

MUDDYING THE WATERS: *STOP THE BEACH RENOURISHMENT* AND THE PROCEDURAL IMPLICATIONS OF A JUDICIAL TAKINGS DOCTRINE

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*Our task is to clarify the law—not to muddy the waters.*¹

I. INTRODUCTION

On June 17, 2010, the Supreme Court of the United States unanimously held in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*² that the Florida Supreme Court's enforcement of Florida's Beach and Shore Preservation Act³ was not a "taking" requiring just compensation under the Fifth Amendment to the United States Constitution.⁴

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1. *United States v. Va.*, 518 U.S. 515, 574 (1996) (Scalia, J., dissenting).

2. 130 S. Ct. 2592, 2613 (2010).

3. Fla. Stat. §§ 161.011–161.45 (2009).

4. *Stop the Beach*, 130 S. Ct. at 2613. Justice Stevens, a landowner along Florida's coast, recused himself from consideration of the case. All eight remaining justices concurred in Parts I, IV, and V of the opinion, which held that no taking had occurred based upon the facts of the case. *Id.* at 2597, 2613. The reason for this, said the unanimous Court, was that the State of Florida had always enjoyed the right to ownership of avulsions. Thus, the Florida Supreme Court decision had not actually taken anything by replacing the mean high-water line (MHWL), the nineteen-year average of the high-tide point along the beach, with the Erosion Control Line (ECL), which after the renourishment of the beach would be permanently fixed at the location of the MHWL prior to the beach-renourishment project. *Id.* at 2610–2613; see *Bd. of Trustees v. Sand Key Assocs.*, 512 So. 2d 934, 936 (Fla. 1987) (defining an avulsion as a "sudden or perceptible loss of or addition to land by the action of the water or a sudden change in the bed of a lake or the course of a stream"). Because there is no exception in the case where the State itself is the very cause of the avulsion, the Court went on to hold that "Florida law as it stood before the decision below allowed the State to fill in its own seabed, and the resulting sudden exposure of previously submerged land was treated like an avulsion for purposes of own-

On the key legal question presented by the case—namely, whether a judicial action can ever constitute a taking under the Fifth Amendment—however, the Court was evenly split, four to four.

Justice Scalia, writing for the plurality and joined by Chief Justice Roberts and Justices Thomas and Alito, had no reservations in concluding that a judicial taking is possible:

The Takings Clause (unlike, for instance, the Ex Post Facto Clauses, see Art. I, § 9, cl. 3; § 10, cl. 1) is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor (“nor shall private property *be taken*”). There is no textual justification for saying that the existence or the scope of a State’s power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation. Nor does common sense recommend such a principle. It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.⁵

The remaining justices, Kennedy, Sotomayor, Breyer, and Ginsberg, however, refused to go as far as Justice Scalia and their more conservative colleagues. Instead, they sidestepped the judicial takings question altogether. Justice Kennedy, for example, writing a concurrence in which Justice Sotomayor joined, urged the Court to consider questions such as that presented by *Stop the Beach* under the ambit of a Due Process inquiry:

If a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law. The Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power. . . . It is thus natural to

ership.” *Stop the Beach*, 130 S. Ct. at 2611. Therefore, “[t]he Florida Supreme Court decision before us is consistent with these background principles of state property law[, and i]t did not abolish the Members’ right to future accretions, but merely held that the right was not implicated by the beach-restoration project, because the doctrine of avulsion applied.” *Id.* at 2612 (citations omitted).

5. *Stop the Beach*, 130 S. Ct. at 2601 (plurality) (emphasis in original) (citations omitted).

read the Due Process Clause as limiting the power of courts to eliminate or change established property rights.⁶

Justice Breyer's concurrence, in which Justice Ginsberg joined, urged even more judicial restraint, stating that "the plurality unnecessarily addresses questions of constitutional law that are better left for another day."⁷ That said, Justice Breyer nonetheless admonished that "the approach the plurality would take today threatens to open the federal court doors to constitutional review of many, perhaps large numbers of, state-law cases in an area of law familiar to state, but not federal, judges."⁸

This Article begins by assuming that Justice Scalia's plurality is correct and that such a thing as a judicial taking exists. It then uses the following hypothetical, which Chief Justice John Roberts posed at oral argument in *Stop the Beach*, to examine the procedural implications of Justice Scalia's proposed doctrine:

[L]et's say the legislature passes an act saying the boundary of beachfront property is now where the sand starts and not the mean high water mark but the mean high sand mark. . . . [And y]ou sue under that and the court says, yes, of course that's a taking, our precedents have always said it's the mean high water line and nothing else. Florida has judicial elections, say, somebody runs for election for the Florida Supreme Court and says I'm going to change that law, I'm going to say that it is not a taking. I think people should be able to walk right up to the land. And that person is elected and the law is changed.⁹

6. *Id.* at 2614 (Kennedy & Sotomayor, JJ., concurring in part and concurring in the judgment). While Justice Kennedy wrote that "this case does not require the Court to determine whether, or when, a judicial decision determining the rights of property owners can violate the Takings Clause," *id.* at 2613, he later added that because "judicial decision[s] altering property rights 'appear[] to turn on the legitimacy' of whether the court's judgment eliminates or changes established property rights 'rather than on the availability of compensation, . . . the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause.'" *Id.* at 2614–2615 (quoting *E. Enters. v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in the judgment and dissenting in part)).

7. *Id.* at 2618 (Breyer & Ginsburg, JJ., concurring in part and concurring in the judgment).

8. *Id.* at 2619.

9. Transcr., *Stop the Beach Renourishment, Inc. v. Fla. Dep't. Env'tl. Protec.*, 2009 U.S. Trans. LEXIS 71 at **29–30 (Dec. 2, 2009) (130 S. Ct. 2592 (2010)). Chief Justice

Given that scenario, how exactly would an aggrieved landowner pursue a judicial takings claim? This Article follows that hypothetical case through the court system and discusses the practical and procedural implications of Justice Scalia's judicial takings doctrine.

Part II of this Article follows the hypothetical judicial taking posed by Chief Justice Roberts through the traditional avenue of state court. As will be shown, an aggrieved landowner attempting to prosecute a judicial takings case in state court will face procedural and jurisprudential obstacles that in all likelihood reduce Justice Scalia's proposed judicial takings doctrine to an academic theory (and near impossibility) in state court. As Part II demonstrates, various practical implications, the Florida Rules of Civil Procedure, and jurisdictional issues make it incredibly difficult for plaintiffs who claim that a court has taken their property to vindicate their constitutional rights through the avenue of state-court proceedings.

Part III of this Article examines Chief Justice Robert's hypothetical takings claim, if originally brought in federal court, and discusses whether a federal forum might provide a better staging ground than state court for the prosecution of the aggrieved landowner's judicial takings claim. This Part primarily focuses on the concomitant quagmire of federalism and procedural issues inherent in pursuing the judicial takings claim through the federal court route.¹⁰

Roberts was incorrect in stating that Florida Supreme Court Justices are elected by popular vote. The Florida Constitution was amended in 1972 and now provides that Florida Supreme Court Justices are appointed by the Governor from a list of candidates prepared by a judicial nominating commission. Fla. Const. art. V, § 11. Florida does provide, however, for a "yes or no" judicial retention vote every six years on each member of the Florida Supreme Court and the Florida district courts of appeal. *Id.* at art. V, § 10. That said, the Chief Justice's hypothetical remains an excellent starting point from which to examine the practical considerations that will arise in any judicial takings claim.

10. It is theoretically possible for a federal district court sitting in diversity to effect a taking if, in the absence of controlling precedent, the federal court changed state property law when attempting to make an "Erie guess" as to a question of state property law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); see e.g. *LeFrere v. Quezada*, 582 F.3d 1260, 1264 (11th Cir. 2009) (conducting an *Erie* guess regarding state law). Under Justice Scalia's judicial takings doctrine, however, a property right must be "established" for a court's changing of that right to constitute a taking. *Stop the Beach*, 130 S. Ct. at 2602 (plurality). Therefore, unless the federal court simply made a serious error as to state property law, it would be nearly impossible for it to adhere to the *Erie* doctrine and simultaneously effect a judicial taking. Thus, this Article only considers the scenario of a state court's change of property law that has allegedly worked a taking.

Part IV of this Article discusses the further intricacies and difficulties inherent in pursuing a judicial takings claim under 28 U.S.C. Section 1983—these issues apply with equal force to both the state court judicial-takings route¹¹ and the federal-court route.¹² Such difficulties include identifying potential defendants in the judicial takings claim and whether the state's special sovereignty interests might prevent a federal court from enjoining state officials' behavior even if the court deemed that behavior to be unconstitutional.

Finally, Part V concludes this Article, noting that at present, the judicial takings doctrine proposed by Justice Scalia is unrealistic, if not utopian. It further asserts that based on the analysis of Chief Justice Robert's hypothetical, the best present route for pursuing such a claim is a suit brought in federal court not by the aggrieved landowner, but by similarly situated landowners equally affected by the state supreme court's decision. In closing, and especially in light of the paradoxical apparatus that currently exists, this Article urges the Supreme Court of the United States and the lower courts to take an active role in defining the contours and practical implications of pursuing a judicial takings claim.

Before continuing further, it is important to remember that the hypothetical forming this Article's focal point involves the Florida Supreme Court's decision to change the common law in such a way that, at least if done by the legislature, would most surely constitute a taking within the ambit of the Takings Clause of the United States Constitution. The hypothetical then follows the aggrieved landowner (who claims the Florida Supreme Court has taken his or her land without just compensation) through the courts as he or she attempts to have such a judicial taking recognized and seeks redress for the allegedly unconstitutional Florida Supreme Court decision.

11. *See infra* pt. II (examining a hypothetical judicial takings case as it makes its way through state court).

12. *See infra* pt. III (examining the procedural implications of originally filing the judicial takings claim in federal district court).

II. THE STATE-COURT AVENUE

A. Option #1: Motion for Rehearing to the Florida Supreme Court Followed by Writ of Certiorari to the Supreme Court of the United States

The first, and perhaps most obvious, option by which the aggrieved landowner could seek redress would involve the aggrieved landowner moving for rehearing in the Florida Supreme Court itself immediately after the adverse decision in an attempt to have that Court consider whether what it had just decided constitutes a taking.¹³

1. *Procedural Obstacles in Seeking a Motion for Rehearing*

Florida Rule of Appellate Procedure 9.330 provides:

A motion for rehearing, clarification, or certification may be filed within [fifteen] days of an order or within such other time set by the court. A motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its decision, and shall not present issues not previously raised in the proceeding.¹⁴

If the plaintiff had predicted that the Florida Supreme Court was going to rule against him or her in the way that it did, the plaintiff may well have briefed the takings issue before that Court in the first instance. In such a case, the Court would simply hear the motion for rehearing on its merits.¹⁵ If the plaintiff had not anticipated that the Court would drastically change the law in such a way as to effect the alleged taking, then the motion for

13. If a lower court effected the alleged taking, the question would arise whether the aggrieved landowner would be required to raise the issue on appeal or risk waiving the claim. See *Markham v. Neptune Hollywood Beach Club*, 527 So. 2d 814, 814 n. 2 (Fla. 1988) (per curiam) (explaining that the failure to raise an issue at the trial court level or on direct appeal effects a waiver of that issue). Because state trial courts in Florida are bound to adhere to the common law as prescribed by the District Courts of Appeal and the Florida Supreme Court, however, the most common instance that will provoke a takings claim will derive from the decision of the Florida Supreme Court itself (or any state supreme court, for that matter).

14. Fla. R. App. P. 9.330(a).

15. See *id.* (allowing for rehearing only of issues "previously raised in the proceeding").

rehearing would involve “issues not previously raised in the proceeding,”¹⁶ and the only way for such a motion for a collateral rehearing to be considered by the Florida Supreme Court would be if the Court agreed to a *sui generis* expansion of the rehearing principle. Of course, the chances of the Florida Supreme Court agreeing to such a unique expansion of the rehearing principle are slim; indeed, in *Stop the Beach*, the landowners moved for rehearing to the Florida Supreme Court immediately following the decision against them, but the Court denied their request without published opinion.¹⁷

Even if the Florida Supreme Court did take up the issue on rehearing, the remedy suggested by the plurality in *Stop the Beach* makes it even more unlikely that the Florida Supreme Court would declare its previous decision a taking.¹⁸ In *Stop the Beach*, Justice Scalia implicitly agreed that mandated compensation is not a possible remedy because of separation-of-powers issues.¹⁹ Instead, he asserted that the consequence of the judicial taking would be nullification of the state-court decision itself.²⁰ Thus, for the plaintiff to prevail, the Florida Supreme Court would have to issue a decision about property rights and then, based solely on the plaintiff's assertion of a takings claim in a motion for rehearing, immediately turn around and nullify that very decision. Justice Scalia's proposed remedy for the victim of a

16. *Id.*

17. *Walton Co. v. Stop the Beach Renourishment, Inc.*, 2008 Fla. LEXIS 2483 (Fla. Dec. 18, 2008).

18. *Stop the Beach*, 130 S. Ct. at 2607 (plurality). “If we were to hold that the Florida Supreme Court had effected an uncompensated taking in the present case, we would simply reverse the Florida Supreme Court's judgment that the Beach and Shore Preservation Act can be applied to the property in question.” *Id.*

19. *See id.* (analyzing Justice Kennedy's concerns regarding mandated compensation for judicial takings). “Justice Kennedy worries that we may only be able to mandate compensation. That remedy is even rare for a legislative or executive taking, and we see no reason why it would be the exclusive remedy for a judicial taking.” *Id.*

20. *Id.* Of course, even if the Florida Supreme Court did declare its decision to be a taking and nullified the decision, under the temporary takings doctrine of *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), compensation would have to be paid for the period of time during which the property was taken. Therefore, major problems involving separation of powers (and the judiciary potentially forcing the state legislature to open the purse strings) arise in any judicial takings setting except those where the rule has merely been announced but not applied (in which case Justice Scalia's nullification guidance could be implemented without any separation-of-powers issues with regard to monetary compensation). These monetary remedy and separation-of-powers issues are outside the scope of this Article.

judicial taking therefore further reduces the likelihood that the plaintiff could obtain relief.

2. Writ of Certiorari to the Supreme Court

The more likely scenario, then, is that the Florida Supreme Court would deny the motion for rehearing, as it did in *Stop the Beach*, and the plaintiff's last hope for redress would be on writ of certiorari to the Supreme Court of the United States.²¹ Let us assume that the Florida Supreme Court denies the motion for rehearing, presumably based upon the fact that the issue was raised for the first time on rehearing.²² Given those circumstances, the United States Supreme Court might follow its holding from *Michigan v. Long*²³ and deny certiorari based upon the fact that the Florida Court's procedural ruling as to the issue of waiver is an "adequate[] and independent" state ground that removes Supreme Court jurisdiction.²⁴ In *Long*, the Court announced that as a threshold jurisdictional issue, it cannot review state-court judgments "that rest on adequate and independent state grounds."²⁵ For purposes of our hypothetical, however, *Long* contains a saving caveat: the Court will "assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground."²⁶ Therefore, "in the absence of a plain statement that the decision below rested on an adequate and independent state ground," the Supreme Court will assume it has jurisdiction to decide the case.²⁷ Thus, if the Florida Supreme Court denies the motion for rehearing without specifying the grounds for its denial, as it did in *Stop the Beach*, the

21. *Stop the Beach*, 130 S. Ct. at 2600-2601.

22. See Fla. R. App. P. 9.330(a) (laying down the rule that motions for rehearing "shall not present issues not previously raised in the proceeding").

23. 463 U.S. 1032 (1983).

24. *Id.* at 1041.

25. *Id.* The Court further explained the rationale behind this jurisdictional limitation: "The jurisdictional concern is that we not render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Id.* at 1042 (quoting *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945)).

26. *Id.*

27. *Id.* at 1044.

“adequate and independent” state-grounds doctrine will not bar the Supreme Court from reviewing the case.²⁸

An alternative obstacle might arise in seeking Supreme Court review of the Florida Court’s summary denial of the motion for rehearing. The Supreme Court has explained that when a state-court decision is silent on a given federal issue, the Court will assume that the issue was not properly presented in the state forum and thus will not address it on review.²⁹ Returning to our hypothetical, and as explained earlier,³⁰ while there is a possibility that the party arguing against the adoption of the new property rule would be prescient enough to include the takings claim in the original proceedings before the Florida Supreme Court, the events of *Stop the Beach* itself demonstrate that litigants may well be surprised by the rule announced by the Florida Supreme Court through no fault of their own.³¹ As a result, the plaintiffs will not have had the opportunity to raise the takings claim in the original proceeding. Thankfully for our plaintiff, however, Justice Scalia foresaw this issue and explained why it would not prevent Supreme Court review in footnote four of the plurality opinion in *Stop the Beach*:

We ordinarily do not consider an issue first presented to a state court in a petition for rehearing if the state court did not address it. But where the state-court decision itself is claimed to constitute a violation of federal law, the state court’s refusal to address that claim put forward in a petition for rehearing will not bar our review.³²

Despite this dictum, the issue remains that to successfully pursue a writ of certiorari to the Supreme Court of the United States, the

28. *Id.*

29. *Adams v. Robertson*, 520 U.S. 83, 86–87 (1997) (citing *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987)).

30. See *supra* nn. 14–17 and accompanying text (explaining that the litigants in *Stop the Beach* failed to anticipate the Florida Supreme Court’s ruling and failed to brief the issue of a judicial taking before the motion-for-rehearing stage).

31. The landowners in *Stop the Beach* were blindsided by the Florida Supreme Court’s ruling that their rights to future accretions were a “future contingent interest, not a vested property right,” and immediately moved for rehearing to the Florida Supreme Court on the grounds that the decision itself had worked a taking. 130 S. Ct. at 2600–2601. The Court summarily denied the motion. *Id.*

32. *Id.* at 2600–2601 n. 4 (citations omitted).

state court must have *actually decided* some federal issue.³³ The question arises: is the simple act of denying the motion to rehear (in which the plaintiff will have asked the Florida Supreme Court to reconsider the case in light of the Takings Clause) sufficient to create a constitutional issue in the state-court decision below and allow the United States Supreme Court to accept the writ of certiorari? Justice Scalia's footnote four suggests that the denial of the motion to rehear *would* be sufficient to confer jurisdiction to the Supreme Court of the United States if the state-court decision itself is claimed to violate federal law.³⁴ Assuming that same analysis would be adopted by the Supreme Court upon a writ of certiorari in our hypothetical, neither of these first two procedural hurdles would bar Supreme Court review of the Florida Supreme Court's decision and subsequent denial of the motion for rehearing.

The last procedural issue in getting our hypothetical takings claim before the Supreme Court is that even after overcoming the hurdles discussed above, Supreme Court review requires that the Supreme Court actually grant a petition for writ of certiorari.³⁵ What is more, the Supreme Court has continually reduced the

33. Justice Scalia's plurality does not address this particular question, partially because he considered only the question of how a plaintiff should proceed when a *lower state court* (rather than the state supreme court) is alleged to have effected a taking:

Finally, the city and county argue that applying the Takings Clause to judicial decisions would force lower federal courts to review final state-court judgments, in violation of the so-called *Rooker-Feldman* doctrine. That does not necessarily follow. The finality principles that we regularly apply to takings claims would require the claimant to appeal a claimed taking by a lower court to the state supreme court, whence certiorari would come to this Court. If certiorari were denied, the claimant would no more be able to launch a lower-court federal suit against the taking effected by the state supreme-court opinion than he would be able to launch such a suit against a legislative or executive taking approved by the state supreme-court opinion; the matter would be *res judicata*. And where 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 to the same extent that he would be able to challenge in federal court a legislative or executive taking previously approved by a state supreme-court opinion.

Id. at 2609–2610 (plurality) (citations omitted).

34. *Supra* n. 32 and accompanying text; see *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 677–678 (1930) (granting certiorari and reversing where the state-court decision itself was claimed to violate federal law and the plaintiff's motion for rehearing was denied without written opinion).

35. S. Ct. R. 10. "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." *Id.*

number of the cases it accepts for review,³⁶ to the point where the Court now issues written opinions in only eighty to ninety cases per term.³⁷ Additionally, the greatest factor in determining whether the Supreme Court will grant certiorari is whether the case involves a conflict, or “split,” amongst the lower federal appeals courts.³⁸ In our hypothetical, the aggrieved landowner’s petition for certiorari would surely not involve a split amongst the lower federal courts. It would instead involve Supreme Court review of an allegedly unconstitutional state-court decision. This fact only further augurs against the Supreme Court granting the landowner’s petition for certiorari. In sum, even if our hypothetical landowner were able to overcome the many procedural and practical challenges to vindicating his or her federal rights through a motion for rehearing to the Florida Supreme Court and a subsequent writ of certiorari to the Supreme Court, his or her chances of gaining redress through this avenue are grim indeed.

B. Option #2: File a New Suit in Local State Court

As an alternative to the motion-for-rehearing route described above, the aggrieved landowner could file an entirely new takings claim in local state court under either 42 U.S.C. Section 1983 or the equivalent state-law provision for compensating takings, which in Florida is the Bert J. Harris, Jr., Private Property Rights Protection Act (The Harris Act).³⁹ Assuming that our

36. Amanda Frost, *Overvaluing Uniformity*, 94 Va. L. Rev. 1567, 1575 (2008).

37. S. Ct. of the U.S., *The Justices’ Caseload*, <http://www.supremecourt.gov/about/justicecaseload.aspx> (accessed Apr. 27, 2013); see Adam Liptak, *Supreme Court Term Offers Hot Issues and Future Hints*, N.Y. Times A1 (Oct. 3, 2010) (available at <http://www.nytimes.com/2010/10/03/us/03scotus.html?1>) (noting that as of October 2, 2010, the Supreme Court had only fifty-four cases on its docket for the October 2010 term).

38. David R. Stras, *The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 Tex. L. Rev. 947, 981–982 (2007) (explaining that “nearly [seventy percent] of the cases reviewed by the Court [from 2003 to 2005] involved a split among the lower courts”).

39. Fla. Stat. § 70.001 (2011). The statute provides, in pertinent part:

The Legislature recognizes that some laws, regulations, and ordinances of the state and political entities in the state, as applied, may inordinately burden, restrict, or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution. The Legislature determines that there is an important state interest in protecting the interests of private property owners from such inordinate burdens. Therefore, it is the intent of the Legislature that, as a separate and distinct cause of action from the law of takings, the Legislature herein provides for relief, or payment of compensation, when a new

aggrieved landowner lives in Pinellas County, Florida, he or she would file a suit in the Sixth Judicial Circuit asserting that the adverse Florida Supreme Court decision effected a taking of his or her land in violation of 42 U.S.C. Section 1983⁴⁰ or The Harris Act.⁴¹

1. Lack of Authority in the Lower State Courts

The primary issue that arises here is that, assuming Justice Scalia was correct and the only remedy in the event of a judicial taking is the nullification of a Florida Supreme Court decision, it is quite unlikely that the Sixth Judicial Circuit (or the Second District Court of Appeal, which would hear the appeal from the circuit court)⁴² would overturn a decision by the Florida Supreme Court. In fact, because the hierarchy of Florida's court system actually *requires* that lower courts defer to the Florida Supreme Court, it is entirely possible that the lower state courts would not have the power to nullify the Florida Supreme Court decision even if they so desired.⁴³ On the other hand, the lower courts

law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property.

Id. It is unclear whether the statute's reference to "state and political entities" or the fact that the statute applies only to "law[s], rule[s], regulation[s], or ordinance[s]" effectively precludes its application to the sphere of judicial takings. *Id.*

40. 42 U.S.C. Section 1983 provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

41. State courts enjoy concurrent jurisdiction with federal courts over Section 1983 claims. *Haywood v. Drown*, 556 U.S. 729, 731 (2009). "In our federal system of government, state as well as federal courts have jurisdiction over suits brought pursuant to 42 U.S.C. [Section] 1983, the statute that creates a remedy for violations of federal rights committed by persons acting under color of state law." *Id.*; see *Me. v. Thiboutot*, 448 U.S. 1, 3 n. 1 (1980) (explaining that federal and state courts enjoy concurrent jurisdiction over Section 1983 claims); *Martinez v. Cal.*, 444 U.S. 277, 283 n. 7 (1980) (noting the well-settled "general rule" that a state court may exercise concurrent jurisdiction over Section 1983 claims); cf. *Monroe v. Pape*, 365 U.S. 167, 183 (1963) (stating that "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked").

42. Fla. St. Cts., *Florida's District Courts*, <http://www.flcourts.org/courts/dca/dca.shtml> (accessed Apr. 27, 2013).

43. *State v. Lott*, 286 So. 2d 565, 566 (Fla. 1973) (discussing the rule that "[t]he trial court[s] [are] bound by the decisions of this Court just as the District Courts of Appeal

would not necessarily defy a Florida Supreme Court decision *per se* if they were to declare that decision to be a taking. The takings issue might be seen as completely separate from the Florida Supreme Court's ruling as to property law, which would allow the lower state court to declare the Florida Supreme Court's decision a taking without actually overturning the binding decision of a higher court. There is no proper way to predict how such a dynamic would ultimately play out—the important point is that the plaintiff's road to relief is laden with pitfalls and obstacles that will ultimately require resolution by courts throughout the land. It seems fair enough to say, however, that the chances of the Sixth Judicial Circuit or the Second District Court of Appeal issuing a decision that would effectively nullify—that is, overrule—the decision of the Florida Supreme Court are practically nonexistent.⁴⁴

2. *The Potential Lack of Jurisdiction in the Florida Supreme Court*

Proceeding along the safe assumption that the local circuit court and the district court of appeal will deny the plaintiff's takings claim, the case would make its way back to the Florida Supreme Court.⁴⁵ While the Florida Supreme Court would probably have the authority to overrule and nullify its previous decision, the seemingly ubiquitous question again arises whether such reversal is a realistic possibility. In any event, the more pressing procedural problem at this point is whether the Florida Constitution even provides the Florida Supreme Court with jurisdiction to review a judicial takings claim originally brought in

follow controlling precedents set by the Florida Supreme Court"); see *State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976) (explaining that "[w]here an issue has been decided in the Supreme Court of the state, the lower courts are bound to adhere to the Court's ruling when considering similar issues, even though the court might believe that the law should be otherwise"); *Hoffman v. Jones*, 280 So. 2d 431, 440 (Fla. 1973) (holding "that a District Court of Appeal does not have the authority to overrule a decision of the Supreme Court of Florida").

44. See *Stop the Beach*, 130 S. Ct. at 2607 (plurality) (explaining that if the Court had found that the Florida Supreme Court's decision in *Stop the Beach* had worked a taking, it would have reversed the decision rather than mandating compensation).

45. Fla. St. Cts., *Court Jurisdiction Chart*, http://www.flcourts.org/courts/bin/Jurisdiction_chart.pdf (accessed Apr. 27, 2013).

state court.⁴⁶ Article V, Section 3(b) of Florida's Constitution lays out very specific grounds for the Florida Supreme Court's jurisdiction, only two of which might possibly confer jurisdiction in the instant case.⁴⁷

a. The "Express" Requirement and the Problem of Per Curiam Affirmance

The first possible basis for Florida Supreme Court jurisdiction permits review of a split amongst the district courts of appeal or review of a district court of appeal decision that expressly construes a federal or state constitutional provision.⁴⁸ Article 5, Section 3(b)(3) of the Florida Constitution provides that the Florida Supreme Court

[m]ay review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.⁴⁹

While this provision might seem expansive at first glance, the inclusion of the words "expressly" and "directly" make the conferral of jurisdiction through this provision far more than a mere formality.⁵⁰

For example, in deciding appeals from the circuit courts throughout the state, the Florida district courts of appeal routinely employ a mechanism known as "per curiam affirmance" (PCA), wherein they affirm the lower court's decision without any

46. See Fla. Const. art. V, § 3(b) (establishing and outlining the Florida Supreme Court and its jurisdiction).

47. *Id.*

48. *Id.* at § 3(b)(3). It is exceedingly rare for the Florida Supreme Court to grant review in these types of cases; indeed, in 2008, the Florida Supreme Court exercised its discretion and granted review based upon this provision in only a single case out of twenty requests. Diana L. Martin & Robin I. Bresky, *Taking the Pathway of Discretionary Review toward Florida's Highest Court*, 83 Fla. B.J. 55, 56 (Nov. 2009).

49. Fla. Const. art. V, § 3(b)(3).

50. *Id.*

written opinion at all.⁵¹ If a district court of appeal wished to dodge, or “punt,” the issue of a judicial taking, it could simply “per curiam affirm” the lower court’s refusal to declare a taking. And while prior to 1980, the Florida Supreme Court would occasionally delve into the record of a PCA case to determine whether it created a circuit split, a 1980 constitutional amendment to the Court’s jurisdiction effectively foreclosed that avenue, too:

[T]he addition of the word “expressly” to the allocation of the court’s conflict jurisdiction (“expressly and directly conflicts”) clearly foreclosed review of one word “affirmed” decisions. This in fact worked against the court’s ability to review for conflict—by going into the “record proper”—a district court per curiam decision not supported by a written opinion. Such a decision could not “expressly” create conflict with another decision.⁵²

Therefore, if confronted with a PCA by the district court of appeal, the aggrieved landowner would need to attempt one of the alternative routes around a PCA, which include:

51. Jud. Mgt. Council, Comm. on Per Curiam Affirmed Dec., *Final Report and Recommendations* 26 (May 2000) (available at http://www.floridasupremecourt.org/pub_info/documents/pca-report.pdf) (explaining that 62.5% of all opinions in 1998 were PCAs and noting the increasing trend in PCAs); see Steven Brannock & Sarah Weinzierl, *Confronting a PCA: Finding a Path around a Brick Wall*, 32 *Stetson L. Rev.* 367, 368–369 (2003) (discussing the “maddening” “commonality” of PCA opinions in the state of Florida); Stephen Krosschell, *DCA’s, PCAs, and Government in the Darkness*, 1 *Fla. Coastal L.J.* 13, 15–16 (1999) (explaining that sixty-three percent of all Florida district courts of appeal decisions in 1996 were PCAs); Thomas Powell & Susan Maguire, *The PCA Debate—An Executive Overview*, 1 *Fla. Coastal L.J.* 67, 90 (1999) (providing a table that lists the percentage of Florida district courts of appeal decisions, through 1997, that were per curiam affirmed).

52. Thomas C. Marks, Jr., *Jurisdictional Creep and the Florida Supreme Court*, 69 *Alb. L. Rev.* 543, 548 (2006); see Brannock & Weinzierl, *supra* n. 51, at 373 (explaining that the 1980 constitutional amendment “finally rid the Florida Supreme Court of discretionary review over PCAs”); Arthur J. England, Jr. & Richard C. Williams, Jr., *Florida Appellate Reform One Year Later*, 9 *Fla. St. U. L. Rev.* 221, 231 (1981) (discussing the reasoning behind the enactment of the 1980 amendment and explaining its limiting effect on Florida Supreme Court jurisdiction); Arthur J. England, Jr., Eleanor Mitchell Hunter & Richard C. Williams, Jr., *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 *U. Fla. L. Rev.* 147, 151–159 (1980) (noting that six of the seven sitting Supreme Court justices, as well as The Florida Bar, supported the 1980 amendment because it circumscribed the Court’s mandatory jurisdiction and completely removed its jurisdiction over PCA decisions).

(1) filing a motion for rehearing coupled with a motion for rehearing en banc, (2) filing a motion for clarification or a motion to write an opinion, (3) asking the court to certify an issue or a conflict to the Florida Supreme Court, (4) appealing directly to the United States Supreme Court, and (5) convincing the Florida Supreme Court that the PCA had the effect of declaring a statute or constitutional provision invalid.⁵³

These options, which constitute the only methods of surmounting "the brick wall that is the PCA,"⁵⁴ are "rarely appropriate (and rarely successful)."⁵⁵ This underscores the procedural conundrum that would confront our aggrieved landowner if he or she sought relief through an entirely new action beginning in the local circuit.⁵⁶

Let us assume that the district court of appeal did not per curiam affirm the trial court's rejection of the plaintiff's takings claim, but instead wrote an opinion affirming the trial court. Florida Supreme Court jurisdiction could be invoked if the district court of appeal's decision "expressly construes a provision of the state or federal constitution, or . . . expressly and directly conflicts with a decision of another district court of appeal."⁵⁷ While the chances of satisfying jurisdiction would be better because of the written opinion, Section 3(b)(3) still requires a *conflict* amongst the circuits or the *express* construal of a federal or state constitutional provision.⁵⁸ If the plaintiff wished to base Florida Supreme Court jurisdiction on a split amongst the district courts of appeal, at least one district court of appeal would have had to have actually accepted or adopted the judicial takings theory.⁵⁹ Otherwise, all the district courts of appeal would be in agree-

53. Brannock & Weinzierl, *supra* n. 51, at 375.

54. *Id.* at 368.

55. *Id.* at 375.

56. For a detailed analysis of each of these potential routes around the brick wall of the PCA, consult *id.* at 375-391.

57. Fla. Const. art. V, § 3(b)(3). In determining whether a district court of appeal's decision "expressly and directly conflicts" with another district court of appeal, the conflict must be clear on the face of the lower court opinion. *Hardee v. State*, 534 So. 2d 706, 708 n. * (Fla. 1988).

58. Fla. Const. art. V, § 3(b)(3).

59. *Id.*

ment, and there would be no conflict; the Florida Supreme Court would lack jurisdiction to hear the case.⁶⁰

One alternative basis of jurisdiction exists when the district court of appeal has “expressly construe[d] a provision of the state or federal constitution.”⁶¹ In order to trigger this jurisdiction-granting clause, the district court of appeal’s decision must “explain, define[,] or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision,”⁶² which in our hypothetical case is the Takings Clause. That standard, coupled with the fact that “the power of the Florida Supreme Court to exercise jurisdiction over a case is strictly construed and there is a heavy burden against the exercise of jurisdiction,”⁶³ means that the district court of appeal would have to opine on the taking effect (or lack thereof) of the Florida Supreme Court’s original decision in order for the plaintiff to invoke this particular jurisdictional provision. The coup de grace, of course, is that even if the landowner slaked one of the stringent standards above, review is “discretionary,” and the Florida Supreme Court would have to actively agree to hear the appeal (essentially of its own decision) on the judicial takings question.⁶⁴

b. Certification to the Florida Supreme Court

The second potential constitutional basis for jurisdiction is that the aggrieved landowner could attempt to have the district court of appeal certify the takings question to the Florida Supreme Court.⁶⁵ The aggrieved landowner can file a motion for

60. *Id.*

61. *Id.* At the outset, it is important to note that it must be the *majority* district court opinion that expressly construes a state statute or a state or federal constitutional provision. Hence, a lengthy discussion of a federal constitutional provision in a dissenting or concurring district court opinion is insufficient to confer jurisdiction. Even if the Florida Supreme Court wishes to review such a case, the Court will lack the jurisdiction necessary to do so. Jack W. Shaw, Jr., “*Per Curiam: Affirmed*”: *Some Historical Perspectives*, 1 Fla. Coastal L.J. 1, 4 (1999).

62. *Ogle v. Pepin*, 273 So. 2d 391, 392 (Fla. 1973) (quoting *Armstrong v. Tampa*, 106 So. 2d 407, 409 (Fla. 1958)).

63. *Martin & Bresky*, *supra* n. 48, at 55.

64. *Id.* at 56.

65. See Fla. Const. art. V, § 3(b)(4) (providing jurisdiction to “review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal”).

certification either after the district court of appeal rules against him or her⁶⁶ or while an appeal is pending from the decision of a trial court.⁶⁷ The plaintiff would need to convince the district court of appeal that the case raises a question of “great public importance.”⁶⁸ In the case of a trial court decision still pending before the district court of appeal, the question must also be certified as “requir[ing] immediate resolution by the supreme court.”⁶⁹ While “great public importance” certification is not an impossible means of gaining Florida Supreme Court review, the contours of what exactly constitutes a question of “great public importance” are “elusive,” and the probability of the plaintiff obtaining review through this conduit is uncertain at best.⁷⁰

If the aggrieved landowner’s bid to take the case before the Florida Supreme Court fails for want of jurisdiction or if the landowner is able to appear before the Florida Supreme Court but that court refuses to declare a taking, the landowner could then apply for a writ of certiorari to the United States Supreme Court because the plaintiff would have presented his or her case to “the highest state court in which decision could be had.”⁷¹ The relatively small (and constantly decreasing) number of cases in which the Supreme Court grants writs of certiorari raises obvious practical problems here,⁷² but the daunting route to the Supreme Court of the United States is available nonetheless.

66. *Id.*; see Brannock & Wienzierl, *supra* n. 51, at 385–387 (explaining the occasional success of such motions).

67. Fla. Const. art. V, § 3(b)(5) (granting jurisdiction to “review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court”).

68. *Id.* at § 3(b)(4).

69. *Id.* at § 3(b)(5).

70. See generally Raoul G. Cantero III, *Certifying Questions to the Florida Supreme Court: What’s So Important?* 76 Fla. B.J. 40 (May 2002) (discussing the “elusive” reasoning behind the certification of certain questions and explaining “some of the major reasons courts have articulated for certifying a question of great public importance,” which include, *inter alia*, the fact that a case is one of first impression, that a particular issue arises frequently, the lack of clarity in contemporary caselaw, considerations of public policy, the old or stale nature of current precedent, and the existence of intervening law).

71. 28 U.S.C. § 1257(a) (2006) (providing that Supreme Court review is available by writ of certiorari from “[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had”).

72. See Frost, *supra* n. 36, at 1575 (noting that the Supreme Court’s “docket shrank to a modern low of sixty-eight cases in the 2006 Term”).

In sum, the state-court avenue offers our aggrieved landowner two options. First, the landowner can move for rehearing in the Florida Supreme Court after the adverse decision and, if unsuccessful, try his or her hand at obtaining certiorari to the Supreme Court of the United States.⁷³ Second, the landowner could file an entirely new action in the local circuit court claiming that the Florida Supreme Court's original decision had effected a taking.⁷⁴ Either option is rife with procedural hurdles,⁷⁵ and the landowner may find that the best avenue for vindicating his or her constitutional rights is to forego the state courts altogether and seek relief in federal court. As the discussion that follows will demonstrate, however, the federal-court route is also lined with a slew of procedural and jurisdictional challenges that may well bar the aggrieved landowner from obtaining relief in any forum at all.

III. THE FEDERAL-COURT AVENUE

A. Option #3: A Takings Claim in Federal District Court

The other avenue available to the plaintiff after the Florida Supreme Court effects its hypothetical judicial taking would be to file suit in federal district court under 42 U.S.C. Section 1983, asserting that the Florida Supreme Court's decision had worked a taking.⁷⁶ There are several procedural issues, however, mostly centering on notions of "Our Federalism" and the appropriate balance of state and federal prerogatives in our federalist system

73. See *supra* pt. II(A) (explaining the challenges along the motion-for-rehearing route).

74. See *supra* pt. II(B) (describing the difficulties inherent in bringing an entirely new state-court action).

75. See e.g. *Hoechst Celanese Corp. v. Fry*, 753 So. 2d 626, 627–628 (Fla. 5th Dist. App. 2000) (en banc) (finding that after reconsidering its per curiam affirmance after a motion for rehearing, the case did not merit certification to the Florida Supreme Court because precedent clearly established that class certification is not appropriate where the plaintiffs allege fraud); *Whipple v. State*, 431 So. 2d 1011, 1013 (Fla. 2d Dist. App. 1983) (stating that in Florida, while every litigant has the right to appeal a judgment, that right does not extend to a hearing by the Florida Supreme Court).

76. Justice Scalia suggests that this avenue would be available even to affected property owners who were not a party to the original suit, regardless of the actions taken by the original parties to the Florida Supreme Court decision. *Stop the Beach*, 130 S. Ct. at 2609–2610 (plurality).

of government,⁷⁷ that would confront (and perhaps prevent) the landowner from bringing the cause before a federal district court.

*1. The Paradoxical Effect of Rooker-Feldman and
Williamson County*

The first procedural issue that would need to be addressed is whether a United States District Court can rule on the takings claim without violating the *Rooker-Feldman* doctrine, by which only the United States Supreme Court can sit in direct review of final state-court judgments.⁷⁸ Justice Ruth Bader Ginsberg recently expounded upon the *Rooker-Feldman* doctrine in *Exxon-Mobil Corp. v. Saudi Basic Industries Corp.*,⁷⁹ writing,

The *Rooker-Feldman* doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments. *Rooker-Feldman* does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts

77. *Younger v. Harris*, 401 U.S. 37, 44 (1971). In Justice Hugo Black's seminal opinion in *Younger*, he explained the contours of "Our Federalism" as follows:

[The] underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." . . . It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

Id. at 44-45.

78. See *D.C. Ct. of Apps. v. Feldman*, 460 U.S. 462, 476 (1983) (agreeing "that the United States District Court is without authority to review final determinations of the District of Columbia Court of Appeals in judicial proceedings[because r]eview of such determinations can be obtained only in this Court"); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-416 (1923) (explaining that in cases under the "province and duty of the state courts[,] "no court of the United States other than this [C]ourt could entertain a proceeding to reverse or modify the judgment").

79. 544 U.S. 280, 284 (2005).

to stay or dismiss proceedings in deference to state-court actions.⁸⁰

Even the limited *Rooker-Feldman* doctrine explained here would likely bar the plaintiff from pursuing his or her claim in federal court.⁸¹ After all, if the landowner in our case had moved for rehearing in the Florida Supreme Court and that Court had issued an opinion specifically rejecting the federal constitutional claim, the landowner would surely be a “state-court loser” within the ambit of *Rooker-Feldman*.⁸² If the landowner failed to raise the takings issue in the original state proceeding but moved for rehearing in the Florida Supreme Court on that ground and was denied without written opinion (in which case the landowner would never have truly “lost” on the merits of the federal takings claim),⁸³ the landowner’s claim would pass the *Rooker-Feldman* doctrine.⁸⁴ The landowner’s federal action would still likely be one in which he or she was “complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.”⁸⁵ In either case, the *Rooker-Feldman* doctrine would in all likelihood preclude lower federal-court review, and the landowner’s only recourse would be a petition for certiorari to the Supreme Court of the United States.⁸⁶

In Justice Scalia’s plurality opinion in *Stop the Beach*, he shed some light on the potential *Rooker-Feldman* question by

80. *Id.*

81. *Id.*

82. *Id.* It of course goes without saying that if the landowner had filed an entirely new takings claim in the local state court and his or her claim was rejected, the landowner would certainly then qualify as a “state-court loser” within the meaning of *Rooker-Feldman*, and his or her only hope for relief would lie in a writ of certiorari to the United States Supreme Court. *Id.*

83. See Fla. Const. art. V, § 3(b)(3) (granting the Florida Supreme Court jurisdiction over any district court of appeal opinion that expressly construes a federal or state constitution provision); Shaw, *supra* n. 61, at 5 (noting that while a PCA opinion decides the law of the case, it has no precedential value); see also Brannock & Wienzierl, *supra* n. 51, at 368–369 (stating that the Florida Supreme Court generally does not have jurisdiction to consider a PCA opinion because the opinion “does not ‘express’ anything”).

84. *Exxon-Mobil*, 544 U.S. at 284.

85. *Id.*

86. See *Rooker*, 263 U.S. at 415–416 (holding that only the United States Supreme Court has jurisdiction to review final state-court judgments); *Feldman*, 460 U.S. at 476 (holding that the Supreme Court alone has the jurisdiction to review a final judgment from the D.C. Court of Appeals).

addressing it head-on and providing significant guidance as to how the issue would actually eventuate in federal court:

[T]he city and county argue that applying the Takings Clause to judicial decisions would force lower federal courts to review final state-court judgments, in violation of the so-called *Rooker-Feldman* doctrine. That does not necessarily follow. The finality principles that we regularly apply to takings claims would require the claimant to appeal a claimed taking by a lower court to the state supreme court, whence certiorari would come to this Court. If certiorari were denied, the claimant would no more be able to launch a lower-court federal suit against the taking effected by the state supreme-court opinion than he [or she] would be able to launch such a suit against a legislative or executive taking approved by the state supreme-court opinion; the matter would be *res judicata*. And where the claimant was not a party to the original suit, he [or she] would be able to challenge in federal court the taking effected by the state supreme-court opinion to the same extent that he [or she] would be able to challenge in federal court a legislative or executive taking previously approved by a state supreme-court opinion.⁸⁷

Therefore, the aggrieved landowner would be *required* to pursue the state-court avenue discussed above,⁸⁸ and if he or she is unable to obtain relief there, he or she will be barred from pursuing the claim in federal court.⁸⁹ The “finality principles that [the Court] regularly appl[ies] to takings claims”⁹⁰ discussed by Justice Scalia emanate from the Court’s decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.⁹¹ The *Williamson County* majority announced that “a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the

87. *Stop the Beach*, 130 S. Ct. at 2609–2610 (plurality) (citations omitted).

88. See *supra* pt. II (discussing the state-court avenue for pursuing the aggrieved landowner’s takings claim).

89. Daniel L. Siegel, *Why We Will Probably Never See a Judicial Takings Doctrine*, 35 Vt. L. Rev. 459, 468 (2010) (discussing Justice Scalia’s awareness of the *Rooker-Feldman* issue and his explanation “that a party would be limited to petitioning the Supreme Court for a writ of certiorari”).

90. *Stop the Beach*, 130 S. Ct. at 2609 (plurality).

91. 473 U.S. at 195.

State for obtaining such compensation.⁹² Thus, applying *Rooker-Feldman* and *Williamson County* in tandem to our hypothetical case results in a paradox: the aggrieved landowner would be barred from seeking relief in federal district court, but other similarly situated landowners not a party to the original case before the Florida Supreme Court would be free to bring their claims in federal court.⁹³

2. *The Subtle Possibility of Abstention as a Bar to Relief for Similarly Situated Landowners*

Even similarly situated landowners not barred by *Rooker-Feldman* and *Williamson County* might face a challenge if the district court decides to apply one of the judicially crafted abstention doctrines and refuses to hear the case.⁹⁴ The abstention doctrine has at this point expanded to include various brands and approaches,⁹⁵ but the two types of abstention most applicable to the similarly situated landowners in our hypothetical are those announced in *Louisiana Power & Light Co. v. City of Thibodaux*⁹⁶ and *Younger v. Harris*.⁹⁷

a. *Thibodaux* Abstention

If the federal district court deems the Florida Supreme Court's decision regarding property rights to be tantamount to the "special and peculiar nature" of eminent-domain proceedings,

92. *Id.*

93. *Stop the Beach*, 130 S. Ct. at 2609–2610 (plurality). Such similarly situated landowners could be, for example, the aggrieved landowner's neighbors or any other landowners adversely affected by the Florida Supreme Court's decision. For purposes of precision and clarity, these landowners are hereinafter collectively referred to as "similarly situated" landowners.

94. See Erwin Chemerinsky, *Federal Jurisdiction* 783 (5th ed., Aspen Publishers 2007) (defining "abstention" as "judicially created rules whereby federal courts may not decide some matter before them even though all jurisdiction and justiciability requirements are met").

95. See e.g. *Burford v. Sun Oil Co.*, 319 U.S. 315, 328–332 (1943) (promulgating a unique brand of "administrative" abstention); *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941) (announcing *Pullman* abstention, which requires district courts to exercise their "wise discretion" and abstain when a case involves an unsettled issue of state law that, if answered by a state court, would obviate or substantially modify any federal constitutional questions).

96. 360 U.S. 25 (1959).

97. 401 U.S. 37.

Thibodaux abstention might lead the judge to stay the similarly situated landowners' federal takings claim.⁹⁸ In *Thibodaux*, the City of Thibodaux had initiated eminent-domain proceedings to take property owned by the Louisiana Power & Light Company, a local utility.⁹⁹ When the utility removed the case to federal district court based on diversity of citizenship, the district court issued an order staying the proceedings until the Supreme Court of Louisiana could interpret the law upon which the expropriation action was based.¹⁰⁰ Finding that eminent-domain proceedings are "of a special and peculiar nature . . . intimately involved with the sovereign prerogative,"¹⁰¹ the United States Supreme Court upheld the district court's decision to stay the case.¹⁰²

Given that the Florida Supreme Court's decision in our hypothetical involves the explication of "state law defin[ing] property interests,"¹⁰³ the argument could be made that the implication of the State's "sovereign prerogative" in allocating property rights would require abstention of the *Thibodaux* brand.¹⁰⁴ That said, *Thibodaux* abstention applies only to stay proceedings when a state-court interpretation of state law is needed for a proper and accurate resolution of the question.¹⁰⁵ In our case, the similarly situated landowners' claim would *not* turn on a question of state law—indeed, it seems beyond dispute that the Florida Supreme Court would have the *power* to decide the property issue originally presented in the aggrieved landowner's case.¹⁰⁶ Rather, the

98. *Thibodaux*, 360 U.S. at 28. For a thorough analysis of the contours of *Thibodaux* abstention and its relationship to the other, more common brands of abstention doctrine, consult James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 Stan. L. Rev. 1049, 1079–1083 (1994).

99. *Thibodaux*, 360 U.S. at 25.

100. *Id.* at 25–26.

101. *Id.* at 28.

102. *See id.* (reversing the Court of Appeals and reinstating the district court's stay order).

103. *Stop the Beach*, 130 S. Ct. at 2597.

104. *Thibodaux*, 360 U.S. at 28.

105. *Id.* at 27–28; *see also* Michael P. Allen, Michael Finch & Caprice L. Roberts, *Federal Courts: Context, Cases and Problems* 689 (Aspen Publishers 2009) (discussing the various types of abstention).

106. As the Florida Supreme Court explained in the decision that would eventually lead to *Stop the Beach*, for example, the Court enjoyed "both mandatory and discretionary jurisdiction" over the matter under Article V, Sections 3(b)(1) and 3(b)(4) of the Florida Constitution. *Walton Co. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1105 (Fla. 2008), *aff'd sub nom. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't'l Protec.*, 130 S. Ct. 2592 (2010).

similarly situated landowners' claim would turn on an issue of federal law (specifically the Takings Clause of the United States Constitution), and *Thibodaux* abstention would therefore be improper.¹⁰⁷ The fact that the Florida Supreme Court's decision would involve issues of property rights is a red herring. The *real* issue in the case would not be whether the Florida Supreme Court's interpretation of state property law was correct. Instead, it would be whether the Florida Supreme Court's decision violates the Fifth Amendment's guarantee against takings of property without just compensation, and *Thibodaux* abstention is simply not implicated by such a pure question of federal constitutional law.¹⁰⁸

b. *Younger* Abstention

An alternative issue is whether abstention of the brand discussed in *Younger*¹⁰⁹ would prevent the federal courts from exercising jurisdiction in the same way that the Anti-Injunction Act¹¹⁰ prevents the enjoining of a state-court judgment after it has been rendered. The Anti-Injunction Act creates an absolute bar to a federal court's enjoining of state-court proceedings, except in the case of certain limited exceptions.¹¹¹ The Supreme Court has held that the Anti-Injunction Act bars injunctions that interfere with ongoing state-court proceedings.¹¹² The Court has also held that the Act continues to apply (and bars federal-court interference) with regard to the *enforcement* of any state-court judgment.¹¹³ Notwithstanding, the Court has held 42 U.S.C. Section 1983 to be an express exception to the Anti-Injunction Act, so the Act itself

107. See *Thibodaux*, 360 U.S. at 30 (explaining that the stay order was appropriate in order to allow the Louisiana courts to interpret a Louisiana statute before involving the federal district court on the question of compensation).

108. *Id.*

109. 401 U.S. at 44–45.

110. See 28 U.S.C. § 2283 (2006) (preventing federal courts from “grant[ing] an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments”).

111. See Allen, Finch & Roberts, *supra* n. 105, at 632 (explaining that the Anti-Injunction Act completely bars federal courts from enjoining state-court proceedings except (1) when Congress expressly excepts a situation; (2) when the injunction is necessary “in aid of” federal-court jurisdiction; or (3) when the injunction is necessary to “protect or effectuate” a federal judgment).

112. *Dombrowski v. Pfister*, 380 U.S. 479, 484 n. 2 (1965).

113. *Co. of Imperial v. Munoz*, 449 U.S. 54, 59 (1980).

will not bar the similarly situated landowners from seeking an injunction in federal district court.¹¹⁴ While *Younger* abstention normally applies only to prevent federal courts from enjoining *ongoing* state proceedings, the unique procedural posture of the similarly situated landowners' suit exposes the possibility that a federal court could hold that *Younger* abstention prevents the enjoining of a duly enacted Florida Supreme Court decision in much the same way that the Supreme Court has refused to allow a similar end-run around the Anti-Injunction Act.¹¹⁵ Perhaps due to the unique nature of this situation, the United States Supreme Court has never held that *Younger* applies in this manner, but the possibility exists nonetheless.

If there were ever a case that would tempt the Supreme Court to extend the *Younger* doctrine beyond ongoing proceedings to the realm of post-judgment attempts to interfere with a state-court decision, the aggrieved landowner's case would likely be it. The case of *Pennzoil Co. v. Texaco, Inc.*¹¹⁶ is instructive in this regard. In *Pennzoil*, the oil company Pennzoil won more than \$11 billion in a suit against Texaco for Texaco's allegedly tortious interference with Pennzoil's attempted purchase of Getty Oil.¹¹⁷ Texas law required Texaco to post a supersedeas bond in the amount of \$13 billion if it wished to prevent Pennzoil from executing a writ of judgment against its assets while it appealed the verdict, and Texaco was clearly in no position to post such an amount.¹¹⁸ Pushed to the verge of bankruptcy, Texaco sued in federal district court and won an injunction preventing Pennzoil from enforcing the Texas state-court judgment on due process grounds.¹¹⁹ The Supreme Court reversed, holding that the district court's injunction constituted an impermissible interference with

114. *Mitchum v. Foster*, 407 U.S. 225, 242 (1971) (finding that in enacting Section 1983, "Congress plainly authorized the federal courts to issue injunctions in [Section] 1983 actions").

115. *See Co. of Imperial*, 449 U.S. at 59 (holding that a federal court cannot enjoin enforcement of an injunction issued by a state court even if the state-court proceedings have concluded).

116. 481 U.S. 1 (1987).

117. *Id.* at 4. Pennzoil actually won a verdict of \$7.53 billion in compensatory damages and \$3 billion in punitive damages; the parties, however, agreed that the actual judgment, including prejudgment interest, would exceed \$11 billion. *Id.*

118. *Id.* at 5.

119. *Id.* at 6-8. The Sixth Circuit affirmed the district court injunction, and Pennzoil appealed, setting the stage for the Supreme Court to enter the fray. *Id.*

the Texas judicial process and therefore violated the *Younger* doctrine.¹²⁰ Significantly, the Court took great pains in its opinion to explain “the importance to the States of enforcing the orders and judgments of their courts.”¹²¹ Admittedly, *Pennzoil*’s reasoning was limited to interference with pending, rather than already decided, state judgments.¹²² Nonetheless, the Court made clear that the “execution of state judgments” is a jealously guarded state interest capable of triggering *Younger* and its progeny.¹²³ If our aggrieved landowner sought a district court injunction to prevent enforcement of the Florida Supreme Court’s ruling, it is no great leap to say that he or she could be confronted with a *Younger*-based challenge deserving of respect. One can only speculate as to whether the Supreme Court would actually use the aggrieved landowner’s case to expand the *Younger* doctrine in this sense, but it seems plain that such a result would not be an overly outlandish outcome given the trajectory of the Supreme Court’s guidance in this area.¹²⁴ This is especially true, given that the Anti-Injunction Act is already applied to prevent the same sort of post-judgment interference with the enforcement of state-court decisions that the aggrieved landowner would be attempting in the instant case.¹²⁵

Another reason that *Younger* abstention would not traditionally apply to the similarly situated landowners’ takings claim is that the doctrine is normally used to prevent a federal court

120. *Id.* at 10. Another justification for reversal was that according to the Court, the district and appeals courts had applied the wrong standard in assessing the relief available to Texaco through the Texas courts. *Id.*

121. *Id.* at 13.

122. *See id.* at 14 (stating, “Not only would federal injunctions in such cases interfere with the execution of state judgments, but they would do so on grounds that challenge the very process by which those judgments were obtained. So long as those challenges relate to pending state proceedings, proper respect for the ability of state courts to resolve federal questions . . . mandates that the federal court stay its hand”).

123. *Id.*

124. *See supra* nn. 116–123 and accompanying text (discussing how the Supreme Court’s *Pennzoil* decision classified the enforcement of state-court judgments as a significant state interest capable of triggering *Younger* abstention). The relevant extrapolation here is that the enforcement of state-court rulings could be a similarly significant, and thus guarded, state interest capable of triggering abstention.

125. *Co. of Imperial*, 449 U.S. at 59; *see Allen, Finch & Roberts, supra* n. 105, at 633 (noting that the Anti-Injunction Act “continues to apply even after the trial has ended by prohibiting interference with the *enforcement* of any judgment resulting from the state court proceeding”) (emphasis in original).

from enjoining state *criminal* proceedings.¹²⁶ In any event, the Supreme Court has issued a series of decisions extending *Younger* abstention to protect civil actions brought on behalf of the state in which the state employs its sovereignty "to vindicate important state policies."¹²⁷ In *Trainor v. Hernandez*,¹²⁸ for example, the Illinois Department of Public Aid brought suit against Juan and Maria Hernandez for misstating their earnings and thereby fraudulently receiving public assistance.¹²⁹ Rather than filing criminal charges, however, the State pursued only a civil action and instituted attachment proceedings against the Hernandezes' property under the State's attachment statute.¹³⁰ Instead of answering the attachment proceedings in state court, the Hernandezes filed a lawsuit in federal district court alleging that the attachment of their property constituted a deprivation of property without due process of law and seeking the return of the attached assets.¹³¹ The Supreme Court held that abstention was proper and that the case should have been dismissed because principles of comity and federalism prohibit federal court "disruption of suits by the State [acting] in its sovereign capacity."¹³² More important to our hypothetical, however, the Court embellished on its *Younger* holding, explaining that "in a Union where both the States and the Federal Government are sovereign entities, there are basic concerns of federalism [that] counsel against interference by federal courts, through injunctions or otherwise, with legitimate state functions, particularly with the operation of

126. See e.g. *Younger*, 401 U.S. at 49-53 (inaugurating *Younger* abstention as a doctrine pertaining solely to criminal prosecutions).

127. *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977); see *Middlesex Co. Ethics Comm. v. Garden St. B. Ass'n*, 457 U.S. 423, 433-434 (1982) (extending *Younger* to quasi-judicial state ethics committee hearings); *Moore v. Sims*, 442 U.S. 415, 423 (1979) (extending *Younger* in deference to the "important state interests" advanced by the state in child custody proceedings).

128. 431 U.S. 434.

129. *Id.* at 435.

130. *Id.* at 435-436.

131. *Id.* at 437-438.

132. *Id.* at 446. Justice Brennan vehemently disagreed with the majority opinion in *Trainor*—indeed, in a stinging dissent (in which Justice Marshall joined), he wrote: "The Court continues on, to me, the wholly improper course of extending *Younger* principles to deny a federal forum to plaintiffs invoking 42 U.S.C. [Section] 1983 for the decision of meritorious federal constitutional claims when a civil action that might entertain such claims is pending in a state court." *Id.* at 450 (Brennan & Marshall, JJ., dissenting). Justice Stevens also dissented, albeit for slightly different reasons. *Id.* at 460 (Stevens, J., dissenting).

state courts.”¹³³ Indeed, in another decision handed down the very same year as *Trainor*, the Court further extended the *Younger* doctrine to a state court’s judicial contempt proceedings between private parties, in large part because contempt proceedings were the vehicle “through which [the state] vindicates the regular operation of its judicial system.”¹³⁴

It seems obvious how the teachings of *Younger* and its progeny might cause a federal court to tread cautiously when considering a suit brought by the similarly situated landowners to strike down a decision of the Florida Supreme Court. What greater “interference” can there possibly be, after all, than seeking the nullification of the state-court decision itself?¹³⁵ Ultimately, however, there is one fundamental difference between the *Younger* cases discussed above and the hypothetical under examination: in each of the *Younger* cases, it was the *state* instituting an action or somehow attempting to bring its sovereign force to bear upon the parties.¹³⁶ In our hypothetical case, it would be the similarly situated landowners, and not the state, bringing suit to enjoin an allegedly unconstitutional taking effected by the decision of the state supreme court. Thus, while many of the principles and legal theories applicable in *Younger* abstention are implicated by our hypothetical case, a federal district court would still need to greatly expand the *Younger* doctrine in order for it to apply to a suit brought by the similarly situated landowners to prevent the enforcement of the Florida Supreme Court decision that allegedly works a taking.

Even if the federal district court expanded *Younger* (a result that is quite unlikely from the onset¹³⁷) and thus abstained in the similarly situated landowners’ suit, the landowners could attempt to defend against abstention by invoking the long-standing *Younger* exception that prevents a federal court from abstaining, unless the claimant has had the opportunity to raise his or her federal issues and have them decided by an adequately compe-

133. *Id.* at 441 (majority).

134. *Juidice v. Vail*, 430 U.S. 327, 335 (1977).

135. *Trainor*, 431 U.S. at 440.

136. *E.g. Younger*, 401 U.S. at 54.

137. *See 31 Foster Children v. Bush*, 329 F.3d 1255, 1274–1275 (11th Cir. 2003) (requiring ongoing state proceedings to trigger *Younger* abstention). Here, in the similarly situated landowners’ case, the Florida Supreme Court’s ruling would already be decided, not ongoing.

tent state tribunal.¹³⁸ As explained earlier in this Article, many obstacles and jurisdictional challenges obstruct the road to relief in state court, and the landowners could argue that they lack an alternative forum to pursue their federal constitutional claims, thus precluding the application of *Younger*.¹³⁹ Nonetheless, in assessing the adequacy of the alternative state forum, the Court has held that the proper inquiry is merely “whether the state proceedings afford an adequate opportunity to raise the constitutional claims.”¹⁴⁰ It is therefore unlikely that a federal court would find the Florida state-court procedures inadequate for the pursuit of the similarly situated landowners’ constitutional claims.¹⁴¹

In sum, the upshot of the federal-court avenue is that the aggrieved landowner would be barred from bringing a claim in federal district court.¹⁴² In any event, those landowners similarly situated to the aggrieved landowner *could* pursue a federal takings claim, and neither *Thibodaux* nor *Younger* abstention would likely bar their claim unless the federal district court decided to appreciably expand either of those doctrines to fit the unique facts of the extant case.¹⁴³

138. *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973) (noting that *Younger* abstention—a federal court’s dismissal of a plaintiff’s federal and state claims so they may be presented to a state court—requires “the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved”).

139. See *supra* pt. II (explaining the plethora of procedural difficulties that will likely confront our hypothetical plaintiff in state court).

140. *Moore*, 442 U.S. at 430.

141. See *id.* at 425 (stating that the federal courts should not “exert jurisdiction if the plaintiffs had an opportunity to present their federal claims in the state proceedings”) (quoting *Judice v. Vail*, 430 U.S. 327, 337 (1977)); *Wexler v. Lepore*, 385 F.3d 1336, 1340 (11th Cir. 2004) (noting that “[t]he *Younger* doctrine does not require abstention merely because a federal plaintiff, alleging a constitutional violation in federal court, filed a claim under state law, in state court, on the same underlying facts”); *In the Interest of D.B.*, 385 So. 2d 83, 94 (Fla. 1980) (holding that state juvenile-dependency proceedings were sufficient to hear a claim regarding a constitutional right to legal counsel, therefore precluding abstention by federal courts).

142. See *supra* pt. III(A)(1) (discussing the effect of the *Rooker-Feldman* doctrine and *Williamson County* on the aggrieved landowner’s federal claim).

143. See *supra* pt. III(A)(2) (explaining why neither *Thibodaux* abstention nor *Younger* abstention would likely apply to the facts of the similarly situated landowners’ hypothetical takings claim).

IV. THE SPECIAL PROCEDURAL IMPLICATIONS OF A
SECTION 1983 ACTION BROUGHT IN EITHER
STATE OR FEDERAL COURT

Even if the plaintiff challenging the Florida Supreme Court decision were able to overcome the procedural challenges unique to either a state- or federal-court action discussed above, he or she would still need to confront several procedural issues inherent in any 42 U.S.C. Section 1983 claim, whether brought in state or in federal court.

A. Whom to Sue?

The obvious (but no less important) question arises as to whom the landowner or the similarly situated cohorts should name as defendants in their Section 1983 takings claim. The decision is largely strategic and must in all likelihood be based on the facts and circumstances of the given case. One classic pre-*Williamson County* judicial takings case, however, does provide some guidance: in *Robinson v. Ariyoshi*,¹⁴⁴ the Ninth Circuit held that a decision of the Hawaii Supreme Court violated the Takings Clause because the decision deprived the plaintiffs of their vested water rights without just compensation.¹⁴⁵ The plaintiffs in *Robinson*, who were the most successful judicial takings plaintiffs to date, had sued the governor, attorney general, and deputy attorney general of Hawaii, as well as members of Hawaii's Board of Land and Natural Resources.¹⁴⁶ Following *Robinson*, it would seem that the most effective means for pursuing a judicial takings claim under Section 1983 would be to bring suit against the governor of the state and the entire executive chain of state officials charged with implementing the state supreme court's decision, which in our hypothetical is the Florida Supreme Court.¹⁴⁷

144. 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986) (vacating the decision and remanding for further consideration in light of the Court's decision in *Williamson County*).

145. *Id.* at 1474–1475.

146. *Robinson v. Ariyoshi*, 933 F.2d 781 (9th Cir. 1991).

147. Even a suit against the Florida Supreme Court justices themselves would be allowable under Section 1983 as long as the plaintiff sought *only* declaratory relief. See 42 U.S.C. § 1983 (providing that “in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable”); Allen,

B. State Sovereign Immunity and *Ex parte Young* Relief

At this juncture, a problem arises: if the plaintiff sues the state officials charged with implementing the Florida Supreme Court's decision, state sovereign immunity might bar the suit in its entirety.¹⁴⁸ The doctrine of *Ex parte Young*,¹⁴⁹ however, does provide a means around state sovereign immunity if the aggrieved or similarly situated landowners sought only prospective injunctive relief and no money damages¹⁵⁰ for a violation of federal (not state) law.¹⁵¹ In our hypothetical, the landowners would certainly sue for a violation of federal law because they would be alleging a violation of the Takings Clause of the United States Constitution. They would also be seeking to enjoin the enforcement of the Florida Supreme Court's decision; thus, the case appears at first glance to be a quintessential candidate for *Ex parte Young* treatment.

Finch & Roberts, *supra* n. 105, at 551 (noting that "[i]n 1998, [S]ection 1983 was amended to preclude injunctive relief against a judge unless declaratory relief is either unavailable or an order of such relief has been violated"). The requirement that attorney's fees be awarded in suits against judicial officers only in cases where the challenged actions "was clearly in excess of such officer's jurisdiction," however, makes it (at least economically) more prudent for potential plaintiffs to let alone the judicial officers and instead pursue an action against those members of the state's executive branch charged with implementing the court's decision. 42 U.S.C. § 1988(b) (2006).

148. U.S. Const. amend. XI; see *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 47 (1996) (holding that the State of Florida enjoyed state sovereign immunity from suit and that despite Congress' clear intent to abrogate that immunity, such abrogation was impermissible when based upon the Indian Commerce Clause); *Hans v. La.*, 134 U.S. 1, 21 (1890) (stating, "It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign state from prosecution in a court of justice at the suit of individuals. . . . It is enough for us to declare its existence"). If the aggrieved landowner or the similarly situated landowners sued local government officials (as opposed to state government officials), state sovereign immunity would not apply in the first instance, and reliance on *Ex parte Young*, 209 U.S. 123 (1908), would be unnecessary. See *N. Ins. Co. of N.Y. v. Chatham Co.*, 547 U.S. 189, 194 (2006) (holding that Chatham County did not enjoy state sovereign immunity unless it was acting as "an arm of the state"); *Alden v. Me.*, 527 U.S. 706, 756 (1999) (noting that "[state sovereign] immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State."); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (stating that the Eleventh Amendment's bar to "suit in federal courts extends to States and state officials in appropriate circumstances, but does not extend to counties and similar municipal corporations") (citations omitted); *Lincoln Co. v. Luning*, 133 U.S. 529, 530-531 (1890) (rejecting a county's claim of state sovereign immunity).

149. 209 U.S. 123.

150. *Edelman v. Jordan*, 415 U.S. 651, 668 (1974).

151. *Pennhurst St. Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

One exception to *Ex parte Young*, however, might prevent the plaintiffs from using this long-standing doctrine to overcome the state officials' state sovereign immunity.¹⁵² In *Idaho v. Coeur d'Alene Tribe of Idaho*,¹⁵³ a federally recognized Native American tribe sued the State of Idaho and various state officials for a declaratory judgment establishing the tribe's exclusive right to use and enjoy certain lands under and surrounding Lake Coeur d'Alene and declaring all state statutes to the contrary invalid.¹⁵⁴ While the Court recognized that "[a]n allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction," it refused to apply *Ex parte Young* because "the Tribe's suit [was] the functional equivalent of a quiet title action which implicates special sovereignty interests."¹⁵⁵ "Some commentators have argued that the Court's language suggests that being 'the functional equivalent of a quiet title action' is merely one example of something that 'implicates a special sovereignty interest,'" and that there is embedded within the *Coeur d'Alene* holding the potential for the expansion of this seemingly limited exception to *Ex parte Young*.¹⁵⁶ And while "[t]he Court has yet to decide a case after *Coeur d'Alene* in which it was called on to pass on another potential 'special sovereignty issue,'" the question nonetheless arises whether the takings claim in our hypothetical is sufficiently similar to an action to quiet title (i.e., to determine property ownership interests) as to preclude *Ex parte Young* relief.¹⁵⁷ While the resolution of this question is uncertain, the mere existence of yet another possible bar to the aggrieved landowner or the similarly situated landowners' pursuit of relief only further underscores

152. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997).

153. *Id.*

154. *Id.* at 264–266.

155. *Id.* at 281. Four justices dissented from the majority decision not to apply *Ex parte Young* in *Coeur d'Alene*, writing that "[t]he principal opinion would redefine the [*Ex parte Young*] doctrine, from a rule recognizing federal jurisdiction to enjoin state officers from violating federal law to a principle of equitable discretion as much at odds with *Young's* result as with the foundational doctrine on which *Young* rests." *Id.* at 297 (Souter, Stevens, Ginsberg & Breyer, JJ., dissenting).

156. Allen, Finch & Roberts, *supra* n. 105, at 457 (quoting *Coeur d'Alene*, 521 U.S. at 281).

157. *Id.*

the thorny procedural implications of Justice Scalia's proposed judicial takings doctrine.¹⁵⁸

V. DOWN THE RABBIT HOLE: THE MUDDY WATERS
OF THE JUDICIAL TAKINGS DOCTRINE

Where, then, does our journey take us? If the aggrieved landowner attempts to have his or her claim heard in state court by seeking rehearing in the Florida Supreme Court, review is likely barred by the fact that the landowner will not have raised the issue below.¹⁵⁹ Even if the landowner succeeds in having his or her motion for reconsideration heard, the fact remains that his or her only potential remedy is nullification of the earlier decision; thus, for the landowner to prevail, the Florida Supreme Court would have to issue a decision about property rights and then, based solely on the aggrieved landowner's argument that its decision constitutes a taking, immediately reverse course and nullify its own decision.¹⁶⁰ As a matter of common sense, the motion for reconsideration would likely be denied. In that case, the aggrieved landowner's only recourse would be on writ of certiorari to the Supreme Court of the United States. Even then, the failure to raise the issue below could well prove fatal to the landowner's bid to have his or her claim heard on the merits, and the dearth of cases for which the Supreme Court actually grants a petition for writ of certiorari only confirms the all-but-futile nature of the motion-for-rehearing route.¹⁶¹ The route of a motion for rehearing is thus a road to nowhere.

158. It is also important to note once more that if a temporary taking had been effected before injunctive relief could remedy the constitutional violation, issues of qualified and absolute immunity under Section 1983 might also be implicated because the state would presumably have to pay damages for the time period that the temporary taking was in effect. *First English Evangelical & Lutheran Church v. Co. of L.A.*, 482 U.S. 304, 321–322. These money-damage questions raise significant separation-of-powers issues beyond the scope of this Article. See Amnon Lehavi, *Judicial Review of Judicial Lawmaking*, 96 Minn. L. Rev. 520, 521–522 (2011) (examining the issues stemming from classifying the judiciary as lawmaker and state actor in a constitutional context); Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449, 1513–1522 (1990) (detailing various proposed remedies in the event of a judicial taking).

159. See Fla. R. App. P. 9.330 (precluding reconsideration of “issues not previously raised”).

160. See *Stop the Beach*, 130 S. Ct. at 2607 (plurality) (noting that the remedy for a judicial taking would be reversal of the decision itself).

161. See *supra* pt. II(A)(2) (explaining the various hurdles and bars to Supreme Court review of the denial of the motion for rehearing).

The chances of the aggrieved landowner vindicating his or her constitutional rights through a separate action in state court are equally slim. After all, it seems unlikely that a local circuit court would even have the authority to declare a decision of the Florida Supreme Court an unconstitutional taking in the first instance.¹⁶² If the trial court considers itself bound by the Florida Supreme Court, the stringent jurisdictional requirements of the Florida Constitution make it unlikely that the Florida Supreme Court could accept the case on appeal.¹⁶³ Finally, and in any event, there remains the seemingly omnipresent and practical conundrum that the aggrieved landowner, even if successful, would be pursuing an appeal whereby he or she asks the Florida Supreme Court to reverse its own decision. Here too, then, it appears our aggrieved landowner is—quite simply—out of luck.

The last option by which the aggrieved landowner could attempt to prosecute his or her judicial takings claim involves a separate action in federal court. It is here that the water truly becomes muddied because even if we assume that the aggrieved landowner would be absolutely correct on the merits and emerge victorious with regard to whether his or her land was taken in violation of the Due Process Clause, the Supreme Court's finality jurisprudence *precludes* federal-court review of his or her claim.¹⁶⁴ In essence, no matter where he or she turns within the current legal framework, the aggrieved landowner finds himself or herself—much like Lewis Carroll's Alice found herself when she ventured into Wonderland—shut down a rabbit hole, the doors closed firmly around the landowner, with each potential exit blocked for one reason or the other.¹⁶⁵ And even though a similarly situated landowner might be able to pursue a similar claim at the behest of the aggrieved landowner, it is troubling that the aggrieved landowner himself or herself—the very person wronged by the

162. See e.g. *Lott*, 286 So. 2d at 566 (noting that trial courts are bound by the decisions of the Florida Supreme Court).

163. Fla. Const. art. V, § 3(b); see *supra* pt. II(B)(2) (explaining the precise contours of the Florida Supreme Court's constitutional jurisdiction).

164. See *Stop the Beach*, 130 S. Ct. at 2609 (plurality) (noting that the plaintiff would first need to try his or her hand in state court and that if unsuccessful there, "the matter would be *res judicata*").

165. See Lewis Carroll, *Alice's Adventures in Wonderland* 11 (Public Domain Books 1997). "There were doors all round the hall, but they were all locked; and when Alice had been all the way down one side and up the other, trying every door, she walked sadly down the middle, wondering how she was ever to get out again." *Id.*

Florida Supreme Court decision at issue—has no forum at all in which to air his or her constitutional grievances.¹⁶⁶ In any event, if Justice Scalia's judicial takings doctrine is ever to be anything more than a mere abstraction—a dusty footnote in the legal case-books of the future—the procedural implications of the fledgling judicial takings jurisprudence require swift resolution by this country's federal courts.

VI. CONCLUSION

As the foregoing analysis demonstrates, the procedural implications of a judicial takings doctrine are far more complicated in practice than Justice Scalia's cursory discussion in *Stop the Beach* reveals. In fact, the current framework creates a paradoxical situation in which the best opportunity for a landowner to have his or her judicial takings claim heard on the pure constitutional question is not for the landowner himself or herself to file suit, but instead for the landowner to convince similarly situated landowners to challenge the state supreme-court decision in federal district court. The state-court route to relief is unrealistic at best and fantastical at worst, and the finality principles of *Williamson County*, coupled with the *Rooker-Feldman* doctrine, prevent the landowner from seeking relief in federal court on his or her own behalf. While the similarly situated landowners would not face an all-out bar, they would likely be confronted with questions of abstention and state sovereign immunity. Admittedly, the decision in *Stop the Beach* remains a plurality opinion with no binding effect,¹⁶⁷ and it is at this point unclear how the recent change in the composition of the Court (i.e., the resignation of Justice Stevens and the addition of Justice Kagan) will change the judicial-takings calculus.¹⁶⁸ Nonetheless, and as Justice Scalia himself wrote some fifteen years prior to his opinion in *Stop the Beach*, the Supreme Court's "task is to clarify the law—not to muddy the waters."¹⁶⁹ If the Court wishes to hold true to that

166. See *Stop the Beach*, 130 S. Ct. at 2609–2610 (noting that those not a party to the original suit, i.e., similarly situated landowners, would be able to challenge in federal court the taking effected by the state supreme-court decision).

167. *Id.* at 2597.

168. S. Ct. of the U.S., *Members of the Supreme Court of the United States*, <http://www.supremecourt.gov/about/members.aspx> (accessed Apr. 27, 2013).

169. *Va.*, 518 U.S. at 574 (Scalia, J., dissenting).

charge, it should act quickly to address (or encourage the lower federal courts to address) the many procedural implications that line the twisted, bumpy road to a coherent judicial takings doctrine.

