ESSAY

ANTICIPATORY REMEDIES FOR TAKINGS

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The Supreme Court has rendered two lines of decisions about the remedies available for a violation of the Takings Clause. One line holds that courts have no authority to enter anticipatory decrees in takings cases if the claimant can obtain compensation elsewhere. The other line, which includes three of the Court's most recent takings cases, results in the entry of an anticipatory decree about takings liability. This Essay argues that the second line is the correct one. Courts should be allowed to enter declaratory or other anticipatory judgments about takings liability, as long as they respect the limited nature of the right created by the Takings Clause and do not usurp the limited waivers of sovereign immunity for actions to recover compensation from the government. Anticipatory litigation should not be routine. In ordinary condemnation cases and in most regulatory takings cases that turn on the particular facts presented, the action seeking compensation should provide complete and adequate relief. But where remitting property owners to an action for compensation will result in an incomplete, impractical, or inefficient outcome, anticipatory relief about whether a taking has occurred is appropriate and should be permissible. The Essay argues that recognizing the appropriate role for anticipatory remedies under the Takings Clause would help reduce the many pitfalls of litigating takings claims, and provide more consistent and effective enforcement of this constitutional right.

INTRODUCTION

Litigating takings claims under the U.S. Constitution involves pitfalls not encountered in ordinary constitutional litigation. With respect to takings claims against the federal government, just compensation can ordinarily be awarded only by the Court of Federal Claims (CFC), an "Article I" court located in Washington, D.C.[1] The CFC, however, has no authority to grant equitable or declaratory relief.[2] Consequently, claimants who wish to advance claims enforced by injunctions or declaratory judgments (for example, that the government action was arbitrary and capricious) must seek relief in an Article III court. This means claimants must often split their claims between two courts, giving rise to tricky questions of timing and preclusion. If they file in the

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[1] *See infra* p. 1640.

[2] United States v. King, 395 U.S. 1, 2–5 (1969). There are narrow exceptions which are immaterial here. *See* 28 U.S.C. § 1491(a)(2), (b)(2) (2012) (granting limited equitable authority to the CFC in federal employment and competitive bidding disputes).

wrong court, or get the sequencing wrong, consideration of the takings claim may be foreclosed.[3] Congress could clean up the mess by rewriting the relevant jurisdictional statutes, but has failed to act.[4]

With respect to federal takings claims against state and local governments, the Supreme Court has held that such claims must be initially presented to state courts before they can be heard in federal court.[5] Any legal and factual issues that are resolved by the state courts, however, cannot be relitigated in a subsequent challenge in federal court.[6] Since federal and state takings clauses are generally interpreted the same way, this gives rise to what has been aptly called a "trap."[7] Although federal constitutional claims ordinarily can be tried in federal court under 42 U.S.C. § 1983,[8] takings claims, because they must be initially presented to state courts, are generally barred from being considered by any federal court other than the U.S. Supreme Court on certiorari from the final state court decision, which is rarely granted.

This Essay argues that these pitfalls of litigating federal takings claims rest, in significant part, on an erroneous understanding about the scope of federal judicial authority under the Takings Clause. Starting from the premises that the Constitution does not prohibit takings but only requires that they be compensated,[9] and that compensation can be awarded only in a court in which the government has waived its sovereign immunity,[10] the Supreme Court has concluded — sometimes — that federal courts of general jurisdiction have no authority to consider takings claims as long as an action for compensation is available elsewhere. On other occasions however — and usually without acknowledging the inconsistency — the Court has reviewed takings claims without requiring that they first be submitted to the court having authority to award just compensation. The latter line of

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[3] *See infra* note 157.

[4] The appropriately titled Tucker Act Shuffle Relief Act of 1997, H.R. 992, 105th Cong. (1997), failed due to a Senate filibuster. *See* GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT 439–40 (2000).

[5] Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194–95 (1985).

[6] *See* San Remo Hotel, L.P. v. City of San Francisco, 545 U.S. 323 (2005) (interpreting 28 U.S.C. § 1738 to preclude litigation in federal court of issues of law and fact determined in state takings cases mandated by *Williamson County*).

[7] Madeline J. Meacham, *The* Williamson *Trap*, 32 URB. LAW. 239 (2000).

[8] The Court has held that exhaustion of state remedies is not required as a prerequisite to filing a § 1983 action. Patsy v. Bd. of Regents, 457 U.S. 496, 516 (1982). Consequently, *Williamson County* justifies its rule that takings claims must be initially presented to a state court as a "ripeness" requirement, *see Williamson Cnty.*, 473 U.S. at 194, although functionally what it requires is exhaustion of state remedies in takings cases.

[9] *See* First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304, 315 (1987).

[10] *See infra* note 71 and accompanying text.

authority, although poorly theorized by the Court, is the correct one. There is no rule of law that prevents federal courts of general jurisdiction from adjudicating claims that arise under the Takings Clause — as long as they confine themselves to the question whether there has been a taking that entitles the owner to compensation. Given sovereign immunity, however, any actual award of compensation against the federal government or one of the states (as opposed to a local government) must be made by a court having jurisdiction to render such a judgment.

The vehicle for allowing federal courts to consider takings claims, even if they have no authority to award just compensation, is what I call an anticipatory remedy.[11] The primary type of remedy I have in mind is a declaratory judgment, authorized by the Declaratory Judgment Act of 1934.[12] In appropriate circumstances, federal courts of general jurisdiction should be able to entertain claims that a federal or state government unit is proposing to engage in action that would constitute a taking, and if so, to issue a declaration that compensation would be required if the government persists. Anticipatory remedies could also take other forms besides declaratory judgments. A petition for review of federal agency action under the agency's authorizing statute or the Administrative Procedure Act[13] (APA) could provide the basis for such a determination. The Supreme Court's discretionary authority to grant certiorari to review federal questions that arise in federal or state courts can — and often does — function as a form of anticipatory relief. In rare circumstances, federal courts should be allowed to enjoin federal or state government action under the Takings Clause.[14]

The understanding that federal courts have authority to enter anticipatory relief under the Takings Clause does not mean that most or even very many takings cases should be decided by federal courts of

[11] I have borrowed this useful term from William M. Landes & Richard A. Posner, *The Economics of Anticipatory Adjudication*, 23 J. LEGAL STUD. 683 (1994).

[12] 28 U.S.C. §§ 2201–2202 (2012).

[13] Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

[14] The primary circumstances where injunctive rather than declaratory relief would be appropriate would be when the government seeks to condemn property for something other than a public use, *see* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (noting injunction was proper relief for taking without public use), or when it lacks legislative authority to take private property, *see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 584–85 (1952) (injunction proper when property has been "unlawfully taken"). Injunctive relief would also be appropriate if the government takes property but has provided no means of securing just compensation. *See* Joshua D. Hawley, *The Beginning of the End?* Horne v. Department of Agriculture *and the Future of* Williamson County, 2012–2013 CATO SUP. CT. REV. 245, 256 & n.58 (collecting cases enjoining takings where the government has provided incomplete or no compensation).

general jurisdiction. Anticipatory relief is discretionary, and should be allowed only if a claimant can show that important private or governmental interests would be served by allowing such relief. Because the substantive right created by the Takings Clause is only a right of compensation, such a showing, in the ordinary case, will be foreclosed, because the right will be vindicated in due course by an award of compensation. In appropriate circumstances, however — such as where litigation in the court having jurisdiction to award compensation would be futile, or where anticipatory resolution would resolve significant uncertainty affecting the use of property, or where such relief is critical to allowing an important governmental function to proceed without running the risk of extensive government liability — a claimant should be able to secure anticipatory relief in federal courts of general jurisdiction. This understanding is already reflected in one line of Supreme Court authority, and indeed is embedded in three of the Court's most recent takings decisions. It awaits only being adequately rationalized.

If this understanding of the Takings Clause is correct, it is a nontrivial conclusion. It means the Supreme Court's precedent requiring that all federal takings claims be channeled through the CFC should be significantly qualified, and its requirement that takings claims against state and local government units must always be initially presented to a state court should be overruled.[15] Since both doctrines are major barriers to federal court adjudication of takings claims, this change in the understanding of permissible remedies for takings would go some distance toward reducing the unnecessary delays and other pitfalls that currently stand in the way of litigating takings claims in Article III courts. In so doing, it would help blunt former Chief Justice Rehnquist's complaint that the Takings Clause stands as a lowly "poor relation" compared to its revered cousins in the Bill of Rights.[16]

The Essay is organized as follows. The first three Parts seek to untangle the intricate doctrinal web that has led the Supreme Court, in some cases, to assert that takings claimants are limited to filing claims for compensation in courts designated for that purpose. I contend that the arguments in support of this conclusion are flawed, and that there is nothing in the Constitution that prohibits anticipatory litigation over whether a taking that would entitle a property owner to compensation has occurred or is being threatened. Part IV turns to the question whether anticipatory remedies are desirable, and considers a number

[15] Overruling this requirement was urged, without a clear theory for doing so, by four Justices in *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323, 348–52 (2005) (Rehnquist, C.J., concurring in the judgment).

[16] Dolan v. City of Tigard, 512 U.S. 374, 392 (1994).

of circumstances reflected in recent decisions and controversies suggesting that such remedies would be highly useful, at least in select circumstances. Part V offers some general thoughts about how judicial discretion to provide anticipatory remedies for takings should be structured.

I. TWO LINES OF AUTHORITY

The law governing remedies available for takings of property is vexed in large part because of the inconsistent behavior of the U.S. Supreme Court. The Court has, in fact, promulgated two separate lines of authority about takings remedies, which I will call the *A line* and the *B line*.

In the *A line*, the Court refuses to adjudicate a takings claim unless the claimant has pursued a claim for compensation in the designated court for securing such relief (hereinafter the compensation court).[17] With respect to alleged takings by the federal government, the *A line* is reflected in the "Tucker Act doctrine," which says that a federal court of general jurisdiction will not adjudicate a takings claim as long as Congress has not withdrawn the jurisdiction conferred by the Tucker Act[18] to consider such claims.[19] With respect to alleged takings by state and local governments, the *A line* is reflected in the "*Williamson County* doctrine," which says that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."[20] *A line* decisions presuppose that an award of money damages is the exclusive remedy for a taking, provided such a remedy is not legally foreclosed. As the Court has stated: "Equitable relief is not available to enjoin an alleged taking of private property for a public use . . . when a suit for compensation can be brought against the sovereign subsequent to the taking."[21]

In the *B line*, the Court adjudicates a takings claim even though the claimant has not presented a claim for monetary compensation to the court having authority to provide such relief. These cases have not

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[17] A few states, such as Wisconsin, use condemnation commissions to determine compensation. *See* WIS. STAT. ANN. § 32.08 (West 2006). The term "compensation court" should be understood to encompass such administrative bodies as well as courts.

[18] 28 U.S.C. § 1491 (2012).

[19] *E.g.*, Preseault v. ICC, 494 U.S. 1, 11 (1990) ("[T]aking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." (quoting Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 195 (1985) (internal quotation marks omitted)); *see also* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127–28 (1985); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984); Reg'l Rail Reorg. Act Cases, 419 U.S. 102, 126–27 (1974).

[20] *Williamson Cnty.*, 473 U.S. at 195; *see also* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 733–34 (1997); MacDonald, Sommer & Frates v. Cnty. of Yolo, 477 U.S. 340, 351 (1986).

[21] *Ruckelshaus*, 467 U.S. at 1016.

been blessed with any unifying moniker analogous to the "Tucker Act doctrine" or the "*Williamson County* doctrine." Sometimes a reason is given for not following the *A line*. The plurality opinion in one case acknowledged the departure from the *A line* position and said that anticipatory relief for a taking was appropriate given the unique character of the alleged takings violation in that case — the imposition of a general monetary liability.[22] More often, the Court does not acknowledge that it is embracing the *B line* rather than the *A line*.[23] In any event, *B line* decisions are quite numerous at the Supreme Court level, probably more so than *A line* cases.[24] They necessarily presuppose that anticipatory relief is sometimes an appropriate remedy for a taking.

Recent takings decisions by the Court continue the trend. Three of the last four takings decisions rendered by the Supreme Court have embraced what I have called the *B line*.[25] They are: *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protec-*

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[22] E. Enters. v. Apfel, 524 U.S. 498, 522 (1998) (plurality opinion of O'Connor, J.). The plurality reasoned that requiring the companies to pay money and then sue in the CFC to get it back "would entail an utterly pointless set of activities." *Id.* at 521 (quoting Student Loan Mktg. Ass'n v. Riley, 104 F.3d 397, 401 (D.C. Cir. 1997)) (internal quotation marks omitted); *see also* Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 71 n.15 (1978) (entering declaratory judgment with respect to takings claim in light of contention that government action could produce "potentially uncompensable damages").

[23] For decisions upholding takings claims without requiring adjudication in a compensation court, see, for example, *Babbitt v. Youpee*, 519 U.S. 234 (1997) (declaring amended Indian Land Consolidation Act unconstitutional; no mention of Tucker Act); *Hodel v. Irving*, 481 U.S. 704 (1987) (declaring original Indian Land Consolidation Act unconstitutional under Takings Clause; no mention of Tucker Act); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (declaring Florida statute transferring interest on interpleader fund to clerk of court unconstitutional; no mention of need to show state would deny compensation); and *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (finding that imposition of navigation servitude by the federal government on a private marina would be a taking; no mention of Tucker Act). For decisions rejecting takings claims arising out of litigation in courts of general jurisdiction without requiring adjudication in a compensation court, see, for example, *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 641–47 (1993); and *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 221–28 (1986).

[24] Doing a precise head count is complicated because some cases contain elements of both. In *Ruckelshaus*, for example, the Court accepted an appeal from a federal district court enjoining certain provisions of the Federal Insecticide, Fungicide, and Rodenticide Act as a taking. 467 U.S. at 990. The Court ruled on the merits, accepting some of the district court's conclusions and rejecting others, but then reversed the judgment on the ground that any final adjudication of the takings claim was "not ripe" because the claimants could bring an action for compensation in the claims court under the Tucker Act. *Id.* at 1016–19. Language in the portion of the Court's opinion requiring recourse to the claims court is often cited in support of the *A line*, *see, e.g.*, *Preseault*, 494 U.S. at 11, but the Court also entered an elaborate declaratory judgment about the scope of the Takings Clause before reaching that conclusion, consistent with the *B line*.

[25] The fourth decision, *Arkansas Game & Fish Commission v. United States*, 133 S. Ct. 511 (2012), arose out of a case filed in the CFC seeking compensation for a taking by the United States, *id.* at 517, and thus is consistent with the *A line*.

tion,[26] in which the Court considered whether the Florida Supreme Court had committed a judicial taking, even though the claimant had made no attempt to secure compensation for the alleged taking in state court;[27] *Horne v. Department of Agriculture*,[28] in which the Court held that a takings claim could be raised defensively in a judicial review proceeding in a court of general jurisdiction without the claimant's first seeking compensation from the CFC;[29] and *Koontz v. St. Johns River Water Management District*,[30] in which the Court determined that a landowner could pursue a takings challenge to an exaction even though the exaction had only been threatened and hence no taking had yet occurred.[31] Each decision authorized what were, in effect, anticipatory adjudications of takings liability. As is generally the case, none of these decisions offered an explanation for why anticipatory relief, as opposed to a suit in the compensation court, was an appropriate remedy for the alleged taking.

II. TAKINGS REMEDIES: SETTING THE STAGE

Given that the *B line* is in ascendancy and the *A line* in eclipse, at least for the moment, it is appropriate to step back and ask which position is correct.[32] But before turning to the question of what remedies *should* be available to federal courts for takings of property, it will be helpful to survey some principles related to the content of the right created by the Takings Clause, the existence of a right of action to enforce that right, which court or courts have jurisdiction over takings claims, when takings claims are ripe for consideration, and sovereign immunity.

A. *The Nature of the Right*

The Takings Clause, which the Supreme Court has held to be enforceable against the states through the Fourteenth Amendment,[33]

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[26] 130 S. Ct. 2592 (2010).
[27] *See id.* at 2600–01.
[28] 133 S. Ct. 2053 (2013).
[29] *Id.* at 2063.
[30] 133 S. Ct. 2586 (2013).
[31] *Id.* at 2595–96.
[32] For a recent exchange on this issue, from which I have benefited, see John Echeverria, Horne v. Department of Agriculture*: An Invitation to Reexamine "Ripeness" Doctrine in Takings Litigation*, 43 ENVTL. L. REP. 10,735 (2013); and Michael W. McConnell, Horne *and the Normalization of Takings Litigation: A Response to Professor Echeverria*, 43 ENVTL. L. REP. 10,749 (2013).
[33] The standard citation is *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166 U.S. 226 (1897). For an interesting argument that the Court did not fully incorporate the Takings Clause through the Due Process Clause until *Penn Central Transportation Co. v. New York City*,

provides: "nor shall private property be taken for public use without just compensation."[34] The right applies to forced exchanges of property by the government. The paradigmatic example is the exercise of the power of eminent domain. When the government condemns property for some public use like the construction of a highway, the Takings Clause requires that the owner be awarded just compensation. Eminent domain proceedings supply by far the largest number of cases that implicate the Takings Clause. Except for a small percentage of eminent domain cases that question whether the taking is for a public use,[35] the only constitutional question of significance in such cases concerns the proper measure of compensation.

The Supreme Court has held that the Takings Clause also applies in certain cases where an owner claims the government has "taken" her property but the government denies that any taking has occurred. These are variously referred to as inverse condemnations, implicit takings, or regulatory takings (hereinafter referred to collectively as regulatory takings).[36] The classic statement recognizing such a claim, often quoted (and equally often lamented), is that a regulation will be deemed a taking if it "goes too far."[37] A better formulation is the Court's more recent statement that government actions will be recognized to be takings if they are "functionally equivalent" to an exercise of eminent domain.[38] In other words, the Takings Clause includes an anticircumvention principle to the effect that the government cannot avoid its obligation to pay compensation by declining to exercise the power of eminent domain when "in all fairness and justice" it should do so.[39] The Court has developed a series of categorical and ad hoc

438 U.S. 104 (1978), see Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle,"* 90 MINN. L. REV. 826 (2006).

[34] U.S. CONST. amend. V.

[35] *E.g.*, Kelo v. City of New London, 545 U.S. 469 (2005).

[36] For discussion of the differences between condemnation and inverse condemnation, see *United States v. Clarke*, 445 U.S. 253, 255–58 (1980). That case held that a statute authorizing condemnation did not permit the government to take property without formal condemnation proceedings, which would have forced landowners to bring inverse condemnation suits to seek recompense for governmental takings.

[37] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). For the lament, see, for example, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) ("[O]ur decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going 'too far' for purposes of the Fifth Amendment.").

[38] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005). The Court's precise words were: "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Id.*

[39] Armstrong v. United States, 364 U.S. 40, 49 (1960). For discussion of this aspect of *Lingle*, see Thomas W. Merrill, *Why* Lingle *is Half Right*, 11 VT. J. ENVTL. L. 421 (2010).

tests for determining when liability for a regulatory taking occurs, which are largely tangential to our inquiry about remedies.[40]

The Takings Clause is unique in one respect, which has a direct bearing on what remedies are appropriate for a violation of the Clause. Unlike other provisions of the Constitution, the Court has held that the Takings Clause establishes a right of compensation — and only a right of compensation — for certain government actions, namely, those that "take" private property for public use. As the Court put it in an often-quoted passage:

> [The Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.[41]

This understanding of the nature of the substantive right draws support from the language of the Takings Clause, whose prohibitory language says "without just compensation."[42] In contrast, the Due Process Clause, appearing immediately before the Takings Clause, says that the government shall not deprive persons of property "without due process of law."[43] The Takings Clause therefore appears to be a discrete prohibition against depriving owners of *compensation* when their property is taken for public use. Other government interferences with property, such as taking property without notice or a hearing, are constrained by the Due Process Clause.

Given the nature of the substantive right created by the Takings Clause, it is fair to say that the presumptive remedy for an otherwise permissible taking is an award of compensation, that is, money damages. Whether the nature of the right requires that compensation be regarded as the exclusive remedy is the question this Essay takes up in Part III.

B. Right of Action

When the government exercises the power of eminent domain, the Takings Clause will come into play defensively, if at all. The owner

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[40] *See generally* DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 86–168 (2002) (providing an overview of categorical and ad hoc tests for when a regulatory taking occurs).

[41] First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304, 314–15 (1987) (citations omitted); *see also* Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.").

[42] U.S. CONST. amend. V ("[N]or shall private property be taken for public use without just compensation.").

[43] *Id.* ("[N]or [shall any person] be deprived of life, liberty, or property, without due process of law . . . .").

will claim that the government is not offering just compensation or, on rare occasions, will say that the taking is not for a public use. There is no need to identify a right of action in order to raise a constitutional right defensively against the government. If the government denies takings liability, however, and the owner goes on the offensive, arguing that the action is a regulatory taking, then it will be necessary for the owner to identify a right of action that allows the owner to bring such a claim before a court.

The requirement of identifying a right of action can be the undoing of plaintiffs in many non-takings contexts.[44] For plaintiffs asserting regulatory takings claims, however, these potential pitfalls do not exist. The Court has recognized that the Takings Clause incorporates within its text a right of action for compensation in the event of a taking of property for public use.[45] The constitutional requirement that the government pay just compensation for takings, the Court has said, is "self-executing,"[46] and requires no "[s]tatutory recognition."[47] Thus, regulatory takings claimants do not need a statutory right of action; they need look no further than "the Constitution itself."[48]

Uncertainty exists about whether it is possible to bring an action under the Takings Clause seeking anticipatory relief, as opposed to an award of just compensation — the topic of this Essay. But this is more properly considered a controversy about remedies, not about the existence of a right of action.

C. Jurisdiction

It is also necessary to determine whether a court has jurisdiction over a constitutional controversy. With respect to takings claims, the general pattern is that when the government exercises the power of eminent domain, jurisdiction is straightforward; when an owner seeks to bring a regulatory takings claim against the government, jurisdiction is more complicated.

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[44] The Court's current view, for example, is that a private right of action to enforce a federal statute does not exist unless it can be shown that Congress intended to create one. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 164–65 (2008); Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001).

[45] *See First English*, 482 U.S. at 315.

[46] *Id.* (quoting United States v. Clarke, 445 U.S. 253, 257 (1980)).

[47] *Id.* (quoting Jacobs v. United States, 290 U.S. 13, 16 (1933)).

[48] *Id.* The Tucker Act confers jurisdiction over regulatory takings claims against the federal government. United States v. Mitchell, 445 U.S. 535, 538 (1980). But the Act does not itself create "any substantive right enforceable against the United States for money damages." *Id.* (quoting United States v. Testan, 424 U.S. 392, 398 (1976)) (internal quotation mark omitted). The Takings Clause is today understood to supply the right of action. *See* Preseault v. ICC, 494 U.S. 1, 11–12 (1990); United States v. Causby, 328 U.S. 256, 267 (1946); *Jacobs*, 290 U.S. at 16.

Where the federal government seeks to take property by eminent domain, the district courts have original jurisdiction.[49] Appeals, as usual, go to the regional court of appeals and then via certiorari to the U.S. Supreme Court. When an owner contends his property has been taken and the federal government denies any obligation to pay compensation, the Tucker Act prescribes a different allocation of judicial authority. Claims seeking compensation of $10,000 or less can be brought either in a federal district court or in the CFC.[50] With respect to claims seeking compensation of more than $10,000, the CFC has exclusive jurisdiction.[51] Appeals in cases brought under the Tucker Act in either the district court or the CFC go to the Court of Appeals for the Federal Circuit.[52] Judgments of the Federal Circuit can be challenged, on petition for certiorari, to the Supreme Court.

When a state or one of its instrumentalities seeks to take property by eminent domain, state law dictates the procedure to be followed. These procedures vary considerably from state to state.[53] Some states require initial determinations by commissioners, others call for jury verdicts. In parallel with federal practice, nearly all states subject eminent domain proceedings to the supervision of courts of general jurisdiction. Whatever procedure applies, the jurisdictional rules are generally well established. Constitutional issues that arise in state eminent domain proceedings are usually framed as a matter of state constitutional law. If issues in such proceedings arise under the federal Takings Clause, they can be resolved by the state courts, subject to normal state appellate review and the possibility of further review by the U.S. Supreme Court.

Regulatory taking cases under state takings law are more difficult to generalize about. Most states have no statutes that indicate which court has jurisdiction over such a claim. The dominant practice is to bring these actions in courts of general jurisdiction, subject to ordinary

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[49] *See* 28 U.S.C. § 1358 (2012).

[50] *See id.* § 1346(a)(2).

[51] *See id.* § 1491(a)(1). The Supreme Court has observed that the assumption of exclusive jurisdiction is "not based on any language in the Tucker Act." Bowen v. Massachusetts, 487 U.S. 879, 910 n.48 (1988). However, given that the Tucker Act gives district courts concurrent jurisdiction only over claims for $10,000 or less, any interpretation that allowed district courts to consider claims for more than $10,000 under their general federal question jurisdiction would effectively nullify the $10,000 limitation. On this basis, the Federal Circuit has held that the CFC's jurisdiction over takings claims for more than $10,000 is impliedly exclusive. Broughton Lumber Co. v. Yeutter, 939 F.2d 1547, 1556 (Fed. Cir. 1991).

[52] *See* 28 U.S.C. § 1295(a)(2)–(3).

[53] *See* AM. BAR ASS'N CONDEMNATION, ZONING & LAND USE COMM., THE LAW OF EMINENT DOMAIN: FIFTY-STATE SURVEY (William G. Blake ed., 2012) [hereinafter FIFTY-STATE SURVEY]. The book consists of descriptions by practitioners of state takings procedures in each of the fifty states.

appeals processes.[54] Some states require a regulatory takings claimant to bring an action in mandamus, seeking to direct the government to commence an eminent domain proceeding.[55] Five states have specialized claims courts analogous to the CFC, but the jurisdictional rules about whether regulatory takings cases must be brought in such courts appear to be confused or at least underdeveloped.[56] Regulatory takings claims against county or municipal governments can also be brought in federal district court under 42 U.S.C. § 1983, with jurisdiction based on 28 U.S.C. § 1331 or § 1343.[57]

D. Justiciability

The Court has held that any claimant seeking to bring an action in federal court must satisfy standing, ripeness, and mootness limitations grounded in Article III of the Constitution, limiting federal courts to deciding "cases" and "controversies."[58] Eminent domain cases, again, almost never present any issue of justiciability. Eminent domain actions are commenced by the government (or an entity like a utility company exercising delegated power from the government). The owner, as defendant, obviously has standing to object to the proposed seizure of her property, and the controversy is virtually always ripe for decision.[59]

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[54] Some states, most prominently California, once denied the existence of an action for inverse condemnation. They held that an owner who objects to a state action as a taking must bring an action in mandamus or for a declaratory judgment holding the state action unconstitutional as an uncompensated taking. *See, e.g.*, Agins v. City of Tiburon, 598 P.2d 25, 28 (Cal. 1979), *aff'd on other grounds*, 447 U.S. 255 (1980). This had the effect of limiting relief to prospective invalidation, and precluded any compensation for the period between the taking and the judicial order invalidating the government action. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), the Supreme Court held that this "invalidation only" state procedural rule was unconstitutional under the federal Takings Clause, because it created the prospect of uncompensated temporary takings. *Id.* at 322. After *First English*, it appears that nearly all states now recognize some form of inverse condemnation or regulatory taking action seeking compensation. Practitioners in forty-six states and the District of Columbia describe their states as recognizing inverse condemnation actions; no information is provided for four states (Alabama, New Jersey, Oklahoma, and Washington), which may simply reflect the lack of prominence of the issue for practitioners relative to conventional eminent domain proceedings. *See* FIFTY-STATE SURVEY, *supra* note 53.

[55] *See* FIFTY-STATE SURVEY, *supra* note 53, at 170–71, 249, 399 (describing Iowa, Minnesota, and Ohio as falling into this category); *see also id.* at 381–82 (explaining that North Carolina allows landowners claiming inverse condemnation or regulatory taking to institute condemnation proceeding as if condemning authority had done so).

[56] *See* John Martinez, *A Proposal for Establishing Specialized Federal and State "Takings Courts*,*"* 61 ME. L. REV. 467, 482–89 (2009).

[57] Of course, such claims may be subject to ripeness requirements, discussed immediately below.

[58] *See generally* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 100–222 (6th ed. 2009).

[59] *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372 (1953); Antonin Scalia, *The Doctrine of*

In regulatory takings cases, standing may be an issue, for example, if the regulation is a general one or if it will not become effective until some time in the future. But standing in such cases will be determined by applying ordinary standing doctrine, without any twists unique to the takings context.

With respect to ripeness, however, the Court has imposed two requirements that apply specifically in takings cases. One holds that a takings claim "is not ripe until the government . . . has reached a final decision regarding the application of the regulation[] to the property at issue."[60] This requirement of administrative finality has proven to be elusive in its application. Local land use regulation tends to resemble a kind of ping-pong match between developers and regulators, in which a developer submits a proposal, the proposal is rejected by regulators, the developer submits a scaled-down proposal, this too is rejected by regulators, and so forth.[61] It is often unclear when this back-and-forth process has come to rest. Property owners therefore frequently face considerable uncertainty about whether or when the local land use authority has announced a "final" position on what type of development is permitted.[62]

The other ripeness doctrine requires that a claimant challenging a state or local regulation show that compensation is not available from the state before any action can be brought in federal court.[63] The Court derived this ripeness requirement from its understanding of the nature of the constitutional right created by the Takings Clause. Since the Clause proscribes only the taking of property without just compensation, the Court reasoned that there is no constitutional violation un-

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Standing as an Essential Element of the Separation of Powers, 17 SUFFOLK U. L. REV. 881, 894 (1983) ("[W]hen an individual who is the very *object* of a law's requirement or prohibition seeks to challenge it, he always has standing."). Issues of mootness could arise if the government announces it may abandon the project associated with a condemnation, but I do not consider these questions here.

[60] Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985).

[61] Evidence of this process is reflected in the facts of several Supreme Court decisions. *See, e.g.*, City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 698 (1999) ("After five years, five formal decisions, and 19 different site plans, Del Monte Dunes commenced suit against the city . . . . The District Court dismissed the claims as unripe under *Williamson County* . . . ." (citation omitted)); *Williamson Cnty.*, 473 U.S. at 177–82 (describing a seven-year process consisting of plan submissions, disapprovals, amendments, approvals, and reversals of approvals).

[62] The Supreme Court has often interpreted the finality requirement in a flexible way, especially when it wants to reach the merits. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 625–26 (2001) (no need to seek variance for specific project when permit to develop parcel denied); Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 739 (1997) (no need to seek variance or to attempt to sell transferable development rights when regulations forbade building on undeveloped lot); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1011–12 (1992) (no need to seek variance under amended statute enacted after initial denial of development permit). These fact-specific decisions provide little guidance to lower courts.

[63] *Williamson Cnty.*, 473 U.S. at 194.

less the government refuses to compensate.[64] Consequently, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."[65] This ripeness requirement (perhaps more accurately characterized as an exhaustion of remedies requirement) is one of the pillars of what I have called the *A line* cases, which restrict remedies for takings to money compensation.

E. Sovereign Immunity

The principle of sovereign immunity is not found in the text of the Constitution, other than its partial recognition in the Eleventh Amendment, which says "the Judicial power of the United States shall not be construed to extend" to suits against the states by citizens of other states or subjects of foreign states.[66] Nevertheless the Court has insisted, especially in recent decades, that sovereign immunity is an implicit premise of the constitutional design and that it applies to the federal government and the states alike.[67] The basic rule, accordingly, is that neither the federal government nor the states can be sued without their consent.

Like the other limitations on constitutional litigation previously discussed, sovereign immunity is not an issue in eminent domain proceedings. The government is the moving party, and must initiate judicial proceedings to complete a transfer of title. In so doing, the government necessarily consents to judicial determination of questions about the scope of its obligations under the Constitution.

The problems, as always, arise in regulatory takings cases. With respect to the federal government, the APA contains a general waiver of sovereign immunity for actions seeking relief other than "money damages."[68] Thus, insofar as one can seek declaratory or equitable re-

[64] *Id.* at 194–95.

[65] *Id.* at 195.

[66] U.S. CONST. amend. XI.

[67] FDIC v. Meyer, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."); United States v. Mitchell, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."). State sovereign immunity is similarly "axiomatic." *See* Alden v. Maine, 527 U.S. 706, 713 (1999) ("[A]s the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments."); Hans v. Louisiana, 134 U.S. 1, 16 (1890) ("The suability of a State without its consent was a thing unknown to the law[.] This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted.").

[68] 5 U.S.C. § 702 (2012). The statute reads in part:

lief for takings (the issue of this Essay), the APA clears the way for suits in federal courts of general jurisdiction. The Tucker Act, which authorizes suits against the United States founded "upon the Constitution,"[69] has been held to constitute a waiver of sovereign immunity for claims seeking compensation for takings.[70] Because there is no other waiver of federal sovereign immunity for claims for compensation, sovereign immunity stands as a barrier to such claims outside the jurisdictional limits prescribed by the Tucker Act.[71] Other than claims for $10,000 or less, this limitation means that the CFC must hear all regulatory takings claims seeking monetary compensation.

With respect to federal takings claims brought against state and local governments, the sovereign immunity issue is more complex. County and municipal governments do not enjoy sovereign immunity.[72] Consequently, they can be sued under 42 U.S.C. § 1983, and federal courts can order either declaratory or equitable relief, or they can award the payment of compensation by such units, without encountering any sovereign immunity barrier.[73] Claims against states and state agencies are more problematic. Insofar as a claimant seeks declaratory or equitable relief, he can obtain such relief by suing one or more state officers under the authority of *Ex parte Young*.[74] An officer suit seek-

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> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

Id. In *Bowen v. Massachusetts*, 487 U.S. 879 (1988), the Court permitted the State to use the APA to recover money from the United States under a theory of equitable restitution. *See id.* at 893. It now appears the decision has been confined to its facts. *See* Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 212 (2002); Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 261–63 (1999).

[69] 28 U.S.C. § 1491(a)(1) (2012).

[70] *See Mitchell*, 463 U.S. at 212–16.

[71] *See* Webster v. Doe, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting) ("No one would suggest that, if Congress had not passed the Tucker Act, the courts would be able to order disbursements from the Treasury to pay for property taken under lawful authority (and subsequently destroyed) without just compensation." (citation omitted)). For direct authority supporting this proposition, which is rather dated but has not been overruled, see *Lynch v. United States*, 292 U.S. 571, 579, 580–82 (1934); and *Schillinger v. United States*, 155 U.S. 163, 168 (1894).

[72] Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 400–02 (1979); Lincoln Cnty. v. Luning, 133 U.S. 529, 530–31 (1890).

[73] *See, e.g.*, City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 694 (1999) (upholding jury verdict of $1.45 million against city in a § 1983 regulatory takings action).

[74] 209 U.S. 123, 155–56, 159–60 (1908). Although there is controversy about the rationale and scope of actions based on *Ex parte Young*, *see, e.g.*, David L. Shapiro, Ex Parte Young *and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69, 74–81 (2011), the decision is securely established as a means of overcoming the defense of sovereign immunity where actions for equitable relief are concerned, *see* Verizon Md. Inc. v. Pub. Serv. Comm'n, 535 U.S. 635, 645 (2002) ("In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongo-

ing compensation from the state itself, however, would likely be doomed.[75] Congress in theory might be able to create such a remedy against the states by legislating under its authority in section 5 of the Fourteenth Amendment.[76] But such a remedy would have to be congruent and proportionate to a record of state violations of the Takings Clause,[77] which recent decisions suggest is a difficult barrier to surmount.[78] In any event, there is no such legislation currently on the books (42 U.S.C. § 1983 does not apply to states inasmuch as they are not "persons" within the meaning of the Act[79]).

Some commentators and lower courts have concluded that the "self-executing" right of action found to exist in the text of the Takings Clause should be deemed to be a waiver of sovereign immunity.[80] A cryptic footnote in one Supreme Court decision has been said to suggest this result,[81] but it was at most dictum.[82] A more recent decision indicates the issue is unresolved.[83] The early history of regulatory takings actions suggests that the Takings Clause was not regarded as having abrogated state sovereign immunity.[84] The takings issue arose in

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ing violation of federal law and seeks relief properly characterized as prospective.'" (alteration in original) (citation omitted) (quoting Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring in part and concurring in the judgment))).

[75] *See* Edelman v. Jordan, 415 U.S. 651, 663 (1974) ("[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." (alteration in original) (quoting Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945)) (internal quotation marks omitted)); *see also In re* Ayers, 123 U.S. 443, 507–08 (1887) (holding that officer suit may not be used to require specific performance of a contract by a state).

[76] *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

[77] *See* City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

[78] *See, e.g.*, Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 642–48 (1999) (refusing to find that a federal statute permitting patent infringement suits against states reflected a valid abrogation of state sovereign immunity under the Fourteenth Amendment because Congress had not established a pattern of state disregard of patent rights).

[79] Will v. Mich. Dep't of State Police, 491 U.S. 58, 64 (1989).

[80] *See, e.g.*, Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 498 (2006). A few state courts have agreed, holding that the federal Takings Clause permits litigants to assert takings claims against the state in state court. *See* Boise Cascade Corp. v. Oregon, 991 P.2d 563, 569 (Or. Ct. App. 1999); SDDS, Inc. v. State, 650 N.W.2d 1, 9 (S.D. 2002). Other state courts have held that state takings clauses abrogate state sovereign immunity. Chick Springs Water Co. v. State Highway Dep't, 157 S.E. 842, 850 (S.C. 1931), *overruled on other grounds by* McCall *ex rel.* Andrews v. Batson, 329 S.E.2d 741 (S.C. 1985). Lower federal courts, in contrast, have generally held that the Eleventh Amendment bars takings claims against state governments in federal court. *See* Berger, *supra,* at 495 n.4.

[81] *See* Berger, *supra* note 80, at 494–95.

[82] First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304, 316 n.9 (1987). The case involved a claim for a temporary taking by a county, which enjoys no sovereign immunity. *See id.* at 311.

[83] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 714 (1999) (plurality opinion).

[84] *See* Brief for the United States as Amicus Curiae Supporting Appellee at 19–23, *First English*, 482 U.S. 304 (No. 85-1199), 1986 WL 727420.

tort suits seeking damages from or injunctive relief against officers.[85] The officer would defend against the suit by citing the state statute authorizing the taking; the plaintiff would then invoke the state takings clause in an effort to strip away the officer's justification that the taking was authorized by statute.[86] Except in a few instances where the state legislature adopted a statutory mechanism for seeking compensation,[87] the only mechanism for securing compensation from the government was through a private bill enacted by the legislature.[88] In short, "[t]he United States Supreme Court, while adopting the view that the Just Compensation Clause is 'self-executing . . . with respect to compensation[,]' has never held that the Clause abrogates either federal or state sovereign immunity."[89]

Given this history, and the Court's recent reaffirmations of sovereign immunity at both the federal and state levels, this Essay assumes that sovereign immunity continues to apply to any claim of federal- or state-government taking brought in federal court. As we have seen, sovereign immunity is rather easily circumvented when a claimant seeks injunctive or declaratory relief, but poses a much more serious barrier when the request is for monetary relief. The disparate treatment of prospective and retrospective relief — reflected both in legislative waivers of immunity and judicial interpretation of the scope of sovereign immunity — reveals that suits seeking monetary relief for government actions are politically sensitive in a way that suits for mandatory relief are not. Consequently, this Essay assumes that any actual award of compensation against the federal government must always comply with the limited waiver of sovereign immunity in the

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[85] *See* United States v. Lee, 106 U.S. 196, 218–23 (1882) (holding that remedy for an owner whose land was unlawfully seized by the government was an injunction against continued possession by the relevant officers).

[86] Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 67–68 (1999).

[87] *See* Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1243–44 (describing statutes enacted by Pennsylvania and Ohio in the first half of the nineteenth century that allowed owners to sue for compensation for injuries to riparian rights).

[88] *See* FALLON ET AL., *supra* note 58, at 859–60. This was the only mode of securing compensation directly from the federal government before the Tucker Act was enacted in 1887. *See id.* at 859–61. Although the Act conferred jurisdiction on the Court of Claims to render judgment "upon any claim against the United States founded . . . upon the Constitution," 28 U.S.C. § 1491 (2012), the original rationale for awarding compensation for takings was based on the imputation of an implied promise by the United States to pay for property it had taken. United States v. Great Falls Mfg. Co., 112 U.S. 645, 656–57 (1884). Only much later did the Court rationalize the duty as being founded "upon the Constitution," that is, as flowing directly from the Takings Clause. *See* United States v. Causby, 328 U.S. 256, 267 (1946); Jacobs v. United States, 290 U.S. 13, 16 (1933).

[89] Brauneis, *supra* note 86, at 137–38 (second and third alterations in original) (footnotes omitted) (quoting United States v. Clarke, 445 U.S. 253, 257 (1980)) (internal quotation marks omitted).

Tucker Act. And any award of compensation against a state government or state agency would have to be entered by a court (presumably a state court) where the state legislature has consented to the entry of such awards.

III. CONSTITUTIONAL LIMITS ON TAKINGS REMEDIES

We are now in a position to see how the Court, at least in some of its decisions, has reached the conclusion this Essay calls the *A line* position: that the exclusive remedy for an alleged violation of the Takings Clause is an action in a compensation court seeking monetary relief. The *A line* position has been deduced from two strands of reasoning. The first is grounded in the unique nature of the constitutional right created by the Takings Clause. The second is derived from the allocation of jurisdiction to consider takings claims and the associated principle of sovereign immunity. Neither strand of reasoning is correct.

A. The Nature of the Right

As we have seen, the Takings Clause, unlike other provisions of the Constitution, is unique in that it establishes only a right of compensation for certain government actions, namely, those that "take" private property for public use.[90] In the vernacular made popular by Guido Calabresi and Douglas Melamed, the clause creates a liability rule, not a property rule or an inalienability rule.[91] Based on the unique nature of the right, the Supreme Court has concluded, most explicitly in *Williamson County*, that a constitutional violation of the Takings Clause does not occur until compensation is denied. From this, the Court has further concluded that a federal takings claim is not ripe unless and until a claimant has sought and been denied compensation in the relevant compensation court.

These conclusions do not follow from the premise. The flaw in the logic is the first step — the proposition that no violation of the right occurs until *relief is denied*. Given the nature of the right, it is equally if not more plausible that a violation is complete when property is taken and the government *does not offer* to pay compensation. The ordinary rule in constitutional law is that "the constitutionally offensive state action occurs at the point at which the state official acts."[92]

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[90] First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 315 (1987); *see also* Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.").

[91] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

[92] Henry Paul Monaghan, Comment, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979, 996 (1986) (citing Home Tel. & Tel. Co. v. City of

Williamson County's notion that a substantive deprivation occurs only when the state fails to provide a post-deprivation remedy is exceptional.[93]

Indeed, the rule implicitly followed in eminent domain proceedings is that a violation of the Takings Clause is complete when the government condemns property without offering to pay just compensation. We know this because property owners, as defendants in eminent domain actions, routinely object to offers of compensation they regard as unjust.[94] And they object on the ground that *the offer* violates the Takings Clause (or its state equivalent). The court overseeing the action will rule on these objections. If the owner is dissatisfied with the court's ruling, the owner can appeal. The eminent domain action is not final until an amount deemed to satisfy the requirement of "just compensation" has been identified and paid.[95] There is no suggestion that the owner subject to eminent domain must file a separate lawsuit demanding just compensation before the Takings Clause (or its state equivalent) can be said to have been violated. Given this implicit recognition in the context of eminent domain that the Constitution is violated when a property owner is offered inadequate compensation for a taking, one might expect that the same conception about when a constitutional violation occurs would prevail in the regulatory takings context as well.[96] From this perspective, *Williamson County*'s second

Los Angeles, 227 U.S. 278 (1913)); *see also* Zinermon v. Burch, 494 U.S. 113, 125 (1990) (stating that, with respect to substantive as opposed to procedural rights, "the constitutional violation . . . is complete when the wrongful action is taken" (citing Daniels v. Williams, 474 U.S. 327, 338 (1986) (Stevens, J., concurring in the judgments))).

[93] A somewhat parallel exception, noted by the Court in support of its analysis in *Williamson County*, is the one for "random and unauthorized" deprivations of property by government officials. 473 U.S. at 195. The Court held in *Parratt v. Taylor*, 451 U.S. 527, 543–44 (1981); and *Hudson v. Palmer*, 468 U.S. 517, 533 (1984), that these sorts of interferences with property rights do not violate due process as long as the state has provided an adequate post-deprivation remedy. Whatever its validity in the context of procedural due process, this exception has no application to the Takings Clause, which is a substantive limitation on the power of government. *See Zinermon*, 494 U.S. at 125 (distinguishing procedural due process claims (including *Parratt*) from claims against government officials brought under either (i) those provisions of the Bill of Rights incorporated into the Due Process Clause or (ii) substantive due process). Moreover, regulatory takings are neither random nor unauthorized; they are deliberate official actions applying regulations to particular interests in property.

[94] *See, e.g.*, United States v. 564.54 Acres of Land, 441 U.S. 506, 508 (1979) (government offered $485,400 for land; owner rejected offer and demanded $5.8 million).

[95] Under so-called "quick take" statutes in effect in a majority of states, title to condemned property can pass to the government before the amount of just compensation is finally determined. *See* 6 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 24.10[2] (3d ed., rev. 2014). But the eminent domain action is not closed until the parties have settled or the court enters a final judgment determining the required amount of just compensation. *See id.* § 24.05[1] ("Title to the condemned land passes when the money is paid . . . .").

[96] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005) (stating that regulatory taking occurs when the government takes action "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain").

ripeness requirement seems less like an ineluctable deduction from the nature of the constitutional right and more like an overly rigid barrier to adjudication of regulatory takings claims in federal court.

B. Jurisdiction and Sovereign Immunity

There is a second path to the *A line*, which has loomed larger in the Tucker Act decisions. The Tucker Act has been construed to mean that the CFC has exclusive jurisdiction to adjudicate regulatory takings claims seeking more than $10,000 against the United States.[97] The Tucker Act has also been construed as a waiver of sovereign immunity by the United States.[98] In contrast, there is no general waiver of sovereign immunity for claims seeking "money damages" in federal courts of general jurisdiction. From this it has seemed to follow that all takings claims for more than $10,000 must be brought in the CFC.

Here, the starting point in the argument is valid: given sovereign immunity, only a court designated by the sovereign as having authority to enter judgments requiring the sovereign to pay just compensation (such as the CFC under the Tucker Act) may do so. It does not necessarily follow, however, that courts of general jurisdiction have no authority to enter declaratory judgments respecting takings claims. Given the compensatory nature of the constitutional right, courts of general jurisdiction ordinarily cannot *enjoin takings of property*. But they can enter anticipatory decrees as to whether the government is required to pay compensation for a taking of property. Given the creation of specialized compensation courts where the government has waived its sovereign immunity, courts of general jurisdiction have no authority to enter judgments requiring the government to *pay compensation*; any such order would always have to come from the compensation court. But the determination of critical takings issues by a court of general jurisdiction — for example, by declaratory judgment — would not yield a judgment requiring the payment of compensation. It would function only to eliminate the need for any takings inquiry in the compensation court, or at least to narrow the issues in controversy.

C. Anticipatory Remedies

What then about anticipatory remedies for takings? For present purposes, I include in this category any remedy other than a judgment requiring the government to pay just compensation. The principal remedy I have in mind is a declaratory judgment, authorized by the Declaratory Judgment Act of 1934. The Act provides that, subject to enumerated exceptions that do not include takings claims, a federal

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[97] *See supra* notes 48, 51, 71.
[98] *See* United States v. Mitchell, 463 U.S. 206, 212–14 (1983).

district court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."[99] This authorization certainly would seem broad enough to include declarations resolving certain antecedent issues that bear on whether the claimant is entitled to compensation, such as whether the Takings Clause applies to the government action in question,[100] whether the claimant has a "private property" interest protected by the Takings Clause,[101] or whether certain categorical rules of liability or nonliability apply.[102]

I would also include within the category of anticipatory remedies petitions for review of agency action, either under the agency's organic act or under the APA, in which a party claims that the agency's action violates the Takings Clause. Again, such a review process could not yield a judgment requiring the government to pay compensation, but it could resolve the antecedent question of whether the government action constitutes a taking. The Supreme Court's various decisions in the *B line* of authority, in which it grants certiorari from a lower federal or state court decision in order to resolve important questions about the Takings Clause without requiring prior adjudication in the compensation court, can also be viewed as a form of anticipatory relief. The Court in these cases does not order the government to pay compensation, but resolves the legal issue and returns the case to the lower courts for further proceedings consistent with its decision. Finally, I would include decisions issuing injunctions in this category. Injunctions requiring the government to pay compensation should be rare, given the alternative of a declaratory judgment and the principle that only the compensation court can award compensation.[103] But if a taking violates the public use requirement or transgresses the scope of the government's legal authority, or if the government has refused or failed to pay compensation, an injunction against the taking of the property would be warranted.[104]

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[99] 28 U.S.C. § 2201(a) (2012).

[100] For example, the Court has assumed that the Takings Clause does not apply to exercises of the taxing power. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2600–01 (2013) (citing Brown v. Legal Found. of Wash., 538 U.S. 216, 243 n.2 (2003) (Scalia, J., dissenting)).

[101] *E.g.*, Phillips v. Wash. Legal Found., 524 U.S. 156 (1998) (considering whether interest on fund held by lawyer for clients was property of the client for takings purposes).

[102] *E.g.*, Yee v. City of Escondido, 503 U.S. 519, 527 (1992) (concluding that rent control scheme coupled with statute allowing tenant to select a successor did not fall within the category of permanent physical occupations that always require compensation). For a discussion of categorical rules of takings liability and nonliability, see DANA & MERRILL, *supra* note 40, at 86–120.

[103] An injunction ordering the payment of compensation might be appropriate if a compensation court determined the amount of compensation owed but declined to award compensation for a reason the reviewing court determined to be legally unsupported.

[104] *See supra* note 14.

Two preliminary observations about these anticipatory remedies are appropriate. First, anticipatory adjudication can never occur unless basic justiciability prerequisites are satisfied. The claimant must have standing, the controversy must be ripe, the issues cannot be moot, and the court cannot render an advisory opinion. As the Supreme Court has explained in the context of declaratory judgments, there must be "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[105] The same of course holds for other modes of anticipatory relief, whether it be a petition for review under the APA, the Supreme Court's exercise of certiorari authority, or an action for equitable relief.

Second, all forms of anticipatory relief are discretionary, in the sense that the court has significant discretion, based on the circumstances presented, either to grant or withhold the requested relief. With respect to the Declaratory Judgment Act, for example, the Court has said that the Act provided an additional "remedial arrow in the district court's quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants."[106] Accordingly, "the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration."[107] Whether a court takes up or rejects the request for anticipatory relief, the standard of review on appeal is abuse of discretion.[108] Similar discretion should be exercised by courts reviewing agency action, such that they should decline to consider the takings issue if considerations of judicial economy would favor leaving it up to the compensation court. Clearly, the Supreme Court exercises enormous discretion in deciding whether to grant review to consider takings issues in the cases presented to them on certiorari. And equitable remedies are always understood to be discretionary rather than mandatory.

Jurisdiction should pose no barrier to such actions. If the second *Williamson County* ripeness requirement were understood to rest on the case or controversy language of Article III, then courts would lack subject matter jurisdiction over any form of anticipatory adjudication. This interpretation would foreclose any use of the Declaratory Judgment Act to resolve takings controversies, since the Act does not confer jurisdiction; it only allows federal courts to use a different type of remedy — the declaratory judgment — when this remedy would be useful

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[105] Medimmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007) (quoting Md. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941)) (internal quotation mark omitted).

[106] Wilton v. Seven Falls Co., 515 U.S. 277, 288 (1995).

[107] *Id.*

[108] *Id.* at 289.

in resolving a legal controversy.[109] There is no indication, however, that *Williamson County*'s second ripeness requirement rests on Article III considerations, as opposed to an inference (erroneously) drawn from the nature of the constitutional right.[110] In any event, the Court has recently characterized *Williamson County*'s second ripeness requirement as "prudential,"[111] and has said "it is not, strictly speaking, jurisdictional."[112] This characterization opens the door to using the Declaratory Judgment Act as a vehicle for obtaining anticipatory relief in takings cases, assuming a court concludes it is appropriate to exercise this authority.[113]

Nor should sovereign immunity present a serious barrier to an anticipatory action. With respect to regulatory takings by the federal government, the sovereign immunity barrier is overcome by the Administrative Procedure Act, which waives immunity for actions against the United States "seeking relief other than money damages."[114] An action seeking a declaration that the government is engaged in a taking that *would require* the payment of money damages is not an action seeking money damages. This is because the government could avoid the obligation to compensate by desisting from or modifying its action in ways that would eliminate the taking. In effect, a declaratory judgment finding a taking would create an option (or options) in the government: desist, modify, or pay. And given the limited nature of the federal government's waiver of sovereign immunity in the Tucker Act, any action actually to collect such money would typically have to be filed in the CFC. With respect to state takings, the sovereign immunity barrier to seeking declaratory relief against the states would be surmounted by relying on the officer suit procedure of *Ex parte Young*.

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109 *See* 28 U.S.C. § 2201(a) (2012) (providing authority for a federal court to issue declaratory judgments in cases "of actual controversy *within its jurisdiction*" (emphasis added)); Skelly Oil Co. v. Phillips Petrol. Co., 339 U.S. 667, 671 (1950) ("Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction.").

110 Nor is there any indication that *Williamson County*'s first ripeness requirement — that the regulatory authority must have reached a final decision about the application of its regulation to the owner's proposed development — was based on Article III considerations. *See* Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186–94 (1985) (deriving the requirement by generalizing from precedent involving takings challenges). Ripeness is, however, a requirement of Article III, *see* United Pub. Workers v. Mitchell, 330 U.S. 75, 89 (1947), and this would obviously limit the authority of federal courts to award anticipatory relief where the controversy is insufficiently crystalized to sustain a judicial resolution.

111 Horne v. Dep't of Agric., 133 S. Ct. 2053, 2062 (2013) (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1013 (1992)) (internal quotation mark omitted).

112 *Id.* (citing Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2610 & n.10 (2010) (plurality opinion)).

113 *Cf.* Hawley, *supra* note 14, at 251 (describing *Horne* as "the Court's first acknowledgment, however oblique, that what *Williamson County* called ripeness may in fact be a question of remedies").

114 5 U.S.C. § 702 (2012).

Local governments do not enjoy sovereign immunity and can be sued directly for takings violations under 42 U.S.C. § 1983.[115]

Another question sometimes raised about declaratory judgments is whether they are binding as a matter of res judicata in later controversies before other courts.[116] The best view is probably that whether or not it has full res judicata effect, a declaratory judgment has issue-preclusion effects, at least between the parties.[117] A principal reason for limiting preclusion to issues rather than claims is that the conduct of the parties may have changed between the issuance of the declaratory judgment and any enforcement action.[118] This makes particular sense in the takings context. One not-unlikely effect of a declaratory judgment finding takings liability is that the government will modify its regulation to eliminate or reduce the features that make it a taking. One would certainly expect such a modification to be taken into account in any later action in the compensation court seeking money damages.[119] That said, there is nothing in the language of the Declaratory Judgment Act to suggest that decisions rendered under the Act are not entitled to full issue-preclusive effect in the compensation court. The Act says that such judgments "shall have the force and effect of a final judgment,"[120] and specifically provides that "[f]urther necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."[121] This language implies that the failure of a party to comply with a declaratory judgment can be followed up by an injunction requiring compliance.

To illustrate how anticipatory adjudication might operate in takings cases, assume that a state government enacts a statute that eliminates a traditional attribute of private property, such as the right to exclude strangers from entering unenclosed land to engage in recreational activities.[122] An owner of unenclosed rural land objects to the

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[115] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 663 (1978).

[116] *Steffel v. Thompson*, 415 U.S. 452 (1974), reveals some disagreement about the res judicata effect of a federal declaratory judgment in subsequent state criminal proceedings. *Compare id.* at 476–78 (White, J., concurring) (concluding declaratory judgment would be res judicata), *with id.* at 480–82 & n.3 (Rehnquist, J., concurring) (expressing doubts).

[117] *See* Samuel L. Bray, *Preventive Adjudication*, 77 U. CHI. L. REV. 1275, 1293 (2010).

[118] *See id.* at 1295.

[119] Even if the government drops the regulation, the owner might have an action for compensation based on lost development value during the time the regulation was in effect. *See* First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304 (1987) (recognizing a right to compensation for temporary regulatory takings).

[120] 28 U.S.C. § 2201(a) (2012).

[121] *Id.* § 2202.

[122] Many states have sought to encourage owners to allow recreational uses on unenclosed land by legislating immunity from tort suits related to such uses. *See* Bragg v. Genesee Cnty. Agric. Soc'y, 644 N.E.2d 1013, 1017–18 (N.Y. 1994); Comment, *Wisconsin's Recreational Use Statute:*

statute and believes it is a taking of property without just compensation in violation of the federal constitution. Using the officer suit mechanism of *Ex parte Young*, the landowner could file an action in federal district court seeking a declaration that the state statute constitutes a taking requiring the payment of just compensation. The federal court would have jurisdiction to entertain the action under 28 U.S.C. § 1331. If the court concluded the statute caused a taking, it would have authority under the Declaratory Judgment Act to enter a decree to that effect. Armed with such a judgment, the claimant should be able to demand, in an appropriate state court, that the state either modify its law or pay compensation for the taking. Such an adjudication would not go beyond the limited right created by the Takings Clause because the court would not enjoin enforcement of the statute, but would only declare that the plaintiff is entitled to just compensation because of the enactment of the statute. And it would not transgress sovereign immunity, because it would only declare that the plaintiff is entitled to compensation; it would not actually order the state to compensate.

IV. THE NORMATIVE CASE FOR ANTICIPATORY REMEDIES

Just because we can fashion a doctrinal argument that would reconcile the *B line* decisions with the constitutional principles the Court has cited in support of the *A line* decisions, it does not follow, of course, that anticipatory relief should be allowed. It is always possible that even if the Court's reasons for endorsing the *A line* are not dispositive, the position staked out in those decisions is nevertheless correct on policy grounds. In order to assess that question, I propose to proceed inductively rather than deductively. Specifically, I will consider whether it made sense to endorse the *B line* rather than the *A line* in the three recent decisions in which the Supreme Court did so, and if so why. I will then consider three other controversies that have recently arisen in which some kind of anticipatory remedy for an alleged takings violation would seem highly advantageous. An examination of these specific data points should anchor a consideration of the normative arguments for permitting anticipatory remedies for takings, as well as inform questions about what sort of limits should be imposed on the availability of such relief.

Towards Sharpening the Picture at the Edges, 1991 WIS. L. REV. 491, 495–508. And many states require owners to post unenclosed land if they wish to exclude hunters. *See* Mark R. Sigmon, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549, 558–68 (2004). My hypothetical statute would go further by abrogating the right to exclude any recreational use.

A. Three Recent Supreme Court Decisions

As previously noted, in three of its most recent takings decisions the Supreme Court has implicitly adopted the *B line* of authority, which in turn presupposes that some forms of anticipatory relief are available for takings.

Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection[123] presented the novel and highly contested question whether "judicial takings" are actionable under the Takings Clause. Several Florida beachfront landowners sought to halt a local government project designed to restore eroded shoreline. The landowners claimed that the project would result in significant amounts of dry sand being deposited seaward on their property. They argued that this was a taking of their riparian rights to future accretions and to have their land touch the water. When the state supreme court ruled that neither of the claimed rights was secured by Florida law, the landowners sought and secured further review by the U.S. Supreme Court to consider the claim that the state court's interpretation of state law was itself a "judicial taking."

The Court unanimously concluded that the Florida Supreme Court, in the judgment under review, had not committed a judicial taking.[124] However, the Justices split 4–4 on whether it was necessary to delineate the elements that would have to be present in order to conclude that there had been a judicial taking.[125] In a concurring opinion, Justice Kennedy cited "certain difficult questions"[126] raised by the idea of judicial takings, one of which was how they would be remedied.[127] He began by noting: "It appears under our precedents that a party who suffers a taking is only entitled to damages, not equitable relief . . . ."[128] The idea of judicial takings, he continued, appeared to contemplate that "reviewing courts could invalidate judicial decisions deemed to be judicial takings."[129] Justice Kennedy was worried about how this would work: "[W]here Case A changes the law and Case B addresses whether that change is a taking, it is not clear how the Court, in Case B, could invalidate the holding of Case A."[130]

Justice Scalia, who wrote for four Justices in support of recognizing judicial takings, responded to the "difficult question[]" raised by Justice

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[123] 130 S. Ct. 2592 (2010).
[124] *Id.* at 2610–13.
[125] *See id.* at 2602, 2604.
[126] *Id.* at 2615 (Kennedy, J., concurring in part and concurring in the judgment).
[127] *Id.* at 2617.
[128] *Id.*
[129] *Id.*
[130] *Id.*

Kennedy about remedies. His response is quite puzzling, so I quote it in full:

> Justice KENNEDY worries that we may only be able to mandate compensation. That remedy is even rare for a legislative or executive taking, and we see no reason why it would be the exclusive remedy for a judicial taking. If we were to hold that the Florida Supreme Court had effected an uncompensated taking in the present case, we would simply reverse the Florida Supreme Court's judgment that the Beach and Shore Preservation Act can be applied to the property in question.[131]

The notion that requiring compensation is "rare" for legislative and executive takings is baffling. As previously discussed, the Court has frequently said that the *only* substantive right created by the Takings Clause is the right to compensation when property is taken, and the Court has often declined to consider takings claims when the option of seeking compensation remains open (the *A line* cases). Justice Kennedy cited some of these authorities,[132] and Justice Scalia did not acknowledge or try to distinguish them.

Justice Scalia was on stronger ground in asserting without elaboration that he saw "no reason why" compensation should be the "exclusive remedy" for a taking.[133] As we have seen, there is no constitutional reason why courts should not be able to enter anticipatory relief in takings cases. The better response to Justice Kennedy's worries about remedies would have been that a federal court, including the Supreme Court, should be able to enter a declaratory judgment as to whether a court has committed a judicial taking. Indeed, this is precisely what the Court did: it declared — unanimously — that the Florida Supreme Court had not committed a judicial taking in the decision under review.

What if the decision had gone the other way? If the Court had issued a declaration that the Florida Supreme Court had committed a judicial taking, the state would then have a number of options. One would be to pay compensation in order to secure the change in property law effectuated by its supreme court's ruling. Another would be to amend the law to eliminate the legal change deemed to be a judicial taking (for example, restore the property right eliminated by the court that committed the judicial taking). A third might be to modify the project that gave rise to the controversy in the first place, so as to eliminate the need to compensate the immediate claimants for a judicial

[131] *Id.* at 2607 (plurality opinion).

[132] *Id.* at 2617 (Kennedy, J., concurring in part and concurring in the judgment) (citing *Ruckelshaus*; *First English*; and *Williamson County*).

[133] *Id.* at 2607 (plurality opinion).

taking.[134] In effect, a declaratory ruling about the state's liability to compensate for the judicial taking would create a number of options for the state, only one of which would be to pay compensation to the claimant.

If the Supreme Court is going to recognize judicial takings (still an open question), some kind of declaratory remedy would seem to be necessary. The alternative of forcing the claimant to file an action in state court seeking compensation would be to compel the performance of a futile act. No state trial court or intermediate appellate court is going to hold that the state supreme court committed a judicial taking, nor is the state supreme court going to rule against itself (unless perhaps there has been an intervening change in court personnel). So requiring the claimant to show that she has sought and been denied compensation by the state (as the *A line* requires) would be to command fruitless litigation having no benefit in terms of moving the controversy toward a resolution.[135] Moreover, the decision that perpetrates the alleged judicial taking is likely to create uncertainty about the rights of similarly situated property owners, and postponing further inquiry into the constitutionality of the decision is likely to cause many owners to take action or decline to take action with respect to their property in ways that cannot later be undone.

Horne v. Department of Agriculture,[136] the second decision about remedies, expressly rejected the government's Tucker Act defense in a case involving a raisin handler who challenged as a taking a fine levied against him under the Agricultural Marketing Agreement Act of 1937[137] (AMAA). The Act requires handlers of raisins to reserve a portion of the raisins they process, typically for school lunch programs and the like.[138] The objective is to restrict the supply of raisins and hence to support prices.[139] If handlers fail to comply, the Act allows the Department of Agriculture to levy heavy fines against them.[140] Handlers who are aggrieved can seek review of any order imposing a fine by filing a petition for review in the federal courts of general jurisdiction.[141] The Hornes refused to reserve any raisins, claiming that

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[134] In other words, moot the case. It is conceivable that other owners, equally affected by the judicial taking, might have standing to challenge the change in property law and seek compensation, using the decision of the reviewing court as a foundation for the claim.

[135] *Cf.* E. Enters. v. Apfel, 524 U.S. 498, 521–22 (1998) (plurality opinion) (granting equitable relief when a suit for monetary relief in the CFC "would entail an utterly pointless set of activities," *id.* at 521 (quoting Student Loan Mktg. Ass'n v. Riley, 104 F.3d 397, 401 (D.C. Cir. 1997)) (internal quotation mark omitted)).

[136] 133 S. Ct. 2053 (2013).

[137] Pub. L. No. 73-10, 50 Stat. 246 (codified in scattered sections of 7 U.S.C.).

[138] *Horne*, 133 S. Ct. at 2057–58.

[139] *Id.* at 2056–57.

[140] *See id.* at 2056.

[141] *See id.*

they were "producers" rather than "handlers" under the Act, and hence they were not subject to mandatory set-asides of raisins imposed by the Act.[142] After the Department found that the Hornes were handlers and imposed a stiff fine on them for violating the Act, they filed a petition for review challenging this order.[143] The district court and the Ninth Circuit both affirmed the finding that the Hornes were handlers, and the Supreme Court, for its part, readily agreed.[144]

Having rejected the Hornes' administrative law defense that they were producers rather than handlers, did the court have authority to consider the takings defense? The Ninth Circuit concluded that it did not.[145] Once the Hornes lost on their APA claim, the only way they could adjudicate the takings claim was to pay the fine and file suit in the CFC seeking to recover the fine as a taking.[146]

The Supreme Court unanimously reversed.[147] The Court found that the AMAA established a "comprehensive remedial scheme" that implicitly withdrew Tucker Act jurisdiction over a handler's challenge to an enforcement order.[148] Given that the Tucker Act remedy was foreclosed, the Court held that the Hornes were free to raise the constitutional defense on judicial review of the enforcement order in the courts of general jurisdiction.[149] The Court did not suggest that the reviewing court, if it found the marketing order was a taking, had authority to grant an award of compensation. The statute in question refers to the reviewing court as exercising "jurisdiction in equity" and contains no hint of any authority to award damages.[150] Presumably, therefore, the remedy for any taking found by the reviewing court would be a judgment invalidating the enforcement order. *Horne* thus joins the *B line* of cases.[151]

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[142] *Id.* at 2058–59.

[143] *Id.* at 2056.

[144] *Id.* at 2060.

[145] Horne v. U.S. Dep't of Agric., 673 F.3d 1071, 1079–80 (9th Cir. 2012).

[146] *Id.*

[147] *Horne*, 133 S. Ct. at 2056.

[148] *Id.* at 2062.

[149] *Id.* at 2063–64.

[150] 7 U.S.C. § 608c(15)(B) (2012).

[151] The Court may have resolved the case this way because the government took the position that the AMAA was the exclusive remedy for seeking review of a marketing order, and that therefore the Tucker Act remedy was foreclosed. *See* Brief for the Respondent at 17–18, *Horne*, 133 S. Ct. 2053 (No. 12-123), 2013 WL 543625. Given precedents holding that withdrawals of the Tucker Act remedy are disfavored, *see, e.g.*, Preseault v. ICC, 494 U.S. 1, 12 (1990) (requiring an "unambiguous intention to withdraw the Tucker Act remedy" (quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1019 (1984)) (internal quotation marks omitted)); Reg'l Rail Reorg. Act Cases, 419 U.S. 102, 133 (1974) (holding that when a later statute is "ambiguous on the question" whether a Tucker Act remedy is available, "applicable canons of statutory construction require" the conclusion that the remedy has not been withdrawn), and given the complete absence of any reference to takings claims in the AMAA, the more plausible position would have been that the AMAA did

Although *Horne* is limited by its terms to the remedies available under the AMAA, one feature of the opinion is more broadly relevant to our topic, and will undoubtedly raise its head in the future. In reaching the conclusion that the Act had implicitly withdrawn a Tucker Act remedy, the Court went out of its way to explain why *Williamson County* did not require a contrary result.[152] The Court characterized *Williamson County*'s second ripeness rule — requiring that takings claims be presented to and denied by state courts before federal courts may intervene — as being only a "prudential" requirement[153] rather than a "jurisdictional" one.[154] It is unclear what the Court meant by "prudential" in this context, or what bearing this characterization had on the displacement of the Tucker Act remedy.[155] The Court immediately acknowledged that claims for just compensation against the federal government must be brought in the CFC "unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute."[156] In other words, the Tucker Act is jurisdictional.

Like Justice Scalia's plurality opinion in *Stop the Beach*, Justice Thomas's opinion in *Horne* would have been more persuasive if he had simply recognized that the case was one in which anticipatory review of the takings issue by a court of general jurisdiction was appropriate. Anticipatory review in this context saves the petitioners from having to split their defense into two parts and litigating in two different forums. Although the question is closer than the one in *Stop the Beach*, where mandating a trip to the compensation court would be futile, the procedure contemplated by the Ninth Circuit would unquestionably be duplicative and burdensome. Moreover, given that the

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not withdraw the Tucker Act remedy. If accepted by the Court, this could have led to a straightforward affirmance of the Ninth Circuit decision. Instead, having argued that the Tucker Act remedy was not available, the Solicitor General also argued (although admitting the issue was "close") that the takings issue could not be raised on judicial review either. Brief for the Respondent, *supra*, at 50. In effect, the government seemed to be saying that the takings claim was unreviewable by any court. This was presumably too much for the Court. How the Court would have ruled if the government had taken the position that the Tucker Act remedy was available is hard to say.

[152] *Williamson County* involved takings claims brought against state government actors, not federal agencies. But the government relied extensively on *Williamson County* in its brief as the leading case establishing a general requirement that takings claims must be ripened in the appropriate court of special jurisdiction before they may be raised in a court of general jurisdiction. Brief for the Respondent, *supra* note 151, at 21–25.

[153] *Horne*, 133 S. Ct. at 2062 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1013 (1992)) (internal quotation mark omitted).

[154] *Id.* (citing Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2610 & n.10 (2010) (plurality opinion)).

[155] As we have seen, this dictum helps open the door to Declaratory Judgment Act suits, whether this was intended or not. *See supra* p. 1652.

[156] *Horne,* 133 S. Ct. at 2062 (quoting E. Enters. v. Apfel, 524 U.S. 498, 520 (1998) (plurality opinion)) (internal quotation mark omitted).

takings claim was based on the same operative facts as the APA claim, and the APA action was filed first, there is authority suggesting that the CFC could not consider the takings claim as long as the APA challenge remained pending.[157] This raised the risk that the takings claim would be barred by the statute of limitations. Some would find the waste and duplication involved in splitting the review process into two parts, and having them considered by two different courts, sufficient reason to warrant anticipatory review. If one includes the risk of losing the claim for compensation altogether, the case for anticipatory relief becomes even stronger. Certainly, allowing the Ninth Circuit to consider the takings claim would promise a less circuitous resolution of the controversy. As it happened, the Court sent the case back to the Ninth Circuit for consideration of the takings defense, where it was rejected, prompting the Court to grant review again.[158] Whether allowing anticipatory relief in this particular case would spare the parties (and the judiciary) the need to process a second suit in the CFC remains to be seen, although that will be the effect if the Hornes' takings claim is ultimately rejected.

Koontz v. St. Johns River Water Management District,[159] the third decision, presented an especially knotty version of the remedial problem. Koontz owned undeveloped land in Florida. He applied for permits to develop a portion of the land under Florida statutes requiring permits for building on wetlands. The local authority said the permits would issue only if Koontz agreed to pay for enhancement of wetlands on government-owned property several miles away. Koontz rejected the deal and filed suit in state court, alleging that the proposed condition was an exaction that violated the "nexus" and "rough proportionality" requirements of the U.S. Supreme Court's decisions in *Nollan*[160] and *Dolan*.[161] The Florida Supreme Court rejected the claim, reasoning in part that because Koontz had refused the deal,

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[157] A federal statute initially adopted in 1868, 28 U.S.C. § 1500, deprives the CFC of jurisdiction when a plaintiff has a related "claim" pending in another court. The Supreme Court has construed "claim" very broadly to mean any action arising out of the same "operative facts" without regard to the relief that is sought. *See* United States v. Tohono O'Odham Nation, 131 S. Ct. 1723, 1728 (2011). Thus, if an action seeking relief under administrative law is filed in a court of general jurisdiction, and only later is an action for just compensation filed in the CFC, the CFC action must be dismissed. Once the administrative law action is concluded, an action in the CFC can be commenced, provided "the statute of limitations is no bar." *Id.* at 1731.

[158] Horne v. Dep't of Agric., 750 F.3d 1128, 1132 (9th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3127 (U.S. Jan. 16, 2015) (No. 14-275).

[159] 133 S. Ct. 2586 (2013).

[160] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (holding that there must be an "essential nexus" between an exaction and the "justification for the prohibition" on development that would apply absent the exaction).

[161] Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (holding that the value of exaction must be roughly proportional to anticipated harms from the proposed development).

there was no exaction, and hence no taking of his property.[162] In effect, the Florida court held that Koontz would have to accept the permit, pay the demanded exaction, and then challenge the exaction as a taking for which he was entitled to just compensation.[163] In other words, the Florida court adopted a version of the *A line* position.

The U.S. Supreme Court reversed,[164] and it was unanimous in rejecting the Florida court's conclusion that there was no issue under the Takings Clause if the exaction was declined.[165] The opinion for the Court, by Justice Alito, was less than clear as to why a court has authority to police exactions under the Takings Clause if there is no exaction and hence no taking. As I read the opinion, the Court held that the Takings Clause not only prohibits takings of property without compensation, but also prohibits certain government *threats* to take property without compensation.[166] The Court analogized the local government's proposed deal with Koontz to extortion, of the your-money-or-your-life variety.[167] Such threats are unlawful whether or not anyone's money or life is taken. Similarly, the Court reasoned, propositions of the form "your money or your development rights" should be subject to judicial scrutiny under *Nollan* and *Dolan*, even if no property or money changes hands.[168] Such deals are not always impermissible, but the government must show that there is a nexus between the property or money demanded and the proposed development, and that the value of the property or money extracted is roughly proportionate to social costs imposed by the proposed development.

Once the Court decided that the Takings Clause prohibits certain threats to take property without just compensation, it would seem that the appropriate remedy would be an anticipatory adjudication like a declaratory judgment action. Forcing a landowner to choose between

[162] St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1230 (Fla. 2011).

[163] *Id.* (holding that *Nollan* and *Dolan* apply "only when the regulatory agency actually issues the permit sought, thereby rendering the owner's interest in the real property subject to the dedication imposed").

[164] *Koontz*, 133 S. Ct. at 2591.

[165] *See id.* at 2603 (Kagan, J., dissenting) ("I think the Court gets the first question it addresses right. . . . The *Nollan-Dolan* standard applies not only when the government approves a development permit conditioned on the owner's conveyance of a property interest . . . but also when the government denies a permit until the owner meets the condition . . . .").

[166] *See id.* at 2596 (majority opinion) ("Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.").

[167] *See id.* at 2594–95 (referring to exactions as a "type of coercion," "pressur[ing] an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation," and potentially "[e]xtortionate"); *id.* at 2595 ("[R]egardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.").

[168] *See id.* at 2595.

giving up on development rights or paying an exaction and suing to get it back is precisely the kind of dilemma the Declaratory Judgment Act was designed to resolve through an anticipatory declaration of rights.[169] The Court nevertheless drew back from drawing this conclusion. Justice Alito repeated the adage that "the Fifth Amendment mandates a particular *remedy* — just compensation — only for takings."[170] He then expressed agnosticism about whether Koontz would have any remedy for the threatened exaction if he could show that it violated *Nollan* or *Dolan*, stating that "whether money damages are available is not a question of federal constitutional law but of the cause of action — whether state or federal — on which the landowner relies."[171] Declaratory relief had not been sought by Koontz, and given the posture of the case, it would seem that such relief was not possible.[172] But it would have been far more clarifying to acknowledge that anticipatory relief is potentially appropriate when the government threatens to commit a taking without compensation. Indeed, the only logical remedy for government threats of future violations of constitutional rights is anticipatory relief.

Allowing property owners to secure declaratory relief in these circumstances would also be socially desirable. The process contemplated by the Florida Supreme Court — requiring the property owner to submit to the exaction and sue for compensation — would frequently result in a change in the use of the property that could not be undone. Assuming (as did the majority but not the dissent) that the government has put a sufficiently final offer on the table,[173] the Florida court's position puts a property owner who thinks the exaction is excessive in a difficult bind. If the exaction is rejected, permission to develop is denied, and there is no avenue for seeking compensation because there is no taking. If the exaction is accepted, valuable property must be handed over to the government, and it will presumably be put to uses

[169] As the Court has observed, in a declaratory judgment action no less, "where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat — for example, the constitutionality of a law threatened to be enforced." Medimmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128–29 (2007).

[170] *Koontz*, 133 S. Ct. at 2597.

[171] *Id.*

[172] A complication in *Koontz* not mentioned by the Court was that the government had ultimately relented on requiring any exaction. *See* Petitioner's Reply Brief at 5, *Koontz*, 133. S. Ct. 2586 (No. 11-1447), 2013 WL 98694. Thus, the only constitutional violation that could be found on remand was for an exaction that had been threatened in the past but then dropped — and the only available remedy was compensation for a temporary threatened exaction. Whether compensation was available in these circumstances was probably too difficult a question to consider without hearing first from the state courts.

[173] *Compare Koontz*, 133 S. Ct. at 2598 (declaring that issue was not presented by petition for certiorari), *with id.* at 2609–11 (Kagan, J., dissenting) (arguing that Florida district never made a "demand" that Koontz give up anything).

dictated by the government in a fashion that cannot be reversed. To be sure, acceptance would give rise to a right of action in the appropriate state court for compensation if the owner can show the exaction violates *Nollan* or *Dolan*. But the owner may not be able to afford having this capital (the future compensation for the exaction) tied up in litigation for years. Either way, the threat is likely to mean that property rights will be affected in ways that are impossible to unscramble. Allowing the validity of the threatened exaction to be resolved by declaratory order would resolve these uncertainties in a more timely manner, which in turn would allow the parties to move more quickly to a resolution about whether or in what form the proposed development would be allowed to proceed.

In sum, the three recent Supreme Court cases suggest that anticipatory remedies for takings may be useful when the alternative would result in (1) futile litigation; (2) duplicative litigation; or (3) legal uncertainty that could have an undesirable effect on decisions about the development of property.

B. Three Emerging Controversies

Consideration of whether anticipatory remedies might be desirable can be amplified by noting three other controversies about the Takings Clause likely to emerge in the near future, each of which could easily give rise to a situation in which guidance in the form of an anticipatory ruling about the scope of the Takings Clause could be of significant value.

The first concerns municipal bankruptcy proceedings, such as the Detroit bankruptcy and those involving several cities in California.[174] A critical question in such cases is whether vested and fully funded public pension obligations can be restructured by the bankruptcy court so as to reduce payments relative to the level promised in the relevant pension agreements.[175] The pension recipients have claimed that vested and fully funded pension obligations are analogous to security interests, and as such have priority over unsecured creditor rights in bankruptcy. One argument in support of this position is that such pension obligations are "private property" protected by the Takings Clause, and that any order by a bankruptcy judge authorizing reduction of these obligations would be a taking. In effect, this is a variation on the judicial takings question: would a decision by a federal bankruptcy judge to require a reduction in vested and fully funded

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[174] *See generally* David A. Skeel, Jr., Address, *Is Bankruptcy the Answer for Troubled Cities and States?*, 50 HOUS. L. REV. 1063 (2013).

[175] *See* Jack M. Beermann, *The Public Pension Crisis*, 70 WASH. & LEE L. REV. 3, 82–83 (2013).

pension rights be a taking? In opposition, other creditors have maintained that such pensions are merely unsecured executory contracts subject to modification in bankruptcy.

Should a bankruptcy judge in such a case avoid ruling on the takings issue, on the ground that if the pension rights are property, any taking of those rights can be remedied by a suit against the United States for just compensation under the Tucker Act? This would make no sense at all. Many of the pensioners have no other means of support, not even Social Security (Detroit, for example, had opted out of the Social Security system[176]). Moreover, if the pensioners' claims are treated as unsecured debts, other unsecured creditors will take less of a haircut than if the pension claims are treated as effectively secured. Once the bankruptcy is over, it will be impossible to re-scramble the various recoveries that have been allowed to different creditors based on the assumed status of the pension claims. Remitting the pensioners to a Tucker Act claim would also leave federal taxpayers on the hook for many years for a potentially huge liability that ordinarily would be borne by creditors.

It would seem to be far better to reach a legal determination of the status of public pension obligations as constitutional property in the bankruptcy court, subject to interlocutory appeal to the district court and the relevant federal court of appeals (or even the Supreme Court). Such a clarification would allow the legal consequences of such a restructuring to be determined and factored into the final confirmation of a plan of reorganization by the bankruptcy court. The ruling could take the form of either a determination of the status of pension obligations under the Takings Clause, or an interpretation of the status of the pensions under bankruptcy law influenced by the desirability of avoiding a possible takings issue.[177]

A second emerging controversy concerns proposals, under consideration in a number of California cities and elsewhere, to use the power of eminent domain to condemn so-called "underwater" home mortgages.[178] The idea is to reduce monthly payments for the owners of such homes and revitalize local communities suffering from large

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[176] David A. Skeel, Jr., *Can Pensions Be Restructured in (Detroit's) Municipal Bankruptcy?* 25 (Univ. Pa. Law Sch. Faculty Scholarship Paper No. 508, 2013), http://scholarship.law.upenn.edu/faculty_scholarship/508 [http://perma.cc/AR8Q-QZN6].

[177] The Court, on review of a decision arising from the bankruptcy court, has interpreted the Bankruptcy Code so as to avoid a takings issue. *See* United States v. Sec. Indus. Bank, 459 U.S. 70, 82 (1982).

[178] *See* Robert C. Hockett, *It Takes a Village: Municipal Condemnation Proceedings and Public/Private Partnerships for Mortgage Loan Modification, Value Preservation, and Local Economic Recovery*, 18 STAN. J.L. BUS. & FIN. 121 (2012); Katharine Roller, Note, *The Constitutionality of Using Eminent Domain to Condemn Underwater Mortgage Loans*, 112 MICH. L. REV. 139 (2013).

numbers of foreclosed homes, by using the power of eminent domain to restructure underwater mortgages. The local government would condemn the mortgages, pay the mortgagees compensation based on the current market value of the homes, and then issue new mortgages consistent with current (lower) home values. The homeowners would remain in possession of the homes, and would end up with new loans and mortgages requiring lower monthly payments, making it more likely that they would be able to avoid foreclosure.

The proposal is intriguing to many municipal politicians and housing advocates, who argue that because most mortgages issued in recent years have been securitized, the massively fragmented ownership and resulting high transaction costs preclude voluntary negotiation.[179] Banks and other mortgage lenders vociferously oppose the idea, arguing that the use of eminent domain to restructure mortgage loans will undermine confidence in the mortgage market for years to come.[180] They argue that the proposed schemes violate both the public use and just compensation requirements of the Takings Clause.[181]

Here we see an example of a controversy involving the exercise of eminent domain, as opposed to regulatory takings, where an anticipatory ruling on the takings issues would seem to be desirable. Given the great uncertainty about whether the proposals are constitutional, cities will be reluctant to adopt them, and investors will be reluctant to put up money for them. Meanwhile, the very existence of these schemes may exacerbate the uncertainty of banks and mortgage lenders about reentering particular mortgage markets. An anticipatory ruling on the constitutional questions, including perhaps an interpretation of the applicable principles of just compensation designed to avoid constitutional pitfalls,[182] would seem to be the only realistic means of overcoming the manifold uncertainties presented by such schemes.

A third controversy grows out of a recommendation by the U.S. Copyright Office to amend the federal Copyright Act to extend federal

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[179] *See* Hockett, *supra* note 178, at 138–49.

[180] *See* Memorandum from Walter Dellinger et al., O'Melveny & Myers LLP, to Secs. Indus. & Fin. Mkts. Assoc. 5 (July 16, 2012), http://www.sifma.org/uploadedfiles/issues/capital_markets/securitization/eminent_domain/memorandumfromo%27melvenymyerstosifmaresanbernardinoeminentdomainproposal071612.pdf [http://perma.cc/C4PQ-2E3Q].

[181] *Id.* at 2, 3–8.

[182] Measuring just compensation in the condemnation of underwater mortgages that are nevertheless still performing would confront a difficult conceptual issue: namely, should the value of the condemned mortgages be based on the value of the security, that is, the current fair market value of the homes, or should it be based on the present value of the future stream of payments on the debt? Because of the collapse in housing prices, the value of the security is relatively low. But if the homeowner is still making payments on the mortgage, the present value of the future stream of payments may generate a higher number.

copyright protection to sound recordings made before 1972.[183] Currently, pre-1972 sound recordings (including some of your favorite Beatles records) are protected only by state law. Creating federal copyright protection and preempting these state laws would afford these recordings more secure protection and more effective remedies. But it would also, in some cases, reduce the length of the term of protection relative to what is currently provided under state law.[184]

Is enhancing protection for a form of intellectual property, while shortening the term, a taking? Owners of pre-1972 recordings would surely like to know the answer to this question. It would have a significant bearing, for example, on what they could obtain for transferring or licensing the rights to such recordings. If they are forced to wait until the federal term of protection ends, followed by a suit in the CFC for just compensation, the world will have moved on. The identities of the holder of the rights and of the licensees may have changed, as well as the market value of the relevant rights. It would be difficult if not impossible to distribute any just compensation to all parties who may have entered into transactions over the rights during the interim. Moreover, it seems odd to stick future federal taxpayers with the burden of compensating for the value of state rights extinguished prospectively by a federal law enacted many years earlier. It would seem far better to allow rights holders to bring an action for an anticipatory ruling about the possibility of a Takings Clause violation shortly after the copyright amendment is enacted. This would clarify the package of rights associated with any license or conveyance of pre-1972 recordings, and, as in the two previous examples, might allow the court to interpret the new law in such a way as to eliminate or minimize any takings problem.

C. Generalizing the Normative Case

The foregoing examples suggest a variety of general reasons why anticipatory remedies for takings would be advantageous.

First, allowing takings claims to be resolved by declaratory judgment or other anticipatory adjudication can eliminate unnecessary litigation and delay in resolving rights. Requiring the parties to litigate in the compensation court when that would be futile is a deadweight loss. Requiring two lawsuits when one will resolve the controversy is a waste. Ironically, savings in litigation costs would be greatest when the takings claim is rejected by the court considering anticipatory relief. The Supreme Court in *Stop the Beach* eliminated a potentially

[183] *See* Eva E. Subotnik & June M. Besek, *Constitutional Obstacles? Reconsidering Copyright Protection for Pre-1972 Sound Recordings*, 37 COLUM. J.L. & ARTS 327 (2014).
[184] *See id.* at 329–33.

inefficient allocation of litigational resources by rejecting the takings claim in that case.[185] Yet even if the court considering anticipatory relief accepts the takings claim, it could result in litigation cost savings. The judgment could lead to a negotiated solution between the government and the property owner in many cases. And even if the owner ends up filing a claim for compensation with the compensation court, in most cases that involve only the amount of compensation, a settlement is reached without formal litigation.[186]

Second, allowing anticipatory adjudication can reduce uncertainty about property rights. In theory, since the only question in takings cases is whether the property owner is entitled to compensation, and if so in what amount, the uncertainty presented by takings questions could be handled by "discounting" the prospective payment by some subjective risk factor.[187] But the reality is not so simple. Whether the government is obligated to pay compensation will affect how various interested parties value their rights, and uncertainty about compensation can stymie efforts to rearrange rights. Thus, the government may not be willing to commit to what sort of exactions it requires for development of land until it knows the answer to the compensation question. And the developer may not want to move forward until the government is prepared to commit.[188] Moreover, as we see in the examples of municipal bankruptcy and the proposed condemnation of underwater mortgages, the way in which the takings question is resolved can have a decisive effect on how a reorganization is structured or whether a program to condemn underwater mortgages even moves forward at all.

Third, allowing anticipatory adjudication would tend to level the playing field between property owners and government regulators. The argument here does not rest on speculation about the respective preferences of federal and state judges, with the assumption that federal judges are more sympathetic to property owners than state judges. Some property rights advocates argue this way,[189] but any such claim is contingent on the composition of the federal and state courts at any

[185] *See supra* pp. 1655–57.

[186] *See* Yun-chien Chang, *An Empirical Study of Court-Adjudicated Takings Compensation in New York City: 1990–2003*, 8 J. EMPIRICAL LEGAL STUD. 384, 389 (2011) (finding in a 12-year period in New York City only 27 adjudicated cases as opposed to 430 settlements); *see also* Curtis J. Berger & Patrick J. Rohan, *The Nassau County Study: An Empirical Look into the Practices of Condemnation*, 67 COLUM. L. REV. 430, 440 (1967) (reporting in an earlier study that over 85% of eminent domain cases settled).

[187] *See* Bray, *supra* note 117, at 1303–06.

[188] *See id.* at 1298 ("[I]t is hard for people to act and plan when they do not know the precise legal consequences of their actions.").

[189] *See, e.g.*, Michael M. Berger, *Silence at the Court: The Curious Absence of Regulatory Takings Cases from California Supreme Court Jurisprudence*, 26 LOY. L.A. L. REV. 1133, 1140 (1993).

given point in time, and in any event it is not clear that it is true. A better argument is that government regulators have a built-in advantage because the costs of defending takings claims are paid by the taxpayers, whereas property owners must pay their legal fees out of their own pockets. This advantage allows government regulators and their lawyers to engage in a war of attrition, proposing multiple rounds of plan revisions and then engaging in multiple rounds of motions in court, with the result that property owners often relent rather than persist in pressing takings challenges to government regulations.[190] Opening the doors to anticipatory relief could push the conflict toward a quicker resolution in some cases, which would offset this litigation advantage.

Against these advantages it must be acknowledged that there are significant disadvantages to allowing anticipatory relief for takings. Accordingly, there should be limitations on its availability. Because the only substantive right created by the Takings Clause is the right of just compensation, there should be a strong presumption in the ordinary case that an action in the compensation court is a fully adequate remedy for a taking. This is especially true if the issues in dispute are factual.[191] The compensation court — whether it be the CFC or a state court of appropriate jurisdiction — can presumably resolve the factual questions as well as can any federal court asked to render a declaratory judgment or other anticipatory relief. This suggests that anticipatory relief should be reserved primarily for controversies that involve some novel and controlling issue of law. Just as certification of interlocutory appeals in federal court requires that the issue be "a controlling question of law" the resolution of which "may materially advance the ultimate termination of the litigation,"[192] anticipatory adjudication in takings cases will be appropriate primarily in cases where there are one or more discrete and controlling legal issues, such as whether the taking is for a public use, whether the interest of the claimant is "property," or whether particular categorical rules of liability or nonliability apply.

Because the ultimate relief in a takings case can only be awarded by a compensation court, allowing anticipatory relief will also present the risk of multiplying lawsuits. If the property owner prevails in the anticipatory action, it may be necessary to file a second action in the compensation court to secure an award of compensation. As we have

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[190] *See* Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 43 (1995) ("Practically speaking, the universe of plaintiffs with the financial ability to survive the lengthy ripening process is small.").

[191] *See* Bray, *supra* note 117, at 1330 (arguing that legal indeterminacy is more likely to justify "preventive" adjudication than factual indeterminacy).

[192] 28 U.S.C. § 1292(b) (2012).

seen, this is not inevitably the case. Anticipatory adjudication can eliminate futile or duplicative litigation. But if it is used indiscriminately, it could mean two lawsuits in many circumstances where there would otherwise be only one, which would increase rather than reduce the expenditure of social resources on takings litigation.

V. SOME GUIDELINES FOR ANTICIPATORY ADJUDICATION

Anticipatory relief is discretionary, but this does not mean that district courts should exercise raw intuition in deciding whether to grant such relief. It would be helpful to have a general set of principles, and ideally a body of precedents, to draw upon that would shape the judicial exercise of discretion in determining whether to grant anticipatory remedies for takings. My suggestion is that courts look to the law of equity for guidance in resolving applications for anticipatory relief.

The principles of equity are not directly applicable to most forms of what I have called anticipatory adjudication. Although "born under equitable auspices and having preponderantly equitable affiliations,"[193] declaratory judgments in federal courts are the product of a statutory reform — the Declaratory Judgment Act. Thus for historical reasons courts have not regarded the declaratory judgment as part of the system of equity.[194] Similarly, judicial review of agency action is determined by statute today, yet it has origins in equity.[195] And the Supreme Court's discretionary exercise of the certiorari power is certainly not regarded as a type of equity. Nevertheless, each of these anticipatory regimes shares with equity the central feature of great discretion and the need to develop a set of principles or guidelines to structure the exercise of that discretion so as to make it socially useful. Equity, as the discretionary system that has been around the longest, has devoted the most sustained thought to developing solutions to this problem. It is therefore not surprising that in its "flexibility and adaptability" the declaratory judgment has "imported many features from equity."[196]

Lawyers who are not familiar with equity often regard it as being centered on a simple four-part test.[197] More accurately considered, eq-

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[193] EDWIN BORCHARD, DECLARATORY JUDGMENTS 348 (2d ed. 1941).

[194] The general understanding is that actions for declaratory judgments are characterized as either legal or equitable depending on the nature of the anticipated action that the declaratory action is designed to resolve. *See* Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504, 507–08 (1959); *id.* at 515 (Stewart, J., dissenting).

[195] *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 952–53, 963–95 (2011).

[196] BORCHARD, *supra* note 193, at 178.

[197] *See* Mark P. Gergen et al., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 218–19 (2012) (criticizing lower courts for reading

uity consists of a highly articulated system.[198] That system consists of a series of distinct remedial devices, like the injunction, restitution, and the constructive trust. But it has also developed a set of conditions that determine whether equitable relief is appropriate, such as good faith and lack of notice, and a set of defenses that can be invoked to defeat the intervention of equity, including unclean hands, laches, and estoppel.[199] Perhaps most importantly, because it has been around for centuries, equity has generated a very large body of precedent, which can provide guidance on many of the issues likely to arise in determining whether anticipatory remedies for takings are appropriate. For example, equity has determined that one ground supporting discretionary intervention is to forestall a multiplicity of suits[200] — one of the reasons developed in the last Part as a justification for anticipatory relief.

Another reason why equity provides a good benchmark is that the central problem that has concerned courts of equity for hundreds of years is directly analogous to the problem that would face any court asked to provide anticipatory relief in a takings case. The central question in equity is whether the remedy "at law," which is ordinarily money damages, is for one reason or another inadequate, such that a different form of relief, such as an injunction, is warranted. The problem that would confront a judge asked to award declaratory or other anticipatory relief in a takings controversy is closely related: whether the remedy provided by the compensation court, money damages, is for one reason or another inadequate, such that anticipatory relief is warranted. Although eminent domain is not an action "at law" in the constitutional sense (for example, the Court has held that condemnation cases are not actions at law for purposes of the right to trial by jury[201]), the point of the general threshold condition for equitable relief is that such relief should be allowed if an action for money damages will provide inadequate relief. The learning accumulated by courts of equity in answering this question can directly inform the exercise of discretion in determining whether to grant anticipatory relief in a takings case.

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eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006), as endorsing a universal four-part test for equitable relief and ignoring traditional principles of equity).

[198] *See* Samuel L. Bray, *The System of Equitable Remedies* 20 (Columbia Law Sch. Legal Theory Workshop Paper, Sept. 19, 2014).

[199] *See generally* DAN B. DOBBS, LAW OF REMEDIES 66–85 (West 2d ed. 1993).

[200] *See* Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 714 (1990) (citing decisions holding that "[a] legal remedy is inadequate if it would require a 'multiplicity of suits'").

[201] United States v. Reynolds, 397 U.S. 14, 18 (1970); Bauman v. Ross, 167 U.S. 548, 593 (1897). In contrast, the Court has held that regulatory takings claims brought under 42 U.S.C. § 1983 are actions at law for Seventh Amendment purposes. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 709 (1999).

The requirement that the remedy at law be inadequate is often expressed in terms of whether the claimant will suffer "irreparable harm," meaning the claimant will suffer harm that cannot be rectified by an award of damages.[202] Thus, for example, courts will generally decline to enjoin a breach of contract for the delivery of fungible goods, because the ordinary remedy for breach of such a contract — an award of damages — is fully adequate in this context.[203] The party who suffers such a breach can use the money damages to acquire equivalent goods in the market, leaving that party whole.

The logic of limiting a party who suffers a government taking to an action for money compensation is, if anything, even more powerful than the argument for limiting relief to money damages in cases of breach of contract. In contract, the substantive right is the right to have the contract performed as promised. Depending on the subject matter of the contract, an award of damages may or may not provide adequate relief for the breach. It is well established, for example, that contracts for the sale of real estate or unique personal property are subject to specific performance, a form of equitable relief, because such goods cannot be replaced by purchasing equivalent goods in the market.[204] In the case of takings of property (assuming the public use requirement and other legal prerequisites are met), the *only substantive right* is the right to payment of just compensation. In the ordinary case, therefore, there is a strong reason to presume that the remedy of compensation will provide adequate relief. Whether or not there should be a presumption against equitable relief in other contexts,[205] insofar as takings claims are concerned it is entirely appropriate to start with a presumption in favor of compensation being an adequate remedy, which is to say, a presumption against anticipatory relief.

In garden-variety eminent domain actions, for example, there is no reason to consider anticipatory relief. The condemnation action will itself yield a judgment awarding "just compensation" to the owner, and this is the full extent of the relief to which the owner is entitled under the Constitution.[206] Compensation is "just" if it is based on the "fair

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[202] *See* Gergen et al., *supra* note 197, at 209 (noting that irreparable injury and inadequacy of legal remedies "are, traditionally speaking, one and the same"); Laycock, *supra* note 200, at 694 ("The two formulations are equivalent . . . .").

[203] *See, e.g.*, Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002).

[204] Laycock, *supra* note 200, at 703–07.

[205] Professor Douglas Laycock argues persuasively that the presumption against equitable relief reflected in the usual formulation of "irreparable harm" does not fairly represent the actual practice of courts. *Id.* at 700–01. In his view, "legal remedies are inadequate unless they are as complete, practical, and efficient as equitable remedies." *Id.* at 766.

[206] *See* 4 SACKMAN, *supra* note 95, § 12.02[1].

market value" of the property taken.[207] Payment itself can be delayed if interest is given to compensate for any delay between the time of the taking and the time of payment.[208] "All that is required is the existence of a 'reasonable, certain and adequate provision for obtaining compensation' at the time of the taking."[209] Deviations from these principles can ordinarily be rectified on direct appeal.

Nevertheless, just as the proposition that equity will not intercede to prevent a breach of contract is subject to exceptions where specific performance is warranted, there are also, as we have seen, exceptions where anticipatory relief is warranted under the Takings Clause. Even in condemnation cases, equitable relief in a federal court of general jurisdiction is warranted if the condemnation is not for a public use or is not authorized by law.[210] If the government seeks to take an owner's property in return for an award of compensation, but has no constitutional or legal authority to do so, then the owner will have been deprived of a unique asset without justification, and has necessarily suffered irreparable harm. Equity should intervene in these circumstances.[211]

Regulatory takings cases present more serious candidates for anticipatory intervention than do eminent domain cases. These are situations in which an owner claims her property has been taken, but the government denies any obligation to compensate. For example, the government may ban development of land in order to preserve a wetland or habitat, and may argue that such a ban may be imposed without compensation under the police power.[212] Or the government may deny that the interest asserted is "property" within the meaning of the Takings Clause.[213] Or the government may argue that a categorical rule of nonliability, such as the navigation servitude, applies.[214]

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[207] United States v. Miller, 317 U.S. 369, 374 (1943) (quoting United States v. Chandler-Dunbar Co., 229 U.S. 53, 81 (1913)); *see* 4 SACKMAN, *supra* note 95, § 12.02[1].

[208] *See* Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 306 (1923).

[209] Preseault v. ICC, 494 U.S. 1, 11 (1990) (quoting Reg'l Rail Reorg. Act Cases, 419 U.S. 102, 125 (1974)).

[210] *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (injunction proper for taking without public use); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) (injunction proper when property has been "unlawfully taken").

[211] One could argue that equitable intervention for an unauthorized taking should be grounded in the Due Process Clause rather than the Takings Clause. *See* D. Zachary Hudson, Note, *Eminent Domain Due Process*, 119 YALE L.J. 1280 (2010). But at least rhetorically, the public use requirement has been situated in the Takings Clause rather than being regarded as an element of due process. *See, e.g.*, Brown v. Legal Found. of Wash., 538 U.S. 216, 231–32 (2003) ("While it confirms the State's authority to confiscate private property, the text of the Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for a 'public use' and 'just compensation' must be paid to the owner.").

[212] *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 611 (2001).

[213] *See, e.g.*, Phillips v. Wash. Legal Found., 524 U.S. 156, 160 (1998).

[214] *See, e.g.*, United States v. Cherokee Nation, 480 U.S. 700, 701–02 (1987). For a discussion of categorical rules of nonliability, see DANA & MERRILL, *supra* note 40, at 110–20.

When the government engages in action that the owner regards as a taking, but denies any obligation to compensate, the owner is put in a much more disadvantaged position relative to an owner who is subject to a formal eminent domain proceeding. Any taking, whether compensated or not, may be disruptive, even wrenching, to the owner's plans. But, with a formal eminent domain proceeding, at least an award of money is guaranteed to be forthcoming, adjusted if need be by interest to account for any delay. The owner can use the compensation to begin rebuilding her life or business. A person who suffers a taking for which the government denies responsibility, in contrast, is much worse off. Here, much or all of the economic value of the property is gone and there is no guarantee than any money equivalent will be forthcoming, certainly not at any time in the foreseeable future. If and when the compensation materializes, the owner quite likely will have experienced a change in circumstances that cannot be undone. The prolonged period of deprivation of the property, combined with the great uncertainty about whether any compensation will ever be paid, can fairly be described as a form of injury that goes beyond that which accompanies an exercise of eminent domain.[215]

Still, it would not be correct to characterize every regulatory takings case as entailing irreparable injury of the sort that would justify anticipatory relief. Consider in this regard a typical regulatory takings claim governed by the ad hoc standard of *Penn Central Transportation Co. v. New York City*.[216] In such a case, whether the government has committed a taking will be determined only after gathering facts about the nature and circumstances of the government action and weighing multiple factors that the courts have identified as being relevant to reaching a judgment about takings liability.[217] The compensation court is probably as well equipped to find the facts and do the balancing as is any other court.[218] Indeed, since only the compensation court is empowered to enter judgments providing the payment of compensa-

[215] *See* Laycock, *supra* note 200, at 741 ("Despite the Court's claim to the contrary, the injury from financial distress is often irreparable.").

[216] 438 U.S. 104, 124 (1978). Another example of an ad hoc standard is the fair return standard for public utility ratemaking. *See, e.g.*, Duquesne Light Co. v. Barasch, 488 U.S. 299, 308–10 (1989); *see also* DANA & MERRILL, *supra* note 40, at 164–68.

[217] *See Penn Central*, 438 U.S. at 124.

[218] A caveat is appropriate here given that the CFC is an "Article I" court, rather than an Article III court, and the Federal Circuit reviews factual determinations by the CFC under a highly deferential clear error standard. *See, e.g.*, Ark. Game & Fish Comm'n v. United States, 637 F.3d 1366, 1374 (Fed. Cir. 2011), *rev'd on other grounds*, 133 S. Ct. 511 (2012). It has been held in other contexts that critical facts that bear on the protection of constitutional rights must be considered independently by an Article III court. *See* Crowell v. Benson, 285 U.S. 22, 60–61 (1922); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 253–56, 276 (1985). Whether the Federal Circuit's fact review in takings cases comports with such a requirement is an untested question.

tion, the case will be resolved more quickly by requiring that all issues be resolved in a single proceeding before the compensation court. The regulatory takings claimant may suffer more than the owner subject to eminent domain due to the delay and uncertainty, but a court of general jurisdiction can do nothing in a routine *Penn Central*–type case to alleviate that hardship, and hence should generally stay its hand.

Yet even in cases governed by the *Penn Central* standard, it would not be appropriate to invoke any categorical rule against anticipatory intervention. *Penn Central* includes many ill-defined elements, and lower courts have made some headway in attempting to bring greater clarity and coherence to aspects of the standard.[219] If a case arose in which a critical issue was presented about the correct interpretation of one of the *Penn Central* factors, this too could be the type of occasion in which declaratory relief would be warranted.

The foregoing considerations suggest that anticipatory relief will ordinarily be appropriate only when some controlling question of law is presented, the resolution of which will prevent more injury to the owner or the legal system than will be the case if the resolution is postponed until the compensation court renders a final judgment. It would be a mistake, however, to adopt a strict rule to the effect that only controlling questions of law may be considered in takings cases by a court of equity. The history of equity suggests that intervention may be appropriate to prevent a variety of injustices. It is impossible, in the nature of things, to catalog in advance all of the circumstances in which anticipatory relief would be warranted.

CONCLUSION

Given that virtually all eminent domain cases and most regulatory takings cases can and should be resolved by compensation courts, a critic might wonder if anticipatory intervention should be limited to the Supreme Court. After all, the Court, by its own reckoning, is a specialized tribunal, one of whose prime purposes is to resolve important questions of federal law that "ha[ve] not been, but should be, settled."[220] Perhaps this requires that the Court be given flexibility about when to pick out takings cases from the pool of litigation bubbling up below, which means giving it discretion to ignore general rules that bind inferior tribunals. Allowing inferior tribunals to disregard the requirement of channeling all takings cases to compensation courts, in contrast, might generate too much takings litigation, exces-

[219] *See* Thomas W. Merrill, *The Character of the Governmental Action*, 36 VT. L. REV. 649, 661–71 (2012) (describing efforts in lower courts to particularize the meaning of one of the *Penn Central* factors).

[220] SUP. CT. R. 10(c).

sive involvement of federal courts in the essentially local process of land use regulation, or other forms of mischief.

If anything, I think the reverse is true. The Supreme Court has shown that it is not restricted by the general rule, reflected in the *A line* cases, requiring adjudication of takings claims by compensation courts. The Court enforces the *A line* when it deems it important to reinforce the rule. But when it perceives a need to resolve a takings issue that has not been processed by a compensation court, it simply follows the *B line*, which is to decide the issue without adverting to the supposed rule. By having both the *A line* and the *B line*, the Court already has what amounts to large discretion, manifested in a pattern of alternating between following the rule and ignoring the rule. This is not especially edifying as a model of jurisprudence, but it does not impose great costs on the Court itself in terms of its ability to exercise supervisory authority over the development of takings law.

The actors who suffer most from the existence of two lines of authority about litigating takings claims are the lower courts and the lawyers who appear before them. Especially where novel takings claims arise in courts of general jurisdiction, any attempt to secure legal resolution of the claim is likely to be met by an aggressive invocation of the *A line* by government attorneys. Opposing counsel will struggle to find an adequate response to these authorities, since the many Supreme Court decisions that dispense with the *A line* lack any kind of doctrinal foundation. The result is that both lawyers and courts are left to struggle with articulating reasons for permitting the takings claim to be litigated by a court of general jurisdiction, or at least permitting controlling issues to be resolved, when their intuition tells them this is the sensible thing to do. All this confusion leads to extra legal research, extra rounds of briefing, and a roulette wheel of decisions either dismissing or not dismissing claims on the basis of *A line* precedents.

What is needed is better guidance from the Supreme Court. I suggest the adoption of three simple principles: (1) the Takings Clause is violated only by denying compensation for otherwise permissible takings; (2) awards of compensation must be made by the designated compensation court; (3) courts of general jurisdiction may enter declaratory or other forms of anticipatory relief about an owner's eligibility for compensation when requiring the owner to litigate the claim in a compensation court would violate principles of equity.

Anticipatory relief, whether in the form of a declaratory judgment or otherwise, should not be available as a matter of course. Given the nature of the right, in most cases courts should refrain from issuing declaratory judgments, and should direct the claimant to bring an action in the court that has authority to award money compensation. But there are circumstances, perhaps increasing in frequency over time as governments march into uncharted territories, where remitting proper-

ty owners to actions in the compensation courts will result in incomplete, impractical, or inefficient outcomes.[221] In such cases, anticipatory relief should be both permissible and appropriate. Recognizing that anticipatory relief is available in circumstances where the general conditions for equitable relief are satisfied, as long as such relief respects the limited nature of the right created by the Takings Clause and does not usurp the limited waiver of sovereign immunity for actions to recover compensation from the government, would go far to clear up the highly confusing state of the law regarding remedies for takings, and would lay the foundation for more consistent and effective enforcement of this constitutional right.

[221] *Cf.* Laycock, *supra* note 200, at 768.