# The Impact of *Palazzolo* and Other Recent Cases on Ripeness and Forum Selection in Takings Cases

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## I. Introduction

Establishing ripeness and determining the appropriate forum in regulatory takings litigation requires consideration of a complex set of issues. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* [1] and *First English Evangelical Lutheran Church v. County of Los Angeles*,[2] establish the basics with respect to takings actions against state and local governments. There are two requirements. Before bringing an as applied regulatory takings claim a property owner must obtain a final decision from the authorities as to how the property can be used. The second requirement is that all takings claims[3] be filed in

state court. The first prong is based on the idea that a court cannot determine whether a regulation has gone "too far" without knowing "how far" it goes. The second stems from the fact that the Fifth Amendment takings clause does not proscribe takings, but only takings without compensation. Thus, state remedies for compensation must be pursued.

This paper examines the basic rules of ripeness and forum selection and includes the impact of the United States Supreme Court's decision in *Palazzolo v. Rhode Island* as well as cases from the Fifth Circuit, *Vulcan Materials Co. v. City of Tehuacana* and Sixth Circuit, *Anderson v. Charter Township of Ypsilanti*.

**II. Ripeness**[4]

**A. The Basics**

In *Williamson County*, a developer received preliminary plat approval in 1973 for a cluster home development from the planning commission. The developer then conveyed open space easements to the county and began putting in roads and utility lines. Over the next few years, the commission reapproved the preliminary plans on several occasions. In 1977, the county changed the density provisions of its zoning ordinance and in 1979 it advised the developer that its project was subject to the 1977 ordinance. The commission rejected revised plats submitted in 1980 and 1981 for numerous reasons, some based on the new law and some based on the old law. The developer then brought suit in federal court.

The Court found the action unripe, noting that a taking claim is premature until the "government entity charged with implementing the regulation has reached a final decision."[5] This had not occurred since the developer had not "sought variances that would have allowed it to develop the property according to its proposed plat."[6] While the developer contended that it had done everything possible to resolve the matter,

the Court was not convinced that a final decision had been obtained. The Court noted that the Board of Zoning Appeals had the authority to grant variances dealing with five of the eight objections, and that the commission itself had the power to grant variances to solve the other objections.

A year after *Williamson County*, the Court decided *MacDonald, Sommer & Frates v. Yolo County*[7]. There, the developer submitted a preliminary plan to subdivide its residentially zoned land into 159 lots for single family and multi-family housing. After the planning commission rejected the plan due to inadequacies in access, police protection, water and sewer services, the developer filed suit asserting that its property was being condemned to open space.

The Court found the action was not ripe since the developer had not obtained a final decision as to what kind of development would be allowed. The developer failed to convince the Court that it had, with its one application, done enough. "Unfair procedures, [or] futile [ones]" need not be pursued, said the Court, but the "rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews."[8]

*Williamson County* and *MacDonald* require that a challenger obtain a final decision on a meaningful application for development to make an as-applied taking action ripe. Physical taking claims are not subject to the final decision requirement since the physical invasion itself establishes what has been taken.[9] Likewise, a property owner making a facial taking claim is not subject to the final decision rule since, by definition, the mere enactment of the law, and not its application, takes the property.[10]

The final decision requirement is theoretically distinct from the requirement of exhaustion of administrative remedies, but in practice the distinction blurs. The former addresses whether one must seek some confirmation by the initial decisionmaker that a denial is final, and the latter addresses whether one is obligated to climb the administrative ladder to seek review of that final decision. For ripeness purposes, resort to a board of adjustment, for example, is required if the board possesses the power to waive or grant a variance from a regulation, but is not required if the board has only the power to review the application of the

regulation. *Williamson County* provides an example. The Court said the property owner had to seek permission of both the board of adjustment and the planning commission for variances because both bodies had the power to relieve the property owner of the alleged hardships.[11] But, the Court said the developer would not be required to appeal the planning commission's rejection of the plat to the board of adjustment since the board had the power only to review, not participate in, that decision.[12]

Identifying the initial decisionmaker is troublesome, and case law instructs that it is a mistake to view the term "initial decisionmaker" narrowly. The driving force behind the rule is to give the governing body a "realistic opportunity and reasonable time within which to review its zoning legislation vis-a-vis the particular property."[13] Resort to the legislative body may be necessary where the current zoning classification is dated.[14] In seeking a final decision, if a variance or other procedure exists that might permit the project to proceed, it must be used unless applying would be futile.

When the *MacDonald* Court suggested that the denial of "exceedingly grandiose" plans did not mean that "less ambitious plans" would also be rejected, it created an obligation of reapplication in situations where the initial application is not a realistic one. Determining when that obligation arises is a guessing game with but few clues, only some of which are helpful. The Court, for example, referred to the *MacDonald* project as an "intense type of residential development," and intimated that the "`five Victorian mansions'" sought in *Agins v. City of Tiburon* and the nuclear power plant in *San Diego Gas & Electric Co. v. City of San Diego* were of the grandiose variety.[15] The proposed fifty-five story office tower atop Grand Central Station in the *Penn Central* case was also likely "grandiose" in the ripeness sense, since the Court noted that the landmark commission might approve a smaller tower.

In *Suitum v. Tahoe Regional Planning Authority*,[16] the Court addressed final decision ripeness in the context of transferable development rights. In *Suitum*, the landowner had received a final decision from the land use authority that she could not build on her parcel, but she had not applied for transferable development rights that were available. The Court held that she did not need to do so. Leaving open the question of whether TDRs might be taken into account in determining whether a taking has occurred, their

existence did not relate to the allowable uses of the land of the claimant. Once that use was established, the Court held the final decision ripeness requirement met.[17]

The reapplication process that *McDonald* contemplates creates a dilemma. How many efforts are called for? At some point the downsizing will render the project economically unattractive, but if the developer gains approval of a lesser request, it presumably waives any objection to losses based on the prior denials.

**B. *Palazzolo v. Rhode Island*[18]**

In the recent decision in *Palazzolo v. Rhode Island*,[19] the Court dealt with the futility exception. Anthony Palazzolo acquired approximately 20 acres of land on the Rhode Island coast in 1959. Eighteen acres of the tract was salt marsh and bordered a pond. Title was taken in the name of a corporation that Palazzolo formed with others, but by 1960 Palazzolo was the sole shareholder. The balance of roughly two acres was uplands. Palazzolo, through his corporation, unsuccessfully sought permits to fill the wetlands portion in the 1960s. While the state had no regulations against filling wetlands, a dredge permit was required. The state rejected the first application for failure to provide the state with adequate information, and, it rejected a second other for environmental reasons. In the 1970s, while Palazzolo made no efforts at development, the state was busy enacting a coastal resources management program that severely limited development of wetlands. In 1978, Palazzolo's corporation lost its charter for failure to pay state taxes, and title to the land passed to Palazzolo.

Palazzolo's next effort (but first in his own name) to develop came in 1983 when he sought a permit to fill all 18 acres of wetlands. His application was denied. In 1985, he scaled down his plans, asking to fill 11 acres to create a private beach club. Again, he was denied permission. After an unsuccessful state court suit challenging the propriety of the latter rejection on state administrative law grounds, Palazzolo sued in state court claiming a taking under the Fifth Amendment, seeking $3,150,000 in compensation. The state courts rejected Palazzolo's takings claim and he appealed to the Supreme Court.

As to ripeness, the state court, applying *Williamson County* and *McDonald*, found the lawsuit was premature since the extent of development allowed on Palazzolo's property was not known. Palazzolo had not, for example, sought a permit for a less intensive development (say, filling only 5 acres). He also had not sought a permit to develop the uplands. Finally, Palazzolo had not made specific application for permission to develop a 74 lot subdivision, which was the basis of his claim for compensation.

The Supreme Court disagreed. Rhode Island law was unequivocal, said Justice Kennedy: wetlands could not be filled. State law did allow the coastal council to grant a "special exception" where the proposed activity served a compelling public purpose. However, neither residential use or the private beach club qualified for this exception. It was true, the Court conceded, that where a landowner is denied approval of a substantial, or "grandiose," project, he must return to the permitting authorities with a more modest proposal before his case is ripe. But that rule did not apply to Palazzolo's case; he had tried twice and failed. There was, simply, nothing left for Palazzolo to ask of the state. Any further applications would have been futile.

As to the failure to seek a permit to build on the uplands, the Court noted that the state had conceded that "it would be possible to build at least one single-family home" on the upland portion." The state argued that since it was possible to build "at least" one home, other uses might be allowed. For the Court, however, there was no doubt. The state was bound by its concession that the uplands might be developed with one home and that, as such, the uplands had a value of $200,000.

There was no need for Palazzolo to apply specifically for approval of a 74 lot subdivision even though that was the basis of his compensation claim. The state worried that Palazzolo was playing "hide the ball," by seeking approval for relatively modest uses, only to seek compensation for a much larger project. The council's practice was to not consider proposals until the applicant had satisfied all other state and local requirements. Here, that would have meant zoning approval from the town and state approval of individual sewage disposal systems. The Court said none of that mattered as far as ripeness was concerned. As far as the coastal council was concerned, no fill would be permitted for any purpose. Second, the state need not worry

that Palazzolo could claim damages based on the value of an intensive subdivision unless he could show that the project would have been allowed under other existing, legitimate land use restrictions.

**C. Ripeness after *Palazzolo***

The ripeness requirement is considered a curse by the development community, and some likely hoped that the Court would seize upon *Palazzolo* to do away with or significantly modify the rules in favor of challengers. That did not happen. In fact, the Court reaffirmed *Williamson County* and *MacDonald*. They seem to be here to stay.

One aspect of the Court's finding of ripeness provides a modicum of hope to frustrated landowners' and their lawyers that the ripeness rules might be read in a more pro-landowner manner. The record in *Palazzolo* contained ambiguities as to what development permission the state might have granted Palazzolo. In detailed examinations of the facts, Justice Kennedy for the majority found that the landowner had done everything he *should* have done to ascertain what the state would permit him to do with his land while Justice Ginsburg for the dissent found that the landowner had *not* done everything he *could* have done to ascertain what the state would permit him to do with his land. With a record that was unclear, the majority resolved the doubts in favor of the landowner, while the dissent would have resolved them in favor of the state.

This suggests that once the landowner has made a reasonable application for development, the courts may put the burden on the government to indicate possible development options. For example, the majority observed that there was "no indication" by the state as to whether a smaller area could be filled and that the state had not "explain[ed] the reach" of the regulation. Whether lower courts will notice this rather subtle message, if indeed it is even that, and if they do recognize it, feel constrained to read the case as moving the burden to the state remains to be seen. But, it is an argument developers may now press.

The Court's application of the futility exception is not new,[20] but it is another wake up call to governments who place themselves in a bind by enacting restrictions with little or no flexibility. If there is simply, in the state's mind, no way a certain type of land should ever be developed in any fashion, the law should be firm and inflexible. Adoption of such a law, however, makes it easier for a landowner to get the merits of her takings claim heard since ripeness will be easy to establish. If it is conceivable that development might be permitted on some land (i.e., if all wetlands are not the same), then consideration should be given to allowing a meaningful variance or special exception process to allow a landowner to ask whether her land qualifies for the variance.

A classic example of how not to do it is found in the South Carolina experience in the *Lucas* case, decided in 1992.[21] Lucas owned two beachfront lots on the Isle of Palms. The state's beachfront setback law, when applied to Lucas' parcels, meant no structure could be built on them. Lucas did not seek a variance from the state because state law contained no variance process. The gist of the setback law was that nowhere on the coast of South Carolina could the setback be relaxed. Thus, there was no way the coastal council could look at a particular lot or stretch of beach where the setback fell seaward of privately owned land and conclude that building something might not be so bad. Thus, Lucas had a ripe claim and won his case, since the effect of the setback was to deprive him of any economically viable use of his land. After buying Lucas' lots, the state of South Carolina put the lots on the market. It then sold them for less than it paid for them, permitting residential development on them. One can imagine that had a variance process been available at the outset, the landowner in *Lucas* could have gotten a variance if, as seems to be the case with hindsight, the council thought that erosion considerations would not be meaningfully advanced by being applied to the lots.

Rhode lsland had a special exception process but it was quite narrow. The only time permission to fill might be granted was for a compelling public benefit, which was not the case with Palazzolo's proposals. This process is much too narrow to be helpful in avoiding takings claims.

The *Palazzolo* opinion is an invitation to governments to build some discretion into their inflexible processes. This can, and indeed must, be done without reserving so much discretion that arbitrary decision making is allowed.

In addition to providing for some degree of discretion in ruling on permit applications, governments might explore the Court's acknowledgment that states may require applicants to exhaust state procedures and obtain permits from other state or local agencies as conditions precedent to consideration of their application. For example, in this case, the coastal council might have required Palazzolo to obtain local zoning approval first. Sequencing requirements may not, however, be unfair. Multiple agencies cannot all insist on being last. State law should establish a priority system.

In sum *Palazzolo's* impact on ripeness is mixed. Perhaps a seed has been planted that might grow into a burden shifting requirement where the regulator will be required to tell a developer whose development application it has denied what the developer may do. Even should that be the case, the Court's reaffirmation of *Williamson County* and the suggestions that states may develop their own exhaustion requirements are government victories.

**III. Forum Selection Under *Williamson County* and *First English*[22]**

**A. The Often Overlooked Connection Between *Williamson County* and *First English***

The second prong of *Williamson County* dealt with forum selection. The landowner in that case sued in federal district court, without having used the inverse condemnation process available in state court. Even assuming the restrictions were so severe that they constituted a taking, the Court said the Constitution is not violated unless compensation is not paid. Pursuit of such a remedy is required where the state's remedy is adequate.[23]

At the time of the *Williamson County* decision it was not clear whether states had to provide a compensation remedy, but two years later, in *First English Evangelical Lutheran Church v. County of Los*

*Angeles*,[24] the Court held that they did. Concluding that a mandatory compensation remedy existed due to the self-executing nature of the Fifth Amendment, *First English*, in effect, deleted the qualifying "if" in *Williamson County's* holding that "if a state has an adequate process, compensation must be sought from the state." It was no longer a choice. States had to grant such relief. While a few have disputed or not understood this, it is beyond question. As the Court reconfirmed in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, "when the government condemns property for public use, it provides the landowner a forum for seeking just compensation, as is required by the Constitution."[25]

The combined rule of *Williamson County/First English* is that a landowner with a takings claim has an action for compensation conferred directly by the Constitution, and that action can and must be brought in state court. When one adds to this the law of preclusion and other judicial federalism doctrines such as the *Rooker-Feldman* doctrine, the claim and issues that must be litigated in state court cannot be attacked collaterally in a subsequent action in federal district court. With very few exceptions, if federal review is to occur, it must come by way of direct review by the Supreme Court, as it did in other recent takngs cases: *First English*, *Nollan*, *Lucas, Dolan*, *Palazzolo, Penn Central, Loretto* and *Agins.*[26]

The *Williamson County/First English* message is not well understood. Too often the two cases are viewed separately. And, often, though usually in dicta, the preclusive effects of *Williamson County/First English* are overlooked. The Seventh Circuit, for example, has vigorously enforced the *Williamson County/First English* compensation requirement, yet, it still tells property owners in gratuitous dicta as it sends them to state court, to come back if they are unhappy with the result.[27] A moment's reflection on preclusion should tell the court that it ought not be so gracious. Such an invitation, perhaps understandable in the immediate aftermath of *Williamson County*, is no longer responsible with a substantial body of post-*Williamson County/First English* case law holding that claim and issue preclusion bar relitigation.[28]

**B. Nature of the Cause of Action: "claims for just compensation are grounded in the Fifth Amendment"[29]**

In exploring the procedural consequences of *Williamson County/First English*, an initial inquiry must be made into the nature of the cause of action that is to be pursued in state court. Is it a right to compensation arising under the Fifth Amendment? Or, is it one arising under state law? It matters for at least two reasons. If the cause of action asserts a federal right, then claim preclusion applies to an attempt to relitigate in federal court. If the claim arises under state law, then the federal claim will not be litigated in state court, and claim preclusion will not apply in federal court. Issue preclusion will apply, but issue preclusion generally only bars matters actually litigated, not matters that could have been litigated.[30] A second consequence that flows from the federal versus state characterization is a potential affect on a federal court's exercise of diversity, supplemental and removal jurisdiction.

A number of courts have assumed, and in some cases affirmatively decided,[31] that the cause of action to be pursued in state court is state-law based. I think this is wrong. This assumption often is reflected by unexamined comparisons between "takings claims" and "inverse condemnation" claims as if the former represents the Fifth Amendment claim and the latter represents a state law claim. There is, however, no inherent difference between them. Inverse condemnation simply refers to the manner in which a property owner seeks compensation for a taking. Thus, loose references to landowners bringing "inverse condemnation actions" in state court do not, standing alone, tell whether the source of the action is federal or state law.

When a landowner approaches the state court to demand "just compensation" on the basis that the state has "taken" property, it is the Fifth Amendment right that is being asserted. The state controls the process, and may additionally provide its own substantive protection, but the "just compensation" claim, as *First English* says, is "grounded in the Fifth Amendment." Since the Fifth Amendment is self-executing, reliance on state law is unnecessary. Likewise, federal statutory support is not necessary to support a Fifth Amendment takings claim. Other constitutional claims must be filed pursuant to 42 U.S.C. § 1983, or rely on the Court finding an implied direct cause of action under the constitution. A takings claim, however, is given an express cause of action. That is what self-executing means. Advantages to using § 1983 exist, such as the availability of attorney's fees, but resort to § 1983 is not necessary.

*Palazzolo v. Rhode Island*[32] demonstrates this. After being denied development permission, Palazzolo "filed an inverse condemnation action in Rhode Island Superior Court asserting that the state's wetland regulations . . . had taken the property without compensation in violation of the Fifth and Fourteenth Amendments."[33] The state courts denied Palazzolo's claims based on the Fifth Amendment and the United States Supreme Court, as has been noted, reversed on Fifth Amendment grounds. So much for the idea that one does not pursue federal rights in state court.

**C. Preclusive Consequences of State Court Action**

The takings claim is unique in two respects, and this uniqueness produces a good news/bad news irony for the property owner. The good news: it is the only constitutional right that is awarded an express self-executing compensation remedy. The bad news: the final step to creating the cause of action is a step litigating the cause of action. What makes some uncomfortable about this is that the benefit of the mandatory compensation remedy means that an unsuccessful assertion of the Fifth Amendment right to compensation in state court precludes a federal district court from ever hearing the claim. A state court's refusal to find a taking might be wrong on the merits, but the only test of that is by direct appeal.

If, as is usually the case, no avoidance technique enables the property owner to avoid litigating the takings claim in state court,[34] that ends the matter. Where the plaintiff, unhappy with what the state court has done, seeks to obtain review by the federal district court, she will find one of two bars: the *Rooker-Feldman* doctrine, or, if that does not apply, claim or issue preclusion.

**(1) *Rooker-Feldman* Doctrine**

Federal district courts are barred by the *Rooker-Feldman* doctrine[35] from "entertaining a proceeding to reverse or modify"[36] a state court judgment or from hearing issues "inextricably intertwined"[37] with a state court decision. The sole avenue of relief available to a party who has lost in state court and wishes review of a

federal question that was or could have been presented in state court is to appeal to the Supreme Court of the United States. If that route is not taken, the state court judgment stands.

While the doctrine lay dormant for years, it has emerged in recent years as a popular defense, being used over 500 times by lower federal courts in the 1990s to dismiss cases for lack of jurisdiction.[38] The basis of *Rooker-Feldman* is 28 U.S.C. §1257, which vests appellate jurisdiction solely in the Supreme Court.[39] The rationale is that if a "federal challenge succeeds only to the extent that the state court wrongly decided the issue, . . . [or] if the federal action would effectively reverse the state court decision,"[40] the district court would be exercising appellate review. As the Court said in *Feldman*, "this it may not do."[41]

**(a) Compared to Preclusion and Abstention**

*Rooker-Feldman*, while similar to the preclusion doctrines in that it prevents relitigation, *Rooker-Feldman* exists for a reason different from the preclusion doctrines. As Professor Sherry says, Ares judicata is about parties; *Rooker-Feldman* is about courts.[42] Preclusion rules exist primarily to protect persons from being exposed to repetitious litigation by those they have defeated in prior lawsuits. *Rooker-Feldman* protects the integrity of the state courts by prohibiting federal district courts from intruding on state courts. While preclusion rules limit all courts (within a state, between states, and between state and federal systems) from second guessing prior court decisions, *Rooker-Feldman* only acts to curtail federal district court jurisdiction. Preclusion, under the full faith and credit statute, requires federal courts to look to state law. *Rooker-Feldman* is federal law.

*Rooker-Feldman* goes to the subject matter jurisdiction of the district court and, thus, Amay be raised at any time by either party or sua sponte by the court . . . [and] in that respect, it is quite unlike the affirmative defenses of collateral estoppel or res judicata.@[43] The *Rooker-Feldman* determination of jurisdiction based on federal law comes first;[44] and, if jurisdiction exists, res judicata or collateral estoppel may follow as an affirmative defense.[45] What *Rooker-Feldman* does not bar, preclusion doctrines may.[46]

*Rooker-Feldman* fills some of the gaps in preclusion. Professor Sherry explores these gaps in detail in her article,[47] but, a short list includes the fact that preclusion does not apply to pending suits, *Rooker-Feldman* does. With preclusion issues, federal courts apply state law, and preclusion rules vary among the states and are notoriously complex, with numerous exceptions. *Rooker-Feldman* is a rule of federal law, theoretically unvarying among the federal courts, though still dependent on state law to some degee.[48]

A recent Sixth Circuit case, *Anderson v. Charter Township of Ypsilanti*,[49] actually speaks of *Rooker-Feldman* abstention, but the doctrine does differ from abstention.[50] The most frequently invoked rule of abstention, for example, *Younger v. Harris*,[51] requires that the state proceeding be pending and that the matter involve important state interests. Neither requirement applies to *Rooker-Feldman*.

**(b) Applications of *Rooker-Feldman* in Land Use Cases[52]**

*Rooker-Feldman* requires dismissal of a claim that is Ainextricably intertwined@ with a claim already adjudicated in state court. The test is whether the relief requested in the federal action, if granted, would effectively void the state judgment.[53] It applies to issues litigated and issues that could have been litigated in state court.

*Anderson v. Charter Township of Ypsilanti,*[54] exemplifies *Rooker-Feldman*=s use in takings litigation.[55] Plaintiff was unsuccessful in obtaining a rezoning of land from light industrial to multi-family use. Plaintiff sued in state court, alleging a taking and a due process violation under the federal and state constitutions. The township removed the case to federal court. That court remanded the state law claims and stayed proceedings on the federal claims (a takings claim and apparently substantive and procedural due process claims). When the state court ruled against plaintiff on the merits of his takings claim, the plaintiff filed a motion in federal court to lift the stay, and he appealed to the state intermediate appellate court. While

the state appeal was still pending, the federal district dismissed the takings claims for lack of subject matter jurisdiction on the basis *Rooker- Feldman.*

The Sixth Circuit affirmed, finding that the issues the district court would have been called upon to decide were Ainextricably intertwined@ with the state court=s ruling. Examining the state courts' various rulings at the trial and appellate levels, the court concluded that Michigan and federal takings law were essentially the same. While the state trial court had limited its review to categorical takings doctrine, the state appellate court had covered non-categorical takings law as well.[56] Thus, after a thorough discussion of the grounds of the Michigan decisions, it was clear to the Sixth Circuit that consideration of a Fifth Amendment claim by the district court would involve a prohibited review of what the Michigan courts had done.

Another case is Hill v. Town of Conway.[57] There the Second Circuit upheld the dismissal of a takings claim on the basis of *Rooker-Feldman*. The landowners had filed a subdivision plat that depicted a road. After the project was built, the town maintained the road. Then, the town filed a declaration of taking of the road with the state Board of Tax and Land Appeals. The Board allowed the take but awarded no damages. The landowners filed two state lawsuits. One challenged the propriety of the taking. The other sought a reassessment of the damages. The landowners lost both cases. In the first case, the court held that the filing of the plat constituted a voluntary dedication of the road to the public and, alternatively, that the maintenance performed on the road resulted in dedication. The state supreme court summarily affirmed the trial court.

In the second case as to damages, the trial court held that the plaintiffs were barred from relitigating the issue of the first case, whether a dedication had occurred. The court then found that damages were not due to one who dedicated a road. The state court rejected landowners= reliance on *Dolan v. City of Tigard*,[58] finding that dedication in *Dolan* was not voluntary.[59] The state supreme court refused review.

Rather than seeking United States Supreme Court review of the state court judgment, landowners commenced suit in federal district court seeking compensation for the taking of the road on the basis of *Dolan*. Since the relief requested in the federal action, if granted, would effectively void the state judgment,

the Second Circuit held that the district court was barred from hearing the claim for compensation under the doctrine of *Rooker-Feldman*.[60]

*Rooker-Feldman* does not apply if the federal plaintiff lacked an opportunity to raise the federal issue in state court. Thus, in Agripost, Inc. v. Miami-Dade County,[61] the county revoked a waste disposal facility=s permit due to neighbor complaints about the Avile stench@ and Ablack, thick glue-like mold@ that the plant emitted. The permit revocation was appealed to a three-judge panel of the state circuit court, which affirmed based on findings that Agripost had breached its permit conditions. The state court of appeal refused review. Then Agripost filed a takings claim in federal court. The county sought dismissal on the basis of *Rooker-Feldman*, or in the alternative , on preclusion grounds. The district court rejected the applicability of either, and on its own initiative, dismissed the case as unripe since Agripost had not sought compensation from the state court.

The county appealed to the Eleventh Circuit,[62] which affirmed the district court. *Rooker-Feldman* did not apply since the plaintiff could not have raised the takings issue in the state circuit court, which, due to the procedural posture in which the case came to it, lacked authority to decide that issue. The state circuit court was only to decide the validity of the permit revocation. While the state court decided the revocation was proper under state law, it was still possible, noted the Eleventh Circuit, that the revocation had rendered the plaintiff=s land worthless and might therefore be a taking. But, that issue had not been before the state court. In *Rooker-Feldman* terms, the federal court is barred from hearing a matter where its judgment would contradict a prior state court ruling. Here, a finding of no economic value would not be at odds with what the state court had found.

As the Eleventh Circuit opinion in *Agripost* indicates, if the takings issue was not, or could not have been, litigated in state court, the takings claim must still be dismissed by the federal court, but on *Williamson County's* state compensation rule rather than *Rooker- Feldman* grounds. That, however, does not mean that the landowner can return to federal court after the litigation takes place in state court. At that point, a return to federal court will be barred by either *Rooker-Feldman* or preclusion.

**(2) Res Judicata/Collateral Estoppel (Claim and Issue Preclusion)**

Once a property owner has completed prong two, the law of res judicata will usually preclude a Fifth Amendment claim from being pursued in federal court.[63] Adjudication of the claim in state court bars a subsequent suit in federal court under the full faith and credit statute, 28 U.S.C. § 1738. Collateral attack of the state court judgment is not available in federal district court. A property owner who is dissatisfied with the results obtained from the state court is limited to appealing directly to the United States Supreme Court.[64]

Most courts have addressed the issue as one of claim preclusion, finding the state court's adjudication of the federal takings claim to bar relitigation.[65] If a court takes the position like the Ninth Circuit in *Dodd*, discussed below,[66] that the state claim must be litigated first in state court, making the federal claim cognizable in district court, the property owner will be limited by issue preclusion. Typically, the same issues that the property owner asserts under the federal claim are the same as those asserted under the state claim, in which case the bar is complete.

**D. Possible Exceptions Allowing a Suit in Federal District Court**

There are several possible exceptions to consider for the plaintiff who would prefer to be in federal court. I stress these are *possible* options; they may never, and at best will rarely, work.

(1) Sue in federal court, claiming resort to the state courts would be futile.

(2) Sue in state court and give notice to the state court of an intent to reserve the right to go to federal court at the end of the state litigation.

(3) Where there is diverse citizenship, a federal district court may hear a state takings claim and perhaps a federal one as well.

(4) For the property owner who has another claim over which a federal district court has jurisdiction, sue on that claim and append a state takings claim, asking the court to exercise supplemental jurisdiction over the latter.

(5) As a variant of number four, append the otherwise incomplete federal takings claim to the other federal claim.

(6) Finally, and not of the plaintiff's choosing but perhaps to her liking, the plaintiff who begins as she should in state court may wind up in federal court by virtue of government removal.

**(1) Futility of Using State Court**

The burden is on the property owner to establish the inadequacy of the state's compensation remedy, and it is a difficult burden to carry.[67] Uncertainty, for example, does not equal inadequacy.[68] Also, if the property owner allows the state statute of limitations to run, she forfeits any right to seek compensation in federal court.[69] If the property owner's state action is dismissed with leave to amend, and the property owner fails to amend, no federal suit will lie.[70]

There are cases where the state remedy is inadequate, but they are few. In Neumont v. Monroe County,[71] the federal court found the state's obstruction of plaintiff's pursuit of relief in state court to render the state compensation requirement futile. The county allegedly made changes to the ordinance and agreed not to enforce the ordinance to moot the state suit.

In rare instances, prong two futility can be established by proving that the state courts have rejected takings claims that are on all fours with the challenger's case. Since takings claims are usually highly ad hoc affairs, this will not often occur,[72] but it does happen. In Naegele Outdoor Advertising, Inc. v. City of Durham,[73] a challenge to a five- and-one-half year billboard amortization ordinance was deemed ripe in federal court without pursuit of a suit in state court since the North Carolina state courts had, on several occasions, upheld the same type of amortization ordinance.[74] The federal court concluded that a five and one half year sign amortization provision would not be viewed as a taking by the North Carolina courts and that it would be pointless to ask the state court for relief. The Ninth Circuit has made a similar finding with respect to certain rent control statutes as they have been construed in California state courts.[75]

Unavailability must be clear. It is not enough to point to an ambiguous intermediate state court opinion.[76] In SGB Financial Services, Inc. v. Consolidated City of Indianapolis-Marion County,[77] the court rejected the argument that the state courts would not grant relief in a condemnation blight case. The federal plaintiff could only point to a state intermediate appellate court opinion that was arguably distinguishable.

Another instance of unavailability may occur where the government defendant removes a takings case from state court. I explore this idea, which is supported by common sense if not by prevailing law, below.

**(2) Reservation à la *England***

Several courts have wondered[78] whether, or assumed that,[79] state court plaintiffs may reserve the right to litigate their Fifth Amendment takings claims in federal court under the doctrine of *England v.*

*Louisiana State Board of Medical Examiners*. In *England,* the Court held that a party who, having properly invoked federal court jurisdiction, is compelled by the federal court's exercise of *Pullman* abstention to litigate in state court can reserve her right to return to federal court for consideration of federal issues after the termination of the state proceedings.

*England* is not directly applicable since it involves a suit properly commenced in federal court. A taking claimant cannot do that, if he she does so will have her case dismissed for lack of jurisdiction for failure to pursue state remedies. Since the district court lacks jurisdiction over the claim, there is nothing to reserve. By extension, England might be applied where the landowner brings suit in state court, and, at the outset of the litigation, files a notice with the state court of an intent to reserve the right to have the federal takings issue heard in federal court. Whether *England* will or should be expanded to cover this situation is open question.

There is, to be sure, a similarity of involuntariness in the *England* abstention situation and the takings case. Like an *England* plaintiff, a takings plaintiff is sent to state court involuntarily and will be denied a federal forum by the move. The takings issue is different, however, since the matter submitted to state court is not an issue of state law the resolution of which might avoid a federal ruling. It is a federal law issue, the Fifth Amendment, that the state court decides.[80] The *England* rule exists to protect the purpose of *Pullman* abstention to avoid federal constitutional rulings, but *Williamson County/First English* demand that a state court make a federal constitutional ruling.

In *Fields v. Sarasota Manatee Airport Authority*,[81] the Eleventh Circuit, with some reluctance, said that an *England* reservation can be used in a regulatory takings case.[82] The court conceded that *England* was not directly applicable since a takings case cannot be brought in federal court in the first instance, but the court found that precedent within the circuit compelled it to recognize a reservation made in a case initiated in state court.[83] This was a misreading of *England*, said the court, but one that it found too late to revisit.[84] *Fields* went on to find that despite the strict inapplicability of *England*, allowing a reservation was proper under post-*England* holdings in *Allen v. McCurry*[85] and *Migra v. Warren City School District Board of Education*.[86]

In *Anderson v. Charter Township of Ypsilanti*,[87] the Sixth Circuit found that a landowner waived an assumed England reservation. In *Anderson*, the property owner had sued in state court and been removed to federal court. The federal district court partially remanded the case, sending the state claims back and keeping the federal claims.[88] In remanding the district court judge said that the "stay was intended to preserve `the defendant [township's] right to have a federal court determine the federal issue.'"[89]

Even assuming an *England* reservation is proper in theory, the *Anderson* landowner failed to reserve his assumed rights when he got back to state court. The Sixth Circuit pointed out that there are two ways to make one's reservation. First, and preferably, one makes an explicit statement to the state court of a his intent to return to federal court. Failing that, he may still return "`unless it clearly appears that he voluntarily did more than . . . required and fully litigated his federal claim in state court.'"[90] Anderson made no explicit reservation in state court, but argued that the federal district court's statement quoted above "preserving the defendant's right" to a federal forum operated as his state court reservation. The Sixth Circuit did not accept that since not only did the above statement refer to the defendant not the plaintiff, but it was made in federal court rather than, as required, in state court. Secondly, the court found that Anderson had fully litigated his federal claim in state court by presenting takings arguments which included reliance on federal cases.

The effort to expand the *England* reservation principle to takings claims may not be worth the trouble since issue preclusion will apply to prevent relitigation in federal court. *Dodd v. Hood River County*[91] left open the propriety of an *England* reservation question, but found the parties and the state court had agreed to allow the property owners to assert their takings claim in federal court after state court adjudication of a state takings claim.[92] The state court expressly ruled that it was considering only Oregon law in finding no taking of the plaintiffs' property. Since there was an agreement allowing the plaintiffs to split their claims, the court held the plaintiffs were not subject to claim preclusion when they sued in federal court. The court went on to hold, however, that issue preclusion prevented the Dodds from relitigating issues that had been decided adversely to them by the state court.

**(3) Diversity Jurisdiction**

Diversity jurisdiction represents another avenue to federal court. If diverse citizenship exists between the property owner and the city or county agency,[93] then a federal district court has jurisdiction to hear any claim the state court could hear.[94]

In *County of Allegheny v. Frank Mashuda Co.*,[95] the county appropriated land allegedly to use in expanding the Pittsburgh airport. Under state practice, a board of assessors was appointed to assess compensation for the taking. The (former) land owners discovered that the land taken from them had been leased to a private party. Claiming this transfer violated Pennsylvania law, which prohibited takings for private use, the landowners, who were citizens of Wisconsin, sued in federal district court, seeking ouster of the private lessee. The Supreme Court upheld the exercise of diversity jurisdiction over the state law claim. Since the petitioners could have filed such an action in state court, they were entitled, by virtue of their non-citizenship, to ask a federal court to act as would a state court and apply Pennsylvania law with respect to private takings.

Following this Supreme Court lead,[96] several lower federal courts in recent years have ruled on property owners' state law regulatory takings claims when their jurisdiction was founded on diversity.[97] In such a case, the federal district court must act as a state court would act, and this presents no problem insofar as the takings claim is based on state law. Traditional rules of claim and issue preclusion will bar a subsequent federal trial on the federal claim.[98]

In the recent *Vulcan Materials Co. v. City of Tehuacana,*[99] the Fifth Circuit recognized this exercise of diversity jurisdiction. Denied the ability to mine by the city, the property owner sued in federal district on virtually every conceivable ground: the Fifth Amendment, the state constitutional counterpart to the Fifth Amendment, substantive and procedural due process as well as equal protection under the Fourteenth Amendment, state due process and equal protection claims, and a declaratory judgment on other state law grounds. The plaintiff asserted federal question jurisdiction over the federal claims and supplemental jurisdiction and diversity jurisdiction over the state law claims. The district court dismissed the federal takings

claim as unripe and dismissed the other federal claims for failure to state a claim. It declined to exercise jurisdiction over the state law claims.

Vulcan appealed the dismissal of its state law takings claim. The Fifth Circuit held that the district court should not have dismissed this claim inasmuch as diversity existed between the plaintiff and defendant.[100] State law takings claims are cognizable in federal court under diversity, said the court. Once the trial is held, the court noted that standard rules of preclusion apply to prevent rehearing the claim as a federal takings claim.[101]

Can a federal court, sitting as a state court by diversity jurisdiction, hear a federal takings claim? This occurred in *William C. Haas & Co., Inc. v. City and County of San Francisco*,[102] where the Ninth Circuit heard a Kansas City developer's federal takings claim based on diversity jurisdiction. If you find this odd and suspect that the plaintiff really brought a claim based on California law, or that jurisdiction, in this pre-*Williamson County/First English* case, was based on the existence of a separate, independent federal question, the opening statement of the court should satisfy you:

> "Haas, a Kansas City developer "brought this diversity action against the . . . City claiming that the City's rezoning of its property . . . so far diminished the value of its property as to constitute a taking for which it is entitled to just compensation protected by the Fourteenth Amendment."[103]

The court proceeded to rule against the plaintiff developer on the merits. Though it may seem peculiar that a federal court could hear a federal claim in diversity when it could not hear the same claim under its federal question jurisdiction due to the *Williamson County/First English* rule, the exercise of such jurisdiction comports with the notion that, in diversity, federal courts should act like state courts would act, and in a regulatory takings case based on the Fifth Amendment, the state court would hear the case.

Assuming existence of the power to hear the claim, a question of comity remains as to whether the federal district court in diversity must hear the takings claim, be it state or federal. Here, *County of Allegheny v. Mashuda* is instructive though not determinative. The *Mashuda* Court rejected the idea that the district court should abstain on grounds of comity from applying what, in that case, was settled state law. A different matter presents itself if state law is unsettled. But, if the claim is a federal one, as in *Haas*, then no deference to the state courts need be considered.

With respect to state law eminent domain issues, the *Mashuda* Court found "no hazard of friction in federal-state relations."[104] Federal courts were accustomed to dealing with such issues, said the Court. However, where the issue is the reach of the police power in controlling land use, greater comity considerations may arise. In contrast to the relatively straightforward questions of compensation that typically arise in eminent domain proceedings, the issues in regulatory takings cases might justify abstention by a federal district court.

**(4) Supplemental Jurisdiction: Appending a State Takings Claim**

If a Fifth Amendment claim is filed in federal court where the landowner has not sought compensation in state court, the action is dismissed for lack of subject matter jurisdiction. An equal protection or substantive due process claim, however, can be filed in federal court more easily than a takings claim. Most courts apply *Williamson County*'s final decision requirement to equal protection and due process claims, but, quite properly, do not require the plaintiff to pursue state judicial relief under *Williamson County*'s second prong. Thus, the property owner might file an equal protection claim in federal district court and append to it a takings claim. This might be a state takings claim, or possibly the federal takings claim. While there is a fair amount of support for the former, there is but slight support for the latter. Using supplemental jurisdiction as an end run around the inevitable *Williamson County* dismissal of a Fifth Amendment claim "turns *Williamson County* on its head,"[105] as one court charged, and, since courts have discretion in exercising supplemental jurisdiction, it may not be successful.

Title 28 U.S.C.A. § 1367(a) provides that "the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Thus, a property owner who secures federal district court jurisdiction by asserting a due process or equal protection claim may append a state takings claim, which the court may hear through its exercise of supplemental jurisdiction.[106]

Hearing the claim is not compulsory. Under § 1367 (c), a federal court may decline to exercise such jurisdiction if one or more of the following circumstances exists: "(1) the claim raises a novel or complex issue of state law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed the claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction."[107] Normally, at least one, and perhaps several, of these will apply to *Williamson County* end run attempts.

Subsection (1) may arise where the takings issue presented has not been adjudicated by the state courts under the state constitution. It is not unusual for state courts to rule on takings claims without being clear whether they are applying the state or federal takings clauses, or both. Where the federal court finds the issue presented has not been decided by the state court under the state constitution, it may decline jurisdiction.

Subsection (2) may exist since the equal protection and due process claims that are asserted are often insubstantial, stretching notions of the Fourteenth Amendment with no realistic opportunity of success. To use this end run a plaintiff who has to scrounge for a claim to leverage the takings claim is out of luck. If the only serious issue is the state takings claim, the federal court should let the state court decide it.

The leveraging hook of equal protection or due process may be found so wanting that it is dismissed early on, either for failure to state a claim or on summary judgment. Even though the court has had the claim for some deliberations, dismissal of the state takings claim is nonetheless proper under Subsection (3).

The potential expansion of property owner equal protection claims suggested by *Village of Willowbrook v. Olech*[108] may make it less likely that subsections (2) or (3) will apply. Olech sued the Village of Willowbrook seeking damages for the village's alleged denial of her right to equal protection. The essence of her complaint was that when she asked the village to hook her house to the public water line, the village demanded from her a 33' easement. Others similarly situated had only been asked to grant a 15' easement. The reason for the disparate treatment, she alleged, was that she had successfully sued the village earlier over stormwater damage, and that the village, seeking revenge, was motivated by ill will.

The Court held that Olech stated an equal protection claim. It mattered not that she was a "class of one," or that she asserted no fundamental right or that she claimed no membership in a suspect class. It is sufficient that she "alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."[109] Though Olech had alleged that the village was motivated by ill will, the Court said the village's subjective motivation did not matter. Her complaint was sufficient without such allegation.[110] The possibility thus exists that equal protection claims can now more easily survive a motion to dismiss, and perhaps survive a summary judgment motion as well.[111] To the extent that this occurs, it is more likely that appended takings claims will not be thrown out under § 1367 (c) (2) and (3).

The fourth category of exceptional circumstances may apply to all takings claims under the rationale that local control over land use is a per se compelling reason. Even if not a per se rule, on an ad hoc basis, takings claims often present strong cases for deferral.[112]

While most reported cases involve district courts that have refused to exercise supplemental jurisdiction,[113] there are cases to the contrary. In *Picard v. Bay Area Regional Transit District*,[114] alleging lack of ripeness, the plaintiff sought remand to the state court of its federal due process, equal protection, and takings claims and its state takings claim. The federal district court dismissed the federal takings claim based on *Williamson County*'s prong two. The court then found the due process and equal protection claims ripe.

The court, however, refused to remand a state inverse condemnation claim to state court. In an ironic twist, the plaintiffs who wanted to be back in state court resorted to the argument that their due process and equal protection claims were too "insubstantial" to justify retention of their state takings claim. Disagreeing, and finding it important to keep the related claims in one forum, the court declined to defer to the state's interest in applying its own law of takings to the case.[115]

**(5) Supplemental Jurisdiction: Appending an "Otherwise Incomplete" Federal Takings Claim**

If the property owner sues in federal court on equal protection or substantive due process grounds and appends an otherwise[116] incomplete federal takings claim, there are legions of cases keeping the former and dismissing the latter for failure to pursue state remedies.[117] But, is it necessary and proper to do this where the failure of the property owner to seek state judicial relief is the only reason the federal court lacks original jurisdiction over the takings claim?[118] If the federal district court has jurisdiction over the equal protection or due process claim, why should it not hear a takings claim, which arises out the same facts, particularly when it can hear such a federal takings claim upon removal and hear a state takings claim by supplemental jurisdiction?

Assuming the claimant has obtained a final decision from the local government, her takings claim is ripe (in any proper sense of the term) for adjudication, and the question is simply which court should decide it. "The state court," one might think, is the only response that *Williamson County/First English* allow. That is true if the takings claim is the claim on which federal jurisdiction depends. But, if the federal court has jurisdiction on another basis, it may be more efficient for the federal court to hear the takings claim as well. Most importantly, the supplemental jurisdiction statute, which provides that "the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy,"[119] allows it on its face.

If the power exists, comity considerations may often suggest the federal court not exercise it. Addressing the efficiency v. comity question though, is, I think, a better way to resolve the matter than to

deny that the power exists. I know of no direct holding accepting supplemental jurisdiction over a federal takings claim,[120] but the theory can explain the results of some of the removal cases discussed below where the federal courts reach the merits of federal takings claims.

**(6) Removal**

It is not always the property owner who prefers a federal forum. Municipalities do at times, and when that is so, they try to achieve it by removal. Cases are removable from state court under 28 U.S.C. ' 1441, where they are within the original jurisdiction of the federal court.[121] Three situations may arise. (1) If a property owner files a Fifth Amendment takings claim in state court, conventional wisdom says it is not removable since the case is not within the original jurisdiction of the court under prong two of *Williamson County*.[122] A competing view is that the act of removal establishes the unavailability of a state remedy, conferring original jurisdiction on the court. (2) The second situation is where the plaintiff brings a federal and/or state takings claim and couples with it other federal claims such as equal protection or due process. Here, removal may be proper, and supplemental jurisdiction may exist. (3) If the plaintiff files in state court solely alleging a state law claim for compensation, the case is not removable.

**(a) Consequences of Government Removal**

In a number of recent cases, the defendant government entity removes. It then seeks dismissal on either the merits or on jurisdictional grounds. The plaintiff may choose to seek remand or to stay and fight.

McDonald's Corp. v. City of Norton Shores,[123] is typical. McDonald=s sought approval of a site plan for a restaurant with a drive-thru window. While the city=s site plan review procedures did not expressly include consideration of traffic flow, the plan was rejected due to traffic concerns. The denial of the site plan was only one of three denials by the city in the past five years, and other fast food restaurants with drive-in windows had been permitted in the vicinity.

McDonald=s sued in state court alleging, in addition to state law claims, a taking, and denials of substantive due process and equal protection. The city removed and moved for summary judgment. The court found against McDonald=s on the merits of its substantive due process and equal protection claims.[124]

As to the takings claim, the plaintiff had not met the state compensation requirement of *Williamson County*, so the court dismissed the case. That left McDonald=s back where it started, to sue again in state court alleging a taking. That result accords with conventional wisdom.[125] However, the court might have kept the federal takings claim, treating the defendant's removal as conclusive evidence that the state's procedure had proven futile in this case. The court alternatively might have considered exercising supplemental jurisdiction over the federal takings claim. This still might have led to dismissal, since the exercise of supplemental jurisdiction is discretionary, but, at least, the propriety of proceeding based on efficiency and equity would have been considered.

In *Seiler v. Charter Township of Northville*,[126] the city conditioned subdivision approval on construction of a bicycle path and bridge for public use. The landowner sued in state court alleging an as applied Fifth Amendment takings claim, as applied due process and equal protection claims, a facial claim that the standards and procedures used by the township were unconstitutional without specifying the clause of the constitution that was allegedly violated, and a state inverse condemnation claim. The city removed, and the district court dismissed the as applied takings claim and equal protection and due process claims for failure to meet either prong of *Williamson County*.

As to the takings claim, the landowner argued that he had sued in state court only to have the township remove and that the court ought not dismiss the takings claim because he would suffer delay caused by the defendant's removal. The court sympathized, but said removal was a right separate from ripeness. The township had a right to remove and any delay suffered by the plaintiff was the plaintiff=s fault: namely, the "plaintiff=s decision to file unripe federal claims as part of his state court inverse condemnation action."[127] The plaintiff, thus, is back where he started.

Rather than arguing delay as a reason to overcome the ripeness objection, Seiler might have suggested that the township=s removal deprived him of a state remedy. He had tried to seek compensation in the state courts, but the defendant would not allow him to proceed. The unavailability of a state remedy is a specific basis for the exercise of original jurisdiction by a federal district court under *Williamson County.*

The *Seiler* court may well be correct in saying, as a general proposition, that "the right to remove federal claims is separate and distinct from the question of whether those claims are ripe for adjudication," but it is wrong to apply that to Fifth Amendment takings claims that are indisputably ripe for judicial action and the only question is which court, state or federal, will decide them.[128]

**(b) *College of Surgeons* and Support for the Exercise of Jurisdiction Upon Removal**

International College of Surgeons v. City of Chicago,[129] brought attention to the practice and propriety of government defendants removing takings claim to federal court. The holding of *College of Surgeons* did not address the propriety of government removal, but the district court's handling of the federal takings claim opens up the possibility of district court jurisdiction over takings claims in removal situations. Also, the power the Court confers on district courts to review state administrative findings speaks to the broader federalism issue of whether district courts should use the power they have to hear claims via supplemental jurisdiction.

The Surgeons filed suit in Illinois state court complaining on various federal constitutional and state law grounds about the city's historic landmarking of their property. The city removed the case to federal court on the basis of supposed federal question jurisdiction. The federal claims included equal protection and due process claims, and a takings claim. In 1992, the district court dismissed "some of the constitutional claims."[130] Then, in 1995, the district court ruled on the remaining federal and state claims, finding in the city's favor on all counts. The Seventh Circuit reversed in part, holding that it was error for the district court to exercise supplemental jurisdiction over the state law claims that called for deferential, on-the-record review of state administrative findings. The Supreme Court reversed the circuit court.

The Supreme Court held that when a case is properly removed on the basis of a federal question presented by the plaintiff to the state court, a district court has the power to exercise supplemental jurisdiction over state claims including deferential, on-the-record review of state administrative findings. The Supreme Court did not discuss the federal claims that justified removal.

The district court had “dismissed with prejudice several of plaintiffs' equal protection and due process claims, including the claim that the Landmarks Ordinance effected an unconstitutional `taking’ of plaintiffs' property.”[131] With respect to plaintiffs' federal takings challenge, the district court, relying on *Penn Central*,[132] found that the landmarks ordinance did "`not affect plaintiffs' ability to continue using the subject property as a corporate headquarters or museum,’" and hence was not a taking.

Conventional wisdom tells us that it was wrong for the district court to rule on the substance of the federal takings claim. The district court should have remanded the takings claim for lack of compliance with *Williamson County/First English*. This apparent error was not noted by the Supreme Court, which is unsurprising since it was of no significance to the issue in the cases. There were other federal claims that justified removal,[133] thus, the Supreme Court proceeded to the question of supplemental jurisdiction over the state issue.

Perhaps conventional wisdom is wrong, and perhaps the district court’s decision on the federal takings claim can be viewed as an exercise of supplemental jurisdiction, as I suggest in the immediately preceding section. That is, the district court having jurisdiction over the equal protection and due process claims had the supplemental jurisdiction over the federal takings claim. Alternatively, removal may have been deemed conclusive evidence that no state remedy existed, giving the court jurisdiction on the authority of *Williamson County’s* unavailable forum rule.

The *College of Surgeons* district courts' exercise of jurisdiction over a federal takings claim via removal does not stand alone. In *Garneau v. City of Seattle*,[134] the Ninth Circuit ruled on the merits of a federal facial takings claim that had been removed from state court by the city. Similarly, in *New Pulaski Company Limited Partnership v. Baltimore*,[135] the Fourth Circuit heard a federal takings claim by removal.

In such cases, three possibilities exist. One, the court assumes that the city's removal constitutes conclusive evidence that resort to the state court is futile, and thus jurisdiction proper under *Williamson County*. Two, the court finds it proper to exercise supplemental jurisdiction over the otherwise incomplete claim federal claim. This requires that there be another federal claim removed, which was the case in *College of Surgeons, Garneau,* and *Pulaski*. Or, if one rejects these two implicit findings of jurisdiction, a third possibility is that the court does not have jurisdiction. The proper thing would be to remand the case to state court under prong two of *Williamson County*, but a court might not realize that jurisdiction is lacking.[136]

[1]473 U.S. 172 (1985).

[2]482 U.S. 304 (1987).

[3]Physical or regulatory, facial or as applied. *See* Thomas E. Roberts, Ripeness and Forum Selection in Fifth Amendment Takings Litigation, 11 J. Land Use & Envtl. L. 37, 42-42 (1995).

[4]Section B. of Part II draws from Julian Juergensmeyer and Thomas E. Roberts, Land Use Planning and Control Law §10.10 (West 1998).

[5]473 U.S. 172, 186, 105 S.Ct. 3108, 3116 (1985).

[6]Id. at 188, 105 S.Ct. at 3117.

[7]477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986).

[8]MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 353 nn. 8,9, 106 S.Ct. 2561, 2568 (1986).

[9]Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1402 (9th Cir.1989) cert. denied, 494 U.S. 1016, 110 S.Ct. 1317, 108 L.Ed.2e 493 (1990). But see Harris v. City of Wichita, 862 F.Supp. 287, 291 (D.Kan.1994) (stating in dicta that law is unclear).

[10]Yee v. City of Escondido, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992). See also Galbraith v. City of Anderson, 627 N.E.2d 850 (Ind.App.1994).

[11]473 U.S. at 188, 105 S.Ct. at 3117.

[12]Id. at 193, 105 S.Ct. at 3120. But see Acierno v. Mitchell, 6 F.3d 970 (3d Cir.1993) (repeated denials of a building permit by the building inspector did not constitute final action where appeal to a board of adjustment available).

[13] Hernandez v. City of Lafayette, 643 F.2d 1188, 1200 (5th Cir.1981).

[14]Hernandez v. City of Lafayette, 643 F.2d 1188, 1200 (5th Cir.1981); Celentano City of West Haven, 815 F.Supp. 561 (D.Conn.1993). Where development permission is denied and the land then immediately downzoned, a request for rezoning may not be required since the recent nature of the downzoning may show finality and futility. Resolution Trust Corp. v. Town of Highland Beach, 18 F.3d 1536 (11th Cir.1994); Hoehne v. County of San Benito, 870 F.2d 529, 535 (9th Cir.1989). But see Southern Pacific Transp. Co. v. City of Los Angeles, 922 F.2d 498 (9th Cir.1991).

[15]*MacDonald*, 477 U.S. at 353, n.9, 106 S.Ct. at 2568.

[16]117 S.Ct. 1659, 137 L.Ed.2d 980 (1997).

[17]117 S.Ct. at 1667.

[18]Sections B and C of Part III draws from Thomas E. Roberts, Wetlands Takings Law Turns a New Page with Palazzolo - Or Does It?, National Wetlands Newsletter (ELI Sept.-Oct. 2001).

[19]121 S.Ct. 2448 (2001).

[20]The Court previously recognized the exception in *MacDonald* and applied it in Lucas v. South Carolina Coastal Council.505 U.S. 1003 (1992).

[21]Id.

[22]Part III of this article is a revision and update of Thomas E. Roberts, Procedural Implications of *Williamson County/First English* in Regulatory Takings Litigation: Herein of Reservations, Removal, Diversity, Supplemental Jurisdiction, Rooker-Feldman, and Res Judicata, 31 Envtl. L. Rep. 10351 (April 2001). © Thomas E. Roberts. Please refer to that article for more complete discussions of Sections III A. and B. and C. (1).

[23]If the claim is not for compensation but to bar the act on the basis that there is no public purpose, then the second prong of *Williamson County* does not apply. Montgomery v. Carter County, 226 F.3d 758 (6th Cir.2000); Samaad v. City of Dallas, 940 F.2d 925, 933 (5th Cir. 1991). Also, this rule applies to actions against state and local government entities. Actions against the federal government must be filed in the Court of Federal Claims.

[24]482 U.S. 304 (1987).

[25]526 U.S. 687, 714 (1999). The landowner was able to sue in federal court in *Del Monte Dunes* because at the time of the taking, which was before *First English*, California had no compensation remedy. Id. at 710.

[26]Missing from the list are Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S.. 470 (1987) and *Del Monte Dunes*, both occurring in states where, in pre-*First English* jurisdprudence, at the time of the alleged taking, the state courts did not provide a regulatory taking compensation remedy. See Thomas E. Roberts, Fifth Amendment Taking Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata, 24 Urb. Law. 479, 487-488 (1992). In *Suitum,* supra note 16, the case was against the case proceeded in federal court. Jurisdiction was not discussed, perhaps because the action was against a agency formed by interstate compact. The case likely should have been tried in state court.

[27]Forseth v. Village of Sussex, 199 F.3d 363, 372 (7th Cir.2000) ("Should plaintiffs sufficiently pursue their case in state court only to be denied relief, they may then seek relief in federal court on their federal substantive due process and takings claims.") The Sixth Circuit too recently debated whether a property owner complaining of a private taking should be sent to sue in state court. The only purpose, said the court, would be to have the plaintiff "vet her claims in state proceedings (such as . . . a quiet title suit . . .) before the claims can be aired in federal courts." Montgomery v. Carter County, 226 F.3d 758 (6th Cir. 2000). Since it was a claim of a private taking and not one for compensation, the court appropriately did not dismiss the claim, but to even suggest that the plaintiff could air the matter in state court and then come back shows a surprising lack of anticipation of the preclusion rules that will apply when she returns.

[28]For a detailed discussion see Thomas E. Roberts, Procedural Implications of *Williamson County/First English* in Regulatory Takings Litigation: Herein of Reservations, Removal, Diversity, Supplemental Jurisdiction, Rooker-Feldman, and Res Judicata, 31 Envtl. L. Rep. 10351 (April 2001).

[29]*First English*, 482 U.S. at 315-316.

[30]Dodd v. Hood River County,59 F.3d 852 (9th Cir.1995), after remand decision, 136 F.3d 1219 (9th Cir.), cert. den., 525 U.S. 923 (1998).

[31]Id.

[32]121 S.Ct. 2448 (2001). See discussion infra part II. B. for discussion of the facts of *Palazzolo*.

[33]Id. at 2456.

[34]Avoidance techniques are discussed infra Part III D.

[35]*See* Rooker v. Fidelity Trust Co., 263 U.S. 413, 425 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

[36]*Rooker*, 263 U.S. at 414.

[37]*Feldman,* at 486.

[38]Suzanna Sherry, *Judicial Federalism in the Trenches: the Rooker-Feldman Doctrine in Action*, 74 Notre Dame L. Rev. 1085, 1088 (1999).

[39]Rooker v. Fidelity Trust Co., 263 U.S. 413, 425 (1923).

[40]Snider v. City of Excelsior Springs, 154 F.3d 809, 811 (8th Cir. 1998).

[41]*Id.*, quoting *Feldman*, 460 U.S. at 483, n. 16.

[42]Sherry, supra note 38, at 1101.

[43]Moccio v. New York, 95 F.3d 195, 198 (2d Cir. 1996).

[44]While *Rooker-Feldman* is federal law, reference to state law may be necessary in an instance when the federal plaintiff claims that she did not raise an issue in state court because she lacked a reasonable opportunity to do so. See, e.g., Long, at 559-560 (Illinois forcible entry and detainer law precluded state defendant/federal plaintiff from asserting claim not germane to possession.)

[45]Long v. Shorebank Development Corp., 182 F.3d 548, 553 (7th Cir. 1999); Fayyumi v. City of Hickory Hills, 18 F.Supp.2d 909 (N.D. Ill. 1998).

[46]Fayyumi v. City of Hickory Hills, 18 F.Supp.2d 909 (N.D. Ill. 1998).

[47]Sherry, *supra* note 38.

[48]E.g., the court may have to consider what issues the party could have presented to the state court.

[49]2001 WL 1104685 (6th Cir. 2001).

[50]See also U.S. v. Owens, 54 F.3d 271, 274 (6th Cir. 1995) (*Rooker-Feldman* is sometimes thought of as Aa combination of the abstention and res judicata doctrines.@)

[51]401 U.S. 37 (1971).

[52]While I discuss takings cases here, where there is no disagreement, disagreement does exist with respect to the application of *Rooker-Feldman* to a federal challenge to local government conduct alleged to violate due process and equal protection, where the state court has already found the conduct appropriate. The Seventh Circuit has rejected its use in this setting. Homola v. McNamara, 59 F. 3d 647, 650 (7th Cir. 1995); but see Community Treatment Centers v .City of Westland, 970 F.Supp. 1197 (E.D. Mich. 1997).

[53]Snider v. City of Excelsior Springs, 154 F.3d 809, 811 (8th Cir. 1998).

[54]266 F.3d 487 (6th Cir. 2001).

[55]See also Zealy v. City of Waukesha, 153 F.Supp.2d 970 (E.D.Wis.2001), dismissing takings claim under *Rooker-Feldman* and claim preclusion.

[56]The district court dismissed the case before the Michigan appellate court decision. While the Sixth Circuit found this premature, in hindsight it was correct, and thus harmless error. If the state trial court decision had not been appealed and the matter had gone to the federal court on the basis of the trial court's incomplete or erroneous treatment of the takings issue, the Sixth Circuit implies that a *Rooker-Feldman* dismissal might not have been proper. I am not certain this is correct. But, even if it is, the res judicata/collateral estoppel defense might apply.

[57]193 F.3d 33 (2nd Cir. 1999).

[58]512 U.S. 374 (1994).

[59]Even if one finds the distinction between the facts of *Hill* and *Dolan* unconvincing, it does not entitle the landowner to collateral review in federal district court. That a state court may be wrong on the law does not void its judgment. But, the court=s ruling is consistent with other courts. *Dolan* involved an individualized determination whereas the subdivision plat law of New Hampshire was legislative.

[60]*See also* Snider v. City of Excelsior Springs, 154 F.3d 809 (8th Cir. 1998) (federal plaintiffs could not challenge in federal court the result of state condemnation action).

[61]195 F.3d 1225 (11th Cir. 1999), cert. denied 121 S.Ct. 51 (2000).

[62]Despite having prevailed by the district court=s dismissal of the claim as unripe, the county had standing to challenge the district court=s decision because it was harmed by the court=s rejection of the res judicata and collateral estoppel defenses. When the (unripe) case was filed in state court, the county wanted to be able to argue that the prior state court proceeding had decided the matter. But, the federal district court=s finding that the state court had not dealt with the takings issue, if it stood, would preclude the county from raising that argument in state court since the state court would be bound by the federal court determination that the takings issue had not been raised. *Id.* at 1230.

[63]For a complete discussion of this issue, *see* Thomas E. Roberts, *Fifth Amendment Taking Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata,* 24 Urb. Law. 479 (1992).

[64]Grriffin v. State of Rhode Island, 760 F.2d 359 (1st Cir.), cert. denied, 474 U.S. 845 (1985); Peduto v. City of North Wildwood, 878 F.2d 725 (3d Cir. 1989); Rainey Brothers Construction Co., Inc. v. Memphis and Shelby County Bd. of Adjustment, 967 F.Supp. 998 (W.D.Tenn.1997), aff'd, 178 F.3d 1295 (6th Cir.1999), cert. den. 120 S.Ct. 569 (1999); Palomar Mobilehome Park Association v. City of San Marcos, 989 F.2d 362 (9th Cir. 1993); Wilkinson v. Pitkin County, 142 F.3d 1319 (10th Cir. 1998); Saboff v. St. John's River Water Management Dist., 200 F.3d 1356, (11th Cir. 2000), cert. denied, 121 S.Ct. 67 (2000); Zealy v. City of Waukesha, 153 F.Supp.2d 970 (E.D.Wis.2001).

[65]Zealy v. City of Waukesha, 153 F.Supp.2d 970 (E.D.Wis.2001), dismissing takings claim under claim preclusion.

[66]See discussion of *England* reservation, infra III, D. (2).

[67]Belevedere Military Corp. v. County of Palm Beach, 845 F.Supp. 877, 879 (S.D.Fla.1994)(If the state courts have "unequivocally indicated that an individual in Plaintiffs' situation had no cause of action under state law" then they need not bother asking).

[68]Aiello v. Browning-Ferris, Inc., 1993 WL 463701 (N.D.Cal.1993) (though state law not clear on whether private party acting under color of law was liable in an inverse condemnation action, plaintiff is required to resort to state court).

A most unusual case is Kruse v. Village of Chagrin Falls, 74 F.3d 694, 697, n.2 (6th Cir.1996), where the court found Ohio lacked a procedure but the court said the state need not provide one. To the court, "self-executing" does not mean state must provide an inverse condemnation procedure. Try telling that to California cities and counties after *First English*.

[69]Gamble v. Eau Claire County, 5 F.3d 285 (7th.Cir. 1993).

[70]Belevedere Military Corp. v. County of Palm Beach, 845 F.Supp. 877 (S.D.Fla.1994).

[71]104 F.Supp.2d 1368 (S.D.Fla.2000).

[72]*See*, e.g., Rockler v. Minneapolis Community Development Agency, 866 F.Supp. 415, 417-418 (D.Minn. 1994).

[73] 803 F.Supp. (M.D.N.C. 1992).

[74]Initially, the state supreme court had found such schemes not per se unconstitutional as applied to a three year provision for the removal of junk yards. State v. Joyner, 211 S.E.2d 320 (N.C. 1975), *appeal dismissed*, 422 U.S. 1002 (1975). Had that been all the law on the subject, a challenge as to sign amortization would not have been futile since one premise of the *Joyner* case was that the validity of amortization schemes would be examined on a case by case basis. Two later intermediate court of appeals decisions, however, had ruled in favor of billboard amortization.

[75]Schnuck v. City of Santa Monica, 935 F.2d 171 (9th Cir. 1991); Sierra Lake Reserve v. City of Rocklin, 938 F.2d 951 (9th Cir. 1991).

[76]SGB Financial Services, Inc. v. Consolidated City of Indianapolis-Marion County, 2000 WL 680412, 2000 U.S. Dist. LEXIS 7204 (S.D.Ind.2000). The Sixth Circuit found that a landowner seeking compensation for a physical taking did not need to file suit in the state court in Ohio, which, according to the court, lacked a procedure for inverse condemnation action.

[77]2000 WL 680412, 2000 U.S. Dist. LEXIS 7204 (S.D.Ind.2000).

[78]Wilkinson v. Pitkin County, 142 F.3d 1319, 1324 (10th Cir.1998) ("We need not decide whether it is possible to reserve a federal claim, or, if so, what must be done to reserve such a claim because at no time did plaintiffs attempt to do so.");Front Royal and Warren County Industrial Park Corp. v. Town of Front Royal, 135 F.3d 275, 283 (4th Cir. 1998); Rainey Brothers Construction Co., Inc. v. Memphis and Shelby County Bd. of Adjustment, 967 F.Supp. 998,1004, n. 5 (W.D.Tenn.1997), aff'd, 178 F.3d 1295 (6th Cir.1999), cert. den. 120 S.Ct. 569 (1999) (since no reservation made court declined to address whether to do so would be effective in similar cases); Peduto v. City of North Wildwood, 878 F.2d 725, 729, n. 5 (3d Cir. 1989) (noting that the district court had said that an *England* reservation could have been made, the Third Circuit did not reach the issue, finding, in the absence of any reservation, that state court litigation compelled by *Williamson County* barred subsequent federal court consideration of the same issues). From a state court, *see* Guetersloh v. State, 930 S.W.2d 284 (Tex.App.1996), cert. denied 522 U.S. 1110 (1998).

[79]Anderson v. Charter Township of Ypsilanti, 266 F.3d 487 (6th Cir. 2001).

[80]See Palazzolo v. Rhode Island, 121 S.Ct. 2448 (2001), and discussion supra in part II.B.

[81]953 F.2d 1299 (11thCir. 1992).

[82]The court continues to see the reservation as an available option, but still applies rules of preclusion. *See* Saboff v. St. John's River Water Management District, 200 F.3d 1356 (11th Cir.2000), cert. denied, 121 S.Ct. 67 (2000).

[83]Jennings v. Caldo Parish School Bd., 531 F.2d 1331 (5th Cir.1976) (the Eleventh Circuit's predecessor circuit).

[84]953 F.2d at 1305.

[85]449 U.S. 90 (1980).

[86]465 U.S. 75 (1980). Kathryn Kovacs, in an extended analysis, finds the Eleventh Circuit's extension of *England* inconsistent with these subsequent Supreme Court cases dealing with preclusion. Kathryn E. Kovacs, *Accepting The Relegation Of Takings Claims To State Courts: The Federal Courts' Misguided Attempts To Avoid Preclusion Under Williamson County*, 26 Eco.L.Q. 1 (1999).

[87]2001 WL 1104685 (6th Cir. 2001).

[88]The court should have dismissed the federal takings claim.

[89]Id. at *2.

[90]Id. at *8, citing *England*, 375 U.S. at 421.

[91]59 F.3d 852 (9th Cir.1995), after remand decision, 136 F.3d 1219 (9th Cir.), cert. den., 525 U.S. 923 (1998).

[92]59 F.3d 852 (9th Cir.1995), after remand decision, 136 F.3d 1219 (9th Cir.), cert. den., 525 U.S. 923 (1998).

[93]Counties and cities, as municipal corporations, are citizens of their state for purposes of diversity. Regents of the University of California v. Doe, 519 U.S. 425, 430, n. 6 (1997) (counties); People of State of Ill. v. Kerr-McGee Chemical Corp., 677 F.2d 571 (7th Cir. 1982)(cities).

[94]"In diversity cases the rights enjoyed under local law should not vary because enforcement of those rights was sought in the federal court rather than in the state court." Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949).

[95]360 U.S. 185 (1959).

[96]In addition to *Mashuda*, *see* Searl v. School Dist. No. 2, 124 U.S. 197 (1888) (ordering district court to exercise diversity jurisdiction in condemnation case removed from state court).

[97]SK Finance SA v. La Plata County, 126 F.3d 1272, 1276 (10th Cir. 1997); Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401 (9th Cir. 1996); American Tel. & Tel. Co. v. Madison Parish Police Jury, 465 F.Supp. 168 (D.La. 1977).

[98]Vulcan Materials Co. v. City of Tehuacana, 238 F.3d 382 (5th Cir. 2001).

[99]238 F.3d 382 (5th Cir. 2001).

[100]It was also error for the district court to dismiss the state due process and equal protection claims and other state law claims since diversity existed as to those as well as to the takings claim.

[101]"The City argues that to allow a district court to hear a state takings claim in diversity is to risk the danger of a district court reviewing its own decision regarding the state claim to determine if that decision denied the plaintiff just compensation. We think that this would almost never be a problem. Assume that, to prevent res judicata from impairing its rights, a plaintiff in diversity pleads both state and federal law takings claims. The district court, properly following Samaad, dismisses the federal takings claim. Then, following our holding today, proceeds to try the state law takings claim. If the plaintiff wins, no difficulty is presented because, under the doctrine of collateral estoppel, the issue of damages may not be relitigated. If the state remedy is inadequate, Williamson County and Samaad allow the plaintiff to bring the federal law takings claim without first bringing the state claim. If the plaintiff loses, the doctrine of collateral estoppel prevents relitigation of any issues determined in the first proceeding. It would only be in the rarest of cases wherein the denial of compensation was due to some issue peculiar to state law that there could ever be a second trial. This faint possibility is not enough to justify departure from the normal rules governing federal diversity jurisdiction over state law claims." 238 F.3d at 386-387.

[102] 605 F.2d 1117 (9th Cir. 1979), cert. denied 445 U.S. 928 (1980).

[103]605 F.2d at 1118.

[104]Mashuda, 360 U.S. at 192.

[105]"[B]ecause the federal claim is not yet ripe precisely because the state courts have not yet had an opportunity to consider the parallel state takings claim, this court would turn Williamson County upside down

if it proceeded to decide SGB's state constitutional takings claim." SGB Financial Services, Inc. v. Consolidated City of Indianapolis-Marion County, 2000 WL 680412, 2000 U.S. Dist. LEXIS 7204 (S.D.Ind.2000).

[106]Geddes v. County of Kane, 121 F.Supp.2d 662 (N.D.Ill.2000) (plaintiffs brought equal protection, federal takings claim, and state takings claim; the federal takings claim was dismissed because the plaintiffs has not used their remedies under state law. The court, however, retained the state takings claim).

[107]28 U.S.C.A. § 1367(c). *See* Executive Software North America, Inc. v. U.S. Dist. Court for Cent. Dist. of California, 24 F.3d 1545 (9th Cir.1994).

[108]120 S.Ct. 1073 (2000). Justice Breyer, concuriring, expressed the hope that the holding would not have the effect of "transforming run-of-the-mill zoning cases into cases of constitutional right.@ *Id.* at 1075 (Breyer, J., concurring). It is difficult to imagine that the other members of the Court wish for such a transformation either.

[109]*Id.* at 1074.

[110]*Olech* is a per curiam decision. It is one page long, and the tone of the Court's language is that there is nothing new here. Others, however, see or hope for, a potential relaxation of the law, with a consequent invitation for more lawsuits. Justice Breyer in concurrence raised the specter that anytime a zoning official treats one landowner differently from another and in so doing violates local law, one might claim the action to lack a rational basis. Breyer thinks there must be an allegation of "ill will." The Seventh Circuit's application of *Olech* in Hilton v. City of Wheeling, 209 F.3d 1005 (7th Cir.2000), indicates that it likes Justice Breyer's concurrence more than the per curiam opinion. Whether the absence of a fundamental right or suspect class requires an allegation of ill will remains cloudy.

[111]*See* Cruz v. Town of Cicero, 2000 WL 967980, 2000 WL 967980 (N.D.Ill.2000).

[112]Norton v. Village of Corrales, 103 F.3d 928, 933 (10th Cir.1996) (federal courts "should be reluctant to interfere in zoning disputes which are local concerns").

[113]*See* Macri v. King County, 126 F.3d 1125 (9th Cir.1997) (the court dismissed the Fifth Amendment claim for failure to meet prong two of *Williamson County* and it remanded the state based inverse condemnation claim); Patel v. Penman,103 F.3d 868, cert. denied 520 U.S. 1240 (1997); Hallco Environmental Inc. v. Comanche County Bd. of County Com'rs,149 F.3d 1190 (10th Cir. 1998); Davis v. City of Baldwyn, 2000 WL 994469, 2000 U.S. Dist. LEXIS 9922 ( N.D.Miss. 2000); SGB Financial Services, Inc. v. Consolidated City of

Indianapolis-Marion County, 2000 WL 680412, 2000 U.S. Dist. LEXIS 7204 (S.D.Ind.2000) (federal takings claim dismissed on ripeness grounds, and dismisses a state takings claim on the ground that exercise of supplemental jurisdiction was not proper.) In Burnham v. City of Salem, 101 F.Supp.2d 26 (D.Mass.2000), a motion to remand was denied with a conclusory statement that removal was proper. Then, the court proceeded to rule on the merits of the due process and takings claims, finding in the city's favor. The state law claims were then remanded. *See also* Rau v. City of Garden Plain,76 F.Supp.2d 1173 (D. Kan.1999) (Fifth Amendment, due process, and state law claims removed; federal court dismissed takings claim and due process based on failure of plaintiff to sue in state court solely on state law; and remanded plaintiff to state court to seek compensation under state procedure). *See also* Vilas of Lake Jackson, Ltd. v. Leon County, 121 F.3d 610, 611 (11th Cir.1997), where the Eleventh Circuit, in considering plaintiff's substantive due process claim, notes that the district court had dismissed plaintiff's federal takings claim as unripe and refused to exercise supplemental jurisdiction over the state takings claim.

[114]823 F.Supp. 1529 (N.D.Cal.1993).

[115]*See also* Geddes v. County of Kane, 121 F.Supp.2d 662 (N.D.Ill.2000) (plaintiffs brought equal protection, federal takings claim, and state takings claim; the federal takings claim was dismissed because the plaintiffs has not used their remedies under state law. The court, however, retained the state takings claim).

In Moore v. City of Tallahassee, 928 F.Supp. 1140 (N.D.Fla.1995). the property owner filed a substantive due process claim and a state takings claim in federal court. The court said the action was originally filed in state court. It may have been removed, but the court makes no reference to removal, or the plaintiff himself might have dismissed his state action and refiled in federal court. The court found both the substantive due process claim and the state takings claim sufficient to survive summary judgment. The court did not explain or comment in any way on its exercise of supplemental jurisdiction.

[116]I use "otherwise incomplete" as opposed to "otherwise unripe" to draw attention to my view that Williamson County's second prong is not accurately described as a ripeness matter.

[117]If not legions, there are many. To save space but still support the point, I cite only some recent circuit court opinions. *See* John Corp. v. City of Houston, 214 F.3d 573 (5th Cir.2000) (substantive due process ripe; takings claim unripe); Montgomery v. Carter County, 226 F.3d 758 (6th Cir.2000); Forseth v. Village of Sussex, 199 F.3d 363 (7th Cir.2000) (dismissing substantive due process and takings claim for not seeking compensation in state court, but keeping equal protection claim); McKenzie v. City of White Hall, 112 F.3d 313 (8th Cir.1997) (dismissing takings claim and keeping due process and equal protection claims);SK Finance SA v. La Plata

County, 126 F.3d 1272 (10th Cir.1997) (dismissing federal takings claims for failure to pursue state remedies while recognizing original diversity jurisdiction over state takings claim). Restigouche, Inc. v. Town of Jupiter, 59 F.3d 1208 (11th Cir.1995).

[118]I am assuming the plaintiff has met the final decision requirement of *Williamson County*.

[119]28 U.S.C.A. § 1367(a).

[120]And certainly many takings claims have been dismissed in just such circumstances, with courts acting as if the dismissal is obligatory.

[121]AAny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . .@

[122]Eggleston v. Pierce County, 99 F.Supp.2d 1280 (W.D. Wa. 2000); Evans v. Washington County, 1999 WL 1271025, 1999 U.S. Dist. LEXIS 20036 (D. Ore. 1999) (*Evans* grudgingly remands on the basis of Ninth Circuit decisions, but finds that *Williamson County* has been misinterpreted). Continental Cablevision of Michigan, Inc. v. Edward Rose Realty, Inc., 840 F.2d 16 (Table; unpublished ) (6th Cir.1988) (where there has been a removal from the state court, the proper course for the district court, if it should conclude that it was without subject matter jurisdiction, would be an order of remand).

[123]102 F.Supp.2d 431 (W.D. Mich. 2000). *See also* Vigilante v. Village of Wilmette, 88 F.Supp.2d 888 (N.D. Ill. 2000).

[124]Applying deferential review, the court unsurprisingly found the city=s traffic concerns constituted a rational basis to reject the plan. As to the equal protection claim, the court acknowledged, pursuant to *Olech*, that Aa class of one@ claim was cognizable, but the claim was nonetheless a loser. Other restaurants' applications had been granted but they were different from McDonald=s application. K-Mart, next to the McDonald=s lot, had a restaurant without a drive-thru window, raising fewer traffic concerns. Other fast food restaurants with drive-thrus either were not on the same street or had been permitted Asubstantially before@ McDonald=s and thus were not Asimilarly situated@ for equal protection purposes. It appears that McDonald=s came to the area late, after other drive-thrus had overloaded the area with traffic. That did not make it irrational or unfair for the city to say no to one more drive-thru.

[125]*See also* Frustaci v. City of South Portland, 2000 WL 1310671, 2000 U.S. Dist. LEXIS 13635 (D.Me.2000); Rau v. City of Garden Plain,76 F.Supp.2d 1173 (D. Kan.1999) (Fifth Amendment, due process, and state law claims removed; federal court dismissed based on failure of plaintiff to sue in state court solely on state law).

[126]53 F.Supp.2d 957 (E.D. Mich. 1999).

[127]53 F.Supp.2d at 962.

[128]A distinct matter arises where the city removes and then moves to dismiss or seeks summary judgment for the failure of the plaintiff to obtain a final decision, or other ripeness-related grounds other than *Williamson County's* prong two. Medina v. City of Charleston, 1992 U.S.App. Lexis 6489 (4th Cir.1992); Hidden Creek Stock Farms, 1993 U.S.Dist. Lexis 16378 (E.D.Pa.1993). *See also* Lindell v. City of Waconia, 71 F.Supp.2d 95 (D.Minn.1999), which involved a city ordinance that limited pull-tab gambling in bars unless sponsored by a qualifying charity. The city removed the action, which alleged "battery" of claims, including a takings claim. The court dismissed for lack of standing. In Davis v. City of Baldwyn, 2000 WL 994469, 2000 U.S. Dist. LEXIS 9922 (N.D.Miss.2000), the plaintiff apparently commenced the wrong kind of action in state court. Rather than point that out to the plaintiff or the state court judge, who likely could have easily corrected the matter, the city removed, and asked the federal court to dismiss the takings claim on the basis that the plaintiff had not followed the proper state procedure. The federal court agreed. In these cases, the takings claim is not remanded to state court, but rather, to the local land use authorities where the plaintiff must pursue a final decision. Assuming removal is an otherwise legitimate process, the local government is not abusing or delaying the plaintiff by its removal. Rather, the defendant prefers the local federal court's view of final decision ripeness to that of the state judges.

[129]522 U.S. 156 (1997).

[130]Id. at 160.

[131]1995 WL 9243 (unpublished opinion).

[132]438 U.S. 104 (1978).

[133]In 1995, in an unpublished opinion, the district court found against the Surgeons on the remaining federal claims of equal protection and substantive due process, which rested on the charge that the Surgeons were

being treated unfairly by being singled out, and procedural due process claims that alleged the state's notice and hearing process was faulty. 1995 WL 9243 (unpublished opinion).

[134]147 F.3d 802 (9th Cir. 1998).

[135]217 F.3d 840 (4th Cir.2000).The majority found the time had run. The dissent reasoned to the contrary *Williamson County*'s final decision requirement figured prominently in the statute of limitations analysis. After all, the dissent said, the statute should not run until a final decision has been made. But, the majority disagreed with the dissent on when that had occurred.

[136]*See also* Burnham v. City of Salem, 101 F.Supp.2d 26 (D.Mass.2000), where a motion to remand was denied with a conclusory statement that removal was proper. Then, the court proceeded to rule on the merits of the due process and takings claims, finding in the city's favor. The state law claims were then remanded.