hoping to replace what was lost, the city and Walton County applied for state permits in 2003 to add about seventy-five feet of dry sand seaward along a seven-mile stretch of shore.

Beach renourishment is a popular, if controversial, tactic to combat erosion in areas reliant on coastal tourism and shorefront development. Coastal communities typically support such projects; they benefit from a taxpayer-financed beach and increased protection against erosion and future storm surge. But after state and local officials raised about $15 million to

58. See Summer of ’89: Beach by Beach, USA TODAY, May 26, 1989, at 9A (listing Destin as one of the “hot spots” in its national roundup of beaches).
59. Rice, supra note 57; Barnes, supra note 4.
60. Rice, supra note 57.
61. Id.; see also Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1106 n.4 (Fla. 2008) (citing damage by Hurricane Georges (1998), Tropical Storm Isidore (2002), and Hurricane Ivan (2004)).
63. A renourishment project typically involves dredging submerged sand from offshore and pumping it onto the beach, where heavy equipment carves it into place. See Donna R. Christie, Of Beaches, Boundaries and SOBs, 25 J. LAND USE & ENVTL. L. 19, 38–39 (2009). The practice has a bevy of critics, who pose serious questions about its cost, effectiveness, and environmental impacts. They argue that the projects are at best a subsidy for wealthy coastal property owners and, at worst, a complete waste of money: millions of dollars spent on sand that literally washes back into the ocean. See e.g., Editorial, Property Rights at the Water’s Edge, WALL ST. J., Dec. 1, 2009, available at http://online.wsj.com/article/SB10001424052748703939404574567690566662658.html (noting that, by 2002, the total federal price tag for renourishment projects topped $2.5 billion, and arguing that many renourishment projects are special interest giveaways for wealthy communities); Rice, supra note 57 (citing Duke University geologist Orrin Pilkey for the proposition that renourished beaches erode twice as quickly as natural ones); Cornelia Dean, Surfers Deal a Blow to a Beach Dredging Project, N.Y. TIMES, Mar. 9, 2009, at A11, available at http://www.nytimes.com/2009/03/09/science/earth/09surfers.html (describing a lawsuit filed by a group of surfers in southern Florida to block a renourishment project on environmental grounds); Cornelia Dean, Is It Worth It to Rebuild a Beach? Panel’s Answer Is a Tentative Yes, N.Y. TIMES, Apr. 2, 1996, available at http://www.nytimes.com/1996/04/02/science/is-it-worth-it-to-rebuild-a-beach-panel-s-answer-is-a-tentative-yes.html (describing beach renourishment as equivalent to “using taxpayers’ funds to build sand castles that wash away in the first big storm”).
64. This is especially true in Florida, where beach renourishment is one of the state’s “more popular public initiatives” and a “lifeline” for many tourism-dependent communities. Rice, supra note
cover the Walton County renourishment project, many of the adjacent beachfront property owners balked.\textsuperscript{65} On a practical level, the opposition left some commentators "befuddled," wondering why property owners would object to having their beaches widened and protected on the taxpayers' dime.\textsuperscript{66} The answer, as in so many coastal land use disputes, was the elusive boundary between public and private land. Thus, although the case eventually assumed constitutional dimensions and reached the highest court in the land, it basically boiled down to whether beachfront owners could "keep the public off a sandy strip of paradise."\textsuperscript{67}

1. Local Opposition

Like most states, Florida uses the fluctuating mean high-water line to mark the coastal boundary separating private and public property. Private beachfront property extends down to the wet sand; the state owns everything below that in the public trust.\textsuperscript{68} Under the Beach and Shore Preservation Act, however, Florida renourishment projects replace the fluctuating boundary with a fixed "erosion control line," with the state taking title to any sand it adds on the oceanfront side of that line.\textsuperscript{69} Thus, private beachfront owners saw the proposed Walton County project as a "land grab" to create a new public beach in their backyards on dry sand that previously did not exist.\textsuperscript{70}

\begin{itemize}
  \item[57.] The state statute governing renourishment projects, the Beach and Shore Preservation Act, describes the management practice as "a necessary governmental responsibility," and describes and characterizes beach erosion as "a serious menace to the economy and general welfare." Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1107 (Fla. 2008) (quoting Fla. Stat. § 161.088 (2005)).
  \item[65.] Totenberg, supra note 4; Rice, supra note 57 ("[I]t came as a great surprise when, in Destin, the prospect of restoring the shore ran into fierce opposition").
  \item[66.] Rice, supra note 57; see also Scott D. Makar, Reflections on Stop the Beach Renourishment v. Florida Department of Environmental Protection, 61 SYRACUSE L. REV. 281, 308 (2011) (noting that property owner plaintiffs in Stop the Beach "received at no charge a beatifully restored beach and substantial protection from flooding and erosion of their property"). The question arose during oral arguments, when Justice Scalia opined about the project, "I'm not sure it's a bad deal." Transcript of Oral Argument at 21, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592 (2010) (No. 08-1151) [hereinafter Oral Argument Transcript], available at http://www.supremecourt.gov/oralarguments/argumenttranscripts/08-1151.pdf.
  \item[67.] Editorial, Florida Should Win Battle Over Beaches, ST. PETERSBURG TIMES, Dec. 2, 2009, at 12A; see also Rice, supra note 57 ("In this sense, the controversy . . . is not so much a matter of coastal dynamics, or constitutional rights, but rather the perennial divisions that afflict seaside development.").
  \item[69.] Stop the Beach, 130 S. Ct. at 2599 (citing 1961 Fla. Laws ch. 61-246, as amended, Fla. Stat. §§ 161.011–.45 (2007)).
  \item[70.] Totenberg, supra note 4; Barnes, supra note 4. Even before the renourishment proposal, tensions ran high along the Walton County shoreline. Rice, supra note 57 (noting that Destin city council members previously considered an ordinance to declare the first twenty feet of dry sand public, but tabled it based on confiscatory objections). Property owners received hate mail for enforcing trespass laws, and enraged members of a Jimmy Buffet fan club staged a beach sit-in after being kicked out. Totenberg, supra note 4; Barnes, supra note 4.
\end{itemize}
Beachfront owners formed two nonprofit organizations, Save Our Beaches and Stop the Beach Renourishment, to oppose the project and challenge the state’s beach renourishment program more generally. In 2006, the state district court ruled in favor of the nonprofits, finding the restoration project would take, without just compensation, the owners’ constitutionally protected rights to maintain contact with the water and gain future land if the fluctuating mean high-water line extended seaward. The decision had broad implications for the state because compensation to private property owners would make most renourishment projects financially infeasible.

2. Florida Supreme Court

In 2008, the Florida Supreme Court reversed the lower court and held 5-2 that the Beach and Shore Preservation Act, on its face, did not unconstitutionally deprive private property owners of any rights. The court noted that general common law property principles distinguish between gradual additions to the shoreline (accretions) and those that are sudden (avulsions); the former belong to the beachfront owner and the latter to the state. The distinction attempts to balance the parties’ interests in inevitable changes to the shoreline, yet avoid any “drastic shifts in title” that might result from sudden or unexpected alterations. Analogizing the nourishment project to a sudden avulsion—a doctrine that the lower court failed to consider—the Florida Supreme Court found that the Act’s erosion control line did not alter the common law relationship between public and upland owners.

One Florida Justice shot back with a “fiery” and “blistering” dissent. He accused the majority of “butcher[ing]” state law with “infirm, tortured logic” that altered the rights of waterfront property owners and “unnecessarily created dangerous precedent.” Unlike the majority, the dissenting Justice felt that

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71. Save Our Beaches v. Fla. Dep’t of Envtl. Prot., 27 So. 3d 48, 55 (Fla. Dist. Ct. App. 2006). The state administrative agency, and the court, concluded that Save Our Beaches did not have standing to challenge the project, but Stop the Beach Renourishment, whose six members all owned beachfront property in the area of the proposed project, did. Id. at 55–56.
72. Id. at 50, 58–60.
73. Louis Jacobson & Craig Pittman, Who Will Own This Beach?, ST. PETERSBURG TIMES, Dec. 3, 2009, at 1A (describing the appeal as “determin[ing] the fate” of beach renourishment in Florida, which in turn could have a “crippling effect” on the state’s economy).
74. Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1105, 1120–21 (Fla. 2008).
75. Id. at 1113–14 (explaining that gradual changes to the shoreline move the public-private boundary, whereas the boundary remains fixed in the case of an avulsion).
76. Id. at 1114.
77. Id. at 1115–18.
78. Barnes, supra note 4; Rice, supra note 57.
79. Walton Cnty., 998 So. 2d at 1121 (Lewis, J., dissenting).
Florida property law recognized and protected a riparian owner's right to contact the water. In words tailored to bolster a judicial takings certiorari petition to the U.S. Supreme Court, he complained that the majority "simply erased well-established Florida law without proper analysis." The property owners unsuccessfully sought rehearing, arguing that the majority's decision itself, rather than the underlying state law or renourishment project, took their property without just compensation. They then petitioned the Court for review on their judicial takings claim: "This case presents a unique opportunity for this Court to address an ever-increasing and important constitutional question," the petitioners wrote.

B. U.S. Supreme Court Decision

After oral arguments that featured entertaining hypotheticals about noisy hot dog stands, port-a-johns, and televised spring break parties, the Supreme Court held unanimously, 8-0, that the underlying Florida Supreme Court decision properly interpreted state property law and did not violate the Fifth Amendment. Justice Stevens did not participate, most likely because he owns a beachfront apartment in Fort Lauderdale, Florida. But all eight remaining Justices agreed the renourishment was akin to an avulsion that belongs to the state, even if it alters the waterfront nature of private property and even when the state artificially causes the avulsion. For support, the Court cited Martin v. Busch, a 1927 Florida Supreme Court case that held the state took title to dry land it created when it drained water from a lakebed.

Writing for the Court, Justice Scalia expressed sympathy for the plaintiffs, whose oceanfront property had been "deprived of its character (and value)" by the government-sponsored artificial avulsion. He characterized the outcome as counterintuitive and an "arguably odd result." However, because the state

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80. Id. at 1124–25.
81. Id. at 1121; see also Rice, supra note 57 ("The wording seemed tailored to encourage an appeal to the U.S. Supreme Court [based on judicial takings theory]."); Barnes, supra note 4 (noting the words appeared "carefully chosen to conform" with previous Supreme Court language defining when a state court decision could rise to the level of a judicial taking).
82. See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2600–01 (2010).
83. STBR Certiorari Petition, supra note 29, at 15.
84. Oral Argument Transcript, supra note 66, at 9, 41, 48.
85. Stop the Beach, 130 S. Ct. at 2612–13.
87. Stop the Beach, 130 S. Ct. at 2611.
88. Id. (citing Martin v. Busch, 112 So. 274 (Fla. 1927)).
89. Id. at 2612.
90. Id.
court's decision was consistent with background principles of state property law, all eight Justices agreed that the Florida Supreme Court had not taken any private property.91 "The Takings Clause only protects property rights as they are established under state law," Justice Scalia wrote, "not as they might have been established or ought to have been established."92

Although all eight Justices agreed that no taking occurred in the case, they divided sharply on the wisdom and viability of the underlying judicial takings doctrine. For the conservative wing of the Court, Justice Scalia authored a plurality opinion that unequivocally embraced the theory.93 He made brief textual and precedential arguments in support of recognizing a judicial takings doctrine94 but rested his opinion primarily on common sense, finding it "absurd to allow a [s]tate to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.”95 The plurality concluded that a court would commit a judicial taking if it eliminated or deprived a party of “an established property right,” such that there was no prior doubt about its existence.96

Justice Kennedy, in a concurrence joined by Justice Sotomayor, found it unnecessary to adopt the judicial takings doctrine because the Due Process Clause already limits a court’s ability to eliminate or alter private property rights.97 Until those due process protections prove inadequate to constrain the judiciary, Justice Kennedy believed it would be imprudent for the Court to "reach beyond the necessities of the case to announce a sweeping rule.”98 Writing for himself and Justice Ginsburg, Justice Breyer agreed that the

91. Id. at 2612–13.
92. Id. at 2612.
93. Id. at 2601–02 (plurality opinion); see also Echeverria, Different, supra note 49, at 476 (noting that, on the question of judicial takings, the plurality “comes down squarely in its favor”).
94. Stop the Beach, 130 S. Ct. at 2601–02 (plurality opinion) (“Our precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary.”). Justice Scalia cited PruneYard and Webb's Fabulous Pharmacies, but notably omitted prior Court precedent pointing the other way. Daniel W. Bromley, Scalia Agonistes: Takings Law Under the Florida Sun, 62 PLAN. & ENVTL. L., Sept. 2010, at 9, 10 (“Scalia draws comfort from earlier takings jurisprudence, but conveniently fails to mention cases that cut the other way. Artful citation is not novel, but it bears watching.”) (internal citations omitted). Even the Stop the Beach certiorari petition cited New Deal cases that "seem to contain language inconsistent with [judicial takings]." STBR Certiorari Petition, supra note 29, at 24. In his seminal article on the topic, Professor Thompson wrote: "Although one can cite opinions on both sides of the question, the most relevant Supreme Court decisions suggest that courts are absolutely free to make such changes in property rights." Thompson, supra note 26, at 1453.
95. Id. at 2615, 2617–18 (Kennedy, J. concurring) (asserting it is "not wise, from an institutional standpoint, to reach out and decide questions that have not been discussed at much length by courts and commentators").
plurality unwisely addressed constitutional questions "better left for another day."

He expressed concern that recognizing judicial takings would "open the federal court doors" to constitutional review of a large number of state property law cases, inappropriately inviting federal judges to shape matters of "significant state interest" and "considerable complexity."

I. Key Areas of Disagreement

Because it relied so heavily on common sense, the plurality did not spend much time making an affirmative case for judicial takings. Instead, Justice Scalia assumed a defensive posture and spilled more ink fending off counterarguments, seeking to discredit the "nonexistent or insignificant" practical concerns the concurring Justices worried "may perhaps stand in the way of recognizing a judicial taking." The following Parts highlight some key areas of disagreement found in the dueling opinions.

a. Adequacy of Due Process Protections

Echoing his own concurrence in Eastern Enterprises v. Apfel, Justice Kennedy argued that the Due Process Clause is a "more appropriate constitutional analysis" to limit a court's ability to alter established property rights because the Takings Clause implicitly recognizes a governmental power (eminent domain) before placing a limit on it (just compensation). Under the judicial takings theory, then, a state court decision eliminating established property rights would be "otherwise constitutional," so long as the state compensated aggrieved property owners. Justice Kennedy expressed concern that this might encourage some judges to act as if they had the power of eminent domain and thus "give more power to courts, not less." Citing Justice Kennedy's landmark Lawrence v. Texas opinion, Justice Scalia derisively suggested his colleague preferred due process to a takings analysis because due process is such a "wonderfully malleable concept." He also

99. Id. at 2618 (Breyer, J., concurring).
100. Id. at 2619 (Breyer, J., concurring).
101. Id. at 2607 (plurality opinion).
103. Stop the Beach, 130 S. Ct. at 2613-15 (Kennedy, J., concurring) (stating that “[t]he Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights” violates the Due Process Clause).
104. Id. at 2614 (Kennedy, J., concurring). By contrast, a state court decision that violated the Due Process Clause would presumably be unconstitutional either way. Cf. Matthew D. Zinn, Note, Ultra Vires Takings, 97 MICH. L. REV. 245, 281-83 (1998) (recommending due process as a preferred analysis for alleged "ultra vires" takings, where the state actor lacked authority to take the challenged action).
105. Stop the Beach, 130 S. Ct. at 2615-16 (Kennedy, J., concurring).
106. Id. at 2608 (plurality opinion) (citing Lawrence v. Texas, 539 U.S. 558, 562 (2003)) (suggesting the "great attraction" of substantive due process is that "it never means anything precise"). Justice Kennedy parried back that the Court's takings jurisprudence is far from a model of precision itself. Id. at 2615 (Kennedy, J., concurring).
dismissed the idea that judicial takings might empower courts to exercise eminent domain, countering that the only realistic incentive it would provide is "the incentive to get reversed, which . . . few judges value."  

b. Availability of Alternative Remedies

The question of proper remedies is related to Justice Kennedy's argument in favor of a due process analysis. Because the Takings Clause does not prohibit governmental action, he noted, a property owner who suffers a judicial taking may only be "entitled to damages, not equitable relief." By contrast, the Court would invalidate a state court decision that violated the Due Process Clause without regard to damages. Justice Scalia, however, saw "no reason" why compensation needed to be the exclusive remedy. He suggested that if the Court had found that the Florida Supreme Court effected an uncompensated taking in Stop the Beach, it would have reversed the state court decision rather than validated the taking by ordering the state to pay compensation. But Justice Kennedy countered that even if the Court remanded a judicial takings case and the state court rescinded its original decision, the state would still have to pay for the temporary taking that occurred in the interim under existing takings precedent.

c. Applicability of Ripeness Limitations

Alongside remedies, Justice Kennedy identified ripeness as a second practical consideration the Court must address before recognizing a judicial taking. He deemed it "unclear" how a plaintiff would raise a proper judicial takings claim, and surmised that a party would have to file a second, separate suit challenging the outcome of the first case as a taking. Justice Scalia disagreed with Justice Kennedy's ripeness analysis and suggested it "hardly presents an awe-inspiring prospect." He believed the original plaintiff could petition the Court to review a state supreme court decision, and that a nonparty whose property interests were affected by the state court decision could file a collateral attack in lower federal court.

107. Id. at 2607 (plurality opinion).
108. Id. at 2617 (Kennedy, J., concurring).
109. See Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 543 (2005) ("[I]f a government action is found to . . . violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.").
110. Stop the Beach, 130 S. Ct. at 2607 (plurality opinion) (noting that mandated compensation is "even rare for a legislative or executive taking").
111. Id. (plurality opinion).
112. Id. at 2617 (Kennedy, J., concurring) (citing First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304, 321 (1987)).
113. Stop the Beach, 130 S. Ct. at 2617 (Kennedy, J., concurring).
114. Id. at 2607 (plurality opinion).
115. Id. at 2609–10 (plurality opinion).
The Court’s unanimous decision allowed Florida authorities to continue their beach renourishment program, which is significant because the Florida coastline will be vulnerable to increased erosion from sea level rise and storm surge in the coming decades. To the extent the Court relied on common law property principles, the decision also may help affirm beach renourishment programs in other coastal states. Indeed, only three months after the Court issued its Stop the Beach decision, the New Jersey Supreme Court applied the same avulsion/accretion distinction and upheld a city-sponsored beach renourishment project against a takings challenge.

More importantly, however, the Court fell only one vote shy of establishing the long-debated judicial takings doctrine, which is still effectively in play because no Justice rejected the concept outright. With four strong votes in favor of the doctrine, property rights advocates are already peppering the Court with judicial takings certiorari petitions, some of which also include due process claims in an attempt to catch the eyes of Justices Kennedy and Sotomayor.

The unanimous holding in Stop the Beach raises the initial question why the Court granted certiorari on a claim where eight Justices eventually agreed there was no taking. One likely reason is that the Florida Supreme Court decision and the government attorneys’ opposition to certiorari both failed to cite the Martin v. Busch case that ultimately “provide[d] the greatest support”...

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117. See Christie, supra note 63, at 26, 38.

118. See, e.g., Wylie Donald, Op-Ed., Who Owns the Beach? A Fla. Case Suggests a Framework for Md. and Other States to Combat Rising Sea Levels, BALT. SUN, June 24, 2010, at 17A (suggesting Stop the Beach “could have a significant impact on how Maryland and other states respond to the threat of rising sea levels”); Timothy M. Mulvaney, Decision in Florida Case Muddles Law on Takings, Hous. CHRON., (June 22, 2010, 8:19 PM), http://www.chron.com/disp/story.mpl/editorial/outlook/7074595.html (suggesting Stop the Beach “has paved the way for more than $100 million worth of planned shore protection projects along Texas’ Gulf Coast”). However, because the Court’s analysis relied on Florida property law, and in particular, the 1927 Martin case, its precedential weight might be limited in other states. Cf. Michael C. Blumm & Elizabeth B. Dawson, The Florida Beach Case and the Road to Judicial Takings, 35 WM. & MARY ENVTL. L. & POL’Y REV. 713, 759 n.358 (2011) (discussing other states that apply different rules regarding avulsion).


120. See Donna R. Christie, Stop the Beach Renourishment v. Florida Department of Environmental Protection: Much Ado About Nothing?, 40 STETSON L. REV. 495, 506 (2011) ("The door is viewed as definitely open for the development of the judicial takings concept in the right case.").

121. See, e.g., Petition for Writ of Certiorari at 17–18, Maunalua Bay Beach Ohana 28 v. Hawaii, No. 10-331, 2010 WL 3518678, pet’n denied, 131 S. Ct. 529 (2010) (“Whether viewed through the plurality’s lens of the takings clause or Justice Kennedy’s view of the due process clause, the Hawai’i court has done exactly what Beach Renourishment forbids.”).
for the state court’s holding. Indeed, after the \textit{Martin} case arose in the Solicitor General’s amicus brief and then again at oral arguments, some commentators predicted the Court might dismiss \textit{Stop the Beach} as improvidently granted. It is possible that the dismissal did not occur simply because Justice Stevens’s recusal prevented the fifth vote needed to do so. Instead, the conservative plurality apparently decided that even if they could not win a majority for the judicial takings doctrine, it was worth getting their views in print to spur more literature and litigation on the issue.

All told, it seems unlikely that the judicial takings doctrine will command a supportive majority of the Court any time soon. Justice Kennedy, typically the swing vote in takings and other cases, seemed committed to his due process analysis in the face of a relatively harsh Scalia critique. Indeed, Justice Scalia’s acerbic tone indicates that he may have abandoned the prospect of convincing a fifth colleague to join the judicial takings party. Moreover, then-Solicitor General Kagan, who has since replaced Justice Stevens on the bench, signed an amicus brief in \textit{Stop the Beach} listing several reasons why the

\begin{footnotes}
\begin{enumerate}
\item[122.] Oral Argument Transcript, \textit{supra} note 66, at 56–57 (Justice Alito needled Deputy Solicitor General Edwin Kneedler on this omission during oral arguments); \textit{see also id.} at 27 (“Justice Scalia: Isn’t that weird? Why didn’t they cite it?”).
\item[124.] Although Justice Stevens’s views on \textit{Stop the Beach} are the subject of pure speculation, his overall vision for the Takings Clause is relatively well documented and decidedly narrower than Justice Scalia’s. \textit{See generally} Alan Weinstein, \textit{Justice John Paul Stevens—His Take on Takings, 62 PLAN. & ENVTL. L., Oct. 2010, at 3. His prior dissents in \textit{First English} and \textit{Lucas} are also instructive on how Justice Stevens would have viewed the plurality’s attempt to create a judicial takings doctrine in \textit{Stop the Beach}. \textit{See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1069 (1992) (Stevens, J., dissenting)} (“Arresting the development of the common law is not only a departure from our prior decisions, it is also profoundly unwise.”); \textit{First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304, 341 (1987) (Stevens, J., dissenting)} (“It would be the better part of valor simply to decide the case at hand instead of igniting the kind of litigation explosion that this decision will undoubtedly touch off.”).
\item[125.] So far, at least one lower state court has disregarded the \textit{Stop the Beach} plurality opinion as “without precedential authority.” Sagarin v. City of Bloomington, 932 N.E.2d 739, 744 n.2 (Ind. Ct. App. 2010) (rejecting citation to \textit{Stop the Beach} as support of the proposition that compensation is not the sole remedy for inverse condemnation).
\item[126.] \textit{See} Echeverria, \textit{Green Light, supra} note 116, at 5; \textit{see also} Liptak, \textit{supra} note 8 (noting that “Justice Scalia used language tart even by his standards to deride” the concurring Justices).
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Court should not recognize judicial takings. Justice Kagan's views as a Justice may diverge from her views as an advocate, but it appears unlikely that she will emerge as a champion for the doctrine.

The Court recently granted certiorari on a case about navigability that raised judicial takings claims within the petition. However, it is unclear at this stage whether the Court will tackle those claims or rely solely on others in its review. Until the Court revisits the issue, aggrieved property owners will continue to file certiorari petitions and likely bring judicial takings claims in lower state and federal courts. This Note aims to provide guidance to lower courts on threshold procedural questions for such claims. In doing so, the Note also shows that the judicial takings concept is fundamentally at odds with federalism principles behind the Court's special ripeness and preclusion rules for takings claims. Thus, examining the ripeness implications of judicial takings may shed some light on both the practicalities and overall wisdom of recognizing such a doctrine.

III. JUDICIAL TAKINGS AND RIPENESS

In Williamson County Regional Planning Commission v. Hamilton Bank (Williamson County) and San Remo Hotel, L.P. v. City and County of San Francisco (San Remo), the Supreme Court developed special ripeness and preclusion rules that effectively relegated all federal takings claims to state court. The rules are unique within the federal court system and stand out as

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128. USG Amicus Brief, supra note 5, at 9, 11-18 (describing "numerous jurisprudential and practical problems with recognizing [judicial taking] claims").
129. See Echeverria, Green Light, supra note 116, at 5.
131. Although the petitioners and amici raise judicial takings claims, the Court might simply review the Montana Supreme Court decision for its purportedly erroneous interpretation or application of federal navigability law. See Timothy Mulvaney, Mulvaney’s Take on SCOTUS Cert Grant for PPL Montana v. State of Montana, LAND USE PROF BLOG (June 22, 2011), http://lawprofessors.typepad.com/land_use/2011/06/mulvaney-s-take-on-scotus-cert-grant-for-ppl-montana-v-state-of-montana.html ("It remains to be seen whether the U.S. Supreme Court will address the judicial takings question when it takes up PPL Montana, LLC v. State of Montana in the coming year."), Notably, the Solicitor General did not address the judicial takings argument in its amicus brief opposing certiorari. Brief for the United States as Amicus Curiae, PPL Mont., LLC v. Montana, No. 10-218, 2011 WL 1979661. However, the petitioner’s supplemental brief still referred to the "judicial taking effected by the decision below." Supplemental Brief of Petitioner, at 1, PPL Mont., LLC v. Montana, No. 10-218, 2011 WL 2135023.
132. See, e.g., Echeverria, Different, supra note 49, at 483 (suggesting that the difficulty of applying Williamson County to judicial takings claims argues "strongly for jettisoning the judicial takings idea").
odd exceptions to other important jurisdictional principles.134 Counterintuitively, these rules may have helped force the judicial takings question. Advocates of the judicial takings doctrine complain that state courts abuse the Lucas "background principles" exception to avoid finding takings liability,135 and there is at least some anecdotal evidence that state courts' reliance on such takings defenses has increased in recent years.136 To the extent that such a problem exists, the Court's ripeness and preclusion rules may be at least partially complicit. By corraling all takings cases into state courts and effectively insulating them from federal review, Williamson County and San Remo may have unwittingly enabled or encouraged creative reinterpretation of background state property law.137 This might explain why, after denying dozens of certiorari petitions raising judicial takings claims, the Court finally granted certiorari in Stop the Beach only a few years after the preclusive bite of the state litigation requirement became clear.138

Irrespective of the role ripeness and preclusion played in forcing the judicial takings question, they present a threshold justiciability hurdle for judicial takings because they will determine when and how such claims may proceed. Indeed, the only federal appellate court opinion that ever recognized a judicial taking, Robinson v. Ariyoshi, was later vacated and dismissed on ripeness grounds in light of Williamson County.139 Moreover, the Court's


135. Justice Scalia made this point in his Cannon Beach dissent, only two years after Lucas. Stevens v. City of Cannon Beach, 510 U.S. 1207, 1211 (1994) (denial of writ of certiorari) (Scalia, J., dissenting) ("Our opinion in Lucas, for example, would be a nullity if anything that a state court chooses to denominate "background law"—regardless of whether it is really such—could eliminate property rights."). See supra text accompanying notes 21–22, 50 for a discussion of Lucas and the background principles exception.

136. See Michael C. Blumm & Lucas Ritchie, Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses, 29 HARV. ENVTL. L. REV. 321, 322–23 (2007) ("[P]roliferation of background principle defenses in the wake of Lucas shows no sign of subsiding and may be practicably beyond the ability of the Supreme Court to curtail, since so many of these claims are a function of state courts interpreting state law.").

137. See PLF Amicus Certiorari Petition, supra note 49, at 12 ("[I]n the absence of federal review, state courts are free to fashion whatever rules they choose without being cabined by constitutional boundaries.").

138. Indeed, the Stop the Beach plaintiffs pitched their judicial takings certiorari petition as a way to close the "ever-increasing problem" of the background principles loophole, about which state courts are becoming "more brash." STBR Certiorari Petition, supra note 29, at 31, 33; see also PLF Amicus Certiorari Petition, supra note 49, at 10 (quoting Sarratt, supra note 5, at 1489, to lament the so-called Lucas "loophole").

special ripeness and preclusion rules also raise theoretical problems for the judicial takings doctrine, because their underlying federalism principles seem inherently at odds with intrusive federal review of state court property law decisions.\footnote{See infra Part III.C.}

The Justices' competing opinions in \textit{Stop the Beach} exhibit very different—and perhaps underdeveloped—views on the ripeness and other procedural aspects of judicial takings. Both supporters and opponents of the judicial takings theory criticized the plurality's treatment of ripeness as "cavalier," and others warn that the subject is "even more complex" than Justice Kennedy's concurrence makes it out to be.\footnote{See Echeverria, \textit{Green Light}, supra note 116, at 4; Blaesser, \textit{A Doctrine in Need}, supra note 16, at 14; Barros, \textit{Complexities}, supra note 139, at 943.} At first glimpse, it is unclear whether the Court's confusion is a symptom of differing interpretations of the ripeness requirements\footnote{See, e.g., \textit{Asociación De Subscripción Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza}, 484 F.3d 1, 18 n.21 (1st Cir. 2007) ("As our discussion and the difference of opinion among our own panel members indicate, there is substantial tension among the various doctrines at issue in this [takings] context—ripeness, exhaustion and preclusion—and further guidance from the Supreme Court seems necessary to resolve the uncertainties.").} or reflects problems inherent in the judicial takings concept. The following Parts attempt to diagnose the dilemma by untangling the Court's ripeness discussion and providing additional analysis. Ultimately, this Note prescribes an approach that would limit judicial takings claims to state courts and certiorari petitions, at least until the Court revisits \textit{Williamson County}.

\textbf{A. Background: The Takings-Ripeness Catch-22}

Ripeness is a federal justiciability doctrine with both constitutional and prudential dimensions.\footnote{See \textit{Reno v. Catholic Soc. Servs., Inc.}, 509 U.S. 43, 57 n.18 (1993).} It refers to a dispute's readiness for adjudication: a case must be sufficiently well developed and adversarial before it is "ripe" for judicial review.\footnote{See \textit{Texas v. United States}, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (internal quotation marks omitted).} The basic rationale of the doctrine is to prevent federal courts from adjudicating premature, unnecessary, or abstract disagreements.\footnote{See \textit{Abbott Labs. v. Gardner}, 387 U.S. 136, 148 (1967); \textit{United Pub. Workers of Am. v. Mitchell}, 330 U.S. 75, 90 (1947) (holding that ripeness ensures a case poses an "actual interference," not a "hypothetical threat").}

In \textit{Williamson County}, the Supreme Court created two special ripeness requirements that a property owner must satisfy before an as-applied regulatory takings claim is ripe for federal court.\footnote{\textit{Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City}, 473 U.S. 172, 186, 194 (1985).} First, there must be a final decision
from the governmental entity charged with implementing the regulation;\textsuperscript{147} second, the claimant must seek compensation through any available state procedures, such as an inverse condemnation suit in state court.\textsuperscript{148} The two ripeness hurdles are commonly referred to as the "final decision" and "state litigation" prongs of \textit{Williamson County}.\textsuperscript{149} The Court justified the second prong under the rationale that the Fifth Amendment only proscribes the taking of property without compensation; thus, a property owner could not claim a federal constitutional violation until the state court system actually denied such compensation.\textsuperscript{150} Questions quickly arose about the preclusive effect of a state court decision under the second prong, however, and lower federal courts split on whether a plaintiff could reserve a takings claim for later adjudication in federal court in order to avoid such an effect.\textsuperscript{151}

The Supreme Court provided an answer to the Circuit split in \textit{San Remo}, where the plaintiff, pursuant to a Ninth Circuit suggestion, expressly reserved its federal takings claim for future resolution while pursuing its initial suit in state court.\textsuperscript{152} After the state court ruled against the plaintiff on its state law takings claim, however, the Ninth Circuit held and the Supreme Court affirmed that collateral estoppel barred lower federal courts from hearing the reserved claim.\textsuperscript{153} The Court's direct holding in \textit{San Remo} only addressed issue preclusion, but the practical effect applied to claims preclusion as well.\textsuperscript{154} The result presented a catch-22: a federal regulatory takings claim is not ripe until the plaintiff litigates in state court; but, once the plaintiff brings suit in state

\textsuperscript{147} \textit{Id.} at 186.

\textsuperscript{148} \textit{Id.} at 194–96.


\textsuperscript{150} \textit{Williamson County}, 473 U.S. at 194–95.

\textsuperscript{151} \textit{Compare} Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 130 (2d Cir. 2003) ("[W]e deem it appropriate to permit parties like Santini, who litigate state-law takings claims in state court involuntarily, to reserve their federal takings claims for determination by a federal court. It would be both ironic and unfair if the very procedure that the Supreme Court required Santini to follow before bringing a Fifth Amendment takings claim—a state-court inverse condemnation action—also precluded Santini from ever bringing a Fifth Amendment takings claim."). with Dodd v. Hood River Cnty., 136 F.3d 1219, 1227 (9th Cir. 1998) ("Nor does the Dodds' previous reservation of this federal takings claim . . . prevent operation of the issue preclusion doctrine. . . . To the extent that they fully litigated a necessary issue in the course of the state proceedings that is identical to an issue before the federal court, the Dodds are precluded from taking a second bite of the apple.").

\textsuperscript{152} \textit{San Remo Hotel L.P. v. City & Cnty. of San Francisco}, 41 P.3d 87, 91 n.1 (2002) (\textit{San Remo II}) (noting that plaintiffs "explicitly reserved their federal causes of action"); \textit{San Remo I}, 145 F.3d 1095, 1106 n.7 (9th Cir. 1998) ("If [the plaintiff] wishes to retain his right to return to federal court for adjudication of his federal claim, he must make an appropriate reservation in state court.").

\textsuperscript{153} \textit{San Remo IV}, 545 U.S. 323, 333 (2005), \textit{aff'd} \textit{San Remo III}, 364 F.3d 1088 (9th Cir. 2004) (\textit{San Remo III}).

\textsuperscript{154} See William A. Fletcher, Kelo, Lingle, and \textit{San Remo Hotel: Takings Law Now Belongs to the States}, 46 \textit{SANTA CLARA L. REV.} 767, 774–75 (2006); Stewart E. Sterk, \textit{The Demise of Federal Takings Litigation}, 48 \textit{WM. & MARY L. REV.} 251, 254, 280 (2006) [hereinafter Sterk, \textit{Demise}]. For recent applications of this rule, see Adam Bros. Farming, Inc. v. County of Santa Barbara, 604 F.3d 1142, 1149–50 (9th Cir. 2010); Knutson v. City of Fargo, 600 F.3d 992, 996–99 (8th Cir. 2010).
court, collateral estoppel and res judicata prohibit raising the takings claim later in federal court. Thus, taken together, *Williamson County* and *San Remo* relegate virtually all federal takings claims to state courts.

The state litigation requirement has faced heavy fire from critics, who describe it as “deceptive,” “inherently nonsensical,” “draconian,” and a “Kafkaesque maze,” among other unflattering things. Several commentators have argued that it is not actually a ripeness rule because the claim never ripens for federal court. And others, including Justice Kennedy, have characterized the state litigation requirement as mere dicta because the Court based its *Williamson County* ruling solely on the “final decision” prong and thus did not need to address the second prong.

Citing broad unhappiness with the rule, several lawmakers have proposed legislation to overrule the state litigation requirement. However, Congress’s
ability to revise the rule would turn on whether it is constitutional or prudential.\textsuperscript{161} Over the years, there has been some uncertainty about the prudential or constitutional nature of the \textit{Williamson County} ripeness rules.\textsuperscript{162} The Court provided a definitive answer in \textit{Stop the Beach} when all eight Justices agreed that the state litigation requirement was not jurisdictional, and therefore the city and county waived their ripeness defense when they failed to raise it in their opposition to the certiorari petition.\textsuperscript{163} The unanimous prudential declaration is significant beyond the potential for legislative overruling, because government takings defendants may now unintentionally waive their ripeness defense if they do not raise it in a timely manner.

Moreover, the Court has indicated that it too might be willing to reconsider the state litigation requirement. In a \textit{San Remo} concurrence, four Justices signaled their desire to revisit the rule in an "appropriate case."\textsuperscript{164} Chief Justice Rehnquist acknowledged that he signed onto \textit{Williamson County} twenty years earlier, but explained that "further reflection and experience" led him to believe he "may have been mistaken."\textsuperscript{165} Justice Kennedy cited Rehnquist's \textit{San Remo} concurrence favorably in his own \textit{Stop the Beach} opinion, anticipating the day when "\textit{Williamson County} is reconsidered."\textsuperscript{166} But until that day, Justice Kennedy noted, judicial takings claimants must comply with the state litigation requirement; it is a practical consideration that courts must address "\textit{before recognizing judicial takings}."\textsuperscript{167}

\textsuperscript{161} Constitutional rules inhere as Article III jurisdictional limitations, and thus are non-waivable by parties, inalterable by Congress, and must be raised sua sponte by a reviewing federal court. By contrast, prudential limitations are subject to legislative overruling and may be waived or forfeited by a party who fails to raise the issue before a court. See Guggenheim v. City of Goleta, 582 F.3d 996, 1009 (9th Cir. 2009), \textit{vacated on other grounds}, 638 F.3d 1111 (9th Cir. 2010) (en banc).

\textsuperscript{162} Compare Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1013 (1992) (Scalia, J., majority op.) ("[W]e do not think it prudent to apply that prudential [ripeness] requirement here."); with \textit{id.} at 1041–43 (Blackmun, J., dissenting) (arguing that the ripeness requirements were jurisdictional). See also Kidalov & Seamon, supra note 160, at 26; Keller, supra note 149, at 209. The Ninth Circuit, for example, has analyzed ripeness in the takings context as both prudential and constitutional. McClung v. City of Sumner, 548 F.3d 1219, 1224 (9th Cir. 2008) (noting conflict among Ninth Circuit cases addressing the issue).

\textsuperscript{163} \textit{Stop the Beach}, 130 S. Ct. at 2610.

\textsuperscript{164} \textit{San Remo IV}, 545 U.S. 323, 352 (2005) (Rehnquist, C.J., concurring) (joined by Kennedy, Thomas, O'Connor, JJ.); see also Breemer, Check Out, supra note 156, at 300 ("At oral argument, San Remo's counsel [noted] that the hotel had not asked the Court to reconsider \textit{Williamson County}, to which Justice O'Connor replied: 'Maybe you should have.'").

\textsuperscript{165} \textit{San Remo IV}, 545 U.S. at 348, 352 (Rehnquist, C.J., concurring) ("[T]he justifications for [the] state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic."); \textit{id.} at 349 (suggesting that "[n]either constitutional [n]or prudential principles" justify the requirement).

\textsuperscript{166} \textit{Stop the Beach}, 130 S. Ct. at 2618 (Kennedy, J., concurring).

\textsuperscript{167} \textit{id.} at 2616, 2618 (Kennedy, J., concurring) (emphasis added).
B. Practical Analysis: When Is a Judicial Takings Claim Ripe?

Despite the fundamental importance of ripeness to the judicial takings theory, neither commentators nor courts have adequately examined the relationship between the two doctrines. Ripeness received very little briefing in Stop the Beach, and never arose during oral arguments. A close reading of the Court’s competing opinions reveals that the Justices have directly opposing views on ripeness and other procedural implications of judicial takings. One supporter of the judicial takings theory expressed discontent that Justice Scalia largely ignored the ripeness hurdles that “greatly diminish[] the likelihood that a judicial takings claim will ever get to federal court.” Hoping to provide some guidance to lower courts amidst this confusion, the following Parts examine the potential justiciability of judicial takings claims under various procedural postures.

1. Certiorari Petition by Party

The Justices in Stop the Beach offered contradictory views on the ripeness of a certiorari petition that raised, for the first time, an alleged judicial taking by a state supreme court. Justice Scalia believed that Williamson County would allow a plaintiff to petition the Court to review the state court decision as a taking, and Justice Breyer interpreted the plurality’s analysis to imply that a party could raise her judicial taking claim for the first time in a certiorari petition. But Justice Kennedy found it “doubtful” that a party could raise such a claim because the issue would not have been litigated below. Indeed, there is reason to believe that, if a respondent properly objected, the Court might decide that a judicial taking claim raised for the first time in a

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169. For what little attention it did receive, see Brief for Respondents Walton County and City of Destin at 44–45 & n.13, Stop the Beach, 130 S. Ct. 2592 (No. 08-1151); Reply Brief for Petitioner at 26–29, Stop the Beach, 130 S. Ct. 2592 (No. 08-1151) [hereinafter Reply Brief]; USG Amicus Brief, supra note 5, at 20–21. Because the ripeness argument did not appear in the briefs opposing the certiorari petition, the Court deemed it waived. Stop the Beach, 130 S. Ct. at 2610.


172. By holding that the government respondents waived their ripeness defense, the Court left open the question even while entertaining a judicial takings claim raised in a certiorari petition. Stop the Beach, 130 S. Ct. at 2610 (plurality opinion). The Court also entertained a judicial takings claim raised in a certiorari petition in PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980), but that case predated the Williamson County ripeness requirements by five years.

173. Id. at 2609 (plurality opinion).

174. Id. at 2618 (Breyer, J., concurring).

175. Id. at 2617 (Kennedy, J., concurring).
certiorari petition is unripe.176 For example, after the Supreme Court vacated the Robinson judicial takings decision in light of Williamson County, the Ninth Circuit deemed the claim unripe because the state had not yet implemented the new property rule on the ground.177 Even Justice Scalia, in his dissent from denial of certiorari in Cannon Beach, acknowledged that ripeness posed an obstacle to judicial review because the takings claim had not been adequately developed below.178

In Stop the Beach, the city and county overlooked ripeness in their opposition to certiorari, but argued in their merits brief that the judicial takings claim was unripe because the plaintiff never separately sought compensation in state court for the alleged judicial taking.179 The Solicitor General made a similar argument in its amicus brief, and also noted that the lower courts had not considered the judicial takings claim because the petitioner simply recast its legislative taking claim after losing in state court.180 Justice Ginsburg raised this point in the very first question at oral arguments, deeming it "kind of strange" for petitioners to switch their target on appeal and argue that the judiciary was somehow complicit in the legislative taking.181

Chief Justice Roberts later countered that the petitioner could not have raised its judicial taking claim any earlier because it could not have predicted the state court would change the law.182 And the petitioner argued that a party need only raise a judicial taking "at the first reasonable opportunity," namely in a request for rehearing at the state supreme court before seeking certiorari.183 Ultimately, the Court noted that although it ordinarily does not consider an issue that parties only raised for the first time in a petition for rehearing before a state court, it does make exceptions where the parties claim the state court decision itself violated federal law.184

177. See Robinson I, 887 F.2d 215, 219 (9th Cir. 1989) (deeming the judicial takings claim unripe under the Williamson County final decision prong).
178. Stevens v. City of Cannon Beach, 510 U.S. 1207, 1213 (1994) (denial of writ of certiorari) (Scalia, J., dissenting); accord Bederman, Resurrection, supra note 50, at 1445 (noting that Justices Scalia and O’Connor “had to acknowledge (as the petitioners in the case did) that the . . . takings claim was not really ripe for review”).
179. Brief for Respondents Walton County and City of Destin, supra note 196, at 44–45 & n.13.
180. USG Amicus Brief, supra note 5, at 10, 20–21. Notably, the Court vacated and remanded Robinson v. Ariyoshi on ripeness grounds after the Solicitor General raised the argument in an amicus brief. Ariyoshi v. Robinson (Robinson III), 477 U.S. 902 (1986); Robinson v. Ariyoshi (Robinson IV), 676 F. Supp. 1002, 1004 (D. Haw. 1987) (concluding that “it was the brief of the Solicitor General and his uncritical assumption of ‘unripeness’” that triggered the Court’s remand), overruled by 887 F.2d 215 (9th Cir. 1989).
182. Id. at 51.
183. Reply Brief, supra note 169, at 27.
It therefore seems necessary, though not sufficient, that a losing party file for rehearing at the state supreme court before petitioning for certiorari on a judicial takings claim. Otherwise, in violation of Williamson County, the party never would have sought compensation through state procedures for the alleged judicial takings. The petitioner in Stop the Beach all but conceded that an application for rehearing was a procedural prerequisite to a judicial takings certiorari petition, and at least one recent respondent has distinguished its case on exactly this point in its opposition to certiorari. That said, even if petitioners seek rehearing in state court, respondents should raise Williamson County ripeness objections in their oppositions to certiorari to avoid waiving the defense as the local governments did in Stop the Beach.

The Court should also consider applying a more restrictive state litigation rule that would require an initial plaintiff to plead judicial takings as an alternative claim in the original state court suit. Requiring parties to argue judicial takings in the alternative would result in a more complete factual record for future certiorari review, thereby avoiding the problem raised by the Solicitor General in Stop the Beach and acknowledged by Justice Scalia in Cannon Beach. Such a record would include all the relevant state precedent regarding whether a property right was “established,” as well as any additional facts pertaining to a traditional takings analysis—diminution in value, history of property ownership, investment-backed expectations, and the like—that might otherwise be absent in a judicial takings claim raised for the first time in a certiorari petition. Moreover, requiring parties to develop their

185. Reply Brief, supra note 169, at 27 (citing three Supreme Court cases where constitutional claims were first raised in petitions for rehearing at the state court).
186. Brief of Respondent, SEECO, Inc., in Opposition to Petition for a Writ of Certiorari at 10–11, Selrahc Ltd. P’ship v. SEECO, Inc., No. 10–69 (U.S. Aug. 12, 2010) (noting that petitioners never sought rehearing, and thus “[u]nhile the Florida Supreme Court in Stop the Beach, the Arkansas Supreme Court was never given the opportunity to address” whether the lower courts effected a judicial taking).
187. The plaintiff would claim in effect: “We win on our legislative taking claim, but if not, the state court itself will have committed a taking.” Chief Justice Roberts overlooked this possibility when he suggested the Stop the Beach plaintiff could not have raised its judicial taking claim any earlier. Oral Argument Transcript, supra note 66, at 51.
188. See USG Amicus Brief, supra note 5, at 17 (“[I]f judicial takings] claims were first raised before this Court, there would be little record evidence to evaluate whether a taking occurred.”); Stevens v. City of Cannon Beach, 510 U.S. 1207, 1213 (1994) (denial of writ of certiorari) (Scalia, J., dissenting) describing the lack of factual record as an obstacle to reviewing petitioner’s judicial takings claim).
189. For example, if the Florida Supreme Court had faced a judicial taking claim in the alternative in Stop the Beach, it might not have overlooked Martin v. Busch.
190. The plurality does not indicate whether its proposed standard of eliminating “an established property right” is simply a threshold test that then triggers a traditional takings inquiry, or whether it also determines, per se, when compensation is due. See Robert H. Thomas et al., Of Woodchucks and Prune Yards: A View of Judicial Takings from the Trenches, 35 Vt. L. Rev. 437, 440 (2010) (suggesting the plurality attempted to create a new, third per se taking test); Echeverria, Different, supra note 49, at 476–77 & n.11 (suggesting the “best reading” of the plurality opinion is that it created a per se test, but noting the existence of “some confusing counter-evidence”). However, to remain consistent with the “fairness and justice” principle behind the Takings Clause, it seems that a change in property law would
judicial takings claims below would prohibit them from sitting on their hands and waiting for a "second bite at the apple," a litigation strategy that imposes negative externalities on the courts and other parties.\textsuperscript{191}

2. \textit{Subsequent Suits}

a. \textit{By Party to Initial Suit}

The Justices in \textit{Stop the Beach} also disagreed about the viability of a second, subsequent judicial takings suit by a plaintiff who lost in an initial state court proceeding. Justice Scalia believed that, if the Supreme Court denied certiorari, res judicata would bar the petitioner from launching another suit challenging the state court decision.\textsuperscript{192} Because Justice Kennedy questioned whether a party could raise the judicial takings claim on certiorari, however, he suggested that a claimant would likely have to file a separate suit arguing that the outcome of the first case changed property law and resulted in a taking.\textsuperscript{193} He argued res judicata would not apply because the party would not have known that property rights were eliminated until after the first case ended, and thus could not have raised the claim any earlier.\textsuperscript{194}

Whether collateral estoppel or res judicata applies to a subsequent judicial takings claim may turn on the particulars of the case. In instances like \textit{Stop the Beach}, where the plaintiff simply recasts its traditional takings claim as a judicial takings claim after losing in state court, a subsequent suit might be precluded because the plaintiff is essentially litigating the same underlying dispute. In fact, the petitioner in \textit{Stop the Beach} assumed that collateral estoppel would bar a subsequent suit because its takings claim was "functionally identical" to the one argued below.\textsuperscript{195} Similarly, one commentator has argued that the Robinson judicial takings case never should
have been allowed to proceed as a subsequent suit because it was “an improper attempt to get a second hearing on the issue.”

Moreover, it is likely that a plaintiff could have raised a judicial takings claim earlier, contrary to Justice Kennedy’s assertion. First, the losing party could have sought rehearing in the state supreme court; the failure to do so might result in claim preclusion because the plaintiff had an opportunity to raise her judicial takings claim and did not. Second, as discussed above, the plaintiff could have also pleaded her judicial takings claim in the alternative. If the state supreme court’s *sua sponte* change to property law was so unpredictable and unexpected that a reasonable plaintiff would not have thought to argue in the alternative, the plaintiff would likely have a valid procedural due process claim for lack of an opportunity to be heard. Thus, as Justice Kennedy suggested elsewhere in his concurrence, there would be no need to recognize a separate judicial takings claim.

b. Collateral Attack by Nonparty to Initial Suit

Justice Scalia suggested that a nonparty whose property interests were affected by the original suit could file a collateral attack to challenge the state court decision as a judicial taking. Justice Kennedy never addressed the question, but Justice Breyer commented on the oddity of the plurality’s conclusion that all those affected by a state court property law decision could raise a subsequent takings claim except for the losing party, who could only petition for certiorari. Justice Breyer also expressed concern that, because state court property law decisions often affect so many people, allowing collateral attacks might invite thousands of new takings claims each year.

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196. Martinez, supra note 176, at 343.
197. If she seeks rehearing and loses, collateral estoppel might preclude a subsequent suit. *But see* Robinson I, 441 F. Supp. 559, 564 (D. Haw. 1977) (proceeding in federal court, without a collateral estoppel analysis, even after landowners sought rehearing and lost before the Hawaii Supreme Court), aff’d in relevant part, 753 F.2d 1468 (9th Cir. 1985), vacated, 477 U.S. 902 (1986).
199. *Stop the Beach*, 130 S. Ct. at 2614 (Kennedy, J., concurring) (“The Due Process Clause, in both its substantive and procedural aspects, is a central limitation on the exercise of judicial power.”) (emphasis added); see also E. Brantley Webb, Note, *How to Review State Court Determinations of State Law Antecedent to Federal Rights*, 120 YALE L.J. 1192, 1241–48 (2011) (recommending procedural due process claims as a preferable alternative to judicial takings).
200. Id. at 2609–10 (plurality opinion).
201. Id. at 2618 (Breyer, J., concurring).
202. *See, e.g.*, Stevens v. City of Cannon Beach, 510 U.S. 1207, 1212 (1994) (denial of writ of certiorari) (Scalia, J., dissenting) (“The judicial takings claim is serious in the sense that the landgrab (if there is one) may run the entire length of the Oregon coast.”).
203. *Stop the Beach*, 130 S. Ct. at 2618–19 (Breyer, J., concurring).
Certainly, the prospect of collateral attacks poses a difficult problem for the judicial takings theory.\(^{204}\) The ripeness of a collateral attack might turn on the doctrinal judicial standard.\(^{205}\) On the one hand, if it is a per se taking whenever the court eliminates an established property right—regardless of its as-applied effect to the plaintiff’s property in question—then a collateral attack by a similarly situated property owner might be akin to a facial regulatory takings challenge that ripens immediately.\(^{206}\) On the other hand, if a judicial taking claim depends in part on the specific effect that the property rule has on a landowner, a collateral plaintiff likely must wait until the state applies or enforces that rule against her land before challenging it.\(^{207}\) Thus, again, a procedural due process claim—for lack of an opportunity to be heard—might be a better route for a collateral attack because it would not face the same ripeness hurdles.\(^{208}\) In either case, res judicata would only preclude the nonparty’s suit in narrow circumstances where the original plaintiff effectively acted as an agent or proxy.\(^{209}\)

c. **Proper Forum for Subsequent Suits**

Exhibiting even more confusion about the ripeness implications of the judicial takings theory, Justices Kennedy and Scalia also disagreed about the proper forum for subsequent judicial takings claims by either a party or nonparty to the original suit. Justice Kennedy stated that under *Williamson*
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County, litigants would have to press most of their judicial takings claims before state courts. But Justice Scalia suggested that nonparties would be able to bring suit in federal court, and Justice Breyer read the plurality as "open[ing] the federal court doors" to judicial takings claimants.

i. Likely Limited to State Courts

Most commentators addressing the question agree with Justice Kennedy that Williamson County would require any subsequent judicial takings claim to proceed in state and not in federal court. One practitioner who filed an amicus brief in favor of the Stop the Beach petitioners later acknowledged there is "little reason" to believe that the Court's ripeness rules would allow judicial takings plaintiffs to litigate in federal courts. In fact, Justice Kennedy in his Stop the Beach concurrence blamed Williamson County for preventing federal courts from weighing in on the judicial takings concept. If Justice Kennedy is correct—and Justice Scalia does not debate him on this point—the plurality offers no reason why Williamson County would not continue to bar lower federal courts from hearing judicial takings claims.

It is true that applying Williamson County results in the "undeniably awkward" situation whereby a lower state court judge must decide in the first instance whether a state appellate court has taken private property. Such a claim might seem "dead on arrival," given the state supreme court's binding interpretation of state property law. In the criminal law context, however, lower state courts frequently review constitutional questions from higher court decisions through mandatory state post-conviction habeas petitions.

210. Stop the Beach, 130 S. Ct. at 2618 (Kennedy, J., concurring).
211. Id. at 2609–10 (plurality opinion) ("[W]here the claimant was not a party to the original suit, he would be able to challenge in federal court the taking effected by the state supreme-court opinion ... .").
212. Id. at 2618–19 (Breyer, J., concurring).
213. See, e.g., Echeverria, Different, supra note 49, at 489; John J. Delaney, "If a Local Government Legislator or Building Permit Official Must Answer to the Takings Clause, Then Why Not the Judicial Branch?", 62 PLAN. & ENVTL. L., Sept. 2010, at 11, 12; Pefialver & Strahilevitz, supra note 191, at 43.
215. Stop the Beach, 130 S. Ct. at 2618 (Kennedy, J., concurring).
217. Petition for Writ of Certiorari, at 36, PPL Mont., LLC v. Montana, No. 10-218, 2010 WL 3236721, pet'n granted in part, 2011 WL 2437029 (2011); see also Barros, Complexities, supra note 139, at 946–48 ("[I]nferior state courts are institutionally incapable of holding that a state supreme court opinion was unconstitutional.").
218. See, e.g., 28 U.S.C. § 2254(b) (2006) (a federal habeas writ shall not be granted unless the applicant has exhausted available state court remedies); see also Stacey L. Dogan & Ernest A. Young,
Moreover, a lower state court considering a judicial takings claim would not review the validity or correctness of the state supreme court’s property law interpretation, but would simply determine whether the purported change warranted just compensation. Thus, instead of bringing their judicial takings claims in lower federal court, plaintiffs would simply work the case back up through the state court system and, if they wished, eventually seek certiorari at the U.S. Supreme Court.

Furthermore, allowing judicial takings claims in lower federal court would implicate two other jurisdictional doctrines that are beyond the scope of this Note. First, a judicial takings claim against a state court would likely violate sovereign immunity principles embodied in the Eleventh Amendment, which the Court has construed as barring most claims for money damages against state entities and officials. Second, the Rooker-Feldman doctrine prohibits lower federal courts from sitting in direct review of state court decisions; the Fifth Circuit rejected a judicial takings claim on exactly this basis.

ii. Possible Exceptions Allowing Claims in Federal Courts

Several possible exceptions might allow subsequent judicial takings claims to proceed in federal court. The first, and potentially most sweeping, is the plurality’s suggestion that compensation need not be the exclusive remedy for a judicial taking. If this were true, it might entirely undercut application of the Williamson County state litigation prong, which relied on the premise that there is no constitutional violation until the state court system denies just compensation. Second, as mentioned above, if the judicial takings standard


220. See Martinez, supra note 176, at 340.


222. See Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983); accord Siegel, supra note 221, at 468; Thompson, supra note 26, at 1511; Martinez, supra note 176, at 337–38 & n.169.


225. Professor Echeverria criticized the plurality for trying to “upend settled takings doctrine” on this point, perhaps so it could avoid the difficulty posed by Williamson County. See Echeverria, Green Light, supra note 116, at 4; Echeverria, Different, supra note 49, at 483 (“Justice Scalia may have
is akin to a facial challenge, then a collateral attack by another property owner might proceed directly in federal court.\textsuperscript{226} Third, and perhaps most promising for judicial takings plaintiffs, subsequent claims might possibly fall under the “futility” or “inadequacy” exception to \textit{Williamson County} if relegated to state lower courts bound by earlier state high court decisions.\textsuperscript{227} As discussed previously, however, the futility exception likely fails because the lower state courts would not review the validity or correctness of the higher court decisions, but rather consider as a matter of first impression whether the purported changes warrant just compensation.\textsuperscript{228} Moreover, courts generally apply this narrow exception sparingly, requiring that a plaintiff prove that state remedies are absolutely or almost certainly unavailable.\textsuperscript{229}

Finally, claims that a federal court decision effected a judicial taking would likely proceed directly in the U.S. Court of Federal Claims, as opposed to state courts.\textsuperscript{230} Granted, such claims would only arise in a narrow set of circumstances, since almost all property law and takings cases current proceed in state court.\textsuperscript{231} But plaintiffs might bring judicial takings claims against federal court decisions that implicate property or contract law, including federal patents or other intellectual property.\textsuperscript{232} And, of course, the U.S. Supreme Court often decides cases and overrules prior precedent regarding property rights.\textsuperscript{233} Thus, the Solicitor General in \textit{Stop the Beach} raised the “exceedingly problematic” prospect that, under a judicial takings doctrine, a nonparty might challenge a U.S. Supreme Court decision by filing a collateral attack in the Court of Federal Claims.\textsuperscript{234}

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\textsuperscript{226} See \textit{supra} text accompanying note 206.

\textsuperscript{227} See Patashnik, \textit{supra} note 168, at 25–28 (citing \textit{Washington Legal Foundation v. Legal Foundation of Washington}, 271 F.3d 835, 851 (9th Cir. 2001) (en banc) (applying the futility exception where the state supreme court was the defendant party to a takings challenge and denied the possibility of relief in its brief)); Barros, \textit{Complexities, supra note} 139, at 947 (“Once the state supreme court has made a decision on property ownership, however, it makes little sense to require further, almost certainly futile, proceedings in the state courts.”).

\textsuperscript{228} See \textit{supra} text accompanying note 219.


\textsuperscript{230} Echeverria, \textit{Green Light, supra note} 116, at 4 (“The U.S. Court of Federal Claims... would apparently hear virtually all takings claims arising from rulings by the federal courts, including presumably the claims court itself.”); \textit{Siegel, supra note} 221, at 470–71.

\textsuperscript{231} Indeed, \textit{Williamson County} keeps most takings claims out of federal courts. See \textit{supra} text accompanying note 156.

\textsuperscript{232} See, \textit{e.g.}, Dogan & Young, \textit{supra note} 218, at 110 n.13, 130–33 (noting possible claims that a federal court decision has taken \textit{federal} property rights by altering preexisting patent, copyright, or trademark law); \textit{Bunch, supra note} 51 (discussing judicial takings in the patent context).

\textsuperscript{233} See \textit{Siegel, supra note} 221, at 469–70; \textit{Mulvaney, supra note} 48, at 259; \textit{Peñalver & Strahilevitz, supra note} 191, at 34; see also \textit{supra note} 35 (discussing the Court's overruling of \textit{Bonelli}).

\textsuperscript{234} USG Amicus Brief, \textit{supra note} 5, at 17.
This Part revealed that the Court's ripeness requirements pose significant practical complexities for how judicial takings claims might proceed. Part IV will propose a consistent and coherent approach that, until the Court revisits *Williamson County*, would limit judicial takings claims to state courts and certiorari petitions when properly raised below. But given the clear confusion on the Court, it is important first to reexamine the policy underpinnings of the two doctrines, which might shed some light on how they should interact in practice.

C. Theoretical Underpinnings: Why Judicial Takings and Ripeness Doctrines Are Inconsistent

As mentioned previously, the judicial takings theory seems fundamentally at odds with the Court's special ripeness and preclusion rules for federal takings claims. Initially, one might argue that the logic of *Williamson County* supports the judicial takings theory by implicitly recognizing state courts as an actor in takings liability—that is, a constitutional violation does not occur until state courts (as well as legislative and administrative actors) have denied the plaintiff just compensation. Whatever its original rationale, however, there is no question that the “ultimate effect” of the doctrine has been to concentrate takings litigation in state courts. Thus, the state litigation requirement as applied and affirmed appears to rest on principles of judicial federalism that, as shown below, are inconsistent with the judicial takings concept.

Although the Court fashioned the *Williamson County* state litigation requirement on a purportedly logical reading of the Takings Clause, subsequent developments in the doctrine show that the initial rationale can no longer support the rule. For example, the ripeness requirement cannot stem from the text of the Fifth Amendment because the Court has since declared it prudential, not constitutional. I do not mean to suggest that Justices intended something other than what they wrote in *Williamson County*; more likely they simply failed to foresee the complex doctrinal and jurisdictional implications that the new rule would create.

Once the significance of the state litigation requirement became known, however, the Court affirmed and compounded its judicial federalism effects in

236. See Sterk, Demise, supra note 154, at 292.
237. See supra text accompanying note 150.
238. See Breemer, Madness, supra note 208, at 617 ("It is deeply troubling that the state procedures rule has morphed from a ripeness rule into an absolute bar to federal takings jurisdiction, particularly since the rule itself seems to have been created without a sound doctrinal basis.").
239. See supra text accompanying notes 161–163.
240. See Breemer, Madness, supra note 208, at 626 (describing the closing of federal courthouse doors to takings plaintiffs as an “unanticipated effect” of *Williamson County*) (quoting DLX, Inc. v. Kentucky, 381 F.3d 511, 521 (6th Cir. 2004)).
And though four Justices in that case indicated their willingness to revisit the state litigation requirement, the Court has repeatedly declined several invitations to do so. Thus, reconsideration of Williamson County in light of San Remo reveals that the state litigation requirement is "not merely a barren formality," but rather an "essential pillar" of the Court's federalism emphasis in the takings context. Indeed, since San Remo, commentators agree that deeper federalism principles underlie application of the ripeness and preclusion rules, as well as modern takings jurisprudence more generally.

Taken together, the ripeness and preclusion rules from Williamson County and San Remo effectively delegated all federal takings claims to state courts with the understanding that they offered an adequate venue for plaintiffs. But judicial takings supporters premise their theory on the purported need to check state court abuses. Thus, the two doctrines offer opposite answers to the question whether we trust state courts to resolve takings claims. The following Parts explore how a judicial takings doctrine is incongruous with three of the major federalism rationales behind the Court's ripeness and preclusion requirements: respect for the parity of state courts; a desire to limit...
the scope and workload of the Article III judiciary; and recognition that property law falls within the proper domain of the states.  

1. Parity: State Courts Are Competent to Resolve Takings Disputes

Whether state courts are as willing or able as federal courts to protect federal rights is a debate that dates back to the Framers. Modern arguments have ranged from parity being a “dangerous myth” to a futile question with no possible empirical measure. For its part, the Supreme Court has repeatedly expressed confidence in state courts’ ability to uphold federal law and has rejected the assumption that federal courts are more sympathetic toward constitutional claims.

Driven by the Court’s ripeness jurisprudence, the parity of state courts to adjudicate federal takings claims has been the subject of no less debate. Some commentators maintain that a federal forum is more appropriate for takings claimants because of inherent bias among elected or appointed state judges to uphold government actions allegedly depriving claimants of protected property. However, others argue that similar factors might actually make state courts a more sympathetic forum for takings plaintiffs. One commentator compared federal and state exactions cases and found “strong

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249. See Lindberg, supra note 245, at 1837, 1871 (describing policy rationales behind the Court’s ripeness requirements as including institutional advantages and competency, judicial economy and efficiency, and federalism).

250. Though it seems counterintuitive that a federal constitutional right is justiciable only in state courts and occasionally in the Supreme Court, it is consistent with the Framers’ design. Under the Madisonian Compromise, Article III created only the Supreme Court (with limited original jurisdiction) and left the possibility of lower federal courts to the discretion of Congress. U.S. Const. art. III, § 1 (“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.”). Thus, the Framers foresaw that adjudication of federal constitutional rights might be available only in state courts, with appellate or certiorari jurisdiction in the Supreme Court.

251. Burt Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105, 1105, 1115–30 (1977) (suggesting that federal courts are “institutionally preferable” to resolve constitutional claims because of technical competence, insulation from majoritarian pressures, and likeliness to vindicate plaintiff’s federal rights); Erwin Chemerinsky, Parity Reconsidered: Defining a Role for the Federal Judiciary, 36 UCLA L. Rev. 233, 236, 256 (1988) (“The debate over parity is the legal equivalent of the Lite Beer commercials where the one side yells, ‘tastes great,’ and the other screams, ‘less filling.’”).


253. See, e.g., Overstreet, supra note 157, at 92–93 (lamenting “[a]n almost certain prejudice” among “elected or appointed state judge[s], sitting in the same local area as the alleged taking”); Blaesser, Closing Door, supra note 157, at 74, 76.

254. Kovacs, supra note 157, at 45–46 (noting that judicial elections might benefit takings plaintiffs because an elected state judge’s constituency is “not the local government, but rather the local landowner and possible takings plaintiff”); see also Sterk, Federalist, supra note 246, at 235–36, 269 (noting that some state courts have construed their state constitutional takings clause as more protective than the federal one).
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empirical evidence of parity,” while Justice Department officials said they are aware of no evidence that state courts fail to protect property owners adequately in the “hundreds, if not thousands, of cases that come before them each year.” In San Remo, the Court expressed confidence in relegating takings claims to “fully competent” state courts because they have more experience than federal courts in resolving the complex legal questions related to land use and state property law. Other courts and commentators have similarly justified the Williamson County requirements because takings claims rely heavily on local conditions and background state property law that federal courts prefer state judges evaluate in the first instance.

The same questions of parity and competence are central to the judicial takings debate. Advocates of the doctrine suggest that state judges should not be entrusted with unreviewable authority over state property and land use law. They assert that state judges are often politically motivated, and complain that state courts abuse doctrinal principles to avoid finding government takings liability. At oral argument in Stop the Beach, Chief Justice Roberts posed a hypothetical of an elected Florida state court judge who campaigns on a platform of altering property rules. But notably, Roberts’s hypothetical was just that—a hypothetical. Judicial takings advocates—

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257. San Remo IV, 545 U.S. 323, 347 (2005); see also H.R. REP. NO. 106-518, at 42 (2000) (Department of Justice written testimony) (“State courts review local land use disputes far more frequently than do Federal courts and therefore are far more familiar with local land use procedures.”). Critics note that justifying ripeness requirements on state courts’ experience is circular and self-serving, however, because the state litigation requirement essentially forced those cases into state court to begin with. Breemer, Check Out, supra note 156, at 288.
258. See Holliday Amusement Co. of Charleston, Inc. v. S. Carolina, 493 F.3d 404, 409 (4th Cir. 2007) (Wilkinson, J.) (noting that the state litigation requirement “puts [regulatory takings] issues in the most competent hands”); Kovacs, supra note 157, at 45 (citing Gardner v. Balt. Mayor & City Council, 969 F.2d 63, 67–68 (4th Cir. 1992)); Zhou, supra note 206, at 968 (arguing that “federal courts are ill suited to adjudicate takings cases” and “historically have refused to interfere with the land-use decisions of local governments or to second-guess the rulings of state courts,” but that “[t]his long-standing division of labor will be upended” if plaintiffs can easily circumvent the Williamson County ripeness rules and proceed directly to federal court).
259. See STBR Czertiorari Petition, supra note 29, at 31 (suggesting state courts are becoming “more brash”).
260. See Thompson, supra note 26, at 1487–89 (noting that state courts “are not always as apolitical as we assume”); William P. Marshall, Judicial Takings, Judicial Speech, and Doctrinal Acceptance of the Model of the Judge as Political Actor, 6 DUKE J. CONST. L & PUB. POL’Y 1, 4 (2011) (“[T]he judicial takings theory advanced in Stop the Beach Renourishment sets forth the vision of judges as political actors. Judicial decisions are not to be treated as interpretations of law but as exercises of raw political power akin to legislative enactments.”).
261. See supra text accompanying note 135.
262. Oral Argument Transcript, supra note 66, at 35.
263. See Makar, supra note 66, at 306 (noting that the governor appoints appellate judges in Florida, and thus Chief Justice Roberts’s “hypothetical election” would be impossible).
including petitioners and their amici in Stop the Beach—fail to muster recent, convincing examples of state court abuses that were not discussed in the early judicial takings literature.264 Thus, skeptics of the doctrine note that advocates have not made the affirmative case why the Court should abandon the traditional “comity and respect” that ripeness requirements afford state judges in the takings context.265

In fact, parity principles are likely even more relevant for judicial takings, where the entire claim rests upon an alleged change to “established” background law.266 Government respondents in Stop the Beach argued that federal courts lack the expertise in state law required to determine “whether a judicial decision that purports merely to clarify property rights has instead taken them.”267 Justice Kennedy agreed that any future judicial takings claims should proceed in “presumptively competent” state courts,268 and Justice Breyer lamented that judicial takings would “involve state property law issues of considerable complexity” that are “familiar to state, but not federal, judges.”269 Justice Scalia countered that federal courts “often” determine state property rights to resolve regulatory takings,270 but his assertion conveniently ignores that, under Williamson County and San Remo, federal courts rarely hear such claims.271

2. Workload: Avoid Inundating Federal Courts with State Property Claims

Workload concerns play a role in both ripeness and preclusion doctrines, which seek to avoid unnecessary and duplicative litigation. In addition, lower federal courts have expressed an aversion to hearing land-use takings disputes

264. Stop the Beach petitioners described judicial takings as “an ever-increasing problem,” but provided no examples to support the assertion. It cited primarily to cases from the 1960s and 70s, and referenced recent certiorari petitions but with no analysis or discussion of their underlying merits. STBR Certiorari Petition, supra note 29, at 31–33.

265. USG Amicus Brief, supra note 5, at 16 (arguing that recognizing judicial takings would “work a substantial change” in the Court’s relationship of “comity and respect” with state courts) (internal quotation marks omitted); see also Echeverria, Green Light, supra note 116, at 4 (noting the plurality’s failure to even acknowledge the possibility that a federal court might commit a judicial taking underscores the “hazard” the doctrine poses).

266. See Thompson, supra note 26, at 1511 n.238 (“Judicial takings claims will also drag the federal courts into attempts to determine what the state law was prior to the alleged taking, a task that no federal court relishes.”). But see Ilya Somin, Stop the Beach Renourishment and the Problem of Judicial Takings, 6 DUKE J. CONST. L. & PUB. POL’Y 92, 101–03 (2011) (critiquing the state court “expertise” argument against judicial takings).


268. Id. at 2618 (Kennedy, J., concurring) (quoting Tafflin v. Levitt, 493 U.S. 455, 458 (1990)).

269. Id. at 2619 (Breyer, J., concurring).

270. Id. at 2609 (plurality opinion).

271. See supra text accompanying note 156.
that would "further congest an already overburdened federal court system."\textsuperscript{272} Thus, although the Court itself has not articulated this policy rationale behind \textit{Williamson County} and \textit{San Remo}, several commentators and lower courts have justified the state litigation requirement as a way of "maintaining manageable dockets."\textsuperscript{273} In fact, representatives of the federal judiciary and Justice Department cited workload concerns in opposing proposed legislation to overrule \textit{Williamson County}, suggesting that doing so "could contribute to existing backlogs in some judicial districts."\textsuperscript{274}

Similar concerns arise in the judicial takings context. Professor Thompson listed federal judicial workload as one of the most important, but overlooked, "counterpulls" against the judicial takings theory, describing it as a "legitimate (albeit academically boring) concern."\textsuperscript{275} Justice Scalia notably ignored workload impacts in his \textit{Stop the Beach} plurality opinion, but Justice Breyer highlighted the problem in his concurrence, suggesting that recognizing judicial takings could "open the federal court doors" to reviewing "many thousands" of property law cases litigated each year.\textsuperscript{276} Unsympathetic ears might dismiss such complaints as life-tenured federal judges sloughing off work on state courts, but important constitutional principles about the limited nature of the Article III judiciary animate concerns about the federal docket.\textsuperscript{277} If such concerns play a role in the Court's special ripeness rules for takings claims, it is hard to see why the rationale would not extend to the judicial takings context as well.\textsuperscript{278}
3. Deference: Property Law as a Core State Function

Beyond the parity and workload arguments is the idea that property law is an area warranting affirmative deference to state control. The Court has recognized property as a unique, core aspect of state sovereignty, and one that is generally defined by state law. Thus, because regulatory takings claims hinge on background state property law, some commentators have emphasized the state litigation requirement as a way for federal courts to defer to state courts on important issues of state law. Justice Department officials expressed concern that abandoning the Williamson County ripeness rule would dramatically increase the federal courts' supervisory role over "core responsibilities" of the states.

Judicial takings claims would likely pose an even greater federalism intrusion, reaching deep into both state property law and the inner workings of the state judiciary. The Solicitor General argued in Stop the Beach that judicial takings would "upset the federal-state balance" and "intrude on one of the core functions of the state courts." Justice Scalia suggested the plurality's proposed judicial takings standard contained "a considerable degree of deference to state courts" because a property right would only be "established" if there was no doubt about its existence. But Justice Breyer remained unimpressed and criticized the plurality for failing to set forth procedural or substantive rules that would limit federal judges' interference in matters that are primarily the subject of state law and of significant state

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280. See e.g., Idaho v. Coeur d'Alene Tribe of Id., 521 U.S. 261, 281 (1997) (deeming an injunction against state officials unavailable in this "unusual" case because the requested prospective relief involved determinations of property boundaries which "implicates special [state] sovereignty interests").

281. See Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) ("Property interests ... are created and their dimensions are defined by ... an independent source such as state law ...."); Dogan & Young, supra note 218, at 116 ("The federalism-based objection to a judicial takings doctrine rests on a particular view of the source of property rights. In our view, state courts define state property law ....").


284. See Blumm & Dawson, supra note 118, at 761–62; Dogan & Young, supra note 218, at 118 ("A primary reason for rejecting a broad doctrine of judicial takings thus sounds in federalism: federal court review of state property decisions ... would interfere with the state courts' control of their own law."); cf. Thomas et al., supra note 190, at 437 (describing judicial takings as "the most metaphysical of legal issues," because state courts are thought to define property).

285. USG Amicus Brief, supra note 5, at 9, 16; see also Echeverria, Green Light, supra note 116, at 4 (suggesting judicial takings would turn federal courts into "intrusive federal overseers of a core state judicial function").

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interest. Indeed, judicial takings would essentially "empower[] federal courts judges to define state property law," an authority that traditionally falls within the exclusive sovereignty of the states.

The preceding Parts reveal that federal recognition of judicial takings claims would be inconsistent with the major federalism rationales behind the Court's ripeness requirements. Property rights advocates describe judicial takings as a way to prevent state courts from committing an "end run" around Lucas. However, critics of the doctrine might just as easily describe judicial takings as an end run around the ripeness and preclusion rules in Williamson County and San Remo: that is, an attempt to reopen federal courthouse doors for takings litigation. Given the overlap and inherent inconsistencies between the two doctrines, the Court must address and analyze the ripeness implications if or when it chooses to tackle the judicial takings issue again, something the plurality notably failed to do in Stop the Beach.

The following Part provides a roadmap for lower courts to reconcile the judicial takings and ripeness doctrines, at least until the Court reconsiders Williamson County.

IV. AVOIDING DOCTRINAL CONFUSION: A WAY FORWARD

Judicial takings interact with the Court's ripeness requirements, both practically and theoretically, in complex and sometimes directly contradictory ways. However, until the Court revisits Williamson County, lower courts should strictly apply the state litigation requirement and relegate judicial takings claims to state court, with the possibility of certiorari review when

287. Id. at 2618–19 (Breyer, J., concurring); see also Dogan & Young, supra note 218, at 109 ("[A]ny court prepared to recognize a judicial taking must come to grips with the difficult question of distinguishing between 'new' and 'established' constructions of state law; that question, we suggest, should be approached with a strong dose of deference to the state courts.").

288. Richard Ruda, Do We Really Need a Judicial Takings Doctrine?, 35 VT. L. REV. 451, 456–57 (2010); Siegel, supra note 221, at 461–62; Dogan & Young, supra note 218, at 117 ("[A]llowing federal courts to review every allegation that a state court has changed state property law would undermine the state courts' control of state law . . . . [I]t would also amount to a significant extension of federal authority.").


290. Cf. Echeverria, Different, supra note 49, at 481 ("[F]rom the standpoint of Justice Scalia and other property rights advocates, the most important feature of the judicial takings concept might not be its application to certain court rulings, but the opportunity it presents to revisit takings doctrine generally.").

291. A Pacific Legal Foundation attorney once criticized the San Remo majority for "purposefully ignor[ing]" how its holding interacted with Williamson County, "because to engage these concepts is to recognize, as the concurrence did, that they are both doctrinally unsound." Breeper, Check Out, supra note 156, at 301. Justice Scalia's Stop the Beach opinion similarly ignored the ripeness implications raised by the concurring Justices. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2607 (2010) (plurality opinion) (sloughing them off as "hardly . . . an awe-inspiring prospect"). However, even supporters of the judicial takings theory criticized his treatment of ripeness as "cavalier." Blaesser, A Doctrine in Need, supra note 16, at 14.
properly raised below. This would maintain a proper judicial federalism balance, leave important questions of state property law to state courts, and ensure that the Court has an adequate factual record when considering any judicial takings claim after granting certiorari. It would also avoid unnecessary confusion and inconsistency with existing case law. If the Court concludes that it no longer trusts state courts to handle takings claims, it should expressly overrule *Williamson County* before opening the lower federal courthouse doors to a new doctrine of judicial takings.

A. Death Knell for Williamson County?

Much of the inconsistency between ripeness and judicial takings might stem from the Court's current disfavor of *Williamson County*. Several commentators have predicted the eventual demise of the state litigation requirement, describing *Williamson County* as a “dead case walking.”

Counting heads from Chief Justice Rehnquist’s *San Remo* concurrence suggests the Court may already have five votes to overrule *Williamson County* and there are aspects of the Court’s *Stop the Beach* opinion that indicate a waning influence for the state litigation requirement. As mentioned previously, however, the Court thus far has declined several invitations to revisit the rule.

Some property rights proponents suggest the Court should do away with *Williamson County* to make room for judicial takings. However, because the state litigation requirement may have helped force the judicial takings question in the first place, it is possible that overruling *Williamson County* and reopening the federal court doors to takings plaintiffs might release the pressure valve and obviate the perceived need for a judicial takings doctrine. Indeed, allowing initial regulatory takings claims in lower federal court might pose fewer federalism implications than judicial takings because the federal courts would not be conducting intrusive reviews of the state judiciary or second-

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292. Barros, *Complexities*, supra note 139, at 945 (describing *Williamson County* as a “dead case walking”); Fletcher, *supra* note 154, at 779 (predicting that the Court might repudiate *San Remo* by 2030); see also Guggenheim v. City of Goleta, 582 F.3d 996, 1008 n.5 (9th Cir. 2009), vacated on other grounds, 683 F.3d 1111 (9th Cir. 2010) (en banc) (“mus[ing]” why the state litigation requirement is incorrect, with the intention of helping enable the Supreme Court’s reconsideration of *Williamson County*).

293. Assuming Roberts and Alito would take the place of Rehnquist and O’Connor, the fifth vote could likely come from either Justice Sotomayor, who joined Justice Kennedy’s *Stop the Beach* concurrence, or Justice Scalia, who did not sign Chief Justice Rehnquist’s *San Remo* concurrence but generally appears eager to ease the path for takings plaintiffs. See Blaeser, *A Doctrine in Need*, *supra* note 16, at 15 (suggesting “Justice Kennedy should join with Chief Justice Roberts and Justices Alito, Scalia, and Thomas to revisit *Williamson County*”).

294. *See supra* text accompanying notes 159, 163, and 166.


296. *See, e.g.*, Blaeser, *A Doctrine in Need*, *supra* note 16, at 15 (“Without a reassessment by the Court of its *Williamson County* ripeness doctrine..., judicial takings..., will have little import...”).

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guessing state court interpretations of state property law. Thus, if the Court
finds that it no longer trusts state courts, it should consider cleaning up its
ripeness mess by clarifying or overruling *Williamson County* before a future
majority opens the Pandora’s Box of judicial takings. 298

B. Limit Judicial Takings Claims to State Courts and Certiorari Petitions

Until the Court reconsiders *Williamson County*, however, lower courts
should strictly apply the state litigation requirement to judicial takings claims.
This Note shows that strict enforcement of *Williamson County* is the most
likely and proper course for judicial takings claims, despite Justice Scalia’s
assertions to the contrary. Moreover, limiting such claims to state courts and
certiorari petitions when the issue is properly raised below would achieve most
of the purported benefits of judicial takings while posing minimal conflict with
existing jurisprudence.

Requiring litigants to raise judicial takings claims in the alternative and
then seek rehearing before petitioning for certiorari would force state courts to
account for the risk of judicial takings and do a more careful job crafting their
property law decisions. 299 Thus, it would likely result in higher quality
property law decisions than simply allowing collateral judicial takings attacks
in lower federal court after-the-fact. 300 This approach would also result in
better-developed factual records for any judicial takings claims the Supreme
Court chooses to take on certiorari review. 301

The mere possibility of Supreme Court review on a judicial takings claim,
or even under Justice Kennedy’s preferred due process approach, will also put
state courts on notice that reinterpretations of background state property law are
potentially subject to constitutional review. A similarly limited federal role has
been relatively effective in the traditional regulatory takings context, allowing
the Court to serve an error-correcting role for the state court takings cases that
“fall through [the] cracks.” 302 Professor Thompson appeared to endorse the
same approach for judicial takings, surmising that “only the United States

298. *See* Breemer, *Check Out*, *supra* note 156, at 306 (criticizing the *San Remo* majority for failing
“to summon the courage to clean up its own mess”).
299. *See* Peñalver & Strahilevitz, *supra* note 191, at 36 (noting that negative externalities arise if
courts allow parties to raise judicial takings claims for the first time on appeal).
300. As mentioned previously, if the state court’s sua sponte change in property law is wholly
unexpected, an affected property owner would likely have a viable procedural due process claim. *See*
*supra* text accompanying notes 198–199, 207.
301. *See* *supra* text accompanying notes 188–190.
302. Lindberg, *supra* note 245, at 1852 (alteration in original) (quoting Friedman, *supra* note 134,
at 1259). The Court noted in *San Remo* that most of its takings jurisprudence developed through
certiorari petitions from state high courts. *San Remo IV*, 545 U.S. 323, 347 (2005). Although this result
seems inevitable under the state litigation requirement, the pattern actually predates *Williamson County*.
*See* Sterk, *Demise*, *supra* note 154, at 286. Certiorari review also allows the Court to patrol those
recalcitrant state courts it finds particularly problematic. *See* Sterk, *Federalist*, *supra* note 246, at 265
n.284 (listing the widely disproportionate number of recent Supreme Court takings cases that reviewed
decisions by the California Supreme Court).
Supreme Court may be able to hear most judicial takings challenges,” but suggesting this would be sufficient to deter the worst state court abuses.303 Notably, there is little if no evidence that judicial takings are a common occurrence.304 More than two dozen certiorari petitions have raised judicial takings claims since 1974,305 yet the one the Court finally heard failed to convince a single Justice that the state court had improperly altered any property rights.306 Thus, occasional certiorari review is likely adequate to handle the rare egregious state court decision that might run afoul of the Takings Clause.

Limiting judicial takings claims in this manner would also remain faithful to the policy rationales behind the Court’s ripeness requirements. It would pose the least disturbance to the current relationship of comity and respect between federal and state courts because state judges have always been subject to occasional review by the Supreme Court, but not by lower federal courts. It would alleviate federal workload concerns because it would simply burden Supreme Court clerks with more certiorari petitions, as opposed to federal district court judges with already overloaded dockets. The small number of certiorari petitions granted also would result in de facto deference to state courts on important questions of their own property law.307 Finally, this approach would leave the difficult, sensitive federalism questions about intruding on state sovereignty over property law in the hands of Supreme Court Justices, instead of lower federal court judges.

CONCLUSION

The Court’s ripeness requirements for federal takings claims have come under heavy fire, and perhaps rightfully so. But much of the same criticism could just as equally apply to the plurality’s attempted judicial takings coup in Stop the Beach.308 Twenty-five years ago, the Court based its Williamson
County state litigation requirement on the “logic” of its textual reading of the Takings Clause, though failed to consider the complex doctrinal and jurisdictional implications it would create. The Stop the Beach plurality did much the same thing, grounding its judicial takings theory in common sense and a cursory textual analysis, while recklessly dismissing ripeness hurdles as “hardly . . . an awe-inspiring prospect.”309 Rather than learning from mistakes in the ripeness arena and fixing those before moving on, the plurality repeated the same mistakes and compounded the problems even further.

Although judicial takings raise many difficult doctrinal issues, this Note focused on the ripeness and preclusion implications because they pose both practical and theoretical problems for the judicial takings concept. Ultimately, this Note illustrated that ripeness and judicial takings are so integrally intertwined that they must be addressed together. “[T]he affirmative case for the state-litigation requirement has yet to be made,” Chief Justice Rehnquist wrote in his San Remo concurrence, noting the rule “has created some real anomalies, justifying our revisiting the issue.”310 Similarly, judicial takings advocates have failed to make the affirmative case for the doctrine’s necessity, and, as this Note has shown, the anomalies it creates with Williamson County warrant serious reconsideration if the Court revisits judicial takings again in a future case.

309. Stop the Beach, 130 S. Ct. at 2607 (plurality opinion).

We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, Ecology Law Currents, please contact ecologylawcurrents@boalt.org.

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